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Criminal Redistribution of Stolen Property: The Need for Law Reform

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Our society is permeated by a consciousness of theft: triple-locked doors of city apartments, guard dogs prowling stores and warehouses at night, retail prices and insurance rates based on the assumption that large quantities of merchandise are simply going to disappear. But our consciousness of theft tends to be limited. It is easy to imagine the act itself—the forced lock or smashed window in the dead of night, the hijacker ordering the driver out of his truck cab at pistol point. It is harder to keep in mind that these acts aren't random or self-contained but are usually practical ways of acquiring goods for an established buyer. As for the dealer in stolen goods—the "fence"—there our imagination seldom goes beyond the owner of a seedy pawnshop or the character who sidles up on the street and mutters, "Hey buddy, wanna buy a watch?"[1]

THE development of sophisticated fencing systems for the sale of stolen property to consumers has paralleled the industrialization of society. Although crimes against property and attempts to control them have ancient origins,[2] most theft before the Industrial Revolution was committed for immediate consumption by the thieves and their accomplices rather than for redistribution in the marketplace.[3] Society's small population, inadequate transportation and

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1. Chasan, *Good Fences Make Bad Neighbors*, N.Y. Times, Dec. 29, 1974, § 6 (Magazine), at 12.

2. Biblical tradition has it that disobedience began with God's first command to man. *See Genesis* 2:16-17, 3:4-6. Laws concerning theft and robbery may be found in many sections of the Old Testament. *See, e.g., Exodus* 22:1-4; *Leviticus* 6:1-5, 19:13; *Proverbs* 29:24. For a discussion of theft in primitive society, see A. DIAMOND, THE EVOLUTION OF LAW AND ORDER 12, 35, 50-51, 108-15 (1951).

3. "Until the seventeenth century the amount of movable property available for theft and the opportunities to dispose of this property except by personal consumption

communication systems, and technological inability to mass produce identical goods constrained large-scale fencing because there were few buyers and because stolen property could be readily identified.[4] The unprecedented economic[5] and demographic[6] growth in eighteenth-century Europe, however, removed these practical constraints and made possible the profitable fencing operations[7] that are now firmly institutionalized in industrial societies.

Although these social and technological developments are important, they do not provide a complete explanation for the rising theft rate or for the tremendous amount of property successfully redistributed annually.[8] Instead, these problems must be attributed in large part to our society's failure to identify properly the economic relationship underlying theft and redistribution and, consequently, to our inability to develop successful methods of legal control.[9]

An understanding of the economic causes of property theft requires brief consideration of the relationship between the two major participants in redistribution systems. First, there are the fences who often find it both profitable and not very risky[10] to purchase

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were limited." Chappell & Walsh, *"No Questions Asked," A Consideration of the Crime of Criminal Receiving*, 20 CRIME & DELINQUENCY 157, 160 (1974) [hereinafter Chappell & Walsh, *"No Questions Asked"*].

4. Prior to the development of mass production techniques, a fence was faced with "the situation of highly individualized property owned on a limited scale . . . ." *Id.* at 168. Limited production and limited ownership foreclosed the possibility of fencing stolen goods on a large scale because there were too few buyers, and property could be too readily identified. *See generally* P. MANTOUX, THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY 108-12 (rev. ed. 1961).

5. Eighteenth century England experienced an expansion of trade that was of "geometric proportions." J. HALL, THEFT, LAW AND SOCIETY 77 (2d ed. 1952). *See* P. MANTOUX, *supra* note 4, at 99-108. *See generally* H. BEALES, THE INDUSTRIAL REVOLUTION 1780-1850: AN INTRODUCTORY ESSAY 48-56 (1958).

6. *See* M. FLINN, AN ECONOMIC AND SOCIAL HISTORY OF BRITAIN, 1066-1939, at 115 (1965) and B. MURPHY, A HISTORY OF THE BRITISH ECONOMY 1086-1970, at 61-62, 100-01, 229-33, 324-34 (1973) (describing dramatic growth of British population). During this period the world population experienced similar growth. *See* K. CHEN, WORLD POPULATION GROWTH AND LIVING STANDARDS 64 (1960).

7. "[T]oday's fence . . . faces an economy in which imperceptibly differing consumer goods are mass-produced and mass-owned and for which there seems to be an insatiable desire." Chappel & Walsh, *"No Questions Asked,"* 168. "The relative impersonality of property items, and the lack of adequate identifying marks on most categories of goods, frequently prevents the establishment of a nexus between the fence and stolen property items, or the return of recovered property to its original owner." Chappell & Walsh, *Receiving Stolen Property: The Need for Systemic Inquiry into the Fencing Process*, 11 CRIMINOLOGY 484, 490 (1974) [hereinafter Chappell & Walsh, *Receiving Stolen Property*].

8. *See Hearings on Criminal Redistribution (Fencing) Systems Before the Senate Select Comm. on Small Business*, 93d Cong., 1st Sess., pt. 1 (1973) [hereinafter *Hearings on Fencing*].

9. *See* section II *infra*.

10. *See* text at notes 22-29 *infra*.

stolen goods from thieves and resell them at retail and wholesale levels. Frequently masquerading as legitimate businessmen,[11] sophisticated fences not only use cheap stolen merchandise to increase their profits and to undercut legitimate competitors,[12] but also operate without much risk of detection since they can easily remove identifying labels from the goods, falsify records to hide illegal purchases, or otherwise "legitimize" the goods, and then quickly dispose of them in the marketplace.[13] Second, there are the thieves who, with the growth of viable fencing schemes, have available purchasers for their stolen property. Thus, they too can rapidly dispose of the evidence of their crimes and are then presumably better able to avoid arrest and conviction.[14] In general terms, a symbiotic relationship between fences and thieves appears to have developed.

Any sketch of this relationship must recognize the primary role played by receivers. Such recognition is crucial if proper legal techniques for controlling theft are to be developed. Unfortunately, law enforcement efforts in the United States have traditionally focused on capturing the thief rather than on eliminating the fence.[15] This "theft-oriented" approach was perhaps sufficient in preindustrial society but is inadequate and seriously misdirected today because it fails to recognize that thieves steal primarily for profit rather than for personal consumption.[16] Fencing systems play a vital role in

11. *See* note 126 *infra*. Although criminal redistribution systems function with varying degrees of sophistication, all successful fences, regardless of caliber, must develop sufficient business acumen and marketing skills to maintain the continued profitability of their operations. *See* notes 64-88 *infra* and accompanying text. *See generally* J. HALL, *supra* note 5, at 156-57.

12. This competitive advantage, however, does not necessarily assure the fence a greater profit margin. *See* C. KLOCKARS, THE PROFESSIONAL FENCE 77 n.2 (1974).

13. *See* text at notes 115-53 *infra*.

14. "[A] ready market for stolen goods is the thief's most urgent need." Chappell & Walsh, *"No Questions Asked"* 167. Obviously, thieves are anxious to dispose of their goods, since prolonged retention increases the possibility of detection. *See Hearings on Fencing* 160. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 682-91 (1972).

15. Chappell and Walsh have maintained "that the historical neglect of the criminal receiver has led to a shortsighted view of his actual and potential role in property crime and to an undeserved relegation of his activities to a category of insignificance . . . ." Chappell & Walsh *"No Questions Asked"* 158. *See* STAFF OF SENATE SELECT COMM. ON SMALL BUSINESS, 92d Cong., 2d Sess., AN ANALYSIS OF CRIMINAL REDISTRIBUTION SYSTEMS AND THEIR ECONOMIC IMPACT ON SMALL BUSINESS 2 (Comm. Print 1972) [hereinafter STAFF REPORT ON SMALL BUSINESS]. *See* notes 16-21 *infra* and accompanying text.

16. "Nearly all professional theft is undertaken with the aim of selling the goods thereafter." PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 99 (1967) [hereinafter TASK FORCE REPORT, AN ASSESSMENT]. *See* C. CONWELL, THE PROFESSIONAL THIEF BY A PROFESSIONAL THIEF 146 (1937); W. LAFAVE & A. SCOTT, *supra* note 14, at 682.

theft activity because most thieves are unable to deal directly with the consuming public and must therefore operate through middlemen who have the financial resources to purchase stolen goods and the contacts to help in their redistribution.[17] Although thieves usually receive only a small fraction of the retail value of their goods,[18] the ability of most fences to make prompt payment[19] facilitates rapid disposal of stolen property and reduces the risk of detection that prolonged possession entails. Without fences, few thieves could survive[20] because fences both satisfy their motive for stealing and provide an incentive for future theft.[21] Thus, the first step in combat-

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It was recently noted that, at least according to some researchers, "virtually nothing is stolen today without a prearranged market for its disposal." Chasan, *supra* note 1, at 12. "[N]ot even an inexperienced junkie will steal something without being assured of a ready market." *Id.* at 17. *See generally Hearings on Fencing*, 30-34.

17. *See* TASK FORCE REPORT, AN ASSESSMENT 99.

18. "[A] norm that has governed the asking price of thieves for centuries says simply, 'When you take something to a fence you should try to get a third of the value of the goods.'" C. KLOCKARS, *supra* note 12, at 114. The thief asks for a third of the retail price because he knows that he cannot get a half, which is the standard wholesale value. Typically, even though bargaining may begin at the one-third price level, few fences ever pay this much. *Id.* at 114 n.6. Most, in fact, pay much less. *See Hearings on Organized Crime, Stolen Securities Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess., pt. 1, at 39, 212 (1971) [hereinafter *Hearings on Stolen Securities*]; C. KLOCKARS, *supra* note 12, at 114 (analyzing fencing from a marketing perspective). Frequently, payment may simply take the form of drugs. *See, e.g.*, Chasan, *supra* note 1, at 14; U.S. DEPT. OF JUSTICE, STRATEGIES FOR COMBATTING THE CRIMINAL RECEIVER (FENCE) OF STOLEN GOODS 16-18 (August 1976) [hereinafter STRATEGIES] (barter transaction typical of West Coast). Thieves are frequently ignorant of the value of their goods, and have little bargaining power against the fence. *See* C. KLOCKARS, *supra* note 12, at 115-26. To avoid paying the one-third price, the more sophisticated fences have developed a variety of methods to deceive their suppliers. *Id.* at 115-27. To combat these practices some of the smarter thieves appear to be taking courses (such as gemmology) so that fences will no longer be able to "exploit [their] ignorance." Chasan, *supra* note 1, at 16.

When a fence negotiates a price he must be aware of his economic costs which include the risk of detection, storage and transportation expenses, cash outlay, repairs, and other middlemen services. *See* Roselius & Benton, *Stolen and Fenced Goods: A New Laboratory for Marketing Theory* [hereinafter Roselius & Benton, *Stolen Goods*], in *Hearings on Fencing* 182.

19. *See* Roselius & Benton, *Marketing Theory and the Fencing of Stolen Goods* in 50 DENVER L.J. 177 (1973) [hereinafter Roselius & Benton, *Marketing Theory*].

20. *See* R. BARNES, ARE YOU SAFE FROM BURGLARS? 142 (1971). At least one critic, however, has rejected this explanation as too simplistic:

> A history of attentions to criminal receiving and the trade in stolen property could be written about the saying "if there were no receivers there would be no thieves." . . . [T]he observation itself is better understood as an hyperbolic plea for attention to the criminal receiver than as an accurate statement of his relationship to theft. . . . In brief, if there were no receivers, there would still be all sorts of thieves, and possibly more thieves of sorts we don't like than we have now.

C. KLOCKARS, *supra* note 12, at 164-66 (citations omitted).

21. "It seems that fencing schemes provide the profit motive for the original theft." *Hearings on Fencing* 2 (opening statement of Senator Alan Bible). *See also*

ing the theft problem is to realize that law enforcement efforts should be primarily directed at the fence.

A major obstacle to dealing effectively with theft is that, despite the institutionalization of criminal redistribution systems, receiving is a so-called invisible crime largely free from public scrutiny.[22] It is difficult to identify stolen property under any circumstances; the task is made virtually impossible after a fence sells those goods to unsuspecting customers, for evidence of the crime is then effectively destroyed.[23] In short, once stolen property is successfully fenced no "smoking gun" remains. This invisibility has several undesirable consequences. Police investigations of fencing activity usually are unsuccessful because the crime is not readily detected by conventional police surveillance techniques.[24] Moreover, the crime of receiving generally has not been subject to comprehensive academic analysis[25] because police enforcement problems are reflected in the absence of accurate statistics exposing methods of redistribution and

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id. at 41-43 (statement of Franklyn H. Snitow, Assistant District Attorney, New York County).

22. Since the 1700s "[t]he fence has . . . been recognized as a very important part of the theft problem and as a crucial figure in the support and maintenance of the thief." Chappell & Walsh, *Receiving Stolen Property* 485. *See Observations on the Buyers or Receivers of Stolen Goods—A Letter to a Member of Parliament*, 3 LAW PAMPHLETS No. 5 (1751).

23. "This is in sharp contrast to . . . 'conventional crimes' such as murder, assaultive offenses, and theft. These activities, even when successful for the perpetrator . . . still leave substantial proof of their occurence." Chappell & Walsh, *Receiving Stolen Property* 494. Consequently, the only data that directly document fencing activity are those that become available when a particular fencing operation has been discovered by the police.

24. *See* notes 207-20 *infra* and accompanying text.

25. *See* Chappell & Walsh, *Receiving Stolen Property* 486; C. KLOCKARS, *supra* note 12, at 1-2; THE IMPACT OF CRIME ON SMALL BUSINESS—PART VI (CRIMINAL REDISTRIBUTION (FENCING) SYSTEMS), S. REP. No. 93-1318, 93d Cong., 2d Sess. 29-30 (1974) [hereinafter REPORT, THE IMPACT OF CRIME].

Chappell and Walsh suggest that one reason for this situation is that the fence has never been viewed as an appropriate subject for criminological research:

> Criminology's search for crime causality, bolstered by inputs from the disciplines of psychology and sociology, has greatly influenced the choice of research topics for students of the field. . . . The quest to develop a psychological and sociological competence in the study of crime causation meant . . . the rejection of the simplicity which economics had introduced. It came also to mean, however, the virtual rejection of the discipline of economics with its rational explanations, as irrelevant and inappropriate. . . . Lacking any obvious psychological difficulties and remaining a well-integrated participant in the socionomic structure, the fence could hold little interest for criminologists who were searching for more deviant personalities to study. The same is true of the white-collar criminal, those individuals associated with organized crime, and many professional thieves. It seems clear that until economics is again accepted as a legitimate input into the criminological research process, the rational criminal—in particular the criminal receiver—will remain little studied and even less understood.

Chappell & Walsh, *Receiving Stolen Property* 487-88.

measuring the amount of property actually redistributed.[26] Understandably, researchers have directed their attention to more visible crimes such as theft itself or violent crimes against persons for which statistics are available.[27] Further, surprisingly carefree public attitudes that insurance will cover theft losses[28] and that the purchase of stolen goods is acceptable social conduct[29] reinforce the neglect afforded fencing operations. Partly as a result of inadequate research, society's theft-oriented approach has long remained free from rigorous scrutiny, and the development of effective and creative legal techniques for controlling the problem has been delayed.

The absence of accurate statistics directly measuring fencing activity, however, has not foreclosed other, sometimes intuitive, means of estimating its significance; this in turn allows appreciation of theft's economic basis and makes it possible to devise reasoned solutions. Crimes against property have increased 230.5 per cent since 1960,[30] and by conservative estimates property crimes cost American businesses, and ultimately American consumers,[31] 20.3 billion

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26. There is a "relative paucity of data" to support fencing research. Chappell & Walsh, *Receiving Stolen Property* 492. "Most of the information that does exist is of an anecdotal, historical, or 'police intelligence' nature." *Id.* at 493. Further, police "[i]ntelligence information is rarely made available for public scrutiny . . . ." *Id.* For a comprehensive discussion of the difficulties involved in researching fencing activity, see C. KLOCKARS, *supra* note 12, at 197-226.

27. *See* Chappell & Walsh, *Receiving Stolen Property* 494-95.

28. *See* REPORT, THE IMPACT OF CRIME 25-26. This view is shortsighted because rising rates are now making insurance premiums for many businesses and individuals prohibitively expensive. *See* note 51 *infra* and accompanying text.

29. Chappell & Walsh, *Receiving Stolen Property* 491; Chasan, *supra* note 1, at 17; notes 45-47, 511 and accompanying text *infra*. One discount store in Chicago was so well known for bargains in stolen goods that the owner even removed labels from legitimately acquired goods to make his customers think they were getting hot articles. *See* U.S. NEWS AND WORLD REPORT, March 17, 1969, at 44. Similar practices have become commonplace in the underworld. *See* V. TERESA & T. RENNER, MY LIFE IN THE MAFIA 70 (1974) [hereinafter V. TERESA]; C. KLOCKARS, *supra* note 12, at 79. *See generally* Roselius & Benton, *Marketing Theory* 177, 189.

30. UNIFORM CRIME REPORTS FOR THE UNITED STATES, 49 (1976) (data for 1960 through 1975).

31. There is little question that the consuming public must ultimately shoulder the burden of paying for the increased costs that are engendered by theft and fencing activity. *See* U.S. DEPT. OF JUSTICE (LAW ENFORCEMENT ASSISTANCE ADMIN.) & DEPT OF TRANSPORTATION, CARGO THEFT AND ORGANIZED CRIME: A DESKBOOK FOR MANAGEMENT AND LAW ENFORCEMENT 8 (1972) [hereinafter CARGO THEFT AND ORGANIZED CRIME]. It is not clear, however, that the consumer, who so quickly pays for theft, would just as quickly reap the benefit of an anti-theft and fencing effort. The immediate effect would be on insurance claims. This could affect rates and consequently profits, prices, or both. How far down the line the benefits would actually flow is not evident. But it seems obvious that, while the effect of an increasing theft rate on the consumer tends to be immediate and adverse, the effect of a decreasing theft rate would, in all likelihood, be gradual and only potentially positive.

dollars annually.[32] Of this amount ordinary crimes, including burglary, robbery, vandalism, shoplifting, employee theft and passing bad checks, account for approximately 16.1 billion dollars.[33] Presented with similar statistics, a recent Senate investigation concluded that since "[t]he magnitude of theft is so great . . . the only reasonable outlet must be to legitimate consumers."[34] Obviously, stolen goods must be channeled through criminal redistribution systems.[35]

One original study of property theft and recovery rates appears in appendix A to this article. Research shows that, for every one hundred persons, the value of property annually stolen, measured in constant "1960" dollars to account for inflation, jumped from 502 dollars in 1960 to 1061 dollars in 1975, an increase of 111 per cent.[36]

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32. The 20.3 billion dollar figure for 1974 was broken down into the following categories:

Estimates in This Study	*1974 (Billions)*
Retailing	$ 5.8
Manufacturing	2.8
Wholesaling	2.1
Services	3.5
Transportation	1.9
Arson	0.3
Preventive	3.9
	$20.3

U.S. DEPT. OF COMMERCE, THE COST OF CRIMES AGAINST BUSINESS 7 (1974) (update of 1972 study). The ratio of losses to total capital expenditures is equal to about 17 per cent of total corporate profits. *Id.* For the 1972 Study, see U.S. DEPT. OF COMMERCE, THE ECONOMIC IMPACT OF CRIMES AGAINST BUSINESS, PRELIMINARY STAFF REPORT 5 (1972) [hereinafter COMMERCE DEPT. REPORT]. "In almost every case, the estimates are conservatively stated, inasmuch as they do not attempt to include unreported crimes, which are considered to be high." *Id.* at 4. Significantly, "small business suffers an impact that is 3.2 times the average, and 35 times that of businesses with receipts over $5 million." *Id.* at 9. *See* CARGO THEFT AND ORGANIZED CRIME 5-6.

33. U.S. DEPT. OF COMMERCE, THE COST OF CRIMES AGAINST BUSINESS 7 (1974).

34. STAFF REPORT ON SMALL BUSINESS 3. *See* CARGO THEFT AND ORGANIZED CRIME 28. *See generally* Roselius & Benton, *Stolen Goods* 174; *Hearings on Stolen Securities* 210-213.

35. Los Angeles authorities have reported, for example, that 95 per cent of stolen property is ultimately redistributed. *Hearings on Fencing* 3. Chappell and Walsh state:

> Reflected in each auto theft, in each burglary, and in many robberies and muggings is evidence of fencing. No goods, whether created through the productive process or acquired by theft, have value to the possessor unless they are distributed and sold—and that is the fence's job. Fencing, then, represents a major proportion of the nation's yearly crime figures . . . .

Chappell & Walsh, *Receiving Stolen Property* 495. Chappell and Walsh, however, may overstate the case, at least in the auto theft area. Most auto thefts are apparently made not for resale but for short term transportation. Young people (under 18) represent a major portion of those arrested for the offense (55 per cent in 1975). Similarly, a high proportion (62 per cent in 1975) of stolen autos are recovered. *Id.* at 178. UNIFORM CRIME REPORTS FOR THE UNITED STATES 37 (1975) [hereinafter U.C.R. 1975].

36. *See* Table 2, Appendix A.

Moreover, during the same period the percentage of stolen property recovered declined from 52.4 per cent to 29.9 per cent.[37] Rising theft rates and declining recovery rates, especially of goods recently manufactured for sale to consumers, are consistent with the theory that theft is the by-product of sophisticated fencing schemes that quickly redistribute stolen goods and frustrate police procedures currently employed to control them.

These conclusions are supported by other observations reported in appendix A. First, the increase in personal property thefts is primarily accounted for by a rapid increase in thefts of "miscellaneous" property,[38] as classified by the Federal Bureau of Investigation in its Uniform Crime Reports. "Miscellaneous" property includes office equipment, televisions, radios, stereophonic equipment, firearms, household goods, consumable goods and livestock,[39] goods which are constantly in high demand by consumers. These goods also are usually quite easy to conceal and transport, and can often be "legitimized" simply by removing identifying labels since they are rarely not marked with serial numbers; they are thus easy to fence.[40] Second, the increase in the value of property recovered kept pace with the increase in the value of property stolen until 1966 when the recovery rate droped dramatically. This drop coincides with the acceleration of thefts of miscellaneous property.[41] Finally, the statistics indicate that although the overall recovery rate declined, the ability of law enforcement authorities to recover most types of stolen property did in fact improve.[42] Nevertheless, improved police procedures for recovering such items as automobiles, furs, and jewelry have been more than offset in the overall recovery rate by the inadequacy of existing investigative techniques to recover miscellaneous property.

This study supports other commentary that postulates a high correlation between merchandise frequently stolen and that readily demanded by consumers.[43] It also reinforces more intuitive observations that thieves do not hijack truck loads of razor blades, tires or tuna fish for personal consumption.[44] Redistribution for profit is always the ultimate objective of these thefts, and the consumer mar-

37. *See* Table 4, Appendix A.
38. *See* section A, Appendix A.
39. *See id.*
40. *See* section B(6), Appendix A.
41. *See* section B(3), Appendix A.
42. *See* section B(4), Appendix A.
43. Roselius & Benton, *Stolen Goods* 182; *see* text at note 71 *infra.*
44. *See* V. TERESA, *supra* note 29, at 141-42 (theft of razor blades).

ket is generally quite willing to absorb stolen goods.[45] Although consumers are often unaware they are purchasing stolen property,[46] many bargain hunters have displayed a marked proclivity to buy such merchandise when it is available.[47] In this regard, reference already has been made to the importance of apparently legitimate businessmen who seek a competitive edge by selling stolen merchandise[48] and whose cash resources facilitate redistribution. Clearly, therefore, the survival of criminal redistribution systems depends upon the continued propensity of consumers and businesses to buy illegal goods.[49]

The ultimate consequences of theft and fencing for both the national economy and American society is not completely reflected in the estimated 20.3 billion dollar cost of property crimes.[50] On one level, rising theft rates for many legitimate businesses mean higher in-

45. "[M]any of these things are stolen for order and they are handled by organized crime. The markets are already established and the property is absorbed into our economic system just like a huge dry sponge. It just sucks it all up and it disappears . . . ." REPORT, THE IMPACT OF CRIME 3; *see id.* at 13-14, 23-24; Roselius & Benton, *Stolen Goods* 174.

46. STAFF REPORT ON SMALL BUSINESS 7.

47. *See* note 29 *supra.*

48. *See* C. KLOCKARS, *supra* note 12, at 62, 111-12; REPORT, THE IMPACT OF CRIME 3, 13-14, 23-24; notes 117-25 *infra* and accompanying text. Some establishments may be reluctant "to buy from irregular, noninstitutionalized sources of supply," but will ultimately wind up obtaining stolen property because of their failure to check the purchasing practices of their buyers, or because a fence has successfully established a quasi-legitimate front. *See* Roselius & Benton, *Stolen Goods* 183; Emerson, *They Can Get It for You Cheaper Than Wholesale*, NEW YORK MAGAZINE, Nov. 22, 1971, at 37.

The greed of legitimate businessmen is a prime support of fencing activity. *See generally Hearings on Fencing* 4. Thieves often feel "completely safe in making an offer to an apparently legitimate store." *Id.* Pure greed may not be the only factor. "Given current economic conditions, many small businessmen are only too glad to get merchandise at low swag [stolen property] market prices." Emerson, *supra*, at 37. "[I]n poor areas of the inner city, where small businesses have an enormous rate of failure, fencing may make the difference between survival and failure." Chasan, *supra* note 1, at 17. Finally, in other situations, organized crime may be coercing businessmen to trade in stolen goods. *See* note 119 *infra* and accompanying text.

49. By analogy, it has been said that "the American confederation of organized crime thrives because a large minority of citizens demand illicit goods . . . that it has for sale." Cressey, *Methodological Problems in the Study of Organized Crime as a Social Problem*, 374 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 101, 107 (1967). *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, ORGANIZED CRIME 2 (1967) [hereinafter TASK FORCE REPORT, ORGANIZED CRIME]. For a discussion of the role of organized crime in fencing activity, see notes 150-69 *infra* and accompanying text.

50. *See* CARGO THEFT AND ORGANIZED CRIME 3 (actual dollar value of lost cargo does not reflect other consequences of the theft); *Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 309, 356 (1972) [hereinafter *Hearings on Criminal Laws*].

surance rates[51] and administrative costs,[52] strained customer relations,[53] and lost profits.[54] In many cases, the free flow of commerce may be impeded.[55] On another level, although the sophistication of fencing schemes varies considerably, the typical fence operates as a businessman, often selling goods at discount and undercutting legitimate competitors. Ultimately, therefore, widespread and sophisticated theft and fencing threatens the free enterprise system[56] as tax revenues decline[57] and legitimate businesses are forced to lay off employees,[58] to relocate, to use other methods of shipping goods, or, perhaps, to declare bankruptcy.[59]

There is a clear and pressing need, therefore, to recognize the undesirable consequences of fencing operations and to deal with them forcefully. An important factor in our society's neglect of the fence's role in the theft problem, however, has been his singular success in avoiding prosecution and conviction.[60] To a limited extent,

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51. *See* SENATE SELECT COMM. ON SMALL BUSINESS, THE IMPACT OF CRIME ON SMALL BUSINESS—PART III, S. REP. NO. 91-1547, 91st Cong., 2d Sess. 3-4 (1970) [hereinafter SELECT COMM. ON SMALL BUSINESS]; *Hearings on Stolen Securities* 66.

52. *See* SELECT COMM. ON SMALL BUSINESS 3; CARGO THEFT AND ORGANIZED CRIME 4.

53. *See* CARGO THEFT AND ORGANIZED CRIME 4.

54. *See, e.g., id.* at 4-5.

55. *See id.* at 5.

56. Ironically, since most stolen goods are eventually resold in the stream of consumer commerce, they are often used in direct competition against the very businessmen who originally attempted to import them. *See Hearings on Criminal Laws* 356; CARGO THEFT AND ORGANIZED CRIME 8.

57. CARGO THEFT AND ORGANIZED CRIME 8.

58. *See generally* note 31 *supra.*

59. *See generally* CARGO THEFT AND ORGANIZED CRIME 5. When a particular carrier or port of entry establishes a poor safety record with respect to the security of its cargo facilities, a poor image may be acquired that would motivate shippers to divert their cargo to alternative routes or modes of transportation. *Id.* at 7-8. A poor image, once acquired, is difficult to lose. *Id.*

A recent report issued by the Waterfront Commission of New York Harbor reveals that airline theft may be valued at a figure as high as $16 million per year at Kennedy, La Guardia and Newark airports (more than in the rest of the country combined); it also casts doubt on previous evidence given to Congress that the theft problem was being brought under control. WATERFRONT COMMN. OF N.Y. HARBOR, REPORT ON THE TRUE EXTENT OF CARGO THEFT AT THE NEW YORK-NEW JERSEY AIRPORTS 2-3 (1975). The Commission concluded:

> The thefts at our airports are really only symptomatic of the more basic problem of criminal control of the air freight industry. Large-scale theft of gold, silver, platinum, rare metals, furs, jewelry, diamonds, etc. are not thefts of individual impulse, but rather require sophisticated planning in advance by organized groups as well as previously arranged distribution channels to get such commodities into manufacturing and consumer markets.

Id. at 31.

60. *Hearings on Criminal Laws* 309-10. *Compare* REPORT, THE IMPACT OF CRIME 10, *with* J. HALL, *supra* note 5, at 197-98. Nationally, the crime of receiving stolen property has had a conviction rate (offense charged) of 38 per cent for a num-

this success is a product of current law enforcement practices that tolerate fencing as a *quid pro quo* for information concerning theft[61] and other crimes that police consider more important. While these law enforcement priorities reveal a failure to recognize receiving as a cause of other crime, they also reflect deficiencies both in techniques used to detect fencing and in the substantive law that frustrates the prosecution of alleged fences.[62] Thus, partial responsibility for the rising theft rate and the tremendous amount of property successfully redistributed annually may be attributed to a failure of the legal system to recognize the character and consequences of modern theft and fencing operations.[63] Section I of this article describes various theft and fencing operations. As will be evident from that discussion, the most sophisticated fences are far removed from those receivers who are owners of seedy pawnshops or who indiscriminately select potential customers on the street, and thus they pose peculiar problems for law enforcement. Section II then identifies inadequacies in existing investigative techniques and in the substantive laws of receiving in light of modern theft and fencing operations. It proposes changes in the law and suggests appropriate law enforcement strategies to facilitate the detection and conviction of alleged fences. Needed changes in the civil law are also discussed. Throughout these sections of the article, reference will be made to the provisions of a Model Theft and Fencing Act set forth in appendix B.

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ber of years. *See, e.g.*, U.C.R. 1975, at 174. Historically, gaps in the substantive law have made it difficult to convict fences. *See* J. HALL, *supra* note 5, at 173. There have also been other barriers to successful prosecution:

> It has always been difficult to convict professional receivers. . . . [T]hey have been shrewd enough to devise methods of operation which [escape] public notice. They dress their illegal traffic in all the paraphernalia of lawful enterprise; they conduct their businesses secretly; they are equipped both mentally and financially to take full advantage of the weaknesses in the administrative machine, should prosecution be initiated.

J. HALL, *supra* note 5, at 195. At least some law enforcement officials today feel that the substantive law related to fencing activity is satisfactory, believing that the "difficulties arise in the practical application of the law especially in the evidentiary and procedural area." *Hearings on Fencing* 46. Chappell and Walsh have stated that "fencing should be considered and attacked as a problem of legal revision, of updating the law to the contemporary situation." Chappell & Walsh, *Receiving Stolen Property* 489.

61. *See* Chappell & Walsh, *"No Questions Asked"* 166-67; C. KLOCKARS, *supra* note 12, at 27-28, 194-95. *See generally* J. HALL, *supra* note 5, at 201-02.

62. *See* notes 175-467 *infra* and accompanying text.

63. Chappell and Walsh attribute partial responsibility for the legal system's inadequacies to society's inaccurate perception of the fence: "[T]o deal effectively with the fence, we must first alter our perceptions of him. . . . The law, after all, can only proscribe and protect against that which *we* can describe and demonstrate for it." Chappell & Walsh, *"No Questions Asked"* 168 (emphasis original).

I. The Realities of Modern Fencing Systems

Although patterns of redistribution differ in sophistication, all fences are essentially businessmen engaged in "[t]he performance of business activities that direct the flow of goods . . . from producer [thief] to consumer or user."[64] As middlemen, fences must locate supplies of stolen goods, contact purchasers, provide transportation and storage facilities,[65] and finance the entire process.[66] During redistribution, therefore, fences confront two major risks: the risk of detection while performing the middleman functions and the risk of financial loss if the particular stolen goods cannot be marketed profitably.[67] As this section of the article will show, the extent of both these risks varies inversely with the sophistication of the fencing operation. Risks are minimized for the most successful fences who have leadership ability, business acumen, established contacts with thieves, broad operation bases, tight organizational control, and legitimate facades.[68] It is, of course, these sophisticated receiving operations that pose the greatest challenge to our society. A brief study of the most common fencing techniques is, therefore, necessary to understand the changes that are desirable both in the substantive law of receiving and in its enforcement.

A. *Marketing Theory and the Fence*

Successful fences frequently minimize their risks by adopting the

64. Committee on Definitions, Am. Marketing Assn., Marketing Definitions 15 (1960). This is the conventional definition of the term marketing. *See* Roselius & Benton, *Marketing Theory* 177-78. Some commentators argue, however, that

> a broader definition is often used to give more specific direction to the persons charged with performing the marketing functions. Thus, "[m]arketing is a total system of interacting business activities designed to plan, price, promote, and distribute want-satisfying products and services to present and potential users." This definition assumes that much of the behavior related to the distribution of stolen goods consists of rational, economically guided decisions. It also indicates that such distribution requires conscious effort and decision making by the thief and fence.

Id. at 179 (citations omitted). Other authorities have recognized the business nature of a fencing operation: "The business of dealing in stolen goods requires a trained personnel. It requires most of the qualifications necessary to carry on any business and a number of additional ones." J. Hall, *supra* note 5, at 156-57.

65. *See* Roselius & Benton, *Marketing Theory* 187.

66. Financing the transfer process actually involved paying the producers for their labor and taking care of both transportation and storage arrangements. Roselius and Benton maintain that of these three functions, providing the thieves with their payment is the most important marketing service performed by the fence. *See* Roselius & Benton, *Marketing Theory* 186; Staff Report on Small Business 6-7.

67. *See* Roselius & Benton, *Marketing Theory* 187; Staff Report on Small Business 7.

68. Arguably, "image-building" is no longer an important aspect of a fencing operation. *But see* Chappell & Walsh, *"No Questions Asked"* 165.

same marketing techniques used by legitimate businessmen.[69] For example, fences frequently use elementary supply and demand principles to determine which goods can be moved safely and quickly through the redistribution chain.[70] This information is then passed to thieves who usually use it in determining the types of merchandise to steal.[71] Although virtually any item can be fenced,[72] many fences prefer high value, low volume goods that produce handsome profits and can easily be hidden and transported.[73] Most fences, however, deal in high volume goods of lower value that are not easily identified by police[74] because of the large quantitites of physically indistinguishable products manufactured today. Thus, the list of commonly fenced "safer" goods includes clothing, stereos, radios, home appliances, cigarettes, liquor, pharmaceutical drugs, building supplies, office equipment, and securities.[75] Shoplifters,[76] employees,[77] and bur-

69. *See* Roselius & Benton, *Marketing Theory* 178, 185-88; STAFF REPORT ON SMALL BUSINESS 6; *Hearings on Criminal Laws* 309.

70. *See Hearings on Criminal Laws* 309; Roselius & Benton, *Marketing Theory* 184. *See generally* J. HALL, *supra* note 5, at 160.

71. Hall has remarked that, "[o]f all these factors [influencing fencing activity], fluctuations in the general market are the most important conditioning forces upon the receiver's purchases and consequently upon professional theft." J. HALL, *supra* note 5, at 160. *See generally Truck Hijacking: Fastest Growing Racket*, U.S. NEWS AND WORLD REPORT, Sept. 14, 1970, at 27; *Hearings on Fencing* 150-51; note 74 *infra* and accompanying text.

72. "Almost anything seems to lure today's thieves: Hotpants are a hot item for today's department store shoplifters. Typewriters, adding machines, electric clocks, and xerox copiers—anything that isn't securely nailed down—are disappearing from offices and warehouses." Dietsch, *Theft: The Hidden Tax*, Washington Star, July 12, 1971, pt. 1.

73. Antique pieces, expensive paintings, jewelry, and even certain kinds of construction equipment (e.g., giant heavy equipment tires) are good examples of high value, low volume goods. "Consumer goods such as guns, gems, autos, television sets, and liquor . . ." also fit into this category. Roselius & Benton, *Marketing Theory* 196-97.

74. One of the prosecutor's chief obstacles in gaining convictions is the identification of the goods as stolen. *See* notes 223-32 *infra* and accompanying text. Accordingly, "identification of goods is the chief risk to be avoided" by any fence. J. HALL, *supra* note 5, at 160.

75. *See* STAFF REPORT ON SMALL BUSINESS 6; *Hearings on Fencing* 3-4, 22-23, 43, 149-53; *Hearings on Stolen Securities* 38, 547; Chasan, *supra* note 1.

76. "Total inventory losses which result almost entirely from shoplifting and employee theft are estimated as high as four to five per cent of sales at some stores. This is virtually equal to the normal profit margins in retailing." COMMERCE DEPT. REPORT 1-1. Over-all, shoplifting accounts for 28 per cent of retail loss due to property crimes. *Id.* at 9. "Shoplifting in some metropolitan areas is highly organized, with the stolen goods handled only by certain fences." Furstenberg, *Violence and Organized Crime*, 13 CRIMES OF VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMN. ON THE CAUSES OF VIOLENCE 911, 922 (1969). *See generally Shoplifting: The Pinch That Hurts*, BUSINESS WEEK, June 27, 1970, at 72; *Shoplifting, Long a Plague of Urban Stores, Is Now an Increasing Menace in the Suburbs*, Wall Street J., Dec. 23, 1971, at 22, col. 1.

77. In the cargo industry, employees are participants in 80 per cent of theft ac-

glars,[78] who together account for most commercial theft,[79] often steal these high-demand products and sell them to fences for redistribution.[80] Even though fences usually deal in high-demand products, the use of standard marketing principles is, nevertheless, often imperfect because the demand for and supply of stolen property are extremely heterogeneous;[81] the only fences consistently successful in matching supply and demand are those with reliable and well-connected informants[82] who can direct the fences to thieves able to supply particular goods and customers willing to purchase them.

Once supply and demand have been estimated, a fence must price his stolen merchandise. As in legitimate marketing operations, pricing involves a consideration of current market prices, available

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tivity. "Cartons [are] stolen by those who have easy access to shipments." CARGO THEFT AND ORGANIZED CRIME 19. It is estimated that "70 to 80 per cent of the cargo stolen as the result of employee theft . . . is converted into cash through the use of fences." *Id. See Hearings on Fencing* 39, 144-46. For excellent examples of such theft activity, see C. KLOCKARS, *supra* note 12, at 61-62, 75, 85-88, 107-08, 143-44. A detailed summary of employee theft techniques is provided in CARGO THEFT AND ORGANIZED CRIME 37-38.

A similar situation prevails in the retail industry. Employee theft is estimated to account for 13 per cent of the losses resulting from property crimes, but the Commerce Department and other sources feel that this percentage is greatly understated because businesses are reluctant "to admit the magnitude of their employee theft problem . . . ." COMMERCE DEPT. REPORT 9-11. There is little reason to believe that these employees retain their stolen goods for personal consumption. *See generally Hearings on Fencing* 4; Gregory, *Why Workers Steal*, SATURDAY EVENING POST, Nov. 10, 1962, at 68.

78. Burglaries account for 23 per cent of property crime losses incurred by retail businesses. The over-all national burglary rate increased 256.6 per cent between 1960 and 1975. *See* U.C.R. 1975, at 49. This activity cost business and noncommercial victims a loss of $1.4 billion in 1975. *Id.* at 28. The goods obtained by burglarizing both residential and commercial establishments are commonly passed on to fences. *See Hearings on Fencing* 161.

79. *See generally* U.C.R. 1975, at 25-31.

80. *See* notes 75-77, *supra*. "To make the original theft profitable, it seems evident that the huge amounts of goods stolen from carrier vehicles, stores, docks, terminals, and warehouses must be passed along to unscrupulous buyers for eventual resale." *Hearings on Fencing* 1.

81. Roselius & Benton, *Marketing Theory* 184.

82. Roselius & Benton state:

> The dominant form of market information about stolen goods is word-of-mouth communications between consumers, fences, information brokers such as bartenders, and thieves. [Our] study [in Colorado] found no evidence of sophisticated data gathering and analysis similar to the very effective techniques used by legitimate businessmen. However, it is likely that syndicated crime [in other areas] does use such techniques on large volume transactions.

Id. at 188. In addition, tips supplied by company employees are an important source of marketing research information. *See* notes 140, 144-45 *infra* and accompanying text. To the extent that a fence is able to buy goods on order for customers who have already indicated a willingness to purchase designated stolen merchandise, his marketing research difficulties with respect to the demand function are eliminated. Buying on order is a frequent occurrence. *See* notes 111, 121 *infra* and accompanying text.

capital resources, promotional costs, personnel disbursements, and storage and transportation expenses.[83] The price of stolen property, however, also includes the costs of precautionary measures taken to avoid detection, such as removing identifying labels from the goods, surreptitiously handling the merchandise and, frequently, paying bribes.[84] Ultimately, the price of stolen merchandise reflects both the length of the redistribution chain and the costs of legitimizing the product.[85] If fences must charge prices approximating legitimate wholesale or retail prices, stolen goods will lose their competitive appeal and demand will diminish.

One approach taken by certain cost-conscious fences is to trade only in particular goods. By specializing in art, jewelry, or automobiles, for example, a fence can eliminate many costly and risky transactions. Specialization, however, does not guarantee success,[86] and

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83. *See* Roselius & Benton, *Marketing Theory* 192.

84. *See* J. HALL, *supra* note 5, at 159-60; F. IANNI, BLACK MAFIA 131-32 (1974).

85. Roselius & Benton, *Marketing Theory* 191. When the purchaser is aware that the goods have been stolen, the goods may be sold at a lower price. *Id.* Indeed, the aware consumer actually expects to purchase stolen goods at bargain rates. In contrast, when the consumer is unaware that

> the goods are stolen, an effort must be made within the channel of distribution to legitimize the transaction by disguising the fact that the property is stolen. Differences in channels will entail differences in the number and type of middlemen involved.
>
> The thief may sell directly to the consumer but must take steps to give the transaction an aura of legality. If he cannot legitimize the transaction or perform some middleman marketing function, he must utilize one or more intermediaries in the channel of distribution, generally a fence. Legitimation is best accomplished if the fence operates a cover or front institution of some kind.

Id.

86. C. KLOCKARS, *supra* note 12 at 188:

> [T]he would-be successful dealer in stolen property may find that forces beyond his control prohibit him from buying both profitably and regularly. This is particularly true if he has decided to become a specialist dealer. The would-be successful dealer in fine art for example, may buy and sell profitably, but may find that not enough fine art is stolen to permit him to deal regularly. Similarly, the would-be jewelry specialist may find that generalist fences . . . and "occasional receiver" legitimate jewelers take up the small regular trade, leaving him only with opportunities to buy large quantities of very expensive jewelry which nonspecialists are not prepared to handle. The would-be specialist in men's suits, on the other hand, may find that he can buy small quantities of suits regularly but not profitably, because thieves manage to sell them to "lay receivers" at prices which are close to or equal to what he would pay for them legitimately. Specialist dealers are generally under economic pressure to deal in large quantities of their particular item. They are also likely to plan each highly profitable individual transaction days, weeks, or even months in advance.

In contrast,

> [t]he generalist dealer may find himself subject to quite different pressures from the economics of theft. These pressures may permit him to deal regularly but may tax his ability to do so profitably. The advantage which the generalist dealer offers to generalist thieves is a ready market for those things which are commonly stolen. Like the department store or shopping center, his attraction is convenience. He is willing and able to buy most things that are stolen, often without special preparations. Two forces are likely to play upon him economically. On the one hand, there is a tendency for him to become more "conveni-

the extent to which a fence can successfully specialize and reduce his risks depends on the sophistication of his operation.

Thus, the use of established marketing principles to analyze fencing behavior, although somewhat imperfect, permits two rather intuitive observations. First, measures that increase a fence's difficulty in matching supply and demand prolong redistribution and increase his risks of detection. Second, as these risks increase so too do the costs of minimizing them, and thus stolen goods begin to lose their competitive advantage as their prices rise. Once the risks of financial loss and detection become sufficiently great, fencing activity may be curtailed. Suppose, for example, that most manufacturers of high-demand goods were to label their products with conspicuous serial numbers and were accurately to record those numbers.[87] Such measures might prolong redistribution and increase a receiver's risks of detection and financial loss. They would have these effects by deterring, to some extent, purchasers who knowingly buy stolen property, since the goods of these manufacturers would be readily identifiable; facilitating detection of fencing activity unless added precautionary measures were taken; and increasing the cost of legitimizing stolen merchandise. Additionally, such measures might prolong redistribution for similar goods not so labelled by preventing fences from arranging their resale far in advance because they were uncertain as to whether they could obtain unlabelled goods, and, similarly, by making fences reluctant to refuse to purchase such scarce goods even though they did not yet have buyers.

It is important always to keep in mind, however, that the extent to which such measures would increase fencing risks would also depend on other factors, such as the sophistication of the fence's operation. Although simple serial numbering of products may help in the detection and conviction of relatively unsophisticated "neighborhood" and "outlet" fences, more comprehensive measures may be needed to help detect large, well-financed fences who can easily shoulder the costs of legitimizing stolen goods and the added risk

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ent," that is, to handle a wider and wider variety of items. Because specialist items are likely to be working with specialist dealers, the unusual items that the generalist dealer is pressed to handle may be small amounts of items taken by chance by generalist thieves. Unless the generalist dealer has an unlimited number of buyers or develops other means of disposing of exotic merchandise, he must find ways of limiting what he buys so as to match his capacities to sell. The specialist dealer must also limit what he buys to what he is prepared to handle readily, but the intermittent character of his trade may make it possible for him to prepare to sell what he knows he is going to buy.

Id. at 188-89.

87. *See* text at notes 227-31 *infra.*

of detection.[88] Attention, therefore, must focus briefly on the major types of fencing systems.

B. *Patterns of Redistribution*

The extremely successful eighteenth century fencing operations of Jonathan Wild[89] provide a preliminary framework for the analysis of modern criminal redistribution systems. Sometimes called the "Father of Professional Fencing,"[90] Wild's "astonishing organizational sophistication"[91] enabled him to develop a large-scale system of redistribution that "[controlled] the London underworld for more than a decade . . . ."[92]

Although his redistribution system was constrained by economic and demographic factors that made the resale of most stolen property impractical,[93] Wild still managed to make a fortune by opening an office for the "recovery of lost property,"[94] a subterfuge through which he established contacts with thieves and, in effect, fenced stolen goods by selling them back to their original owners and collecting rewards. The success of this system depended upon Wild's ability simultaneously to gain the confidence of thieves with whom he dealt and yet to maintain a clean public image,[95] an understandably delicate balancing process that he accomplished by applying elementary marketing principles and by taking advantage of the then current English law. Wild built good relations with thieves by paying the best prices in London for stolen goods,[96] and he created and

88. *See* note 229 *infra*.

89. A vast literature is available which examines the life of Jonathan Wild in great detail. *See, e.g.*, D. DEFOE, THE KING OF PIRATES (1901); H. FIELDING, THE LIFE OF MR. JONATHAN WILD THE GREAT (1926); G. HOWSON, THE THIEF-TAKER GENERAL: THE RISE AND FALL OF JONATHAN WILD (1970); P. PRINGLE, THE THIEF-TAKERS (1958).

90. C. KLOCKARS, *supra* note 12, at 3.

91. Chappell & Walsh, *"No Questions Asked"* 165.

92. C. KLOCKARS, *supra* note 12, at 3. At his peak Jonathan Wild directed the activities of approximately 7000 thieves. *Id.* at 13. He divided London into districts, each administered by carefully selected assistants whom Wild controlled by the threat of legal prosecution under the Transportation Act. *Id.* at 17. Wild ran his operation in a business-like manner. Indeed, he referred to it as a "corporation." Chappell & Walsh, *"No Questions Asked"* 165. Thieves were often skillfully trained, responsibilities were delegated, and even advertising was employed. *See id.* at 157, 159, 165-67; C. KLOCKARS, *supra* note 12, at 13-19.

93. *See* Chappell & Walsh, *"No Questions Asked"* 167; notes 2-7 *supra* and accompanying text. Items that could not be resold in England were frequently smuggled out of the country. *See* C. KLOCKARS, *supra* note 12, at 13; Chappell & Walsh, *"No Questions Asked"* 167-68.

94. *See* C. KLOCKARS, *supra* note 12, at 14-15.

95. *Id.* at 16-17.

96. *Id.* at 11-12.

maintained his untarnished public reputation by "thief-taking"—that is, aiding in the capture of thieves or providing evidence to convict them.[97] Incidentally, the self-proclaimed "Thief-Taker General of Great Britain and Ireland"[98] also accomplished a more subtle goal by helping to convict thieves: Through such activity, he actually tightened his control over the approximately 7,000 thieves in London by giving him means to punish those thieves who would not deal with him.[99]

This brief description of Wild's operation is instructive for at least two reasons. First, it demonstrates that Wild's success depended upon his tight organizational control and, perhaps more importantly, upon his ability to project two apparently contrasting images—an ability that minimized his risks of detection. Thus, " '[b]efore a thief, he was a fellow thief; before a gentleman, a gentleman.' "[100] Second, it demonstrates in a rather simple fashion the extent to which inadequacies in the law may promote fencing. In fact, Wild's operation continued to expand until he succumbed to a law (the so-called "Jonathan Wild's Act") specifically designed to defeat him.[101] As will be evident in the following discussion, the most sophisticated and the most dangerous modern fences also successfully project contrasting images and exploit inadequacies in the substantive law.[102]

1. *The "Neighborhood Connection"*

> *[S]ome fences may deal directly with a thief and openly sell to a buyer. This type of fence is usually found in every neighborhood, and he deals primarily with small amounts of property. He is the "neighborhood connection."*[103]

97. *Id.* at 9-10. *See* J. HALL, *supra* note 5, at 73; Chappell & Walsh, *"No Questions Asked"* 159.

98. C. KLOCKARS, *supra* note 12, at 16-17.

99. *Id.* at 17. It was alleged that "notwithstanding his [Wild's] pretended services in detecting and prosecuting offenders, he procured such only to be hanged as concealed their booty, or refused to share it with him." J. HALL, *supra* note 5, at 71-72. *See* Chappell & Walsh, *"No Questions Asked"* 159. Although Wild generally limited his thief-taking activities to those who did not recognize his authority, his public reputation grew because the assistance he offered did, in fact, lead to the capture and destruction of many of London's most powerful criminal gangs. *See* C. KLOCKARS, *supra* note 12, at 17-19.

100. C. KLOCKARS, *supra* note 12, at 12.

101. *Id.* at 25-26. *See* J. HALL, *supra* note 5, at 73-76.

102. The typology of fences found in the text is only one of many possible. For a typology based on sources of property dealt with, see STRATEGIES 14-23. It is important to emphasize, too, that one individual may play many different roles in many different transactions; the types in the text, therefore, should not be viewed as mutually exclusive.

103. *Hearings on Fencing* 44. Perhaps saying that the "neighborhood connection" exists in "every neighborhood" goes too far. But if the fence himself is not

By definition, the neighborhood fence is a small-time operator. He may, on occasion, actually steal merchandise for resale, but more often he is supplied by local thieves, such as small-time shoplifters or dishonest cargo company employees.[104] Although neighborhood fences tend to specialize, they often buy whatever stolen property is available if the price is reasonable and the item is in demand.[105] Once the thief is paid, the goods are frequently stored in unimaginative and insecure hiding places, for instance, in the trunk of a car or the receiver's basement.[106]

Although the neighborhood fence has no permanent place of business, stolen goods are almost never hustled on the streets because of the risks involved.[107] Instead, the goods are sold in living rooms, local bars, or garages, or to local retail stores and pawnshops.[108] The neighborhood fence rapidly acquires a reputation as a dealer in stolen property because little effort is made to legitimize the goods and because his operation is essentially local. As he develops a regular clientele of thieves,[109] a neighborhood fence may occasionally expand his operation by organizing thefts for customers,[110] by working closely with other fences,[111] and by serving as one of many distributors for property stolen by organized crime syndicates.[112]

There are several reasons why neighborhood fences represent considerably less of a threat to our society than do large-scale fences.

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in the neighborhood, there is usually someone in every neighborhood who knows where such a fence can be found. For a good account of a neighborhood fencing operation, see Emerson, *supra* note 48, at 311-17.

104. *See* Emerson, *supra* note 48, at 34-38. *See generally Hearings on Fencing* 44. For a good example of the working relationship between a neighborhood fence and his boosters, see Emerson, *supra* note 48, at 313.

105. *See* Emerson, *supra* note 48, at 35-36. *See generally Hearings on Fencing* 6.

106. Hiding places for the temporary storage of stolen goods are known in the street language of the "trade" as "drops." *See* note 146 *infra* and accompanying text.

107. In reality, street hustlers often peddle legitimate merchandise which has been characterized as " 'store-bought' swag." Emerson, *supra* note 48, at 37.

108. *See id.* at 35-38.

109. *See id.* at 35-38. For a neighborhood fence, the development of a local reputation may be equated with Jonathan Wild's concern with "image-building." *See* notes 95-100 *supra* and accompanying text. *See also* note 129 *infra* and accompanying text.

110. *See* Emerson, *supra* note 48, at 36-37.

111. The neighborhood fence may work with a professional fence who specializes in wholesaling. "[A] wholesale . . . dealer . . . sells only in large quantities to other hustlers but does no hustling himself." *Id.* at 38. A wholesaler may be a middleman "in the chain of distribution for mob-controlled thefts . . . ." *Id.* For an analysis of the professional fence, see notes 126-28 *infra* and accompanying text.

112. *See* Emerson, *supra* note 48, at 34. On the concept of "organized crime," see note 154 *infra.*

First, they are more easily detected by conventional police investigative techniques because they often retain actual possession of the goods until redistribution is complete,[113] make little effort to disguise the illegal nature of their goods, and are frequently well-known to both thieves and police. Second, neighborhood fences rarely expand because they usually have limited financial resources and marketing opportunities that prevent their establishing a broad operational base or developing long-term relationships with a significant number of thieves. Finally, although a small-scale fencing operation may generate substantial personal income, neighborhood fences probably only distribute a small percentage of the stolen property redistributed annually.[114]

2. *The Outlet Fence*

Many businesses that primarily market legitimate merchandise also serve, knowingly or unknowingly, as convenient outlets for large quantities of low-cost stolen goods,[115] and gain obvious competitive advantages from such marketing.[116] These so-called outlet fences, especially the large, prestigious establishments, usually do not deal directly with thieves.[117] Instead, transfers of illicit merchandise to these merchants are engineered by so-called professional or master fences whose functions are similar to those of legitimate wholesalers. Before delivery to outlet fences, these wholesalers of stolen goods repackage the merchandise and remove all identifying features.[118]

113. Possession is strong circumstantial evidence of guilt in a prosecution for the crime of receiving stolen property. Further, in most states, possession raises a presumption that the fence had knowledge that the goods were stolen. *See* notes 335-42 *infra* and accompanying text. For this reason, other more sophisticated fences generally attempt to avoid actual possession. *See* notes 143-47 *infra* and accompanying text.

114. On the other hand, an anti-fencing strategy that was concerned with local burglaries or thefts committed primarily by addicts and juveniles might well decide to focus on the "neighbor fence." *See* STRATEGIES 14-16.

115. *See* CARGO THEFT AND ORGANIZED CRIME 22; notes 45-48 *supra* and accompanying text. "It seems paramount that these businesses must be named for what they really are, a part of this country's criminal system and not what they think they are, 'good' businessmen interested in making a 'good' profit." *Hearings on Fencing* 37.

116. For example, a retailer may purchase goods at relatively low prices and then sell them at the standard retail level (or just a bit below). The result is a higher mark-up and obviously a greater profit margin. *See, e.g.*, V. TERESA, *supra* note 29, at 141. In some cases, a retail outlet may be unaware that it is buying stolen goods, and in those circumstances the bulk of the excess profit is reaped by third parties, often the fence and a store's buyer.

117. *See* Roselius & Benton, *Stolen Goods* 183.

118. Note that this is in sharp contrast with the procedures utilized by a neighborhood fence who generally makes no effort to disguise the swag identity of his goods. *See* text at note 109 *supra*.

The stolen merchandise then not only is ready for its reentry into traditional streams of commerce, but also is difficult for police and honest businessmen to identify.

In contrast to neighborhood fences, therefore, sophisticated outlet fences pose more serious challenges to law enforcement efforts. First, the merchandise these apparently legitimate businesses receive is usually the product of sophisticated theft and redistribution operations,[119] and the prospect of high retail profits often provides sufficient incentive for retailers to develop a long-term relationship with supplying fences.[120] Thus, outlet fences have a greater adverse impact on society than do neighborhood fences simply because they market large quantities of stolen merchandise that otherwise could not be readily redistributed. Indeed, once such retailers begin to expand their dealings in stolen property they may become professional fences.[121]

Second, although any establishment handling stolen property is technically a fence, criminal liability in most jurisdictions attaches only if authorities can prove the establishment knowingly dealt in stolen property, a *mens rea* difficult to prove if, as is often the case, either the business had no direct contact with thieves or the merchandise when delivered already had been legitimized.[122] One way to prove an outlet fence actually had the requisite *mens rea* is to examine the circumstances surrounding its transaction with the wholesaling fence. For example, as discussed in section II, there is strong evidence of the requisite knowledge if authorities can prove that the wholesaling fence offered the goods at a price substantially lower than the legitimate wholesale market price, had no evidence of ownership beyond mere possession, or demanded cash when the usual practice is to accept a check and issue a receipt.[123]

Finally, even if a knowledge standard is not unduly burdensome for the prosecution in cases involving small retailers whose propri-

119. *See* notes 159-60 *infra* and accompanying text.

120. For this reason, and because of the sophisticated thefts involved, fencing operations involving legitimate businesses probably stimulate considerable "buy-on-order" theft activity. *See Hearings on Fencing* 42; REPORT, THE IMPACT OF CRIME 3.

121. "Most professional receivers seem, indeed, to be offshoots from legitimate businesses." J. HALL, *supra* note 5, at 156. *See Hearings on Fencing* 161. The characteristics of a professional fence are discussed in greater detail in notes 141-54 *infra* and accompanying text.

122. *See* notes 274-409 *infra* and accompanying text.

123. *See* J. HALL, *supra* note 5, at 224-25 n.72. Many sophisticated purchasers of stolen goods, however, take precautionary measures to disguise the illegality of their transactions. For example, phoney checks or fake receipts may be used for these purposes. *See* notes 132-38 *infra* and accompanying text.

etors control all aspects of the purchase and resale, it has serious deficiencies when applied to large-scale retailers. For example, upper-level management of a department store chain often has no actual knowledge of illegal transactions because most purchasing decisions are made at lower levels. By not participating in purchasing decisions, upper-level management may knowingly promote the purchase of stolen goods by the chain's buyers seeking a cost advantage over their competitors and yet avoid criminal liability by intentionally remaining ignorant of relevant transactions.[124] As in the case of smaller retailers, proof of purchases at unusually low prices is strong evidence that store buyers knowingly acted illegally, although frequently the illegal offer itself is even more overt.[125]

3. *The Professional Fence*

So-called professional fences frequently front as legitimate retail businesses[126] and may be either specialist or generalist fences, depending, in large part, on the nature of their retail establishments.[127] Although professional fences thus appear to be similar to outlet fences, they are different in two important respects.

First, unlike outlet fences who may only occasionally handle stolen property,[128] professional fences are primarily criminal distributors specializing in stolen merchandise, though they may also do a substantial amount of legitimate business. Interestingly, since professional fences require a steady flow of substantial amounts of stolen

124. *See* C. KLOCKARS, *supra* note 12, at 111-12; *Hearings on Criminal Laws* 310; Chasan, *supra* note 1, at 15.

125. For example, direct bribes may serve as monetary incentives inducing a buyer to purchase stolen goods. In addition, the buyer may also be rewarded by management for purchasing his merchandise at a good price. *See Hearings on Criminal Laws* 310.

This discussion of the *mens rea* problem, more fully pursued in the text at notes 259-73 *infra*, should note that since a significant number of businesses dealing in stolen property are pressured by organized crime to participate in redistribution schemes, their participation is considerably less culpable than that of willing participants. *See* STAFF REPORT ON SMALL BUSINESS 8.- For a good example of organized crime exerting pressure on legitimate businesses through the use of gambling and loansharking techniques, see *Hearings on Fencing* 148-49. *See generally* CARGO THEFT AND ORGANIZED CRIME 28, 39; TASK FORCE REPORT, ORGANIZED CRIME 4-5.

126. The seemingly legitimate business may be a retail discount center, bargain-basement shop, pawnshop, junk dealership, or even a wholesaling enterprise. *See* Emerson, *supra* note 48, at 37. Naturally, the more respectable the front, the more security it affords.

127. *See* J. HALL, *supra* note 5, at 156-57; notes 86-89 *supra* and accompanying text. The relationship between the professional thief, the professional fence, and organized crime is carefully documented in PENN. CRIME COMMN. 1971-72 REPORT 107-37.

128. *See* notes 115-21 *supra* and accompanying text.

merchandise and thus often need to deal directly with thieves, they must simultaneously develop two contrasting images to a greater extent than outlet fences: they must appear sufficiently legitimate to satisfy law enforcement agencies, or at least to frustrate investigations, yet must actively promote their illegitimate operations to attract both thieves wishing to sell and consumers wishing to purchase stolen merchandise.[129] Thieves are naturally inclined to deal with professional fences because they do not have ready access to outlet fences, who are supplied by master fences, and because the extensive capital resources of professional fences make them more attractive purchasers than neighborhood fences. A professional fence, moreover, can frustrate police surveillance techniques and conviction even though he retains actual physical possession or control over the stolen merchandise.[130] In many cases, for example, the merchandise can be resold within hours of its delivery.[131] Otherwise, a professional fence often can easily make his illegitimate conduct indistinguishable from his legitimate activities.[132] Thus, identifying characteristics may be removed to the fullest extent possible[133] by disposing of incriminating cartons,[134] removing labels,[135] and altering or destroying serial numbers.[136] Further, many brand name products frequently can be successfully commingled with the fence's legitimate stock without any alteration.[137] In any case, false sales receipts are drafted and the fence's personal check for the purchase price is cashed so that he has a receipt and a cancelled check,

129. *See* C. KLOCKARS, *supra* note 12, at 172, 190-91. Obviously, the modern professional has many of the problems that faced Wild. *See* notes 95-101 *supra* and accompanying text.

130. For an analysis of the legal problems posed by possession of stolen property, see note 113 *supra*. These legal risks may be reduced by storing the goods in a warehouse, but this is often not practical and this precaution does not necessarily eliminate the possibility of a tracing process. "Secret locations under fictitious names are simply not normal business procedures; if trouble developed, explaining a hidden storage area might prove to pose more problems than the advantages such an area offered." C. KLOCKARS, *supra* note 12, at 93. Tracing can be avoided only if the fence takes measures to ensure that the warehouse itself cannot be directly linked to him. Even where a warehouse is available, the stolen goods must ultimately be transferred to the retail establishment; consequently, actual possession cannot be avoided interminably.

131. *See* C. KLOCKARS, *supra* note 12, at 85-86; *Hearings on Fencing* 26-27. *See generally* V. TERESA, *supra* note 29, at 143.

132. C. KLOCKARS, *supra* note 12, at 89; J. HALL, *supra* note 5, at 195.

133. *See, e.g.*, C. KLOCKARS, *supra* note 12, at 81, 87.

134. *Id.* Sometimes, instead of disposing of the carton, the fence simply removes its original label and replaces it with his own. *Id.* at 88.

135. *See id.* at 81. *See* note 138 *infra*.

136. *See id.* at 83 n.6.

137. *See id.* at 81; J. HALL, *supra* note 5, at 192-93.

thereby making his conviction extremely difficult even if the goods are identified.[138]

A second distinction is that as the operation of the professional fence grows in sophistication, he may supply vital information to thieves planning a theft[139] or may himself organize thefts for customers.[140] Arranging successful thefts requires both an extensive system of informants who provide inside information detailing the location of particular property and security measures taken to protect it, and a pool of potential thieves. A professional fence frequently may satisfy both needs by using the shoplifters, dishonest employees, and burglars with whom he regularly deals. Alternatively, the professional fence may satisfy his customers' needs by contacting a so-called master fence who wholesales stolen goods.

4. *The Master Fence*

The master fence directs a big-time operation and either organizes large-scale thefts or serves as a middleman for other organizers.[141] While other fences may perform similar services, the master fence is distinguished by his ability to insulate himself from the actual theft and subsequent redistribution process.[142] The master fence operates as a broker, buying and selling stolen goods valued

138. *See id.* at 82, 90-91; J. HALL, *supra* note 5, at 189-91; *Hearings on Fencing* 4. All of this must, of course, be evaluated in the context of the "beyond a reasonable doubt" rule in a criminal case. *See, e.g., In re* Winship, 397 U.S. 358 (1970). If the prosecution fails to convince any member of the jury beyond a reasonable doubt a conviction is not possible. There is some evidence that as a result of recent reform legislation the quality of juries, at least in federal cases, is not as high as it might be. *Cf.* 28 U.S.C. § 1861 (1970) (uniform jury selection). In addition the expertise of the government in prosecuting complicated cases has diminished. *See Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., pt. 4, at 3709-11 (1972). These two factors may combine to make convictions even less likely.

139. Professional fences frequently provide thieves with detailed information concerning the location of items for theft. *See, e.g., Hearings on Fencing* 162. Even so, although many professional fences undoubtedly have teams of thieves, most do not personally arrange large-scale heists. *Id.* at 135-37.

140. *See* J. HALL, *supra* note 5, at 162.

141. *See Hearings on Fencing* 135-38; note 153 *infra.*

142. Hence, "fences may . . . purchase the property from another fence, sight unseen, and never go near the 'drop' where the merchandise is kept. Their transactions are all consummated over the telephone. This type of fence is known as the 'master fence.'" *Hearings on Fencing* 44. *Cf.* Chasan, *supra* note 1, at 15. For a good description of a master fencing operation, see CARGO THEFT AND ORGANIZED CRIME 40-42. Most professional fences do not qualify as master fences since they inevitably come into contact with the stolen goods. *See* note 131 *supra* and accompanying text. Even so, a professional fence may, on occasion, do some master fencing by arranging a transaction in which he is completely insulated.

in the hundreds of thousands of dollars that are always the product of large-scale theft, yet rarely, if ever, seeing or touching any of it.[143]

To be successful, therefore, a master fence must have an extensive system of contacts including both informants and potential large-scale purchasers. For example, as an organizer of thefts, a master fence relies upon his paid connections, such as a dock employee of a manufacturing company or a dispatcher of a trucking outfit, to provide detailed information on shipments of valuable merchandise.[144] The master fence then contacts potential buyers,[145] but does not actually arrange the theft until he has a firm agreement for resale. Once such an agreement is concluded, he plans in great detail the theft itself and arrangements for storing, legitimizing, and delivering the stolen goods.[146]

Although these activities are more daring than those of most outlet and professional fences, who do not regularly arrange thefts and often receive stolen property already legitimized, master fences avoid detection and conviction in two ways. First, they move stolen merchandise rapidly through their redistribution chains because they never steal unless a resale has been arranged. Second, and perhaps more significantly, master fences rarely have actual physical contact with either the stolen goods or their purchasers. They deal with thieves and purchasers indirectly, usually through agents or by telephone. These practices present obvious problems for law enforcement authorities who must gather evidence. As a result, to convict master fences, authorities must use sophisticated surveillance techniques and must offer immunity from prosecution to other members of the redistribution chain.[147] Intensive surveillance, however, is costly and subject to significant legal restraints; further, even immunity grants may not be sufficient to pierce the master fence's legal

143. *See Cargo Theft and Organized Crime* 21; note 145 *infra* and accompanying text.

144. Law enforcement officials believe that the truck hijackers all too often "know exactly what type of property is to be in that truck." *Hearings on Fencing* 136-37. *See* J. HALL, *supra* note 5, at 158.

145. *Hearings on Criminal Laws* 310.

146. A good description of the detail in modern hijacking operations may be found in *Hearings on Fencing* 136-38, 146-54 and CARGO THEFT AND ORGANIZED CRIME 38-39.

147. *See* notes 277-94, 310-25 *infra* and accompanying text. "Most offenses come to the attention of the police by reports from citizens." LAW ENFORCEMENT IN THE METROPOLIS 3 (D. McIntyre ed. 1967). Since citizens will not usually come into contact with a fence's activities except as purchasers, there are no complaining witnesses. A "complaint only" policy in fencing will result in few fencing prosecutions. Consequently, there is a need to institute carefully thought out police programs. Alternative police strategies, primarily from the perspective of a local police agency, are discussed in STRATEGIES 74-112.

shield since thieves are reluctant to testify against their fences,[148] and, in any event, their testimony alone may be insufficient for conviction in those jurisdictions that have adopted the "accomplice rule," which requires independent corroboration of such testimony.[149]

Successful master fences usually require access to the extensive capital resources, personnel and connections of organized crime syndicates.[150] The degree of assistance a master fence receives, of course, depends on the nature of his relationship with the syndicate. While some master fences may actually be syndicate members,[151] and consequently may receive considerable additional assistance in the form of information, personnel, equipment, and storage space, most are content to function outside the syndicate and simply to participate in the redistribution process, reaping a share of the profits.[152]

Because they deal in large quantities of stolen goods, the activities of master fences have a sharp impact on the national economy.[153]

148. Successful fences often enjoy very good relationships with their thieves. *See* C. KLOCKARS, *supra* note 12, at 152-55; J. HALL, *supra* note 5, at 157, 196. Fences have been known to provide thieves with bail money and legal assistance. *See* C. KLOCKARS, *supra* note 12, at 153; STAFF REPORT ON SMALL BUSINESS 4. These factors combine with the thief's natural economic dependence upon his fence to produce a general reluctance to testify against fences. *Cf. Hearings on Fencing* 34. This disinclination is reinforced when the fence is a member of an organized crime syndicate or in some way associated with one. In such cases, potential witnesses may be intimidated by the threat of physical harm. *See* TASK FORCE REPORT, ORGANIZED CRIME 14; V. TERESA, *supra* note 23, at 326-42; Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in TASK FORCE REPORT, ORGANIZED CRIME 80, 83; Furstenberg, *Violence and Organized Crime*, CRIMES OF VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMN. ON THE CAUSES OF VIOLENCE 918-19. Finally, in many cases the thief may not know the actual identity of his master fence.

149. *See* notes 216-308 *infra* and accompanying text.

150. Even where he has not organized the theft, the master fence must have enough cash to meet his personnel, storage, and transportation costs. Naturally, where the fence has actually organized the theft, his initial cash outlay is even higher. The costs of large-scale theft run high; for hijacking a shipment worth $100,000, $20,000 or more may be needed for payoffs to informants, drivers, thieves and other participants. *See Hearings on Fencing* 152-53; CARGO THEFT AND ORGANIZED CRIME 26-27. *See generally* STAFF REPORT ON SMALL BUSINESS 5; Emerson, *supra* note 48, at 37-39. Significantly, testimony has recently been given that in New York City alone "[f]our big fences . . . can come up with $100,000 in cash, no sweat." *Hearings on Fencing* 153.

151. *See* CARGO THEFT AND ORGANIZED CRIME 28; *Hearings on Fencing* 135. These fences receive the benefit of access to capital and manpower resources. *See* CARGO THEFT AND ORGANIZED CRIME 27; *Hearings on Fencing* 134-35.

152. "Fences, especially 'master' fences, are usually not members of 'organized crime' *per se*. However, organized crime figures will often 'stake' a fence with a large amount of money if he will use his connections to move stolen property for them. This is usually the relationship that exists, since a fence especially a 'master' fence, of necessity has the required legitimate contacts and travels in the highest business circles." REPORT, THE IMPACT OF CRIME 27. *See* J. HALL, *supra* note 5, at 164.

153. *See* CARGO THEFT AND ORGANIZED CRIME 25-28, 38-42; *Hearings on Fencing* 43-45, 151-54.

More significantly, however, since master fences must rely upon outside sources for support because of their high overhead costs, their growth and success is a good indicator of the extent to which organized crime syndicates control theft and fencing activity.

5. *The Role of Organized Crime*

Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gathering control over whole fields of activity in order to amass huge profits.[154]

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154. TASK FORCE REPORT, ORGANIZED CRIME 1.

The concept of "organized crime" is much like the fictional crime portrayed in Akira Kurasawa's 1951 film, *Rashomon*, in which a ninth century nobleman's bride is raped by a bandit and the nobleman is killed. This double crime is then acted out in the film in four versions, as seen by the three participants and a witness. Each version is not quite like the others.

The vision of those who have looked at "organized crime" has been much like that of the witnesses whose stories were told in *Rashomon*. Some have seen nothing and hence have decided that nothing is there. *See, e.g.*, Hawkins, *God and the Mafia*, 14 THE PUB. INTEREST 24-51 (Winter 1969). Compare the summaries of wiretaps reprinted in H. ZEIGER, THE JERSEY MOB (1975). Others have looked only at press accounts and have seen little more than a public relations gimmick. *See* D. SMITH, THE MAFIA MYSTIQUE (1975). Others have looked at it through the eyes of an organizational theorist, and have seen the special character of organized crime to be its functional division of labor. *See* D. CRESSEY, THEFT OF A NATION (1969). Some have examined the phenomenon from the perspective of an anthropologist and have seen not a "conspiracy" but a "social system." *See, e.g.*, F. IANNI, A FAMILY BUSINESS (1972). Others have examined it as a lawyer would, and have seen it as "conspiracy." *See, e.g.*, Blakey, *supra* note 148 at 80, 81-83. The President's Crime Commission, too, adopted this view (La Cosa Nostra was recognized only as the "core" of organized crime. *Id.* at 6); the Crime Commission termed conspiratorial crime "organized crime" when its sophistication reached the point where its division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. *Id.* at 8.

A good summary of this view of "organized crime" was composed by the Departments of Justice and Transportation in a study of cargo theft:

> [T]he predominant group and inner core of organized crime is . . . a Nationwide group divided into 24 to 26 operating units or "families" whose membership is exclusively men of one ethnic group and who number 5,000 or more. The Task Force [on Organized Crime of the President's Crime Commission] quoted the FBI's director, who evaluated this core group as "the largest organization of the criminal underworld in this country, very closely organized and disciplined . . . it has been found to control major racket activities in many of our larger metropolitan areas, often working in concert with criminals representing other ethnic backgrounds."
>
> Heading each operating unit, or family, is the boss, whose authority is subject only to the rulings of a national advisory commission, which has the final word on organizational and jurisdictional disputes and is comprised of the more powerful bosses. Beneath each boss, in chain-of-command fashion, is an underboss, several captains (caporegime), who supervise lower-echelon soldiers, who in turn oversee large numbers of nonmember street personnel. One such family is said to number 1,000—half members, half nonmember street-level workers—with 27

In recent years, organized crime syndicates have expanded their fencing operations to exploit the growing demand of consumers and businesses for stolen goods.[155] This expansion has been made possible by the ability of organized crime to marshall its tremendous resources to solve the complex financial and logistical problems that

captains and stretches from Connecticut to Philadelphia. Bosses have access to a variety of "staff men," including attorneys, accountants, business experts, enforcers, and corrupters. Many individuals, while not family members in a formal sense, work closely with these inner-core groups and may be called associates (to distinguish them from mere street workers) and, as is the case with street personnel, should be considered an integral part of organized crime. Some associates are highly respected by family members and are very powerful in their own right.

Through interceptions of phone conversations and other oral communications at different times and places between members and associates of this large criminal nucleus of the organized underworld, its existence, structure, activities, personnel, and such terminology as "boss," "captain," "family," "soldier," "commission" have been confirmed and reconfirmed beyond rational dispute.

Loosely allied with this large criminal nucleus are several other organized crime syndicates or groups, those members can also be distinguished among ethnic lines—just as most neighborhoods can, and probably for much the same sociological reasons. The various organized crime groups call upon the services and special skills of one another frequently enough for them to be characterized as a loose confederation, a designation reflecting the absence of a boss of bosses at the top. Sometimes these groups are referred to individually or collectively as the "outfit," "mob," or "syndicate."

Taking into account the political organizations, unions, businesses, and other groups directly or indirectly under the thumb of organized crime, the manpower available to the confederation could conceivably run into the hundreds of thousands. Because they are relatively well organized and disciplined and because they possess the demonstrated superior ability to protect themselves from prosecution through corruption and other means, organized crime groups have a strength and permanency beyond the reach of conventional partners in crime.

The difference to management between cargo theft committed under the direction of organized crime and cargo theft executed under the direction of nonmember employees is analogous to the difference between a company's market share being challenged by a multibillion conglomerate and being challenged by a three- or four-man partnership. Both the conglomerate and partnership are engaged in business, just as organized crime groups and other nonmember criminal elements are both engaged in organized criminal activity. But there is a world of difference between a conglomerate and a partnership, just as there is between organized crime and less organized and disciplined individuals who may cooperate in crime.

CARGO THEFT AND ORGANIZED CRIME 23-24. The phrase "organized crime" is used throughout this article to refer to this type of conspiratorial criminal behavior. For an analysis of the concept of "organized crime" that further breaks it into "enterprises," "syndicates," and "ventures," see ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMN. FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 189-92 (1976) [hereinafter WIRETAP REPORT] (concurrence of Commissioner Blakey). *See generally* D. CRESSEY, THEFT OF THE NATION (1969); R. SALERNO & J. TOMPKINS, THE CRIME CONFEDERATION (1969); G. TYLER, ORGANIZED CRIME IN AMERICA (1962); M. MALTZ, *Defining "Organized Crime,"* 22 CRIME & DELINQUENCY 338 (1976).

155. *See* V. TERESA, *supra* note 29, at 143-45; notes 150-52 *supra* and accompanying text. Organized crime offers "goods and services that millions of Americans desire even though declared illegal by their legislatures." TASK FORCE REPORT, ORGANIZED CRIME 2. In addition to theft and fencing, those illegal goods and services include gambling, loansharking, narcotics, labor peace, and illegal alcohol. *Id.* at 2-4. See Pileggi, *The Mafia Is Good for You,* SATURDAY EVENING POST, Nov. 30, 1968, at 18.

are inherent in large-scale theft and fencing activity.[156]

The participation of organized crime in many truck hijackings and the evolution of sophisticated hijacking techniques are evidence of its increasing role in large-scale fencing.[157] Illustratively, syndicate members engineer as many as seventy-five per cent of all truck hijackings in some areas of heavy organized crime activity.[158] In fact, the prototype "stick-up" hijacking is essentially a relic of the past,[159] for most hijackings today are more appropriately characterized as "give-ups" in which drivers, in accordance with prior arrangements, deliver the merchandise to thieves and then claim they were hijacked.[160] Sometimes the drivers and other insiders are rewarded for their duplicity,[161] but in most cases syndicate members coerce their participation by threatening to foreclose their gambling and loan sharking debts.[162] Members of the syndicate usually re-

156. *See* notes 150-52 *supra* and accompanying text.

157. Most (top ten) truck hijackings occur in the following areas: New Jersey, New York City, Massachusetts, New York State, Indiana, Pennsylvania, Ohio, Rhode Island, Tennessee and California. SOURCE BOOK OF CRIMINAL STATISTICS 320 (L.E.A.A. 1974). These are areas of high organized crime activity. TASK FORCE REPORT, ORGANIZED CRIME, 7. For a detailed analysis of cargo theft in the motor and air industry, see A REPORT TO THE PRESIDENT ON THE NATIONAL CARGO SECURITY PROGRAM 36-43 (1976).

158. A prime example is New York City. *See* CARGO THEFT AND ORGANIZED CRIME 26; *Hearings on Fencing* 191. The syndicate's role, however, is not obvious to everyone:

> Whether because of such indirect involvement by organized crime in cargo theft or because of public-image reasons—or both—there is the temptation to downgrade or deny the presence of organized crime at facilities where cargo is transported or otherwise handled. For example, at a southern location, a shipping executive did not believe organized crime was connected to pier thefts. However, other sources in the area revealed the following information: (1) the local crime family boss has held meetings with warehousemen, grocers, truckers, etc.; (2) this boss offered his assistance in establishing another local of a waterfront union; (3) a shylock has solicited loans, at 5 for 4 (25 percent weekly interest), from longshoremen and has been in collusion with a local waterfront union, which permitted the presence of the loan shark on payday and held back the wages of those indebted to him; (4) a syndicate-connected gambler is quoted as saying he expects to get "a lot of action off longshoremen"; (5) the president of a local dock workers union wrote a Federal judge about the fine character of the area's mob boss, who was about to receive a sentence from the jurist; (6) the same union president at one time utilized the services of a syndicate-connected bodyguard.

CARGO THEFT AND ORGANIZED CRIME 27. Americans, in general, have not been aware of the nature and extent of organized crime activity. *See* TASK FORCE REPORT, ORGANIZED CRIME 1-2.

159. *See Hearings on Fencing* 136, 145, 151; V. TERESA, *supra* note 29, at 144.

160. *See Hearings on Fencing* 136-37, 151-54; V. TERESA, *supra* note 29, at 144.

161. *See Hearings on Fencing* 151-53.

162. *See id.* at 42; CARGO THEFT AND ORGANIZED CRIME 27; *Hearings on Stolen Securities* 64, 73.

Organized crime members have been able to obtain inside information and place selected employees in sensitive positions by successfully infiltrating many labor unions. Emerson, *supra* note 48, at 312. *See generally* TASK FORCE REPORT, OR-

main completely insulated from the hijacking[163] because nonmembers,[164] often persons aspiring to join the syndicate[165] or persons indebted to it,[166] carry out the crime.

Once the theft is finished, the syndicate efficiently and effectively legitimizes and redistributes the goods.[167] The syndicate's connections with master and professional fences,[168] and the influence it exerts over many legitimate businesses,[169] have enabled it to develop a redistribution system capable of funneling stolen goods through interstate commerce with great ease.[170] Goods hijacked at 4:30 p.m. may be on retail shelves by 5:15 p.m. that same day.[171] The growth of such a redistribution network inevitably stimulates large-scale theft.

Although organized crime groups have not, of course, monopolized theft activity,[172] the considerable profits derived from redistributing large quantities of stolen goods assures their continued participation in large-scale thefts.[173] Moreover, syndicate activity in

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GANIZED CRIME 5; *The Mob: It Racks Up Overtime on Government Payroll*, LIFE, Feb. 14, 1969, at 52.

163. A crime syndicate leader, particularly, tries never to come in contact with the stolen goods. *See, e.g.*, V. TERESA, *supra* note 29, at 144-45; *Hearings on Fencing* 152. The sophisticated structure of an organized crime syndicate, its relatively tight internal controls, and its usually enforced code of *omerta*—the code of conduct which mandates silence and loyalty—all serve to reinforce this insulation. *See, e.g.*, TASK FORCE REPORT, ORGANIZED CRIME 7-9; Cressey, *The Functions and Structure of Criminal Syndicates* in TASK FORCE REPORT, ORGANIZED CRIME 41.

164. *See* CARGO THEFT AND ORGANIZED CRIME 26; V. TERESA, *supra* note 29, at 144-45; REPORT, THE IMPACT OF CRIME 4, 26. *Hearings on Fencing* 42, 364; *Hearings on Criminal Laws* 310.

165. *See Hearings on Fencing* 42; V. TERESA, *supra* note 29, at 144-45.

166. *See* V. TERESA, *supra* note 29, at 144-45.

167. This service is essential because, in its absence, large-scale thieves would not be able to find a market for their goods. With financing supplied by syndicate sources, a sophisticated theft and fencing operation is made possible.

168. *See* note 152 *supra*.

169. Organized crime members have utilized their loansharking and gambling activities as a means of compelling indebted businessmen to handle stolen goods. In other situations, businesses directly controlled by organized crime handle the goods. *See* CARGO THEFT AND ORGANIZED CRIME 28-29 (25 per cent of stolen goods estimated to be handled in syndicate outlets).

170. "Organized Crime . . . also controls the underworld disposal systems where bootlegged goods are rapidly fenced and distributed in the city and across the country." Emerson, *supra* note 48, at 315-16. *See* CARGO THEFT AND ORGANIZED CRIME 39-40; *Hearings on Fencing* 7. Speed of distribution is made possible by finding buyers before the theft is carried out. *See id.* at 42; note 140 *supra*.

171. CARGO THEFT AND ORGANIZED CRIME 38-39.

172. "Organized crime is both stealing and [controlling] the disposition. But they don't have the sole market in stealing. The amateurs and organized crime are stealing. Everybody is stealing. Organized crime is handling the disposition." *Id.* at 28. *See Hearings on Stolen Securities* 73.

173. Organized crime does appear to have more than its share of the disposition

narcotics, gambling and loansharking is indirectly responsible for a large number of smaller property crimes committed by burglars, shoplifters and employees,[174] and it gives syndicate members a means to acquire information useful for planning major thefts. Thus, organized crime is a pervasive influence in theft and fencing activities.

II. Social Control Through Law

A. *Criminal Sanctions*

Despite the growth of large-scale criminal redistribution systems with their widespread adverse economic consequences, our society has been unable to develop correspondingly sophisticated legal measures to control the problem. As the following brief historical account will demonstrate, although fencing has been illegal since the era of Jonathan Wild, conceptualization of the crime has failed to keep pace with changes in the nature of the criminal activity.

1. *The Development of the Law*

Receiving property knowing it to be stolen is an offense whose "origin can be traced to medieval England['s prohibition] . . . against 'harboring stolen cattle,' "[175] but fencing activity at that time was seen merely as an aspect of theft itself, not as a crime deserving of any independent recognition. In fact, early English law did not even impose criminal sanctions upon receivers as accessories after the fact unless they were guilty of sheltering the thieves.[176] Because economic conditions effectively precluded the possibility of large-scale theft for resale, receiving was not considered a major incentive to theft requiring separate criminal punishment.[177] But with ensuing economic developments[178] that spurred the growth of fencing ac-

process:

> The bulk, quantity, specialized nature, or other characteristics of much stolen cargo presents incontrovertible evidence—circumstantial as it is—of facilities, contacts, and know-how of a coordinated underworld. Referring to a series of sizeable cargo thefts, the head of a State investigation unit asserts that "the merchandise involved must be disposed of by the thieves and it is equally obvious that it can only be disposed of through organized crime channels."

Cargo Theft and Organized Crime 27. *See* notes 24, 150, *supra* and accompanying text; *Hearings on Stolen Securities* 2. *See generally* V. Teresa, *supra* note 29, at 259-89.

174. *See* notes 162-63 *supra* and accompanying text.

175. J. Hall, *supra* note 5, at 52.

176. *Id.* at 53. *See* W. LaFave & A. Scott, *supra* note 14, at 682.

177. *See* notes 4, 93 *supra* and accompanying text.

178. *See* notes 5-7 *supra* and accompanying text.

tivity, legislation was enacted in 1692 to criminalize the mere receipt of stolen property.[179] Even then, however, a receiver was only subject to prosecution as an accessory after the fact to the larceny. Consequently, under established English procedure, he could not be brought to trial before the principal was convicted of theft.[180] This measure, which ironically gave receivers an additional incentive to assist their thieves in evading detection, was subsequently amended in part,[181] but the distinctions drawn between theft and fencing had been firmly ingrained in English law: "The tradition remained throughout the eighteenth century and early nineteenth that the receiver was an accessory to the crime rather than a principal."[182] Despite the success of Jonathan Wild, which clearly demonstrated the errors of this approach,[183] receiving stolen property remained an "appendage of theft" until 1827, when it was finally treated as a separate substantive offense.[184]

The 1827 English receiving statute served as a prototype for subsequent American legislation,[185] and although traces of the ap-

179. 3 & 4 W. & M., c.13, § 3 (1692).

180. This reflected prevailing English attitudes which viewed theft as a major crime and receiving as simply a secondary activity. Since the receiver was only considered to be an accessory, English law would not punish him more severely than his principal and not at all if the thief escaped conviction. Since "the thief might avoid a conviction for larceny by dying, or by not getting caught, or by winning an erroneous acquittal," the statute was not an effective enforcement device. W. LAFAVE & A. SCOTT, *supra* note 14, at 682. *See* J. HALL, *supra* note 5, at 54-55.

181. 2 Anne, c.9, § 2 (1701). *See* J. HALL, *supra* note 5, at 55.

182. Chappell & Walsh, "*No Questions Asked*" 160.

183. *See id.*

184. *See* 7 & 8 Geo. IV, c.29, § 54 (1827); W. LAFAVE & A. SCOTT, *supra* note 14, at 682; J. HALL, *supra* note 5, at 55-56.

185. J. HALL, *supra* note 5, at 58. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 682. Title 18 of the United States Code contains at least twelve provisions which could be used to prosecute the receipt of stolen goods. 18 U.S.C. § 659 (1970) (receipt of property stolen from an interstate or foreign carrier or depot); 18 U.S.C. § 662 (1970) (receipt of stolen property within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. § 842(h) (1970) (receipt of stolen explosives); 18 U.S.C. § 1660 (1970) (receipt of property taken by an act of piracy or robbery); 18 U.S.C. § 1708 (1970) (receipt of property stolen from the U. S. mails); 18 U.S.C. § 2113(c) (1970) (receipt of property stolen from a bank that is federally chartered or a member of the Federal Reserve System or stolen from a federally insured credit union or savings and loan association); 18 U.S.C. § 2313 (1970) (receipt of a stolen vehicle moving in interstate or foreign commerce); 18 U.S.C. § 2314 (1970) (transportation of stolen goods, securities, moneys or fraudulent state tax stamps); 18 U.S.C. § 2315 (1970) (receipt of stolen goods, securities, moneys or fraudulent state tax stamps); 18 U.S.C. § 2317 (1970) (receipt of stolen cattle moving through interstate commerce); 18 U.S.C. § 371 (1970) (outlaws any conspiracy to violate any of these provisions, and accordingly may be classified as an anti-fencing statute). Receiving stolen property is also outlawed in every state. State legislation is comprehensively analyzed in THE NATL. ASSN. OF ATTORNEYS GENERAL, COMMN. ON THE OFFICE OF ATTORNEY GENERAL, LEGISLATIVE RESPONSES TO DEALING IN STOLEN GOODS 33-37 (Dec. 1975).

pendage theory still survive,[186] most jurisdictions today conceptualize receiving stolen property as an independent statutory crime.[187] But while the conceptual difficulties that plagued eighteenth-century England have largely been solved, they have been replaced by new failures to recognize the need to draw even more sophisticated distinctions. Whereas eighteenth-century English society had to learn to make legal distinctions between thief and receiver, our society must be prepared to distinguish among different classes of receivers and diverse patterns of fencing activity.[188] Law enforcement strategy and tactics must be designed to reflect modern differences in *modus operandi* and to accord special emphasis to the important role of organized crime syndicates.

Although there is evidence that our legal system has begun to recognize differences in fencing schemes,[189] recent proposals that treat fencing as a subordinate part of the theft problem simply continue outdated formulations.[190] A more advanced intellectual

186. For example, several of the federal provisions deal with receiving activity simply by listing the prohibition as part of a larger section outlawing a particular type of theft. *See* 18 U.S.C. §§ 641, 659, 1708, 2113 (1970). Several of the states, too, have recently consolidated receipt of stolen property as part of a general anti-theft classification reform. *See* note 190 *infra*. Examples of state statutes are: CONN. GEN. STAT. ANN. § 53a-119(8) (Supp. 1975); ILL. REV. STAT. ch. 38, § 16-1(d) (Supp. 1975); KAN. STAT. ANN. § 21-3701(d) (1972). Unless sophisticated grading schemes are also adopted that distinguish different types of receipt, such reform is unwise. *See, e.g.*, N.H. REV. STAT. ANN. 637:11 (1971).

187. *See* THE NATL. ASSN. OF ATTORNEYS GENERAL, *supra* note 185, at 33-37; ATTORNEY GENERAL, LEGISLATIVE RESPONSES TO DEALING IN STOLEN GOODS 33-37 (Dec. 1975).

188. *See* notes 103-74 *supra* and accompanying text. The need to distinguish among different kinds of receivers was first proposed in Hall's classic work. *See* J. HALL, *supra* note 5, at 155-64; 189-99; 211-25. Since Professor Hall's initial study, patterns of redistribution have become even more sophisticated, and the role of organized crime has become more pronounced. Accordingly, the need for reform today is more apparent than ever, especially in light of the failure to implement Professor Hall's original proposals.

189. The judiciary has been primarily responsible for most of the legal developments that have facilitated the conviction of fences. *See* J. HALL, *supra* note 5, at 173-89.

190. For example, both the Model Penal Code and the National Commission on Reform of Federal Criminal Laws have advocated the consolidation of receiving into a general offense category which broadly outlaws theft activity. By characterizing receiving as merely a subordinate part of theft, the proposed legislation inadvertently de-emphasizes the significance of fencing activity. *See* MODEL PENAL CODE, § 223.1 (1) (Proposed Official Draft 1962); SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON CRIMINAL LAWS AND PROCEDURES, REPORT OF THE NATIONAL COMM. ON REFORM OF FEDERAL CRIMINAL LAWS, 92d Cong., 1st Sess., pt. 1, § 1732(c), at 359 (1971) [hereinafter REFORM COMMN.]. Consolidation may be an appropriate way to deal with the receiver who obtains stolen property merely for personal consumption, but it is an awkward way to attack the multifaceted fencing activity that is carried on throughout the nation today. Both the Model Penal Code and the Reform Commission have, however, made some attempt to distinguish among different types of receivers for the

framework that fundamentally changes evidentiary rules, state of mind requirements, and criminal sanctions, is at least one prerequisite to a modernization of investigative techniques. Until this has been accomplished, our laws will remain unable to help control effectively criminal redistribution systems.

2. *Receiving Stolen Property: A Modern Perspective*

Legislation criminalizing fencing activity has traditionally been drafted to outlaw the *knowing receipt of stolen property*.[191] To convict a receiver under such a statute, the prosecution must establish: (1) receipt of the goods by the fence; (2) the merchandise was stolen property at the time of the receipt; and (3) the fence knew the property was stolen.[192] When defined strictly in these terms, each element of the crime poses major obstacles to successful prosecution. Once these elements are considered from a twentieth-century perspective that recognizes the increasing sophistication of redistribution systems, however, appropriate modifications can be made to remove those obstacles.

a. *The "receipt" of property.* As in the first English fencing statute passed in the seventeenth century, the *actus reus* prohibited by most of the early federal and state statutes drafted in this country was the *buying* or *receiving* of stolen property.[193] Since this de-

purpose of grading. *See* MODEL PENAL CODE §§ 223.1(2)(a), 223.6(2) (Proposed Official Draft 1962); REFORM COMMN. § 1735(2)(f) at 362. Nevertheless, the potential impact of § 223.1(2)(a) of the Model Penal Code and § 1735(2)(f) of the Reform Commission is limited, and unless their significance is carefully noted, reform based on these recommendations can err. *See, e.g.*, N.H. REV. STAT. ANN. § 637.11 (1971) (grading distinction not adopted).

191. The offense is commonly referred to as "receiving stolen property." *See* note 185 *supra*.

192. W. LAFAVE & A. SCOTT, *supra* note 14, at 683. In addition, some statutes explicitly require the prosecution to establish that the defendant intended to deprive the owner of his interest in his property. *See, e.g.*, COLO. REV. STAT. § 18-4-401 (Supp. 1975); ILL. REV. STAT. ch. 38, § 16-1(d) (Supp. 1975); N.Y. PENAL LAW §§ 165.45, 165.60 (McKinney 1975). This requirement is designed to eliminate the potential liability of one, such as a policeman or innocent finder, who knowingly possesses the stolen property, but intends to return it immediately. *See* MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962). In any event, this element is not considered a major impediment, since it is readily established by direct or circumstantial evidence. Generally, in the absence of specific language setting forth this requirement, its establishment is not a prerequisite to conviction. *See* STAFF REPORT ON SMALL BUSINESS 17.

193. *See* 3 & 4 W. & M., c.9, § 4 (1692). Approximately 20 jurisdictions still retain this emphasis on the buying or receiving of stolen goods. *Hearings on Fencing* 164-71. *See, e.g.*, MD. ANN. CODE art. 27 § 466 (1957); N.J. STAT. ANN. § 2A:139-1 (Supp. 1974). *See generally* MODEL PENAL CODE § 206.8, Comment (Tent. Draft No. 2, 1954).

194. *See* notes 142-43, 145, 152 *supra* and accompanying text.

scription of the proscribed conduct proved ineffective in controlling fences who avoid physical contact with stolen goods and never make purchases for their own use,[194] many states have expanded the scope of the prohibited conduct to include withholding, concealing or aiding in the concealment of stolen property.[195] Likewise, Congress has adopted measures to correct similar deficiencies in federal receiving statutes, but no uniform formula has yet been developed at the federal level. Thus, current state and federal legislation, reflecting the inability of law enforcement authorities to formulate an effective and consistent approach to fencing, broadly proscribe conduct ranging from the traditional purchase or receipt to the sale, barter, concealment, retention, transportation, disposal, storage, or possession of stolen goods.[196]

It is doubtful that the inclusion of many of these terms actually promotes more efficient law enforcement. Language such as "disposal" or "sale" may help reach the fencing techniques of modern receivers, but, in the absence of appropriate gradation distinctions, the remaining language merely creates additional confusion in the substantive law. In contrast, the clear description of the proscribed conduct in the Criminal Justice Reform Act of 1975, S.1, the most recent Congressional proposal for reforming the federal criminal code, makes possible a realistic effort to deal with modern fencing activity.[197] According to the fencing provisions of that proposed Act, "[a] person is guilty of [receiving stolen property] . . . if he buys, receives, possesses, or *obtains control* of property of another that has been stolen."[198] By focusing on the *control* of stolen prop-

195. *Hearings on Fencing* 164-71. *See, e.g.*, CAL. PENAL CODE § 496 (West Supp. 1975). These additions, however, are only an indirect way of dealing with the problem, and considerable judicial effort has been required to apply the modified versions to fences who have avoided physical contact with the goods. *See* note 202 *infra* and accompanying text. Significantly, the terms "conceal" or "withhold" were probably adopted merely to reach the situation where the defendant, upon initial receipt, had no knowledge of the goods' stolen character but subsequently acquired the requisite knowledge and decided to keep the goods. As the statutes were initially drafted, such a defendant had technically committed no crime since he did not *knowingly receive* the goods. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 688-89. Subsequently, however, the terms "withhold" and "conceal" received appropriately broader application. *Id.* at 684.

196. *See, e.g.*, 18 U.S.C. §§ 641, 662, 659, 842(h), 2113(c), 2313, 2315 (1970). These statutes are discussed briefly in note 185 *supra*. Specific state legislation dealing with specialized aspects of fencing is outside the scope of these materials. Examples of provisions that are common throughout the United States, but are too particularized to merit examination here, are ARIZ. REV. STAT. ANN. § 44-1621 to 1627 (1967) (pawn brokers); COLO. REV. STAT. ANN. § 42-5-102 (1973) (stolen auto parts).

197. The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975) [hereinafter S. 1].

198. S. 1, § 1733a (emphasis added).

erty, the statute concisely covers a broad range of modern fencing activities that do not require physical possession.[199] The proposed federal legislation, however, does not contain a definition of control.[200] In any event, it is, of course, not yet law, and only a few states have adopted a simple control-oriented definition of the *actus reus* by defining receiving to be the equivalent of acquiring possession *or* control of stolen goods.[201]

Despite failures at the legislative level, modernization of fencing statutes has in effect been accomplished in many jurisdictions by judicial statutory construction. By viewing the offense in broad terms, a number of courts have construed statutes to include any conduct that might be considered to be constructive possession, effective control, or an exercise of dominion over the stolen property.[202] Still, many courts steadfastly refuse to make this broad interpretation. Moreover, in those jurisdictions that are willing, case-by-case determinations, requiring close judicial scrutiny of the relationship between the defendant and the stolen goods, suffer from a lack of predictability as to whether proof of constructive possession or control is sufficient to convict alleged fences and, if it is, as to what conduct amounts to sufficient control.[203] This lack of uniformity and predictability can only be alleviated by carefully tailored legislative reform.

This article, therefore, recommends that legislatures enact statutes similar to the Model Theft and Fencing Act (Model Act) set

199. *See generally* notes 142-50 *supra* and accompanying text. The Model Penal Code also reflects the view that *control* of stolen property is the essence of modern fencing activity. *See* MODEL PENAL CODE § 206.8, Comment (Tent. Draft No. 2, 1954).

200. S.1, § 1733(a) simply mentions the word control without explicating the factual basis that would support such a finding. In all likelihood, the courts would follow previous decisions. For a discussion of prior decisions, see United States v. Casalinuovo, 350 F.2d 207, 209-10 (2d Cir. 1965).

201. *See Hearings on Fencing* 164-71. An example of such legislation is COLO. REV. STAT. § 18-4-401 (1973). This approach has been advocated by the Model Penal Code. MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962).

202. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 683. Both state and federal cases stress that control or dominion is the essential element to be established. *See, e.g.*, United States v. Casalinuovo, 350 F.2d 207, 209 (2d Cir. 1965) ("such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession"); Commonwealth v. Davis, 444 Pa. 11, 15, 280 A.2d 119, 121 (1971) ("in possession of stolen goods only when it is proved that he exercised conscious control or dominion over those goods").

203. *See* People v. Fein, 292 N.Y. 10, 53 N.E.2d 373, 39 N.Y.S.2d 999 (1944); People v. Colon, 28 N.Y.2d 1, 267 N.E.2d 577, 318 N.Y.S.2d 929, *cert. denied*, 402 U.S. 905 (1971). The *Fein* decision was rejected by the legislature in 1967. N.Y. PENAL LAW § 10.00, Practice Commentary (McKinney 1975).

forth in appendix B, which modifies the basic approach employed by the drafters of S.1. According to the Model Act, the defendant has exhibited the proscribed conduct if he "obtains or uses" stolen property.[204] The proposal defines "obtains or uses" as "any manner of . . . taking or exercising control . . . making an unauthorized use, disposition, or transfer of property . . . or obtaining property by fraud . . . ."[205]

Even if suggested substantive reforms are initiated, however, because of critical inadequacies in existing techniques for gathering evidence, control or constructive possession may be difficult to establish if the fence is not apprehended in physical possession of the goods. Conviction simply is not possible unless the stolen merchandise can in some way be linked to the fence. An investigation may be facilitated by informants[206] or by testimony from accomplices who have received immunity.[207] To tap these sources of information, the Model Act provides that accomplice testimony alone is sufficient to establish receipt if it is believed beyond a reasonable doubt.[208]

The rule in many jurisdictions, however, is that, unless it is independently corroborated, an accomplice's testimony is insufficient for conviction.[209] As a tactical matter, then, the prosecution's task in

204. *See* MODEL THEFT AND FENCING ACT § 2(a), Appendix B.

205. *See* MODEL THEFT AND FENCING ACT § 7(b)(1), (2), (3), Appendix B.

206. In 1972, for example, FBI informants provided information which led to the recovery by the FBI of $35 million in stolen property and contraband. *Hearings on the Depts. of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1974 Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 1st Sess., pt. 1, at 879 (1973). This information was disseminated to other federal, state, and local agencies, resulting in the recovery of an additional $95 million. *Id.*

207. The use of immunity grants is discussed in notes 277-94 *infra* and accompanying text.

208. *See* MODEL THEFT AND FENCING ACT § 5(b), Appendix B.

209. *See* notes 296-303 *infra* and accompanying text.

Different problems are involved when the informant is not a thief. First, the police may be reluctant to reveal his identity, since such a disclosure would destroy his future effectiveness and jeopardize his physical safety. Second, an informant by his very nature may not make a credible witness. Finally, in some cases, the use of an informant may result in allegations of entrapment. *See, e.g.*, C. KLOCKARS, *supra* note 12, at 98-100. On the federal level, the traditional notion of entrapment focuses on the predisposition of the defendant to commit the crime. *See* Sorrells v. United States, 287 U.S. 435 (1932). In United States v. Russell, 411 U.S. 423 (1973), where the defendant was offered an essential ingredient for the illicit manufacture of drugs, the Court's language in formulating the defense suggests that a "sell and bust" program in the fencing area might not run afoul of entrapment if targets were carefully selected. What might have been only inferred from *Russell* seems to be beyond question in Hampton v. United States, 19 CRIM. L. RPTR. 3039 (4-27-76) (sell to and buy back heroin if predisposed not entrapment). "Attempted receipt," not "receipt," of course, would be the charge. *See* note 237 *infra*. Such a program might, however, run into judicial opposition at the state level. *See* Young v. Superior Court, 253 Cal. App. 2d 838, 61 Cal. Rptr. 355 (1967).

those jurisdictions is appreciably lightened only when it has apprehended the defendant in actual possession of the goods, which seldom occurs at the more sophisticated levels of fencing activity, or has otherwise obtained independent corroboration of the facts establishing control or constructive possession.[210]

The use of a search warrant is all too often an inadequate investigative tool for fencing crimes since the warrant may be issued only after probable cause has been established, a process that tends to be both cumbersome and time-consuming.[211] For example, although the personal observations of a police officer would establish probable cause, in situations where an informant has provided the critical information—the typical case in fencing investigations—police must demonstrate to a judge their basis for considering the information reliable and reveal the informant's source of information.[212] There is sufficient corroboration if the informant, shown to be reliable, states he has personal knowledge of the information he has provided.[213] If the informant does not have such personal knowledge, police must independently corroborate his testimony.[214] Sophisticated fences are too often able to dispose of their stolen goods before police can acquire probable cause and obtain and execute a war-

210. Even in those states where there is no rule requiring the corroboration of an accomplice's testimony, an accomplice's account of the crime often lacks the credibility necessary to persuade a jury beyond a reasonable doubt. This is particularly so when the defense effectively emphasizes to the jury that the witness is testifying under a grant of immunity or promise of leniency. *See* C. KLOCKARS, *supra* note 12, at 99-100.

211. The warrant must set forth sufficient detail of underlying circumstances to enable the federal magistrate or a judge of the state within which the search is to take place to evaluate independently whether probable cause exists. *See* United States v. Harris, 403 U.S. 573, 578-83 (1971); Spinelli v. United States, 393 U.S. 410, 415-16 (1969).

212. *See* Spinelli v. United States, 393 U.S. at 416-17; Aguilar v. Texas, 378 U.S. 108, 110-15 (1964).

213. Spinelli v. United States, 393 U.S. at 416.

214. Spinelli v. United States, 393 U.S. at 416-18. *Spinelli*'s demand for corroboration has been weakened by the holding of United States v. Harris, 403 U.S. 573 (1971). Two concurring justices went as far as to call for the overruling of *Spinelli*. 403 U.S. at 585-86 (Black & Blackmun, JJ., concurring). It may be only a short time before it is overruled. As it stands, it is a significant road block in fencing investigations.

Note that prior to *Spinelli*, Draper v. United States, 358 U.S. 307 (1959), upheld the validity of a warrantless arrest under circumstances where the corroboration consisted simply of police observations of activity which, while not itself illegal, served to confirm so many of the details supplied by the informant that it would have been reasonable for a magistrate to conclude that the information supplied was accurate. The validity of this approach to probable cause, however, underwent a significant development in *Spinelli*, which found that the *Draper* information was based on personal knowledge, so that corroboration of the criminality was not required.

rant.[215] Alternatively, the use of the "buy-bust" technique,[216] which deploys undercover agents who pose as dealers of illegal goods, may offer a more viable solution, at least in gathering evidence against neighborhood, outlet, or professional fences. It obviously offers little hope of success against well-insulated master fences.

In any case, investigations are often also complicated by the general absence of conduct that clearly bespeaks its own illegality: A sophisticated fence utilizes the legitimate aspects of his business to disguise any underlying criminal conduct.[217] Even so, this veil of legitimacy may in some cases be pierced by intensive physical and electronic surveillance, which allows police to show the probable cause they are not otherwise able to establish by conventional methods of enforcement. Police might not then be required to obtain a warrant for an immediate arrest[218] and search[219] where the fence is known to be in criminal possession, thus greatly reducing the risk the fence will transfer the stolen merchandise, thereby disposing of the evidence of his crime. Although admittedly time-consuming, expensive, and an obvious drain on manpower,[220] once the authorities have learned (from an informant, captured thief, or electronic surveillance) of the operations of a particular fence, intensive sur-

215. *See, e.g., Hearings on Fencing* 27; note 131 *supra.*

216. The "buy-bust" or "sell-bust" technique may be utilized against both thieves and fences. When thieves are the target of the technique, the undercover officer assumes the identity of a fence who is willing to buy stolen goods. At an appropriate time, arrests can then be made. *See generally*, 122 CONG. REC. S12222-25 (daily ed. July 22, 1976) (LEAA support for anti-theft programs). For a fence, the process would involve an attempt by an undercover officer to sell goods to, or purchase them from, a suspected fence. If the fence is responsive, an arrest would be made. *See* STRATEGIES 74-113.

217. *See* notes 132-38 *supra* and accompanying text.

218. The right to arrest without a warrant was recognized prior to the development of the warrant procedures and was never supplanted by them. *See* Wilgus, *Arrest Without a Warrant* (pts. 1-2), 22 MICH. L. REV. 541, 548-50, 673, 685-89 (1924). Historically, arrest warrant procedures arose solely out of a desire to protect the arresting officer from tort liability. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 190-93 (1883). The right to search without a warrant, however, received no such independent favorable development. *See generally* LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 23-50 (1937). The current teaching of the Supreme Court on arrests without warrants is contained in United States v. Watson, 423 U.S. 411 (1976) (not necessary in public area).

219. Once an arrest has been made, the police can conduct a limited search of the area to ensure that the goods are not subsequently moved. The Supreme Court has limited the scope of this potential search, however, to the suspect's body and areas within his immediate reach. Chimel v. California, 395 U.S. 752 (1969). Even so, if the goods are not initially obtained in that way, the police could protect against the loss of evidence by posting a guard and returning later with a search warrant. *See* Vale v. Louisiana, 399 U.S. 30 (1970); Shipley v. California, 395 U.S. 818 (1969).

220. *See Hearings on Fencing* 4.

veillance as part of an aggressive enforcement program offers the only realistic hope of acquiring sufficient evidence of the proscribed *conduct* to justify an arrest. Whether a conviction is subsequently obtained depends upon the prosecution's ability to establish the remaining elements of the offense.

b. *The goods must be stolen.* Since receiving statutes are designed to criminalize only conduct that is socially unacceptable, a basic element of the offense is the requirement that the goods have been stolen and have retained their stolen character throughout the redistribution process.[221] This element initially posed definitional problems for prosecutors since courts were inclined, at least at one time, to describe as "stolen" property only those items that were obtained by common law larceny.[222] They thus excluded the receipt of property obtained by embezzlement or false pretenses from the scope of fencing statutes. In recent years, however, the potential for a technical defense based on the narrow common law definition of the term "stolen" has been eliminated by judicial[223] and legislative[224] action that has expanded the scope of the prohibition to include property obtained by any type of felonious taking.[225]

Although this development has successfully eliminated a troublesome technical defense to fencing crimes, conviction is often impossible anyway either because prosecutors are unable to prove that the goods are stolen[226] or because the goods are no longer technically "stolen property" when obtained by the fence. Typically, stolen merchandise lacks any distinctive identifying indicia, and whatever identifying marks are provided can easily be removed by fences.[227]

221. W. LAFAVE & A. SCOTT, *supra* note 14, at 684-85.

222. *Id.* at 684 & nn. 23 & 24.

223. *See, e.g.*, United States v. Turley, 352 U.S. 407 (1957).

224. *See, e.g.*, 18 U.S.C. §§ 641, 659 (1970); CAL. PENAL CODE § 496 (West Supp. 1975).

225. The Model Act eliminates any similar confusion by specifically providing that goods obtained by a variety of means are considered "stolen property." *See* MODEL THEFT AND FENCING ACT § 7(b), Appendix B. S. 1, § 111 proposes a very broad definition of "stolen": "[s]tolen property means property that has been the subject of *any* criminal taking, including theft, executing a fraudulent scheme, robbery, extortion, blackmail, and burglary . . . ."

226. This is due in large part to the prosecution's need to identify stolen property with "some precision." STAFF REPORT ON SMALL BUSINESS 15. The true owner is generally required to identify his goods. An analysis of the cases holding that identification is not necessary suggests only that the owner's identification is not always necessary for *indictment* purposes. *See* Annot., 99 A.L.R.2d 382 (1965). Because the owner's identification is required for trial, however, most prosecutors are reluctant to initiate indictment proceedings if a precise identification cannot be made. *See* notes 228, 231, 259 *infra*.

227. Members of the New York City Police Department have regularly conferred with various manufacturers of clothing and small appliances in an attempt

Manufacturers could deter theft and fencing somewhat by serially numbering their products and recording those numbers.[228] Such a procedure would presumably impede illicit resale efforts by facilitating both the recovery of stolen property and the prosecution of guilty parties.[229] Unfortunately, few manufacturers are willing to incur the production and record-keeping expenses that this process unavoidably entails.[230] In the absence of a reliable identification system, therefore, fungible stolen goods can be easily commingled with legitimate merchandise[231] to preclude precise identification by police.[232]

Conviction of fences is further hampered in many jurisdictions by the requirement that the goods retain their stolen character throughout the redistribution process. Quite often, police catch the thieves with the stolen property or otherwise recover the merchandise before it comes into the possession of a fence, and, frequently with the cooperation of the apprehended criminals, they then proceed to complete delivery to the property's purchasers. By utilizing this approach, police can minimize identification problems and directly trace the goods to a professional fence or other seemingly legitimate business.[233] In contrast to analogous investigatory "set-ups" used to break up distribution networks for narcotics, however, once authorities recover stolen property, the goods immediately lose their stolen character, and subsequent receivers cannot be prosecuted for receiving stolen property.[234] Although this result may be

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to have all products serialized for identification purposes. However, the position of many manufacturers is that identification would be extremely costly in terms of labor and record keeping and might conceivably price their products out of the market. In most cases, identification can be made by markings on outer cartons where consignee names and order numbers are stenciled. Unfortunately, the thieves also have this knowledge and their first act after coming into possession of "swag" is to "strip the cartons" or remove the information from the cartons.

REPORT, THE IMPACT OF CRIME 18. *See* notes 133-35, 146 *supra* and accompanying text.

228. Without a reliable recording system, serialization would be a wasted effort. Many large corporations do not maintain reliable recording systems for their inventories. *See* REPORT, THE IMPACT OF CRIME 18.

229. *See* Roselius & Benton, *Marketing Theory* 203.

230. This is a purely economic decision based on a simple cost-benefit analysis. *See* note 227 *supra*.

231. *See* REPORT, THE IMPACT OF CRIME 17-18; *Hearings on Fencing* 49-50, 54; note 137 *supra* and accompanying text and note 228 *supra*.

232. *See* notes 228, 231 *supra* and accompanying text.

233. After the goods are traced to a warehouse, a professional fence, or a "legitimate" business outlet, investigation could work upstream in an effort to apprehend (or at least identify) the organizer or master fence. This process could be achieved, *inter alia*, through the careful use of immunity grants. *See* note 277-94 *infra* and accompanying text.

234. The authorities uniformly agree on this point. *See, e.g.*, W. LAFAVE & A.

legally sound, a valuable investigative technique is largely emasculated if authorities are also unable to prosecute receivers for *attempted* receipt of stolen property.

In the federal system, the question of whether fences may be prosecuted for attempted receipt of stolen property in these situations is not reached because there is no attempt provision of general application in the federal criminal code.[235] At the state level, a number of jurisdictions with criminal attempt provisions have not yet decided whether an attempt conviction is appropriate in this instance. When the issue was squarely presented in the leading case of *People v. Jaffe*,[236] however, the New York Court of Appeals held that an attempt conviction in the fencing context presented a question of legal impossibility, and accordingly reversed a conviction for attempted receipt of stolen property.[237] New York followed this ap-

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SCOTT, *supra* note 14, at 685; United States v. Cawley, 255 F.2d 338, 340 (3d Cir. 1958); People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

235. *See* REFORM COMMN. 220-21; Keck v. United States, 172 U.S. 434 (1899) (no atempt to smuggle); 18 U.S.C. §§ 641 (1970) (embezzlement and receipt of public money, property or records, but no attempt); 18 U.S.C. § 659 (1970) (theft and receipt of interstate shipment, but no attempt).

236. 185 N.Y. 497, 78 N.E. 169 (1906).

237. The Court of Appeals reasoned that "if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense," and on this basis concluded that he could not be guilty of attempt. 185 N.Y. at 502, 78 N.E. at 170. In reality, however, Jaffe's conviction should have been upheld since the case actually involved a question of factual, not legal, impossibility. Jaffe had made a mistake with respect to a factual attendant circumstance; he had thought that property that was not stolen was, in fact, stolen. Although under the circumstances of the case, the property had legally lost its stolen character, this transition should only have served to preclude a conviction for the substantive offense but not for a conviction for attempt. The authorities are in general agreement that factual impossibility is not a defense to attempt. W. LAFAVE & A. SCOTT, *supra* note 14, at 438-42. As evidenced by *Jaffe*, the distinction between legal and factual impossibility is unclear. The appropriate distinction is outlined by LaFave and Scott: "If the case is one of legal impossibility, in the sense that what the defendant set out to do is not criminal, then the defendant is not guilty of attempt. On the other hand, factual impossibility, where the intended crime is impossible of accomplishment *merely* because of some *physical impossibility* unknown to the defendant, is not a defense." *Id.* at 439 (emphasis added). When analyzed in this context the distinction is apparent, but confusion has developed because of a tendency by some courts to classify certain cases as legal impossibility simply because an attendant circumstance simultaneously involved what appears to be a question of law. For example, in *Jaffe* there had been a prior interception, which made the question whether the property was stolen one of law. But as to the defendant, the question was really one of fact, and the mistaken belief did not make his conduct any less blameworthy. Analyzing the issue in precisely this manner, the Supreme Court of California rightly rejected the *Jaffe* decision: "Even though we say that, technically, the [goods] . . . were not 'stolen' nevertheless the defendant did attempt to receive stolen property." People v. Rojas, 55 Cal. 2d 252, 258, 358 P.2d 921, 924, 10 Cal. Rptr. 465, 468 (1961). Accordingly, mistake as to attendant circumstances should never be a defense to attempt. This is the view taken by the Model Penal Code and sophisticated legislatures and jurists. *See* notes 239-41 *infra*. Other decisions that have incorrectly applied the impossibility theory

proach for many years,[238] but other states adopted a more pragmatic approach in similar situations and, either by judicial interpretation[239] or statutory enactment,[240] authorized convictions for attempting to receive stolen property. Although the primary rationale for the more pragmatic approach is the blameworthy character of the fence's conduct and his state of mind,[241] such an approach also facilitates law enforcement efforts. Rather than requiring police to resort to impracticable techniques that would necessitate their tracking stolen goods from a distance as they pass through a complex redistribution chain,[242] recognition of the propriety of attempt convictions in these circumstances allows authorities to intervene immediately and to maintain direct control as the property passes through the chain.

By legislation, New York has abandoned the impossibility de-

include State v. Guffey, 262 S.W.2d 152 (Mo. App. 1953) (shooting a stuffed deer believing it to be alive); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1952) (attempting to bribe a person mistakenly believed to be a juror).

The apparent confusion surrounding the impossibility defense and the crime of attempt has attracted the attention of numerous scholars. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 586-99 (2d ed. 1960); Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968); Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 848-55 (1928).

The impossibility doctrine still continues to trouble the courts. For two recent cases decided on questionable grounds see United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973) (defendant told that television set was stolen property) and United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973) (refusal to allow conviction of "attempt to smuggle mail in or out of prison without warden's knowledge or consent" when warden knew of smuggling). *See also* United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) (sale of substance not heroin not attempt).

238. *See* People v. Jelke, 1 N.Y.2d 321, 329, 135 N.E.2d 213, 218, 152 N.Y.S.2d 479, 484-86 (1956); People v. Rollino, 37 Misc. 2d 14, 21-22, 233 N.Y.S.2d 580, 587-88 (Sup. Ct. 1962).

239. People v. Rojas, 55 Cal. 2d 252, 257-58, 358 P.2d 921, 923-24, 10 Cal. Rptr. 465, 468-69 (1961); Faustina v. Superior Court, 174 Cal. App. 2d 830, 833-34, 345 P.2d 543, 545-46 (1959). *But see* Booth v. State, 398 P.2d 863, 868-72 (Okla. Crim. App. 1965); Young v. Superior Ct., 253 Cal. App. 2d 848, 853-54, 61 Cal. Rptr. 355, 359-60 (1967).

240. These statutes have not focused specifically on the crime of receiving stolen property but instead have paralleled the approach of the Model Penal Code by authorizing attempt convictions whenever an actor "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." MODEL PENAL CODE § 5.01(1)(a) (Proposed Official Draft 1962). *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-49 (1971).

241. "In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's 'dangerousness' is plainly manifested." MODEL PENAL CODE § 5.01(a), Comment, at 31 (Tent. Draft No. 10, 1960).

242. *See, e.g.*, Copertino v. United States, 256 F. 519 (3d Cir. 1919) (property merely watched by police retains stolen character).

fense,[243] but the law of other states in this area generally remains unsettled.[244] Since an approach authorizing attempt convictions in receiving cases reflects an appropriate standard of blameworthiness and supports a necessary investigative technique, it is to be hoped that legislation eliminating the impossibility defense in fencing situations will be quickly enacted without the delay associated with general penal reform. The Model Act, illustratively, expressly authorizes attempt convictions in the receiving context.[245] Further, since similar investigative techniques would facilitate control by federal authorities of large-scale, interstate fencing activity,[246] there is a need for congressional enactment of an appropriate special attempt provision that would obviate the possibility of a technical defense based on legal impossibility.[247]

Additional legislation could also be drafted to facilitate investigations and help reduce the difficulties prosecutors confront in proving the goods are "stolen."[248] Since legitimate wholesale and retail

243. N.Y. PENAL LAW § 110.10 (McKinney Supp. 1975).

244. Because very few jurisdictions have specifically dealt with the question of legal impossibility in the receipt of stolen property context, the issue has not been satisfactorily resolved. Accordingly, there is the danger that other jurisdictions will consider *Jaffe* well reasoned. *See Annot.*, 37 A.L.R.3d 375 (1971); note 237 *supra.*

245. *See* MODEL THEFT AND FENCING ACT §§ 2, 4(a)(1), 4(a)(2), Appendix B.

246. *See* note 170 *supra.*

247. S. 1, § 1001 proposes the creation of a general attempt offense and the elimination of the defense of legal or factual impossibility whenever the crime would "have been committed had the circumstances been as the actor believed them to be."

248. The need for federal legislation goes beyond reform in the area of attempt. Presently, federal theft legislation is usually tied to some aspect of interstate commerce; the defendant must be shown to have so transported, or at least so caused the transportation of, the stolen goods. *See, e.g.*, 18 U.S.C. § 2314 (1970); United States v. Scandifia, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). This causes additional proof problems at trial. It also causes virtually insurmountable probable cause problems during the process of investigation, particularly investigation of fences. Informants will supply intelligence of fencing activity, but they are not often attuned to the proof requirements of federal law. Under present practices and legal limitations, it is difficult to convict a fence on federal grounds, even with the aid of such extraordinary tools as electronic surveillance. *See generally* Testimony of Special Agent Robert G. Sweeney, *Hearings of the National Comm. for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance*, Vol. 2, at 860-61 (May 20, 1975). The need here is for comprehensive federal fencing legislation patterned after either 18 U.S.C. § 892 (1970) (loansharking) or 18 U.S.C. § 1955 (1970) (syndicated gambling), neither of which makes commerce an integral part of the offense. *See* Perez v. United States, 402 U.S. 146 (1971) (holding that § 892 is constitutional); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (§ 1955 held constitutional). The need for independent federal legislation is underscored by the interplay of other aspects of the problem. Often the states that have comprehensive theft and fencing legislation do not have the necessary investigative tools (*e.g.*, wiretapping); in addition, because of restrictive court decisions, federal-state cooperation is seriously inhibited. *See, e.g.*, People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749, *cert. denied*, 414 U.S. 804 (1973) (lawful federal wiretap inadmissible in state proceedings).

dealers apparently play an important role in theft and fencing,[249] it would be helpful to impose on them a duty of inquiry as to the source of the goods they purchase and to criminalize, under appropriate standards, the possession of merchandise with altered identification marks. An appropiate duty of inquiry would permit undercover police to offer for sale allegedly stolen goods[250] and at least to arrest dealers who purchased without making a proper inquiry. Assuming sufficient corroborative evidence is available, noncomplying merchants might be convicted of both an attempt to purchase stolen property and a failure to inquire, regardless of the innocent character of the property in question.[251] Of course, the failure to inquire might be appropriately graded as a lesser offense than attempted receipt of stolen property.[252]

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249. *See* notes 45-49, 115-39, 145, 169-71 *supra* and accompanying text.

250. The investigation would have to be carried out with great care, since entrapment is an obvious potential difficulty. *See* note 209 *supra*. A suggested method would include the use of agents or cooperative informants who would be wired with appropriate electronic surveillance devices. Since the "wired" individual consents to the use of such a device, no fourth amendment problem is posed. *See* Lopez v. United States, 373 U.S. 427, 437-40 (1963) (wire recorder); On Lee v. United States, 343 U.S. 747, 753-54 (1952) (transmitter); United States v. White, 401 U.S. 745 (1971). *Cf.* Rathbun v. United States, 355 U.S. 107 (1957) (telephone). For an illustration of the creative use of a wired informant in a fencing investigation where the informant died before trial, but the tapes were still used, see United States v. Lemonakis, 485 F.2d 941, 948-49 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). A merchant who fails to adhere to the duty could also be caught through the use of legislatively authorized electronic surveillance measures issued pursuant to a court order. 18 U.S.C. §§ 2516-2519 (1970). *See* notes 310-28 *infra* and accompanying text. Under such circumstances a "wired" agent could establish the initial probable cause for the court order.

251. Since the purpose of such an enactment would be to facilitate investigative efforts, the mere failure to make inquiry would constitute a separate offense, and the character of the goods would be immaterial. Consequently, a merchant who fails to make appropriate inquiry with respect to the source of goods would act at his peril.

Hall points out that New York initially utilized a similar approach by enacting legislation that required diligent inquiry into the character of the goods and later created a rebuttable presumption of knowledge of the goods' stolen character whenever there had been failure to make diligent inquiry. J. HALL, *supra* note 5, at 211-12. New York's statute did not, however, make the mere failure to inquire a separate substantive offense. *Id.* at 212-13. *See* People v. Rosenthal, 197 N.Y. 394 (1910), *affd.*, 226 U.S. 260 (1912) (failure to inquire in receipt of stolen property by junk dealer not violation of liberty of contract or equal protection). Apparently, Hall did not recognize the investigative significance that such a statute might have, for although he proposed to make the failure to inquire a separate offense applicable to designated retail and wholesale dealers, he apparently would not have allowed a conviction if the items were not, in fact, stolen. J. HALL, *supra* note 5, at 224.

252. As an alternative to making failure to inquire an offense, a statutory presumption could be enacted which would give rise to a presumption of knowledge of the goods' stolen character upon proof of a dealer's failure to make inquiry with respect to source. *See* notes 344 *infra* and accompanying text. There are, however, constitutional limitations surrounding presumptions of this type. *See* notes 351-54, 360-88 *infra* and accompanying text.

A law proscribing the possession of altered merchandise would function in a somewhat different manner. As provided by section 3 of the Model Act,[253] possession of altered property itself would be considered a separate crime; in addition, it could be treated as a strict liability offense.[254] The Model Act also provides appropriate gradation distinctions since possession of altered goods may be less blameworthy than possession of stolen property.[255]

Obviously, such a proposal is useful only if sufficient numbers of products are manufactured with distinctive identification marks. For this reason, legislatures should seriously consider requiring serialization of products where technologically feasible.[256] In the past, state legislatures have not refrained from imposing similar requirements upon businessmen to protect state revenues. For example, the stamping of cigarette packages is routinely required in most states.[257] State revenues are similarly threatened by theft and fencing, since fences frequently sell stolen goods without collecting or reporting a sales tax and victimized merchants inevitably report lower profits for income tax purposes.[258] If mandatory serialization is too far-reaching, legislatures might consider offering businesses tax credits in return for voluntary serialization.

In any case, both prosecutors and police are in desperate need of a modernized approach to help them prove receipt of "stolen" property. Serialization accompanied by accurate recording procedures would help in the identification of stolen property, and especially in jurisdictions that do not recognize a crime of attempted receipt of stolen property, would also help police trace property

253. *See* MODEL THEFT AND FENCING ACT § 3, Appendix B. Note that the Model Act would not make possession of altered property a strict liability offense. *See* note 2, Appendix B.

254. Strict liability has traditionally received constitutional approval in the regulatory offense area. For a detailed discussion of the constitutional limitations on strict liability offenses in general, see notes 412-25 *infra* and accompanying text. Note that the proposed legislation should provide an exemption for cases when the dealer has received the manufacturer's express permission to make alterations or when such activity is considered impliedly approved by prevailing commercial standards.

Similar legislation, but of a more limited character, has been enacted in California and Illinois. California's statute does not provide for strict liability, and Illinois' is directed at a very limited range of activity. *See* CAL. PENAL LAW § 537e (West Supp. 1975); ILL. ANN. STAT. ch. 38, § 50-31 (Smith-Hurd 1970).

255. *Compare* MODEL THEFT AND FENCING ACT § 3(b), *with* §§ 2(b), 4(b), Appendix B.

256. Legislation could be designed that would create a hearing board structure to review questions of technological and economic feasibility.

257. *See, e.g.*, CAL. REV. & TAX CODE §§ 30161, 30162 (West 1970).

258. *See* CARGO THEFT AND ORGANIZED CRIME 8.

through complex redistribution systems without actually intervening, and thus without depriving the goods of their "stolen merchandise" status. In addition, since sophisticated receivers can remove serial numbers, the passage of statutes criminalizing either the possession of altered merchandise or the failure to inquire is necessary.

c. *The state of mind requirement.* In addition to establishing that the property was received and stolen, the prosecution must also establish that the fence knew the goods were stolen.[259] In the federal courts the prosecution need not prove that the defendant knew the stolen goods were part of interstate commerce,[260] since this element has uniformly been regarded as a purely jurisdictional requirement.[261] Although for many years the circuits were split over whether knowledge of the jurisdictional element must be established in conspiracy cases,[262] the Supreme Court recently facilitated con-

259. W. LAFAVE & A. SCOTT, *supra* note 14, at 685-88.

260. The interstate character of the transaction must be established under several of the federal theft statutes. There is, however, a difference between the character of the interstate element in several of the statutes. In 18 U.S.C. § 659 (1970), for example, the goods must be taken from interstate commerce, while in 18 U.S.C. § 2313 and § 2315 (1970) the goods must have moved in interstate commerce after having been stolen.

261. *See, e.g.*, United States v. Jennings, 471 F.2d 1310, 1312 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); United States v. Tannuzzo, 174 F.2d 177, 180 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949).

262. The underlying argument of those decisions that have required proof of the defendant's knowledge of the jurisdictional elements in conspiracy cases was originally stated by Judge Learned Hand: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941). Accordingly, "[t]he distinction between the scienter component of the conspiracy and substantive charges arises from the notion that although an individual may commit some crimes unwittingly he cannot conspire to commit a specific crime unless he is aware of all the elements of the crime." United States v. DeMarco, 488 F.2d 828, 832 (2d Cir. 1973).

The Hand approach, however, was widely criticized by both the courts and the commentators. *See* MODEL PENAL CODE § 5.03, Comment at 110-13 (Tent. Draft No. 10, 1960); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 937-39 (1959); 1 WORKING PAPERS OF THE NATIONAL COMMN. ON REFORM OF THE FEDERAL CRIMINAL LAWS 388-89 (1970) [hereinafter WORKING PAPERS]; REFORM COMMN., §§ 203, 204, 1004; United States v. Polesti, 489 F.2d 822, 824 (7th Cir. 1973).

The Model Penal Code, while recognizing the conceptual basis underlying the Hand formulation, proposed an easy legislative solution to the problem. The draftsmen suggested that the interstate requirement be viewed "not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction." MODEL PENAL CODE § 5.03, Comment at 116 (Tent. Draft No. 10, 1960). In this manner, the problem is overcome by simply omitting the jurisdictional requirement from the definition of the basic crime. The jurisdictional elements are listed in separate sections. The Reform Commission accepted this proposal, and accordingly proceeded to segregate the interstate commerce requirement from the remaining elements of the federal statutory offenses. *See, e.g.*, REFORM COMMN., §§ 201, 203, 204, 1732, 1740. This principle has been followed in S.1. *See, e.g.*, §§ 201(c), 1731(c), 1733.

spiracy prosecutions by rejecting the older analysis that required such proof.[263] Despite this reform in the federal courts, federal and state prosecutors still face the difficult task of proving the remaining state of mind requirements.

(i). *The appropriate mens rea.* Although the term "knowledge" suggests an actual awareness of attendant circumstances,[264] if "receiving statutes required absolute certainty, there would be few convictions, for one seldom knows anything to a certainty, and the receiver in particular is careful not to learn the truth."[265] Accordingly, most jurisdictions require the prosecution to show only that the defendant believed the goods were stolen, not that he knew this fact with certainty.[266] Even when framed in these terms, however, jurisdictions have been unable to agree whether an objective test[267]

263. United States v. Feola, 420 U.S. 671 (1975). The Supreme Court held "that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit the offense." 420 U.S. at 696. Justice Blackmun quoted the Government's response to the traffic light analogy: "The Government rather effectively exposes the fallacy of the *Crimmins* traffic light analogy by recasting it in terms of a jurisdictional element. The suggested example is a traffic light on an Indian reservation. Surely, one may conspire with others to disobey the light but be ignorant of the fact that it is on the reservation." 420 U.S. at 690 n.24.

In his opinion for the majority, Justice Blackmun emphasized that the first issue is the proper characterization of the element, but that once it is characterized as jurisdictional, then the requirement is irrelevant to the dual purposes of conspiracy theory: (1) the "protection of society from the dangers of concerted criminal activity," and (2) the initiation of "preventive action" against the commission of crimes that are still in a relatively inchoate stage. 420 U.S. at 693-94. Accordingly, Justice Blackmun concluded that, "[g]iven the level of criminal intent necessary to sustain conviction for the substantive offense, the act of agreement to commit the crime is no less opprobrius and no less dangerous because of the absence of knowledge of a fact unnecessary to the formation of criminal intent." 420 U.S. at 693.

264. "A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist . . . ." MODEL PENAL CODE § 2.02(b) (Proposed Official Draft, 1962) (emphasis added). Note that the Model Penal Code modifies its scienter requirement in receipt of stolen property cases. *See* MODEL PENAL CODE § 223.6(1) (Proposed Official Draft, 1962) ("or believing that [the property] has probably been stolen"). Courts are split as to whether suspicion is sufficient. *Compare* Commission of Pub. Safety v. Treadway, — Mass. —, 330 N.E. 468, 472 (1975) (suspicion enough), *with* State v. Goldman, 65 N.J.L. 394, 398, 47 A. 641, 643 (1900) (suspicion not enough).

265. W. LAFAVE & A. SCOTT, *supra* note 14, at 685.

> The receivers of stolen goods almost never "know" that they have been stolen, in the sense that they could testify to it in a court room. The business could not be so conducted, for those who sell the goods—the "fences"—must keep up a more respectable front than is generally possible for the thieves. Nor are we to suppose that the thieves will ordinarily admit their theft to the receivers: that would much impair their bargaining power.

United States v. Werner, 160 F.2d 438, 441 (2nd Cir. 1947).

266. W. LAFAVE & A. SCOTT, *supra* note 14, at 685.

267. A number of states have adopted legislation which expressly sets out an "ob-

or subjective test[268] of knowledge or belief is appropriate.

Since prosecutors face difficult evidentiary burdens, some mitigation of the stringent subjective test is warranted. Indeed, the sophistication of modern fencing operations compounds the difficulties already inherent in proving even a defendant's *belief* as to whether his goods are stolen.[269] A possible response to these difficulties would be the adoption of the less confining objective test. Such a standard for criminal liability might be appropriate if it were limited to retail and wholesale dealers.

A better reform, however, would be the adoption of a recklessness standard,[270] under which a defendant would have a culpable state of mind if it were established that he purchased goods despite being aware of a substantial risk that the property had been stolen.[271]

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jective" standard of state of mind. Under this approach, the defendant is said to have knowledge if he knew or *should have known* of the goods' stolen character. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-621 (Supp. 1975). A few courts have acknowledged that an objective test is appropriate. *See, e.g.*, Seymour v. State, 246 S.2d 155 (Fla. App. 1971). This standard involves the imposition of a strict form of liability based on what a reasonable person would have known. That a reasonable person would have known is evidence that a particular person did know. But there is a world of legal difference between circumstantial evidence of a fact and actual knowledge of the fact itself. *See* United States v. Werner, 160 F.2d 438, 441-42 (2d Cir. 1947). Of course, in trial, this difference would tend to blur during the process of proof and the jury deliberations. The distinction, however, would have to be stated in the judge's instruction.

268. The majority of jurisdictions have adopted the subjective approach articulated by Judge Hand:

> [S]ome decisions even go so far as to hold that it is enough, if a responsible man in the receiver's position would have supposed that the goods were stolen. That we think is wrong; and the better law is otherwise, although of course the fact that a reasonable man would have thought that they have been stolen, is some basis for finding that the accused actually did think so. But that the jury must find that the receiver did more than infer the theft from the circumstance has never been demanded, so far as we know; and to demand more would emasculate the statute, for the evil against which it is directed is exactly that: i.e., making a market for stolen goods which the purchaser believes to have probably been stolen.

United States v. Werner, 160 F.2d 438, 441-42 (2d Cir. 1947) (footnotes omitted). While recognizing that knowledge may be inferred from circumstances that would give a hypothetical reasonable man knowledge of the goods' stolen character, these jurisdictions nevertheless require a finding of *actual* knowledge on the part of the particular defendant involved. Any instruction suggesting the contrary is considered to be reversible error. *See, e.g.*, Schaffer v. United States, 221 F.2d 17, 23 (5th Cir. 1955).

269. The difficulties involved in proving knowledge are discussed in notes 274-328, 389-97 *infra* and accompanying text.

270. *See* MODEL THEFT AND FENCING ACT § 2 n.2, Appendix B.

271. The Model Penal Code defines recklessness as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross devia-

Use of a recklessness test would permit partial reconciliation of two somewhat conflicting aims of the criminal law. First, by applying a subjective test, a recklessness standard would hold the prosecution to a higher burden of proof than would an objective test, thus limiting criminal punishment to only particularly blameworthy conduct. Second, such a standard, although not as favorable to the prosecution as an objective test, would facilitate the prosecution and conviction of fences since authorities would not be required to prove actual knowledge.

An even more sophisticated refinement would be to incorporate the recklessness standard into a continuum that would vary the prescribed punishment with the state of mind proved by the prosecution. Since a defendant who knowingly purchased stolen property is more blameworthy than a defendant who made a reckless purchase, distinctions in the penalties imposed might be appropriate.[272] More importantly, such a gradation of punishment would facilitate both plea bargaining and the successful prosecution of fences whose cases are taken to trial. For example, in exchange for lighter punishment, a defendant could plead guilty to a lesser fencing offense than that for which he might have been convicted had the case gone to trial. Further, in cases actually tried, jurors would no longer have to elect between convicting a fence of one offense or not convicting him at all. By permitting prosecutors to bring separate charges alleging actual knowledge and recklessness, similar to the procedure in many jurisdictions where prosecutors charge a defendant with both first-degree and second-degree murder, verdicts could more closely reflect the facts; jurors presumably would be less likely to acquit a defendant who made a reckless purchase because they would no longer have to mete out the same punishment as they would to a person who knowingly purchased stolen goods.

Thus far, however, although a few courts have used the language of a recklessness standard,[273] no jurisdiction has expressly modified its state of mind requirement to include a recklessness standard or

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tion from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.20(c) (Proposed Official Draft, 1962). Under S. 1, "[a] person's state of mind is reckless with respect to: (1) an existing circumstance if he is aware of a risk that the circumstance exists but disregards the risk . . . ." § 303(c).

272. For a more detailed discussion of gradation principles, see notes 450-67 *infra* and accompanying text.

273. *See* United States v. Brawer, 482 F.2d 117, 126-27 (2d Cir. 1973), *affd.*, 496 F.2d 703 (2d Cir. 1974) (defendant acted with reckless disregard by consciously avoiding learning the truth).

legislated a comprehensive state of mind continuum correlating punishment and blameworthiness. Consequently, prosecutors are usually left with the unenviable task of proving defendants had an actual belief the goods purchased were stolen.

(ii). *The availability of direct evidence establishing mens rea.* Proof of guilty knowledge under existing statutes is an inherently difficult task because a sophisticated fence is able to "erect the most elaborate defenses."[274] A professional fence, for example, "legitimizes" stolen property in his possession to make its positive identification more difficult and falsifies sales receipts for use in rebutting prosecutorial attempts to establish his knowledge that the goods were stolen.[275] Similarly, a master fence is well-insulated from the complex redistribution process he operates, and thus rarely leaves readily detectable direct evidence that can be used to establish the requisite state of mind.[276]

Although this situation is dismaying, legislative action can, and sometimes has, provided law enforcement officials with potentially powerful evidence-gathering techniques. Most important are various devices to encourage informants to come forward and the expanded use of electronic surveillance. For example, the use of immunity grants may provide a viable means of compelling testimony from informants, despite the widespread reluctance of thieves to testify against their fences.[277] At the federal level, title II of the Organized Crime Control Act of 1970, permits judicial, administrative, and congressional bodies to issue orders granting immunity in exchange for testimony with appropriate safeguards for individual liberties.[278] A grant of immunity is authorized whenever a recalcitrant witness refuses to divulge information important to the public inter-

274. *Hearings on Fencing* 4.

275. *See* notes 132-38 *supra* and accompanying text. False receipts, in particular, afford the offender the opportunity to create his own evidence by establishing that he paid the market value price for the merchandise. *See generally* C. KLOCKARS, *supra* note 12, at 82 n.6.

276. *See* notes 142-49 *supra* and accompanying text.

277. "The commentators, and this Court on several occasions, have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, . . . such statutes have 'become part of our constitutional fabric.'" Kastigar v. United States, 406 U.S. 441, 447 (1972) (citations and footnotes omitted). *See* 8 J. WIGMORE, EVIDENCE § 2281 (3d ed. 1940).

For a good summary of the development and potential effectiveness of immunity grants, see Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 85-88.

278. 18 U.S.C.A. §§ 6001-6005 (Supp. 1975). *See* Kastigar v. United States, 406 U.S. 441 (1972). For an analysis of the use of § 6002, see *Testimony of H. Petersen, Hearings Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2nd Sess. 544 (1972).

est and claims his privilege against self-incrimination.[279] Once immunity has been granted, the witness is required by law to disclose whatever information is requested, but none of his testimony may be used directly or indirectly against him in a subsequent criminal prosecution.[280] This so-called use immunity of the federal statute is an effective investigative technique, for a witness testifying under it has a strong incentive to provide the prosecution with as much information as possible. In effect, the more information a witness provides under the compulsion of an order to testify, the more difficult it is for the prosecution to gather independently, and to show it gathered independently, evidence to convict the witness of the underlying crime.[281] Failure to comply with the order to testify is punishable as contempt, subjecting the witness to a potentially prolonged period of imprisonment,[282] and a grant of immunity does not protect

279. 18 U.S.C.A. §§ 6002, 6003, 6004, 6005 (Supp. 1975).

280. 18 U.S.C.A. § 6002 (Supp. 1975). The negative implication of section 6002 is that the witness's testimony can be used against him in a civil suit. *See* United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974). For a detailed discussion of civil remedies in the fencing context, see notes 499-544 *infra* and accompanying text. Civil consequences were encompassed under the former standard transaction immunity language ("penalty or forfeiture"). *See, e.g.*, Lee v. Civil Aeronautics Bd., 225 F.2d 950 (D.C. Cir. 1955).

281. In a criminal proceeding brought against such a witness, the prosecution may only utilize evidence that has been obtained independently of the subject's testimony. *See* note 280 *supra* and accompanying text. Generally, a use-immunized witness is entitled to a copy of the immunized testimony. *In re* Minkoff, 349 F. Supp. 154 (D.R.I. 1972). Access may also be had to the minutes of an indicting grand jury. United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973). The prosecution's burden to show no subsequent use may not be met with conclusionary assertions. United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972). Proof must be offered. United States v. Seiffert, 357 F. Supp. 801 (S.D. Tex. 1973). Mere exposure to a prosecutor has been held to warrant dismissal of an indictment. *See* United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973). This seems to go too far since other prosecutors who had not been exposed to the testimony could handle untainted evidence. Obviously, the government's burden is heavy, but it is not insuperable. *See* WATERGATE: SPECIAL PROSECUTION FORCE REPORT 208 (1975) (filing of "taint" papers in reference to John Dean).

282. Federal legislation provides that a noncomplying witness may be confined for a period not to exceed 18 months. 28 U.S.C. § 1826. The witness may obtain his release at any time by purging himself of his contempt. His confinement may be renewed if he is subsequently called upon to testify, for example, before a new grand jury, and he again refuses to comply. *See* Shillitani v. United States, 384 U.S. 364 (1966) (dicta); *In re* Grand Jury Subpoena of Alphonse Persico, 522 F.2d 41 (2d Cir. 1975). At least one federal court, however, has expressed dicta to the effect that, at some point, prolonged confinement may violate a person's due process rights. *See* United States v. Doe, 405 F.2d 436 (2d Cir. 1968). New Jersey, too, has upheld prolonged confinement (four years), but has recognized that the facts of each case must determine its resolution. Catena v. Seidl, 65 N.J. 257, 262, 321 A.2d 225, 228 (1974) stated: "The legal justification for commitment for civil contempt is to secure compliance. Once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." The test used by the court to determine whether confinement should end was whether there

a witness from prosecution for perjury.[283]

Immunity grants are also routinely authorized by state legislation.[284] Nevertheless, despite the Supreme Court's decision in *Kastigar v. United States*,[285] which held that the federal "use immunity" statute is coextensive with the scope of the fifth amendment's privilege against self-incrimination,[286] most state legislation only authorizes prosecutors to grant witnesses "transaction immunity," or protection from prosecution for any crime to which the compelled testimony relates.[287] Transaction immunty offers considerably broader protection than that required by the fifth amendment privilege and is less effective than use immunity as an investigative tool. Transaction immunity provides no inducement to the witness to provide maximum information since it acts as an "immunity bath": A witness is always immune from prosecution for the underlying offense once he testifies, regardless of how much useful evidence he provides.[288] Further, a grant of transaction immunity in a fencing investigation may

was "no substantial likelihood" that the witness would testify. 65 N.J. at 262, 321 A.2d at 228. For subsequent developments in *Catena* see N.Y. Times, Aug. 20, 1975, at 1, col. 5 (late city ed.) (Gerardo Catena ordered released from confinement for civil contempt) and 17 CRIM. L. RPTR. 2497 (1975).

283. *See* 18 U.S.C.A. § 6002 (Supp. 1975). Until recently, the perjury sanction has been of limited effectiveness because of the traditional difficulties involved in proving a violation. *See* Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 88-91. This problem has been ameliorated by the passage of legislation that requires only "proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question . . . ." 18 U.S.C.A. § 1623 (Supp. 1975). The cases also make it clear that the immunity attaches only to truthful testimony; untruthful responses may be used against the witness, for example, to cross-examine and incriminate him under another charge. *See, e.g.*, United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974).

284. A comprehensive list of state immunity legislation is provided in 8 J. WIGMORE, *supra* note 277, § 2281, at 495 n.11. Thirty three states now provide for immunity in the fencing area. THE NATIONAL ASSN. OF ATTORNEYS GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 133-41 (1974).

285. 406 U.S. 441 (1972).

286. 406 U.S. at 453.

287. *See, e.g.*, CAL. PENAL CODE § 1324 (West 1972). Only three states currently provide for the granting of "use immunity." LA. REV. STAT. ANN. § 15.468 (1973); N.J. STAT. ANN. § 2 A. 81-17.3 (1968); OHIO REV. CODE ANN. § 2945.44 (Page 1975). The New Jersey approach has been sustained as constitutional. *See* Zicarelli v. New Jersey State Commn. of Investigation, 406 U.S. 472 (1972).

288. Once a witness has been granted transactional immunity, his cooperation is by no means assured. *See, e.g.*, Giancana v. United States, 352 F.2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965). The reluctant witness may provide the government with some evidence, but not enough to sustain a conviction. He is, of course, subject to the contempt sanction, but it is effective only if the government can establish that he is still withholding information. For a discussion of how some of those who attended the infamous Appalachian gathering handled subsequent immunity grants through evasive answers, see United States v. Bufalino, 285 F.2d 408, 418 n.27 (2d Cir. 1960).

require a decision to forego prosecuting a thief and instead to convict a fence, a decision many law enforcement agencies appear reluctant to make.[289] No doubt this aversion reflects outmoded priorities that should be changed,[290] but since police often can independently gather sufficient evidence to prosecute thieves successfully, the dilemma could be eliminated altogether by enacting legislation authorizing the granting of "use immunity,"[291] as is provided by Section 12(b) of the Model Act.[292]

Whether testimony elicited through the use of an immunity grant can provide direct evidence establishing a fence's culpable state of mind depends upon the thief's ability to give a detailed account of his transactions with the fence. Sometimes thieves do not know the identity of their fences,[293] but this obstacle can be overcome by a series of immunity grants used to climb the chain of command of sophisticated fencing operations. Inevitably, even a well-insulated master fence can be convicted.[294]

Regardless of their potential as investigative tools, the effectiveness of immunity grants is considerably hampered in many jurisdictions by courts suspicious of the credibility of testimony favorable to the prosecution given by a witness with an obvious interest in escaping punishment.[295] These courts have created the so-called cor-

289. The reluctance of law enforcement authorities to make this policy decision is suggested by the widespread practice of tolerating fencing operations in exchange for information concerning theft activity. *See* note 61 *supra* and accompanying text. This may be because "the most commonly used measure of police performance is the rate at which crimes are 'cleared' by arrest." C. KLOCKARS, *supra* note 12, at 28. Given the importance of clearance by arrest statistics, the police may not be inclined to grant a thief immunity, since the fence who might be convicted is usually capable of producing a greater number of theft arrests.

290. *See* notes 15-49 *supra* and accompanying text.

291. *See* note 280 *supra* and accompanying text.

292. *See* MODEL THEFT AND FENCING ACT § 12(b), Appendix B.

293. *See* notes 142-43, 163-66 *supra* and accompanying text.

294. In organized crime cases, however, witnesses may be completely intimidated by the threat of physical injury. *See* note 148 *supra*. Fear of "underworld reprisals," however, will not warrant refusal to testify before a grand jury. *See* Latona v. United States, 449 F.2d 121 (8th Cir. 1971). On the federal level this situation has been somewhat ameliorated by provisions of the Organized Crime Control Act of 1970 that were designed to afford maximum protective cover to potential witnesses. 18 U.S.C. §§ 6001-005 (1970) and 28 U.S.C. § 1826 (1970). The program is administered by the United States Marshall Service. The number of witnesses under protection runs to approximately 100 per day. The "increasing number of major crime figures who are volunteering to serve as witnesses is an indication of the success of this program." *Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93 Cong., 1st Sess. 1072 (1973). *See How Business Shelters Witnesses from the Mob*, NATION'S BUSINESS, August, 1973, at 20.

295. The Supreme Court has characterized accomplice testimony as "inevitably suspect" and unreliable. Bruton v. United States, 391 U.S. 123, 136 (1968).

roboration rule that requires either a cautionary jury instruction calling for care in evaluating such testimony or a directed verdict of acquittal whenever the testimony of an accomplice has not been corroborated.[296] Although initially conceived as "merely . . . a [discretionary] *counsel of caution* given by the judge to the jury,"[297] the practice has evolved into a strict rule of law in some jurisdictions.[298] Fortunately for prosecutors, however, a number of jurisdictions have narrowly circumscribed application of the corroboration rule by technically limiting the term "accomplice" to those criminals subject to indictment for the same crime with which the defendant is charged. In some receiving cases, this reasoning continues, the corroboration rule is not applicable since a thief is not a receiver's accomplice; he has instead technically committed a separate offense of theft and therefore is not subject to indictment for the crime of receiving. According to other courts, however, this view is patently superficial since the conduct of both criminals is necessary for successful commission of the theft and the receiving, and the testifying witness still has an interest in escaping punishment by providing testimony favorable to the prosecution.[299] Regardless of which approach is taken, the ultimate result on the evidentiary issue is frequently the same, however, because even those jurisdictions that narrowly define "accomplice" recognize an exception and apply the corroboration rule whenever there has been a prior relationship between the fence and the thief.[300] Given the number of fences who have regular contacts with thieves and the high volume of the "steal-to-order" business,[301] the corroboration doctrine is obviously a potential problem in the prosecution of all large-scale fencing activity.[302]

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296. W. LAFAVE & A. SCOTT, *supra* note 14, at 691; 7 J. WIGMORE, *supra* note 277, § 2056. An early discussion of this problem in the fencing context is provided in J. HALL, *supra* note 5, at 176-85. Massachusetts has gone one step further. Accomplice testimony need not be corroborated. Commonwealth v. French, 357 Mass. 356, 395 (1970). But by statute, MASS. ANN. LAWS ch. 233, § 201 (1970), immunized testimony must be. *See* Commonwealth v. DeBrosky. — Mass. —, 297 N.E. 2d 496 (1973).

297. 7 J. WIGMORE, *supra* note 277, § 2056, at 315 (emphasis original).

298. *Id.* at 319-21.

299. *See* Annot., 53 A.L.R.2d 817, 832-38 (1957).

300. *See id.* at 838-46. Federal law is reviewed in Stephenson v. United States, 211 F.2d 702, 704-05 (9th Cir. 1954) (plain error to fail to give instruction).

301. *See* notes 110, 139, 140, 145-46 *supra* and accompanying text.

302. More than theft or receiving is involved. If there is a prior relationship, it is possible that the receiver is guilty of conspiracy to steal and receiving rather than theft or receiving. *See* State v. VanderLave, 47 N.J. Super. 483, 487, 136 A.2d 296, 298 (1957), *affd.*, 27 N.J. 313, 142 A.2d 609 (1958), where the court said:

> The conspiratorial role of appellant, alleged and proven by the State, transcended the function of a receiver of stolen goods, even one with foreknowledge

These difficulties could be avoided if courts and legislatures would recognize that, although an accomplice's testimony is often deserving of skeptical treatment, the considerations that gave rise to the corroboration rule no longer carry much force,[303] and that credibility should be an issue ultimately left to the jury.[304] The federal courts, for example, have correctly decided that an absolute bar against convictions based upon an accomplice's uncorroborated testimony is inappropriate since the defendant's rights are adequately protected by the required cautionary instruction.[305] Similar action by state legislatures would facilitate the conviction of fences by removing a major obstacle to the prosecution's use of insiders to establish the requisite state of mind.[306] Fencing reform legislation that abolishes the corroboration rule to the extent that it requires a directed verdict of acquittal would obviate the need for the judiciary to draw what are solely formal distinctions. But if such reform legislation is to be effective, it must not preserve the directed verdict where there has been a prior conspiracy or some participation by the receiver in the larceny.[307] Such an exception is a potentially embarrassing loophole

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of the intended theft. The conspiracy plan here was one of continuity; the primary thief and the appellant agreed upon details of the unlawful design and its *modus operandi;* it is not an exaggeration to say that the proof was susceptible of a finding that appellant had participated in supervising the detail, particularly the timing, of certain larcenies, and showed a selectivity in pointing out the type and quantity of material which should be stolen for his use, complaining at one time that drums of stolen material were not filled to his liking . . . and in other respects the conspirators were shown to have been *en rapport,* not in the naked buy and sell relationship of a thief and his receiver, but in the clandestine and consultative concert of planned action which is the hallmark of the criminal conspiracy.

303. The doctrine originated at a time when defendants were not permitted to take the stand and the accomplice's testimony was admitted as an exception to the rule of incompetence. *See* 7 J. WIGMORE, *supra* note 277, § 2057.

304. *See id.* § 2056. The Supreme Court has suggested that it is in basic agreement with this position. *See* Hoffa v. United States, 385 U.S. 293, 303-04 (1966); On Lee v. United States, 343 U.S. 747, 757-58 (1952).

305. In the federal courts, a typical jury instruction simply warns the jury that "such testimony is always to be received with caution and weighed with great care." E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE INSTRUCTIONS § 12.04, at 256 (2d ed. 1970). The government may also obtain, however, an instruction that the jury is not to evaluate informant testimony in terms of their approval of this use and that the government "must take the witnesses to the transactions as they are," particularly in conspiracy cases. United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969).

306. *See* MODEL THEFT AND FENCING ACT § 5b, Appendix B.

307. New York, for example, has purportedly eliminated the corroboration rule, but the legislation has had a limited impact in enhancing the government's ability to deal with major fences because of the exception applicable where the receiver has "participated in the larceny." N.Y. PENAL LAW § 165.65 (McKinney Supp. 1974). *Cf.* People v. Valinoti, 26 N.Y.2d 553, 260 N.E.2d 541, 311 N.Y.S.2d 910 (1970). The New York corroboration rule had been established in People v. Kupperschmidt, 237 N.Y. 463, 143 N.9.2d 256 (1924) (thief held accomplice of receiver for corroboration purposes). *See* J. HALL, *supra* note 5, at 181-85. As a result of business pres-

since it ironically protects sophisticated receivers who organize thefts or who are otherwise involved in the larceny.[308]

Nonetheless, it is another investigative device, electronic surveillance, that clearly affords law enforcement authorities the most direct access to reliable evidence establishing culpable *mens rea*,[309] although it has raised constitutional objections.[310] In 1967, the Supreme Court found no *per se* constitutional objection to the use of electronic surveillance,[311] and Congress responded by enacting legis-

sure, the *Kupperschmidt* decision was legislatively set aside. *Id.* at 184-85. Ironically, however, the corroboration rule still applies in theft prosecutions, so that the reversal has had impact on a limited class of receivers; those who may be accomplices of the thieves are still protected by the corroboration rule. THE N.Y. COMMN. ON THE ADMINISTRATION OF JUSTICE, THIRD SUPPLEMENTAL REPORT 16 (1937) aptly characterized the general rule as "a refuge of organized crime [that] protects the principles [*sic*] in racketeering cases." Their recommendation that the general rule be abolished, however, was not adopted, and it remains today an unwarranted obstacle in the fencing area whenever prearranged theft or a continuous relationship is present.

308. "[T]he moment that the fence enters into the actual conspiracy to steal the property, thereby becoming legally culpable for the larceny itself . . . the People can only obtain a conviction against the fence for the larceny or possession of the stolen property if there is corroborative evidence." *Hearings on Fencing* 6. When characterized in these terms, it is apparent that many fences do participate in the larceny process. *See* notes 139-140, 143-46 *supra* and accompanying text. In the case of a master fence who arranges the actual theft, the corroboration rule—or the exception in conspiracy cases—adds another layer of insulation to his protective network. *See* notes 143, 146-49 *supra* and accompanying text.

It must be stressed, however, that legislative reform should not shelter from credibility attack the testimony of either accomplices or informants. Such an attack is properly part of the adversary process.

Finally, it should be emphasized that a thief generally cannot be convicted for receiving the fruits of his own theft. Consequently, where a relationship exists between the "thief" and the "receiver," it is sometimes necessary to indict in the alternative, permitting the jury to convict for theft or receipt, but not both. *See* United States v. Gaddis, 18 CRIM. L. RPTR. 3079, 3081 (Sup. Ct. 3-3-76).

309. *See* MODEL THEFT AND FENCING ACT § 12(b)(2), Appendix B.

310. Electronic surveillance has raised first, fourth, fifth, and sixth amendment constitutional questions. *See* Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969). Prior to the enactment of Title III (*see* notes 311-23 *infra* and accompanying text), it was felt by some that these constitutional problems could be largely overcome. *See* Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 95-104. *See also* A.B.A. PROJECT ON STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (1974).

311. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

A *per se* fifth amendment argument based on the privilege against self-incrimination had been rejected in 1928 in Olmstead v. United States, 277 U.S. 438 (1928), and this aspect of *Olmstead* has not been overruled. In addition, an analogous argument, based on using an informant rather than a wiretap, was held to be without merit in Hoffa v. United States, 385 U.S. 293 (1966). A sixth amendment violation could occur only if electronic surveillance were used during a post-indictment period, Massiah v. United States, 377 U.S. 201 (1964), or in such a fashion so as to intrude on the attorney-client relationship itself, Roberts v. United States, 389 U.S. 18

lation, modeled after the Court's own guidelines, specifically designed to meet the constitutional problems that had been raised in earlier decisions.[312] The enacted legislation, title III of the Omnibus Crime Control and Safe Streets Act of 1968,[313] authorizes federal and state electronic surveillance upon a court's finding of probable cause and "sets up a system of strict judicial supervision that imposes tight limitations on the scope of the investigation."[314] Title III has received widespread judicial approval in various federal circuit courts[315] and state courts;[316] there seems to be little question that it authorizes an investigative technique well-designed to attack both organized crime[317] and sophisticated hijacking and fencing systems.[318] By directing electronic surveillance at a professional fence's place of business, investigators can overhear and record incriminating remarks. Such evidence is completely reliable so there is little danger of a credibility attack at trial.[319] Numerous prosecutions have been facilitated in this manner,[320] and it is apparent that

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(1967). *See* Note, *Government Interceptions of Attorney-Client Communications,* 49 N.Y.U. L. REV. 87 (1974).

312. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968).

313. 18 U.S.C. §§ 2510-13, 2515-20 (1970).

314. United States v. Cox, 449 F.2d 679, 684 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

315. *See, e.g.,* United States v. Doolittle, 507 F.2d 1368 (5th Cir. 1975).

316. *See, e.g.,* Commonwealth v. Vitello, — Mass. —, 327 N.E.2d 819 (1975). Much of the litigation is reviewed in Cranwell, *Judicial Fine-Tuning of Electronic Surveillance,* 6 SETON HALL L. REV. 225 (1975).

317. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 72 (1968); Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 92-95.

318. The federal legislation, however, authorizes an interception order in fencing investigations only when violations of 18 U.S.C.A. §§ 659, 2314, and 2315 are involved. *See* 18 U.S.C.A. § 2516 (Supp. 1975). Authorization should be extended to cover other federal fencing violations. *See* note 185 *supra.* There is also a certain unfortunate lack of clarity in the current draft of S.1. Section 3101(b) does not explicitly authorize state surveillance in the theft and fencing area, and its general language reads "crime of violence." *See* S.1, § 111. The legislative history indicates that this phrase is used "in the broad sense as comprehending the present language" of 18 U.S.C. § 2516 ("dangerous . . . to . . . property"). SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., 3 REPORT ON CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, at 942 (Comm. Print 1974) [hereinafter S.1 REPORT] Obviously, there is no intent to eliminate this area of investigation from the use of state surveillance, but it might have been hoped that this intent could have been more clearly expressed.

319. The only possible credibility argument would concern whether the recording has been tampered with in any way. Careful police enforcement procedures and the use of a seal would completely obviate this defense. *See* 18 U.S.C. § 2518(8)(a) (1970); S. REP. No. 1097, 90th Cong., 2d Sess. 104-05 (1968); United States v. Falcone, 505 F.2d 478, 483 (3d Cir. 1974) (seal to "insure integrity").

320. The following case study demonstrates the effectiveness of such techniques in the fencing context:

if this method were widely implemented professional fences would run a substantially higher risk of conviction.

In addition to establishing the requisite state of mind, successful electronic surveillance can also help establish "receipt," can locate and identify other stolen property,[321] and can provide authorities

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Case Study
Kings County, New York—Forgery, Criminal Possession of Forged Documents, Grand Larceny, Criminal Possession of Stolen Property, Criminal Usury

Background

This was a "target investigation," begun in 1971, directed against a high level member of an organized crime "family" operating in Brooklyn. Physical surveillance and two gambling wiretaps on public telephones in a local bar which the target's associates frequented had pinpointed the target's headquarters as the trailer office of a nearby busines.

Physical surveillance of the trailer was conducted for several months. During this time, a pattern was established for meetings in the trailer between the target and other persons with criminal histories. During this period of observation, it was also learned that the FBI was engaged in an independent investigation of the gambling activities of several of the target's associates. Following a meeting between the District Attorney and FBI agents, it was decided to proceed with a joint investigation.

At this time, the FBI produced an informant who had personally overheard criminal conversations in the trailer and who described a stolen car racket, using forged documents, which was being conducted there. Orders were then sought to place wiretaps on the three telephones in the trailer and to place a "bug" within the trailer itself.

Operation of the surveillance devices

The three wiretaps were installed on the day that the orders were signed. It took a week, however, to install the bug, as the trailer was inside the lot, surrounded by an eight foot high cyclone fence and guarded by a watch dog.

The wiretaps were initially approved for thirty days, but one extension on each was granted, allowing each to run for sixty days. The order on the bug was extended three times, giving it an authorized operational period of 120 days. During this period, conversations apparently relating to a variety of criminal activity, including bribery, were overheard.

Results

The investigation ultimately resulted in the arrest of seventy-one individuals, including the target of the original investigation and several other alleged members of the same organized crime family. Of this number, thirty-seven pleaded guilty to minor charges and were given $100 fines. Of the thirty-four persons indicted, three have been convicted of perjury or criminal contempt and thirty-one cases are pending.

Evaluation

This is an excellent example of the sophisticated use of electronic surveillance by law enforcement agencies to combat organized crime. It points out the value of federal-state agency cooperation, the interplay between electronic and non-electronic surveillance techniques, and the usefulness of an investigation targeted against a specific organized crime figure, with the availability of reliable informants close to the target.

NATL. COMMN. FOR THE REVIEW OF FED. AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, STAFF STUDIES AND SURVEY 277-78 (1976). Finally, the use of electronic surveillance recently led to the successful prosecution of Jack Mace, one of New York's most sophisticated fencing operators. *See* United States v. Tortorello, 480 F.2d 764, 770-71, 773-76 (2nd Cir. 1973); V. TERESA, *supra* note 29, at 258-89. By intercepting conversations and tapping telephones at Mace's place of business, the "Rio Coin Shop," investigators were able to secure his conviction, as well as the convictions of several major organized crime figures.

321. DEPT. OF JUSTICE RELEASES 13, 17 (May 2, 1974) (statement of Kevin T. Maroney, Deputy Assistant Attorney General, Criminal Division, Before the Select

with evidence and leverage to induce the testimony of potential witnesses. For example, the apparently legitimate businessman who initially denies his association with a major fence may be more willing to cooperate once he has been confronted with a tape recording of his self-incriminating remarks.[322] At this point, the stage is set for granting the businessman immunity in exchange for testimony that may help trace the complex redistribution system of a master fence.

Yet despite its demonstrated success, electronic surveillance has rarely been used in the investigation of fencing cases. Only twenty-three jurisdictions have enacted electronic surveillance statutes pursuant to title III authorization,[323] and of the 701 orders authorizing wiretapping issued in 1975, only thirteen were issued to detect suspected possession of stolen property.[324] Instead, most so-called intercept orders concern probable gambling and narcotics violations.[325] Thus, because of both legislative omission or investigative oversight, law enforcement authorities generally have failed to take advantage of the most effective evidence-gathering device available to combat large-scale fencing activity.[326]

Nevertheless, even if this were not the case, it must be acknowledged that electronic surveillance is no panacea for existing deficiencies in evidence-gathering techniques. Electronic devices are particularly difficult to use where, for instance, a master fence does not

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Committee on Small Business, United States Senate, Concerning the Criminal Redistribution System).

322. The then Chief Counsel of the McClellan Committee, Robert F. Kennedy, makes the point: "The kind of proof makes a difference. He can say very forcefully someone's a liar—that's easy, but here we had his own voice on the tapes. He couldn't deny it." *Quoted in* J. MAGUIRE, EVIDENCE OF GUILT 247 n.16 (1959).

323. U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS II (1975) [hereinafter ANNUAL REPORT 1975]. Among those populous states identified by the ORGANIZED CRIME TASK FORCE: PRESIDENT'S COMMN. ON LAW AND ENFORCEMENT AND ADMINISTRATION OF JUSTICE 7 (1967) as having organized crime problems, but that do not authorize surveillance, are the following: California, Texas, Illinois, Michigan, Pennsylvania, and Ohio. Even among those states with surveillance legislation, the statutes leave something to be desired in the fencing area. *See* WIRETAP REPORT 200-01 (concurrence of Commissioner Blakey).

324. ANNUAL REPORT 1975 VIII. Out of the 13 intercept orders issued for the investigation of possession of stolen property, nine were federal, two were granted in New York, one was granted in New Jersey, and one was granted in Kansas. *Id.* at VIII-IX. In addition, 3 orders were issued for burglary, 5 for larceny and theft, and 6 for robbery. *Id.* Some of these may, in fact, have been issued in fencing investigations.

325. *Id.* at VIII.

326. The National Wiretap Commission has called for "more extensive" use of surveillance in theft and fencing investigations. WIRETAP REPORT 5.

operate from a fixed place of business but instead conducts his transactions from randomly selected telephone booths.[327] Such a receiver is vulnerable only if his purchaser's telephone has been tapped or if for some reason his buyer decides to cooperate with police. In addition, as with search warrants, logistical considerations may delay or completely preclude a successful wire,[328] and once installed, reception is often marred by mechanical difficulties or background noises. These problems, combined with the demonstrated reluctance of legislators and law enforcement authorities to use electronic surveillance, have caused investigators and prosecutors to attempt the more difficult task of proving the requisite state of mind by circumstantial, rather than by direct, evidence.

(iii). *The use of circumstantial evidence to establish mens rea.* A prosecutor who cannot present direct testimony establishing guilty knowledge must instead recreate circumstances surrounding the fence's receipt of stolen property from which a jury might infer the requisite *mens rea.*[329] Some courts have held that evidence establishing that the defendant purchased goods at extremely low prices, removed identification marks, or attempted to conceal the merchandise upon receipt, is sufficient to support a finding that the defendant knew the goods were stolen.[330] In order to show that the defendant's conduct was not the product of innocent mistake, successful prosecutors often supplement this circumstantial evidence with proof that the defendant has acted similarly in other transactions or has previously been convicted of receiving.[331]

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327. It is questionable that many master fences take such extraordinary precautions. *See generally* DEPT. OF JUSTICE RELEASES, *supra* note 321, at 13. Certainly, the professional fence who is also involved in master fencing may tend to use the phone at his place of business. This practice led to the downfall of one of New York City's most sophisticated fences. *See* note 320 *supra.* On the other hand, the master fence's work tends to be episodic rather than regular, in contrast to the activities of those engaged in gambling and narcotics transactions. This sharply curtails the opportunities to establish the probable cause necessary to obtain a court order. Indeed, the best hope of getting at the master fence through wire surveillance lies in overhearing his calls to a professional fence, when the professional needs the superior resources and contacts of the master.

328. *See* note 320 *supra*; WIRETAP REPORT at 7-8, 55-62.

329. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 686.

330. *See, e.g.*, Torres v. United States, 270 F.2d 252, 259 (9th Cir. 1959). For discussion of this issue, see W. LAFAVE & A. SCOTT, *supra* note 14, at 686-87; 2 J. WIGMORE, *supra* note 277, § 327.

331. *See* J. HALL, *supra* note 5, at 186-89; W. LAFAVE & A. SCOTT, *supra* note 14, at 687; 2 J. WIGMORE, *supra* note 277, §§ 324-26. Evidence of this nature is admissible because it tends to establish intent by negating the possibility of an innocent mistake or by demonstrating the existence of an on-going plan. Jurisdictional rules vary concerning whether the same type of property must have been involved, whether the goods must have been received from the same thief, and the requisite

Persuasive circumstantial evidence establishing the guilty knowledge of the most sophisticated fences, however, is usually not available. Instead, prosecutors must attempt to convict professional receivers masquerading as legitimate businessmen by introducing somewhat less powerful evidence of conduct by the defendant that deviates from normal business practices. By skillfully comparing a fence's conduct with normal business practices, prosecutors may be able to establish the requisite *mens rea* on the basis of such circumstantial evidence as proof of poor bookkeeping procedures, unrecorded secret transactions, the failure to retain itemized receipts, unusual methods of payment, or the failure of the accused receiver to make proper inquiry concerning the source of his seller's goods.[332]

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sufficiency of the link between the present offense and the prior illegal transactions sought to be offered into evidence. *See Hearings on Criminal Laws* 550. Hall argues that rules requiring delivery by the same thief are inappropriate, since "the larger the business done, the greater are the probabilities that different thieves have been dealt with, that the property was stolen from different places and persons, and hence, that the receiving in question was with criminal knowledge." J. HALL, *supra* note 5, at 187. Wigmore states that it is usually "necessary and sufficient to show (a) former receipt and possession (and, perhaps, under suspicious circumstances) (b) of goods similar as to the person bringing them or as to their kind or otherwise." 2 J. WIGMORE, *supra* note 277, § 324, at 228.

Evidence of prior criminal transactions, because of its highly prejudicial nature, may only be introduced if "the evidence is substantially relevant for some other purpose than to show a probability that [the accused] committed the crime on trial because he is a man of criminal character." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (E. Cleary ed. 1972) (footnote omitted) [hereinafter MCCORMICK]. Accordingly, such evidence may be admitted for purposes of demonstrating the existence of a plan or for establishing that receipt was not without guilty knowledge. *Id.* at 448-50. For a detailed listing of authorities which have analyzed the prior similar act doctrine, *see id.* at 447 n.32.

332. *See, e.g.*, United States v. Lambert, 463 F.2d 552, 555 (7th Cir. 1972) (manner, timing and price of sale justified inference of knowledge); Henry v. United States, 361 F.2d 352 (9th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967) (failure to give or request *customary* bill of sale justified jury inference).

The Association of Grand Jurors of New York County has summarized these characteristics as follows:

> When a commodity is offered for sale to a business-wise merchant, firm or corporation it is reasonable to presume that he or it knows or will ascertain, before buying, certain things. These are:
>
> 1. The market value of the commodity.
> 2. The cause for its price being disproportionately low.
> 3. That certain identification marks usually appearing on the article or its container have not been removed or altered.
> 4. That the seller has the legal right to sell and conforms to the customs of the trade in so doing.
> 5. That the seller represents a firm known to the trade or is personally known to the buyer.
> 6. That the seller has a permanent address.
> 7. If the seller is a stranger to the buyer that he can furnish trade and other reliable references as to his good standing.
> 8. That nothing connected with the seller or his goods indicates fraud.

PRISON COMM. OF THE ASSN. OF GRAND JURORS OF NEW YORK COUNTY, CRIMINAL RECEIVERS IN THE UNITED STATES 69-70 (1928).

In this way, prosecutors can turn a fence's legitimate facade into a weapon against him.

Yet the availability of such circumstantial evidence does not guarantee conviction, for two accepted judicial doctrines restrict its use and thus diminish its potency. First, most states restrict a trial judge's right to comment on the evidence; consequently, jurors are often unable to draw inferences of guilty knowledge they would otherwise consider if the judge could share his expertise with them.[333] Second, the quantum of incriminating circumstantial evidence deemed necessary to establish an element of a crime beyond a reasonable doubt is often high: In "the absence of direct evidence on a controverted issue, almost all jurisdictions require the prosecution to prove that all the circumstances are consistent with guilt and inconsistent with any reasonble hypothesis of innocence."[334] Although this rule is not applied in the federal courts,[335] it has had a profound impact at the state level because it "imposes an unjustifiably heavier burden on the state than does the reasonable doubt standard."[336]

The Association of Grand Jurors also took notice of the additional recommendations of experts in the fencing area:

> "Mr Leon Hoage of the New York office of the Holmes Electric Protection Company . . . holds that an alleged Fence should be required to explain to the jury acts or omissions, such as the following:
>
> 1. Failure to keep bona fide books of account in connection with a business enterprise.
> 2. Neglect of dealer to keep bills received with goods delivered to him, for a reasonable period, such as two years.
> 3. Omission of the dealer to demand and keep as bills the receipts given in his commercial transactions.
> 4. Lack of itemized bills of job lots of standard goods purchased, apart from the balance of the items.
> 5. Inability or unwillingness of the possessor of goods ostensibly covered by a bill of sale from a reputable firm, to communicate with the firm, at the time the purchase is made, to corroborate the sale.
> 6. Presentation of a bill of sale, the billhead of which gives the name and address of a non-existent firm.
> 7. Purchase of valuable merchandise from a push cart, or similarly unreliable vendor."

J. HALL, *supra* note 5, at 224-25 n. 72.

333. *See* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 121-22 (1968) [hereinafter TRIAL BY JURY]. Although the rule against commentary grew out of an early American distrust of judicial power, Wigmore has maintained "[t]hat the preservation of the pristine power of the Court to comment and advise the jury is essential to the efficient working of the jury system, and that the deprivation of that power is highly injurious." 9 J. WIGMORE, *supra* note 277, § 2551a, at 509. For a detailed list of authorities who have advocated such restoration, see *id.* at 512 and TRIAL BY JURY 122-24. The power to comment must be seen in light of the possible decline in the ability of average jurors to understand complex fact situations.

334. Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COLUM. L. REV. 549, 549-50 (1955).

335. Holland v. United States, 348 U.S. 121, 139-40 (1954).

336. Note, *supra* note 334, at 551.

Courts and legislatures recognizing the difficulties inherent in using primarily circumstantial evidence to establish knowledge have attempted to facilitate convictions by developing several common-law and statutory presumptions favorable to the prosecution.[337] A presumption (permissible inference) in the criminal law reflects a determination that a certain set of circumstances should be given special treatment because it tends to establish a particular element of the crime, although such an inference might not otherwise have been drawn by the trier of fact.[338] In receiving cases, the most important presumption is that of guilty knowledge, which is triggered by proof of the defendant's unexplained recent possession of stolen property: "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."[339] Originally a common-law rule designed to aid the prosecution in larceny cases,[340] the so-called recent possession doctrine has been codified in several

337. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, § 303[01], at 303-08 (1975) [hereinafter J. WEINSTEIN]. For an excellent discussion of the presumptions contained in recent federal legislative proposals directed toward organized crime, see Note, *Presumptions and Due Process: Congress Attacks Organized Crime*, 68 NW. L. REV. 961 (1974).

Traditionally, these rules have been called presumptions, and that term will be used here. Nevertheless, it might be more accurate and less confusing in criminal cases to call them permissible inferences, and to distinguish them sharply from what is best described as a mandatory or irrebutable presumption. A permissible inference arises when *A* is thought normally to infer *B*. Prove *A*, and absent other proof, *B* may be inferred and is thus proven. A mandatory presumption arises when *A* is treated as proof of *B*, and, when *A* is proven, *B* must be found absent other proof. An irrebuttable presumption arises when *A* is treated as the equivalent of *B*, and the contrary may not be shown.

338. C. TORCIA, WHARTON'S CRIMINAL EVIDENCE, §§ 90-91 (13th ed. 1972); 9 J. WIGMORE, *supra* note 277, § 2491, at 288; J. WEINSTEIN § 300[02], at 300-07. WORKING PAPERS 936, observes: "Use of the procedural device is appropriate when Congress [or the state legislature] on the basis of special expertise and amassed empirical evidence decides that certain facts are strong evidence of a crime and that these facts should be given proof significance to assist the government in prosecuting the crime." The best way to conceptualize a presumption is to see that by creating a presumption the law is acting as an expert witness, because it is providing the jurors with the basis for drawing an inference that is not necessarily compelled from the ordinary experiences of their everyday lives. *See* notes 366-68 *infra* and accompanying text. Since the law is injecting its own expertise into the fact-finding determination, any judicial or legislative presumption must comport with due process standards. *See* notes 360-88 *infra* and accompanying text.

339. Wilson v. United States, 162 U.S. 613, 619 (1896) (murder case where property of victim found on defendant used to prove guilt of murder).

340. 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 289 (1778 ed.); J. HALL, *supra* note 5, at 175; 9 J. WIGMORE, *supra* note 277, § 2513, at 417.

jurisdictions,[341] and extended to receiving cases in most jurisdictions.[342] The Model Act contains a presumption of recklessness, the *mens rea* required by that proposal, on proof the defendant possessed recently stolen property.[343] Other presumptions that have been developed to facilitate proof of guilty knowledge are raised on evidence that the defendant purchased the stolen goods from a minor, failed to make a reasonable inquiry of proof of ownership, purchased at a price substantially below reasonable market value, or has purchased stolen property before.[344] Unlike the recent posses-

341. *See, e.g.*, KY. REV. STAT. ANN. § 433.290 (1972); OKLA. STAT. ANN. tit. 21, § 1713 (Supp. 1975). The Oklahoma provision, however, has been declared unconstitutional in a decision that incorrectly applied guidelines set down by the United States Supreme Court. *See* note 380 *infra* and accompanying text.

342. *See* 9 J. WIGMORE, *supra* note 277, § 2513, at 422. Only Georgia and North Carolina have specifically refused to make this extension. *See* Gaskin v. State, 119 Ga. App. 593, 168 S.E.2d 183 (1969); State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952). Nevertheless, despite seemingly clear language in the Georgia opinion that suggests that the recent possession rule does *not* apply to receiving cases, the law in Georgia still seems confused. *See* Comment, *Criminal Law—Receiving Stolen Goods—No Presumption in Recent Possession*, 22 MERCER L. REV. 481 (1971).

"Without the inference it would be difficult, if not impossible, to convict knowing possessors or fences of stolen goods . . . ." New Jersey v. DiRienzo, 53 N.J. 360, 374, 251 A.2d 99, 106 (1969). A comprehensive list of decisions that have applied the rule to fencing cases may be found in 76 C.J.S. *Receiving Stolen Property* § 17, at 34 n.67 (1952), and 9 J. WIGMORE, *supra* note 277, § 2513, at 422 n.6 (C.J.S. *Receiving Stolen Property* § 17, note 65 (Supp. 1976), lists a Colorado and a Montana decision that rejected the presumption in receiving cases. The Colorado decision, however, is incorrectly cited, and the Montana case seemed to turn on a matter of statutory interpretation.

The Pennsylvania Supreme Court has rejected the presumption's applicability in receiving cases because of its purported irrationality. *See* Commonwealth v. Owens, 441 Pa. 318, 271 A.2d 230 (1970). The Pennsylvania decision, however, may be limited to its facts. *See* Note, *Criminal Law—Presumption That Unexplained Possession of Recently Stolen Goods Is Sufficient Evidence of Guilt of Receiving Stolen Goods Held Unconstitutional*, 75 DICKINSON L. REV. 544 (1971). In any event, the Supreme Court has recently given the doctrine constitutional approval in a case involving the receipt of stolen property. *See* Barnes v. United States, 412 U.S. 837 (1973). The question of rationality and the appropriate constitutional tests to be applied in this context is analyzed in notes 360-84 *infra* and accompanying text.

343. *See* MODEL THEFT AND FENCING ACT § 5(a)(1), Appendix B.

344. CAL. PENAL CODE § 496(2) (West Supp. 1975) (presumption upon secondhand dealer's failure to make inquiry); MICH. COMP. LAWS ANN. § 750.535 (Supp. 1976) (presumption upon personal property dealer's failure to make inquiry); MONT. REV. CODES ANN. § 94.2721 (1969) (presumption upon purchase from a minor, unless sold at fixed place of business); N.M. STAT. ANN. § 40A.16.11 (1972) (possession of other stolen property; purchase at price far below reasonable value; dealers presumed to know reasonable market value); N.Y. PENAL LAW § 165.55 (1975) (presumption upon pawnbroker's or dealer's failure to make reasonable inquiry); OKLA. STAT. ANN. tit. 21, § 1713 (Supp. 1975) (presumption from failure to make reasonable inquiry).

California's statute creating a presumption upon the purchase of property from a minor not operating at a fixed place of business was declared unconstitutional in People v. Stevenson, 58 Cal. 2d 794, 376 P.2d 297, 26 Cal. Rptr. 297 (1962). A similar, but more narrow, statutory presumption has recently been repealed by the Arizona legislature. *See* Ariz. Laws of 1974, ch. 144, § 2.

sion doctrine, however, these criminal-law presumptions are strictly statutory creations that, despite their potential utility, have not been enacted in most jurisdictions.[345]

Considerable confusion has long surrounded the role of the recent possession rule and other evidentiary presumptions in a criminal case.[346] McCormick characterized the term "presumption" as one of "the slipperiest member[s] of the family of legal terms,"[347] and concluded only that "a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[348] Unfortunately, both courts and legislatures initially experienced difficulty determining what this "uniform treatment" should be.[349] As a result, criminal presumptions at one time had a range of legal effects: some enabled the prosecution to escape a directed verdict of acquittal; others allowed a judge to give jury instructions as to what might permissibly be inferred from the evidence; and a few effectuated a complete shift in either the burden of producing evidence or the risk of nonpersuasion as to the presumed element.[350]

This wide range of potential legal effects was, however, eventually narrowed as constitutional constraints were recognized to preclude the operation of a so-called "true presumption" in criminal cases.[351] In civil cases, a true presumption shifts the burden of pro-

345. *See Hearings on Fencing* 164-71.

346. *See* McCORMICK § 346. For example, one fencing case involving the recent possession rule was erroneously decided partially because the court mistakenly assumed that the presumption was effecting a shift in the burden of proof. *See* Carter v. State, 82 Neb. 246, 249-50, 415 P.2d 325, 327 (1966). *Carter* was criticized in State v. DiRienzo, 53 N.J. 360, 375-77, 251 A.2d 99, 107-08 (1969). In another case, the recent possession rule was struck down, partially because of legislative language that clearly suggested that the burden of going forward with the evidence was being shifted upon the defendant's shoulders. *See* Payne v. State, 435 P.2d 424, 428 (Okla. Crim. App. 1967); note 380 *infra*. For a discussion outlining the extent to which a criminal presumption may shift the various burdens, see notes 350-54 *infra* and accompanying text.

347. McCORMICK § 342, at 802-03.

348. *Id.* at 803. *See* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953).

349. *See* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 528 (1955); Comment, *Tennessee Criminal Law—Larceny—Effect of Possession of Recently Stolen Property*, 3 MEMPHIS STATE L. REV. 294, 297-99 (1973); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

350. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 147-48; Comment, 34 U. CHI. L. REV. 141, *supra* note 349, at 141-42.

351. A "true presumption," otherwise known as a mandatory presumption or a presumption of law, "has the effect of forcing the jury to find the presumed fact if the proved fact is believed *and* no evidence rebutting the presumed fact is produced by the opposing party. However, the presumed fact may be disputed and need not

ducing evidence by requiring the jury to find the presumed fact in the absence of rebutting evidence if the proved fact is believed.[352] In such a situation, the effect of a true presumption is mandatory and requires a directed verdict for the proponent as to the presumed fact. In a criminal case, however, a verdict cannot be directed against the accused[353] because such a procedure would violate a defendant's constitutionally-protected rights to a jury trial and to have the prosecution burdened with establishing each element of the crime beyond a reasonable doubt. Accordingly, although the language of presumption is still frequently used in criminal cases, its actual effect has been reduced to that of what may be called a "permissible inference": The jury is instructed that it may infer the presumed fact from the fact proved, but that it is not required to do so.[354]

Even though the burden of proof constitutionally must remain on the prosecution,[355] "[t]he practical effect of the inference is to pressure the defendant into going forward with [exculpatory] evidence," since once an instruction has been given "[a] silent defendant assumes the risk that the jury will follow the natural probative force of the proven facts."[356] The source of this pressure is the

be found by the jury if evidence is introduced to rebut it." Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 342-43 (1970). *See* MCCORMICK § 342, at 803; C. TORCIA, *supra* note 338, §§ 90-91; 9 J. WIGMORE, *supra* note 277, § 2491, at 289.

352. *See* authorities cited note 351 *supra*. In addition, McCormick points out that "many authorities state that a true presumption should not only shift the burden of producing evidence, but also require that the party denying the existence of the presumed fact assume the burden of persuasion on the issue as well." MCCORMICK § 342, at 803. *See generally id.* at 824-26.

353. J. WEINSTEIN, *supra* note 337, § 303[04], at 303-22. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); MCCORMICK § 346, at 831.

354. *See* MCCORMICK § 342, at 804; MODEL PENAL CODE § 1.12(5) (Proposed Official Draft 1962) (presumption defined in terms of inference). For an excellent example of a decision that applied this analysis in the context of a fencing prosecution, see State v. DiRienzo, 53 N.J. 360, 375-77, 251 A.2d 99, 107-08 (1969).

355. MCCORMICK § 346, at 831; 1 H. UNDERHILL, CRIMINAL EVIDENCE § 50 (5th ed. 1956); J. WEINSTEIN § 303[04], at 303-24 to 303-25.

356. Note, *Due Process Requirements for Use of Non-Statutory Inferences in Criminal Cases*, 1973 WASH. U. L. Q. 897, 900 (1973). *See* J. WEINSTEIN § 303[04], at 303-26. The Supreme Court has acknowledged the "practical effect" of a criminal law presumption in the recent possession context:

> It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence.

Barnes v. United States, 412 U.S. 837, 846 n.11 (1973). Note that the Court's discussion subsequently mentions that the burden of going forward may be shifted upon the defendant. Once again, this statement must be analyzed in context. The Court

judge's instructions to the jury concerning the effect of a judicial or statutory inference, which permit, but do not compel, finding the presumed fact beyond a reasonable doubt even though jurors may not have otherwise made such a finding.[357] This effect is especially pronounced where a statute authorizes a jury instruction to the effect that the law regards the proved fact as "strong evidence" of the presumed fact.[358] At least on the state level, then, presumptions can mitigate the adverse impact on a criminal prosecutor's case that flows from the rule prohibiting judges from commenting on the evidence.[359]

To safeguard the rights of defendants, the Supreme Court has, over time, formulated due process guidelines for criminal law presumptions. In *Tot v. United States*,[360] the Court held a statutory presumption constitutional only if there is a reasonable connection in common experience between the basic fact and the presumed fact:

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[361]

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is speaking in terms of "practical effect," and not in terms of a formal shift that would require a directed verdict in the absence of rebutting evidence. *See* note 346 *supra*. Justice Black, however, has argued that even a shift in terms of practical effect is unconstitutional. *See* Turner v. United States, 396 U.S. 398, 429-34 (1970) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 74-88 (1965) (Black, J., dissenting). *See generally* J. WEINSTEIN § 303[01], at 303-08.

357. For a discussion of the relationship between presumptions and jury instructions in the criminal law, see notes 346-54, 369-75, 405-12 *infra* and accompanying text.

358. For example, S.1 provides that "although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as *strong evidence* of the fact presumed." Rule 25.1(4)(ii). When phrased in such terms, "the existence of a statutory presumption will probably enhance the value of a basic fact for the prosecution beyond its purely inferential significance." J. WEINSTEIN § 303[02], at 303-18. For a more detailed discussion of the potential impact of different jury instructions, see text at notes 406-12 *infra*.

359. In the absence of a presumption, most states do not permit the judge to comment on the evidence. *See* note 333 *supra* and accompanying text. While the presumption does not give him a right of comment, he is at least permitted to inform the jury of the inferential weight which may be attributed to certain fact patterns.

360. 319 U.S. 463 (1943) (footnotes omitted).

361. 319 U.S. at 467-68. In United States v. Gainey, 380 U.S. 63 (1965), the

The Court further developed the "rational connection" test in *Leary v. United States*,[362] which held that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend."[363] In *Leary*, the Court overturned a statute that authorized conviction of a person for possession of marijuana with knowledge it was illegally imported and that presumed such knowledge solely on proof of unexplained possession.

When a presumption is not involved, due process, of course, requires that the prosecution establish each element of a criminal offense beyond a reasonable doubt.[364] One plausible reading of the *Leary* Court's rational-connection analysis, however, would find it constitutionally proper to submit a case to the jury when the evidence supporting the presumed fact satisfied the "more likely than not" test but was insufficient to permit a finding that the element existed beyond a reasonable doubt. At least one commentator has suggested that a less restrictive evidentiary standard for presumptions is defensible since "[t]here is ordinarily no need for a presumption where the basic fact would, under ordinary methods of utilizing circumstan-

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Court applied the *Tot* test in upholding a statute that provided that a defendant's unexplained presence at an illegal still was sufficient evidence to authorize a conviction for carrying on "the business of a distiller." 380 U.S. at 64. The Court reasoned that the rationality test had been met, since "Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade . . . [and] that strangers to the illegal business rarely penetrate the curtain of secrecy." 380 U.S. at 67-68. An identical presumption, but one that attempted to authorize a conviction for *possession* of an illegal still, was subsequently struck down under the *Tot* analysis. *See* United States v. Romano, 382 U.S. 136 (1965).

Significantly, although *Gainey, Romano*, and other Supreme Court decisions applied the rational connection test to statutory presumptions, the Court's recent decision in Barnes v. United States, 412 U.S. 837 (1973), suggests that an identical analysis is appropriate for judicial presumptions. 412 U.S. at 845 n.8. *See* notes 378-84 *infra* and accompanying text.

362. 395 U.S. 6 (1969).

363. 395 U.S. at 36 (emphasis added). On this basis, the Court held constitutional a statutory presumption providing that unexplained possession of marihuana "shall be deemed sufficient evidence to authorize conviction" for receiving, concealing, buying, selling, or transporting the substance with knowledge of its illegal importation. 395 U.S. at 30 (quoting from 21 U.S.C. § 176a). "The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by *Tot, Gainey*, and *Romano*." Barnes v. United States, 412 U.S. 837, 842 (1973). *See* 395 U.S. at 52-53.

364. *In re* Winship, 397 U.S. 358, 364 (1970).

tial evidence, result in a jury finding the presumed fact."[365] This argument appears to be misconceived, however, because the primary purpose of modern presumptions is not to lower the standard of proof but only to facilitate the fact-finding process by providing jurors with information concerning a possible relationship between the fact proved and the presumed fact that may be beyond their common experience.[366] By creating a presumption, the legislature, in effect, serves as an expert witness offering testimony through the judge's instructions regarding the evidentiary significance of a particular fact pattern.[367] There is no reason for affording this particular type of "expert testimony" special treatment by subjecting it to a different standard simply because it is a legislative or judicial presumption. Indeed, although *Leary* and subsequent cases have not directly decided whether a presumption must satisfy the reasonable doubt standard, one commentator has argued that the Court has in fact adopted that evidentiary standard.[368]

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365. J. WEINSTEIN § 303[02], at 303-12. "Requiring a lesser quantum of evidence is, of course, the prime reason for resorting to presumptions." *Id.*

366. Legislatures are "permitted to create presumptions based, not only upon inferences that might naturally be derived from the facts, but also upon information that will never be given to the jury." MCCORMICK 816. "[Criminal] presumptions are based on empirical evidence that may be outside the expected knowledge of the average juror . . . ." S.1 REPORT 1094. *See* note 338 *supra* and accompanying text. "Unless the jurors are told of the value of the basic facts, which by hypothesis is not readily available to them, they may acquit when conviction is justified." WORKING PAPERS 21. Nevertheless, since a presumption in the criminal law context operates only as a permissive inference, notes 351-54 *supra* and accompanying text, it often serves as an evidentiary device that "merely formalizes a natural inference which one might expect reasonable jurors to draw on their own." S.1 REPORT 1904. *See* C. TORCIA, *supra* note 338, § 90; 9 J. WIGMORE, *supra* note 277, § 2491, at 288. For this reason, S.1 proposes the use of stronger jury instructions for statutory presumptions that embody the special expertise of the law. WORKING PAPERS 20-21, 24-25. *See* notes 406-12 *infra* and accompanying text.

367. Thus "[i]n United States v. Gainey, 380 U.S. 63 (1965), the Court suggested that in empirical matters 'not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.' 380 U.S. at 67." WORKING PAPERS 20 n.52. *See* notes 338, 366 *supra.*

368. W. LAFAVE & A. SCOTT, *supra* note 14, at 149. *See* J. WEINSTEIN § 303[02], at 303-12 to 303-13. Although the Supreme Court, in Turner v. United States, 396 U.S. 398 (1970), did not expressly adopt the beyond a reasonable doubt standard, commentators have suggested that "the Court's frequent reference to that standard in *Turner,* coupled with its decision in *In re Winship* [397 U.S. 358, 364 (1970] recognizing that such a measure of proof is constitutionally required in criminal cases, makes it likely that the reasonable doubt standard will be applied to test the validity of presumptions in the future." MCCORMICK 816. *See* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View,* 1970 DUKE L.J. 919, 923. Since the Supreme Court's initial draft of the Proposed Federal Rules of Evidence contained a section that seemed to incorporate the reasonable doubt standard, the commentators' forecasts did not seem unreasonable. PROPOSED FEDERAL RULES OF EVIDENCE, 56 F.R.D. 183, § 303(b) (1973). *See* J. WEINSTEIN § 303[02],

A more fundamental and potentially more important question, however, is whether the federal courts have indeed been correct in analyzing presumptions in terms of the due process requirements. A presumption in the criminal law is not mandatory; it only triggers a jury instruction concerning inferences that may be made if particular evidence is believed.[369] Accordingly, in the federal courts, where the trial judge still retains his common-law privilege to comment on the evidence,[370] a presumption, in fact, adds nothing to the substance and impact of a jury instruction. The discretionary right to comment on the evidence permits the judge to " 'analyze and dissect the evidence . . . in order to give appropriate assistance to the jury,' "[371] and it is well within the traditional scope of this privilege to comment on the significance of certain fact patterns.[372] The judge's discretion is, of course, not arbitrary and uncontrolled,[373] but once a statutory presumption in the criminal context is viewed as an exercise of discretion, the appropriate question concerns the propriety of the commentary or, more specifically, whether it infringes upon the jury's role as factfinder, and not whether a particular criminal presumption, however tested, comports with due process. The results often will be the same regardless of which analysis is applied, but this will not always be so since the standard of review is more flexible when the question is one of judicial discretion rather than one of due process.[374]

Currently, however, state restrictions on the trial judge's right to

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at 303-16 to 303-18. Nevertheless, when the Court was subsequently given the chance to adopt this standard, it declined to exercise this option. *See* Barnes v. United States, 421 U.S. 837, 843 (1973).

Thus far, the reasonable doubt standard has not been adopted by Congress. Section 303 of the Proposed Federal Rules of Evidence was excised from the draft which was ultimately enacted into law. *See* J. WEINSTEIN 303-1 to 303-6. S.1, however, has proposed the enactment of this evidentiary standard. Rule 25.1(a)(4). S.1 REPORT 1093-94.

369. *See* notes 346-54 *supra* and accompanying text.

370. *See* note 333 *supra.*

371. TRIAL BY JURY 125 (quoting Quercia v. United States, 289 U.S. 466, 470 (1933)). Since jurors naturally tend to equate the judge with their concept of "the law," there is little practical difference between the effect achieved by a jury instruction concerning what "the law" regards as a permissible inference and the trial judge's commentary regarding the significance of certain fact patterns.

372. In "exceptional cases," current federal law even permits "an expression of belief in the defendant's guilt." *Id.* at 127.

373. *Id.* at 125.

374. "It would appear that the comment privilege of federal judges is not abused. One study covering 12 years noted that of 5,781 federal criminal cases tried to juries and appealed, in only 85 cases was any complaint made about the judge's comments. The comments were held to be reversible error in but 30 of these cases, and were criticized in but two others." *Id.*

comment on the evidence inhibit the adoption of this approach at the state level;[375] at the federal level, unfortunately, the Supreme Court has shown no tendency to depart from the well-established rational-connection line of analysis. Thus, legislative bodies must enact statutory presumptions that are consistent with a due process line of analysis, with the probable result that only those inferences that enable a jury to find the presumed fact beyond a reasonable doubt will ultimately be held constitutional.

Yet, even though the trend is to a more rigorous constitutional standard, the Supreme Court has indicated courts may defer in some instances to the expertise or judgment of legislatures in enacting presumptions. In *United States v. Gainey*,[376] the Court stated that in empirical matters "not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."[377] This approach was reiterated in *Leary* and, more recently, appears to have been adopted in *Barnes v. United States*,[378] where the Court considered the constitutionality of the recent possession doctrine.[379] Before *Barnes*, several state courts had held the doctrine constitutionally deficient under the *Leary* standard,[380] even though it had been considered virtually a universally rec-

375. Since most states prohibit or restrict any judicial commentary, note 333 *supra*, any guidance to the jury concerning the significance of a particular fact pattern must be accomplished through the use of criminal presumptions. Even this goes too far in some jurisdictions. For example, Arkansas has traditionally equated comment and presumptions and condemned both as an invasion of the province of the jury. *See* Lott v. State, 223 Ark. 841, 268 S.W.2d 891 (1954); Blankenship v. State, 55 Ark. 244, 247-48, 18 S.W. 54, 55 (1891).

376. 380 U.S. 63 (1965).

377. 380 U.S. at 67.

378. 412 U.S. 837 (1973).

379. Many decisions involving criminal presumptions related to fencing activity have been concerned with the sale of property by minors. *Compare* People v. Stevenson, 58 Cal. 2d 794, 376 P.2d 297, 26 Cal. Rptr. 297 (1962) (en banc), *with* State v. Bundy, 91 Ariz. 325, 372 P.2d 329 (1962) (en banc). *See generally* Note, *Statutory Criminal Presumptions: Judicial Slight of Hand*, 53 VA. L. REV. 702, 723-29 (1967).

380. *See* Carter v. State, 82 Nev. 246, 248-50, 415 P.2d 325, 326-27 (1966); Payne v. State, 435 P.2d 424, 427-28 (Okla. Crim. App. 1968); Commonwealth v. Owens, 441 Pa. 318, 323-26, 271 A.2d 230, 233 (1970). *Contra*, Steve v. DiRienzo, 53 N.J. 360, 251 A.2d 99 (1969). The *Carter* and *Payne* decisions may have been made in part on the basis of a judicial concern with what was perceived to be an unconstitutional shifting of the burden of persuasion. *See* note 346 *supra*. Nevertheless, a similar concern did not furnish the basis for the *Owens* decision. There, the Pennsylvania supreme court seemingly focused on the general insufficiency of the prosecution's evidence and on statistics suggesting that the presumption was arbitrary in the particular context applied (a stolen handgun). 441 Pa. at 324-25, 271 A.2d at 233-34. The court erroneously cited authority purportedly demonstrating that a majority of jurisdictions have rejected the recent possession doctrine. 441 Pa. at 326

ognized presumption.[381] The *Barnes* Court, however, recognized the "impressive historical basis" underlying the recent possession rule and considered "[t]his longstanding and constant judicial approval of the instruction, reflecting accumulated common experience, [as providing] . . . strong indication that the instruction comports with due process."[382] Nevertheless, the Court considered historical considerations alone insufficient to warrant automatic constitutional approval, and thus proceeded independently to examine the presumption "in light of present-day experience,"[383] holding the presumption comports with due process regardless of the evidentiary standard applied.[384]

The analysis offered in *Barnes* has at least three important components. First, it suggests that legislatures enacting criminal presumptions should gather extensive empirical data and hold hearings examining all issues involved. Legislatures can make such studies more efficiently than can courts, and if an adequate record is developed, courts should be willing to defer to legislative determinations. Second, by testing the constitutionality of criminal presumptions with reference to the modern context, the Court has seemingly introduced the potential for much needed flexibility in law enforcement efforts. It is constitutionally permissible for legislatures to draft new presumptions to handle ever changing, increasingly sophisticated fencing techniques[385] provided the appropriate evidentiary standard is satisfied. Third, the Court has reaffirmed the principle that a presumption in a criminal case does not violate a defendant's fifth amendment privilege against self-incrimination provided the jury is instructed that the accused has a constitutional right not to take the stand and that the basic incriminating fact "could be satisfactorily explained by evidence independent of petitioner's testimony."[386] The tendency of a presumption to implicate the defendant and increase the pressure on him to testify was considered a consequence of the

n.5, 271 A.2d at 234 n.5. The cited authority, however, merely states the well accepted principle that the recent possession rule is inapplicable in the absence of additional incriminating circumstantial evidence. *See* note 391 *infra* and accompanying text.

381. Christie & Pye, *supra* note 347, at 925. *See, e.g.*, United States v. Jones, 418 F.2d 818, 821 (8th Cir. 1969).

382. 412 U.S. at 844.

383. 412 U.S. at 844.

384. 412 U.S. at 844-45.

385. Note, *supra* note 379, at 702. The sophisticated techniques employed by modern fences are discussed in notes 137-52 *supra* and accompanying text.

386. 412 U.S. at 846-47.

adversary process not in violation of fifth amendment privilege.[387] If the defendant is the only party with access to facts capable of rebutting the inference, his misfortune is "inherent in the case" and not necessarily created by the evidentiary presumption.[388]

The *Barnes* approach to criminal presumptions is especially welcomed, for it has become increasingly apparent that the long-used recent possession doctrine alone is unable to cope with sophisticated receivers.[389] Prosecutors have the task of establishing that the defendant had *unexplained, exclusive* possession of stolen property.[390] The difficulties they encounter in doing this are inherent in the very formulation of the rule. First, proof of recent possession, in the absence of other affirmative evidence tending to establish guilt, is not sufficient in many jurisdictions to sustain a conviction.[391] Second, although not every explanation a defendant offers precludes a jury instruction,[392] the more sophisticated fences can take precautionary measures that enable them to give reasonable explanations consistent with innocence.[393] Third, even when no such explanation is forthcoming, some jurisdictions hold that the rule does not apply where the prosecution is able to establish only constructive possession.[394] This approach directly impedes, for example, the successful prosecu-

387. 412 U.S. at 847. Nor would the Court consider the trial judge's instruction concerning the effect of the recent possession rule to constitute an impermissible "comment on the defendant's failure to testify." 412 U.S. at 846 n.12, *quoting* United States v. Gainey, 380 U.S. 63, 70-71 (1965).

388. The Court here cited with approval Yee Hem v. United States, 268 U.S. 178, 185 (1925), which said that a statutory presumption does not compel a defendant to be a witness against himself.

389. *See* J. HALL, *supra* note 5, at 189-93.

390. 9 J. WIGMORE, *supra* note 277, § 2513, at 422.

391. *See, e.g.*, State v. Long, 243 Ore. 561, 565, 415 P.2d 171, 173 (1966). "Whether possession plus additional circumstances is sufficient to show knowledge is a matter which must be considered on a case to case basis." Torres v. United States, 270 F.2d 252, 258 (9th Cir. 1959). *See also* Annot., 68 A.L.R. 187, 187-88 (1930).

392. "[T]he mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.'" Barnes v. United States, 412 U.S. 837, 845 n.9 (1973).

393. *See* note 138 *supra* and accompanying text.

394. *See, e.g.*, United States v. Russo, 123 F.2d 420, 422 (3rd Cir. 1941). Some courts have held that constructive possession merely serves to weaken the presumption's inferential strength, while others have seemingly ignored this question completely. *Compare* United States v. Casalinuovo, 350 F.2d 207, 211 (2d Cir. 1965), and United States v. DeSisto, 329 F.2d 929, 935 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1966), *with* Boehm v. United States, 271 F. 454, 457 (1921). It is easy to see how a reconsideration of the presumption field in light of the power of judges to comment on the evidence would facilitate the proper resolution of this split. Sophisticated analysis of "inference on an inference" would be inappropriate; the issue would be abuse of discretion. *See* TRIAL BY JURY 125. *See generally* C. TORCIA, *supra* note 338, § 91, at 148-51.

tion of master fences who avoid physical contact with stolen goods.[395] Fourth, the recent possession doctrine is not applicable where the defendant establishes that the possession was nonexclusive because other persons, not involved in the theft or fencing, also had access to the goods.[396] Finally, since courts recognize the inferential value of proof of possession of stolen property weakens as the time of the theft becomes more remote, the doctrine's effectiveness as a prosecutorial tool is always limited by the fence's potential ability to conceal the goods until the court "must hold that as a matter of law possession is no longer 'recent.' "[397]

These deficiencies in the recent possession rule, combined with the increasing sophistication of the modern fencing process and the declining ability of present-day jury panels to deal with complex issues,[398] necessitate the enactment of more effective criminal presumptions to help establish the *mens rea.* The Model Penal Code, for example, includes a presumption that would apply to any retailer or wholesaler who acquires property "for a consideration which he knows is far below its reasonable market value."[399] Such a presumption, which appropriately focuses upon a designated class of individuals whose fencing activities have had a profound impact on the national economy,[400] is included in section 5 of the Model Act.[401]

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395. *See* notes 142-47 *supra* and accompanying text.

396. *See* C. TORCIA, *supra* note 338, § 139, at 237 n.40. Some courts have refused to recognize the inference where the stolen goods were found "in a place where persons other than the defendant had an equal right and facility of access thereto." Annot., 51 A.L.R.3d 727, § 48(b), at 811 (1973). In general, however, "the requisite of 'exclusive possession' is anything but strictly applied in the defendant's favor. In case after case, the courts have considered all the circumstances in determining whether a jury might raise an inference of guilt from whatever degree of possession might be attributed to the defendant." *Id.* § 2, at 732. Thus, the "jointness" approach is widely applied, *id.* § 48(a), at 810 and possession is often considered exclusive where other persons have equal access under circumstances that suggest that the defendant knew that their right to access would probably not be exercised. *See* United States v. Casalinuovo, 350 F.2d 207, 210-11 (2d Cir. 1965).

397. STAFF REPORT ON SMALL BUSINESS 9-10 (footnote omitted). *Cf.* C. TORCIA, *supra* note 338, § 139, at 239. Most fences naturally prefer to dispose of their goods quite quickly, which they are generally able to do. *See* notes 131, 171 *supra* and accompanying text. Nevertheless, when necessary, "[c]ertain types of property like jewelry and securities can be easily concealed for an indefinite period of time." J. HALL, *supra* note 5, at 191. Even when long-term concealment is not contemplated, modern tracing techniques are so rudimentary that the interval between theft and recovery is frequently quite long. *Id.*

398. *See* authorities cited note 138 *supra.*

399. MODEL PENAL CODE § 223.6(2)(c) (Proposed Official Draft 1962). The Code defines "dealer" as "a person in the business of buying or selling goods." *Id.*

400. *See generally* notes 31-60, 48-49, 115-16, 118-20, 188 *supra* and accompanying text. The Code's proposal would apply to professional fences and to all so-

Nevertheless, since this provision would require the prosecution to establish a purchase price far below market value, a more sophisticated criminal presumption might be necessary to handle, for example, those situations where adequate business records are not available to help establish the purchase price. Accordingly, the Model Act contains a companion presumption that would give rise to an inference of recklessness whenever a dealer has made an unexplained purchase out of the ordinary course of business.[402] This presumption would apply on proof of unrecorded transactions, the retention of nonitemized or bogus receipts, the possession of altered merchandise, unusual methods of payment, purchases from noninstitutional sources, or similar conduct, that is viewed as purchasing behavior not in the "usual course of trade."[403] Since normal trade practices tend to vary by business, the presumption is cast in generalized terms to include the five preceding examples, yet also to retain sufficient flexibility to cover other unusual practices.[404] Similar presumptions should be enacted to help prosecutors establish the guilty state of mind in those jurisdictions that retain the stricter standard of criminal liability.

These statutory presumptions would, it is hoped, encounter little or no difficulty receiving judicial approval regardless of which evidentiary standard is applied.[405] In drafting such presumptions, it must be recognized that the constitutional constraints that preclude the operation of so-called true presumptions in criminal cases[406] do not prohibit legislatures from authorizing jury instructions that give additional strength to any particular statutory presumption.[407] Thus, although Congress[408] and state legislatures have been reluctant to

called "legitimate" businesses. Master fences would be indirectly affected, since they frequently funnel stolen goods to these establishments.

401. MODEL THEFT AND FENCING ACT § 5(a)(2), Appendix B.

402. *See* MODEL THEFT AND FENCING ACT § 5(a)(3), Appendix B. A similar proposal was initially suggested over twenty years ago in Hall's classic study. *See* J. HALL, *supra* note 5, at 224.

403. *Id. See* notes 331-33 *supra* and accompanying text. In particular, note 332 *supra* contains Hall's detailed list of circumstances that are often out of the ordinary course of business. On occasion, with respect to certain types of dealers (*i.e.*, junk merchants or pawnbrokers), the law may require that certain procedures, such as record-keeping, be made part of the ordinary course of business, and attach specific consequences for failure to comply. *See, e.g.*, FLA. STAT. ANN. § 812.051 (Supp. 1975).

404. By analogy, note that the drafters of the Uniform Commercial Code did not consider it necessary to provide a detailed definition of the term "buyer in the ordinary course of business." *See* UNIFORM COMMERCIAL CODE § 1-201(9).

405. *See* note 330 *supra* and accompanying text.

406. *See* notes 350-54 *supra* and accompanying text.

407. *See* WORKING PAPERS 23.

408. Currently, none of the federal statutes concerned with fencing provide any

exercise this power, it ought to be held constitutionally proper to provide that a jury be instructed, for example, that "although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as *strong evidence* of the fact presumed."[409]

This carefully-worded charge to the jury ought to be held satisfactory under the relevant constitutional limitations. First, an instruction that "the evidence as a whole must establish the presumed fact beyond a reasonable doubt" assures that the presumption is not given undue significance and protects a defendant's right to have the prosecution establish all elements of the alleged crime beyond a reasonable doubt. Second, a defendant's constitutional right to jury trial of all elements of the crime is guaranteed since the jury is not required to find the presumed fact on proof of the proved fact. Third, even though the "strong evidence" portion of the jury instruction certainly creates more pressure on the defendant to come forward and testify, his fifth amendment privilege against self-incrimination still

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criminal presumptions to assist in proof of *substantive* elements of the offense. The only statutory presumption included in any of these statutes is concerned exclusively with interstate commerce, a jurisdictional element. 18 U.S.C.A. § 659 (Supp. 1976). *See* WORKING PAPERS 26-31. S.1 has finally proposed that, in the absence of a reasonable explanation, both "possession of property recently stolen" and the "purchase . . . of stolen property at a price substantially below its market value," constitute prima facie evidence of the knowledge element. S.1, § 101, at 148 (proposed § 1738 (b)). Nevertheless, since S.1 distinguishes between prima facie evidence and statutory presumptions by attributing strong inferential weight and authorizing a strong jury instruction only for presumptions, characterizing these fact patterns merely as prima facie evidence subordinates their evidentiary significance and eliminates a real opportunity for facilitating the prosecutorial effort. *See* S.1, § 102, at 345 (proposed Rule 25.1(a)). The present congressional proposal represents a reversal from the position initially advocated by the original drafters. *See* WORKING PAPERS, *supra* note 262, at 22, 935-37.

409. S.1, § 102, at 12 (proposed Rule 25.1(a)(4) (A)(ii)) (emphasis added). Although the Supreme Court in United States v. Gainey, 380 U.S. 63, 71 n.7 (1965), has suggested that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation . . . omitting any explicit reference to the statute itself in the charge" this has not been viewed as a constitutional requirement. *See* J. WEINSTEIN § 303[07], at 303-36. The drafters of S.1 viewed rule 25.1 and its required jury instruction as "a careful reconciliation of the prosecution's and the defendant's interests." *See* WORKING PAPERS 24. Since the "strong evidence" language used by the section does not achieve a significantly greater inferential effect than the statute approved by the Court in Gainey (providing that certain evidence "shall be deemed sufficient . . . to authorize conviction"), the proposed instructions probably do not go beyond the scope of current fifth amendment limitations. *But see* MCCORMICK 832. Significantly, Justice Black, dissenting in *Gainey*, maintained that "[f]ew jurors could have failed to believe that it was their duty to convict under" a jury instruction to the effect that proof of the basic fact shall be deemed sufficient to authorize conviction. United States v. Gainey, 380 U.S. 63, 77 (1965) (Black, J., dissenting).

has not been violated.[410] If a trial judge commenting on the evidence could, in the exercise of discretion, opine that a particular fact pattern is strong evidence of incriminating conduct, the legislature should have the right to make a similar observation through a statutory presumption read to the jury.[411] The pressure that would be exerted upon the defendant is essentially the same as that which would be applied if the inferential significance of the proved facts had been explained by an independent expert witness during the course of the trial, although where a witness testified it is true that the defendant would have an opportunity for cross-examination. In effect, once a statutory presumption has satisfied the relevant due process test, the fifth amendment challenge necessarily dissolves.

(iv). *Strict liability.* Although the enactment of more modern criminal presumptions should facilitate proof of guilty knowledge, legislatures might alternatively abandon the state of mind element and treat possession of stolen property as a strict liability offense.[412] Imposition of strict liability for the receipt of stolen property on all classes of potential violators might encounter serious policy and due process objections, but it does not necessarily follow that similar objections would preclude a strict liability statute from being applicable only to retail and wholesale dealers.[413] While the Supreme

410. *See* United States v. Gainey, 380 U.S. at 70-71; J. WEINSTEIN § 303[07], at 303-36.

411. While it is still generally thought that the older common law-position supporting comment obtains in the federal courts, note 333 *supra*, the issue was clouded by the Supreme Court's opinion in Quercia v. United States, 289 U.S. 466 (1933), a decision soundly criticized by Wigmore. 9 J. WIGMORE, *supra* note 277, § 2551, at 508 n.7. The traditional rule of the Supreme Court was correctly stated in Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886) (discretion to comment on evidence that is ultimately submitted to jury).

412. Strict liability for fencing offenses was considered and rejected by the federal government in 1930. *See* J. HALL, *supra* note 5, at 228-29. Currently, S.1, "recogniz[ing] the force of arguments against the imposition of criminal liability where a person engages in conduct without culpability," has required that any legislation creating a title 18 strict liability offense "be manifest." S.1 REPORT 54. A provision that simply omits any reference to state of mind will not be considered a strict liability offense. *See* S.1, § 303, at 15. This formulation is probably consistent with the policy behind the Supreme Court's statutory construction decision in Morissette v. United States, 342 U.S. 246 (1952), where the Court essentially said "that *mens rea* was presumptively to be implied in the statutory redefinition of offenses taken over from the common law." Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 120. It is probably fair to say that receipt is a "common law" offense, even though it developed late and only through statutory enactment.

413. One New York decision struck down on due process grounds a statute that imposed strict liability upon junk dealers. People v. Estreich, 272 App. Div. 698, 75 N.Y.S.2d 267 (1947), *affd. mem.*, 297 N.Y. 910, 79 N.E.2d 742 (1948). This position, however, seems to be inconsistent with the Supreme Court's modern approach to the question of strict liability. *See* notes 415-17 *infra* and accompanying text. *But see* State v. DiRienzo, 53 N.J. 360, 376, 251 A.2d 99, 107 (1969) ("vulnerable to constitutional attack").

Court has acknowledged that the concept of *mens rea* is a well-established ingredient of the common law,[414] the principle does not yet have independent constitutional significance. Instead, the Court has characterized the strict liability issue as a question of legislative policy[415] and, in the absence of constitutional infringements,[416] has stated that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."[417]

The power to legislate strict liability crimes has been repeatedly upheld in a series of so-called public welfare cases.[418] Emphasizing

414. *See* Morissette v. United States, 342 U.S. 246, 250 (1952): "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Similarly, it has been said that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951). *But see* Packer, *supra* note 412, at 145-46 (deeply imbedded "principle that ignorance of the law is no excuse" is fundamentally "inconsistent with the asserted universality of *mens rea*").

415. Supreme Court decisions involving questions of strict liability have consistently focused on questions of legislative intent. *See* United States v. Park, 421 U.S. 658, 666-73 (1975); Morissette v. United States, 342 U.S. 246, 263 (1951); United States v. Dotterweich, 320 U.S. 277, 279-85 (1943); United States v. Balint, 258 U.S. 250, 252-54 (1922); W. LAFAVE & A. SCOTT, *supra* note 14, at 218-19. Legislative intent has generally been subordinated only when strict liability has threatened the exercise of first amendment freedoms. *See* note 416 *infra* and accompanying text.

416. The Court has stated that, on occasion, "doctrines, in most applications consistent with the Constitution . . . cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." Smith v. California, 361 U.S. 147, 150-51 (1959). Thus, in *Smith*, a strict liability obscenity statute was struck down because it infringed upon the first amendment rights of booksellers and the public by inducing sellers to be extremely cautious with regard to the books they make available for public consumption. 361 U.S. at 152-55.

417. Lambert v. California, 355 U.S. 225, 228 (1957). *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1970).

418. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933), observes: "[W]e are witnessing today a steadily growing stream of offenses punishable without any criminal intent whatsoever. Convictions may be had for the sales of adulterated or impure food, violations of the liquor laws, infractions of anti-narcotic acts, and many other offenses based upon conduct alone without regard to the mind or intent of the actor." *See* United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of adulterated drugs); United States v. Balint, 258 U.S. 250 (1922) (improper sale of narcotics); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting of timber on state lands). *See also* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) (application of *ignorantia legis* to transportation of dangerous acids); United States v. Freed, 401 U.S. 601, *rehearing denied*, 403 U.S. 912 (1971) (application of *ignorantia legis* to registration of dangerous firearms); United States v. Park, 421 U.S. 658 (1975) (strict and vicarious liability of president of food chain for rodent contamination). Strict liability statutes have generally received constitutional approval. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 221-22. Even so, the constitutionality of such legislation has been a favorite subject of debate among

the need to protect important public interests, these decisions have considered it appropriate for legislatures to require selected individuals to take extreme precautions against illegal acts and to assume the risk of a strict liability conviction for "innocent" wrongdoing.[419] Conviction under these statutes usually carries relatively light punishment,[420] although this is not always the case.[421]

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leading scholars. *See,* e.g., Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401, 422-25 (1958); Packer, *supra* note 412, at 147-52.

Thus far, however, the only Supreme Court decision that has raised serious constitutional questions concerning the validity of strict liability legislation is Lambert v. California, 355 U.S. 225 (1957). In declaring unconstitutional a city ordinance that penalized the failure of ex-felons to register with police authorities, the Court distinguished the *Dotterweich, Balint,* and *Shevlin-Carpenter Co.* line of authority: "But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." 355 U.S. at 228. This rationale, however, is inapplicable to fencing cases involving dealers, because such situations generally involve both affirmative conduct and circumstances that would alert the purchaser that he was buying stolen goods. *See* notes 123-25, 329-33 *supra* and accompanying text. Moreover, in applying the principles articulated in *Dotterweich,* even in the absence of such circumstances, a corporate officer could be held vicariously liable for the illegal conduct of one of his department store's buyers, where that buyer himself was being held strictly liable. Finally, the *Lambert* decision may be completely inapplicable to the question of strict liability with respect to attendant circumstances, since the case arguably involved an exception to the principle of *ignorantia legis;* the defendant had no knowledge of the law in question and could not, the court thought, be reasonably expected to inform himself. 355 U.S. at 229.

419. The Supreme Court's language in United States v. Dotterweich, 320 U.S. 277, 280-81 (1943), is precisely on point:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in *responsible relation* to a public danger. United States v. Balint. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . . ." (citation omitted) (emphasis added).

See United States v. Balint, 258 U.S. 250, 253-54 (1922). The court's explanation of *Dotterweich* in United States v. Park, 421 U.S. 658, 672-73 (1975), merits attention:

> The [Food and Drug] Act does not, as we observed in *Dotterweich,* make criminal liability turn on "awareness of some wrongdoing." . . . The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, does not require that which is objectively impossible. . . . If such a claim [of objective impossibility] is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power . . . to prevent or correct the prohibited condition.

420. *See* S.1 REPORT 54-55.

421. In United States v. Balint, 258 U.S. 250 (1922), "the Court showed no concern about the imposition of *severe criminal sanctions* without proof of blameworthiness. There was not a whisper in the opinion about the maximum penalty under the Act: five years' imprisonment . . . ." Packer, *supra* note 412, at 114 (emphasis added).

The felony-muder doctrine and statutory-rape provisions are examples of instances where strict liability principles are extended to more traditional crimes and where severe penal sanctions are provided.[422] Thus, there is precedent for developing a strict liability approach to a nonregulatory offense such as fencing. The imposition of strict liability, however, even upon a limited category of individuals, is somewhat of an anomaly in a criminal justice system that generally punishes only blameworthy individuals.[423] Since the constitutionality of such an approach does not necessarily mean that the approach is wise,[424] legislators must carefully evaluate whether the supposed increase in effective law enforcement, if any, will be won at the expense of society's normative standards. The Model Act does not adopt a strict liability approach, for the Act's provisions already greatly facilitate control of fencing schemes without abridging basic principles of criminal punishment.[425]

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422. Misdemeanor-manslaughter and bigamy are also traditionally strict liability crimes that carry heavy penalties. Parker, *supra* note 412, at 140-42. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 220.

423. The role of *mens rea* in the criminal law has been the subject of much discussion. The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*

Packer, *supra* note 412, at 109. *See* MODEL PENAL CODE § 2.05, Comment, at 140 (Tent. Draft No. 4, 1955). For an interesting discussion that attempts to reconcile these difficulties by limiting the applicability and impact of strict liability offenses, see Brady, *Strict Liability Offenses: A Justification,* 8 CRIM. L. BULL. 217 (1972). Significantly, since strict liability may not achieve any deterrent effect if the penalty imposed is too slight, Bradey proposes the adoption of a gradation continuum that would impose sanctions according to the degree of culpability proved. *Id.* at 222-24. For a more detailed discussion of gradation principles, see notes 450-67 *infra* and accompanying text. While general Supreme Court jurisprudence would seem to argue that a strict liability offense here would be constitutional, there is authority pointing the other way. *Compare* People v. Estreich, 272 App. Div. 698, 701, 75 N.Y.S.2d 267, 270 (1947) ("illegal and arbitrary interference with a lawful business"), *affd. mem.,* 297 N.Y. 910, 79 N.E.2d 742 (1948), *with* Kilbourne v. State, 84 Ohio St. 247, 95 N.E. 824 (1911). *Estreich,* however, is of questionable modern authority, since it is a "liberty of contract" due-process decision.

424. *See* Dennis v. United States, 341 U.S. 494, 555-56 (1951) (Frankfurter, J., concurring).

425. A gradation scheme that imposes minimal penalties upon strict liability offenders could potentially be more effective if special sanctions were provided for recidivists. Thus, the recidivist could be subjected to increased penal sanctions and to revocation of his operating license. Moreover, even under a modified gradation system, strict liability might serve as a powerful incentive to take preventative steps, since a criminal prosecution would have an important collateral estoppel effect in the event of a subsequent civil suit for treble damages. *See* note 481 *infra* and accompanying text.

(v). *Affirmative defense.* A final possible approach to the *mens rea* problem would adopt the strict liability definition of receiving for retailers and wholesalers, but would provide an affirmative defense of due diligence.[426] Under such a statute, the prosecution would have a sufficient case for conviction on proof of the receipt of stolen property, but the defendant could still be acquitted by demonstrating his compliance with a legislatively-defined standard of care when purchasing the goods. Legislatures have traditionally been accorded considerable latitude in defining the elements of criminal conduct,[427] and since strict liability criminal statutes have received judicial approval,[428] a strict liability statute that provides an affirmative defense arguably should receive similar treatment.

Nevertheless, the affirmative defense technique in the past has been attacked as an unconstitutional shift of both the burden of producing evidence and the risk of nonpersuasion to the defendant[429] in violation of due process.[430] While it has now been clearly decided that states may constitutionally place the burden of producing evidence on the defendant, since it would be unreasonable to require the prosecution to introduce evidence negating every possible affirmative defense,[431] considerable controversy still surrounds allocation of the risk of nonpersuasion.[432] The Supreme Court's traditional position on whether the burden of persuasion may be shifted has been quite flexible:

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defend-

426. Due diligence could be defined as adherence to reasonable commercial standards, or, if this is still too demanding, as the absence of recklessness (defined in note 271 *supra*). Note, however, that even the reasonable commercial standards formulation may be too relaxed an approach, since prevailing commercial standards may be quite low. Accordingly, consideration should be given to imposing an even higher standard of care. *See generally* Bradly, *supra* note 423, at 224-26.

427. "[T]he courts have long been loath to interfere with the power of legislatures to define criminal conduct." S.1 REPORT 1092 (footnote omitted). *See* note 412 *supra* and accompanying text. *But see* Mullaney v. Wilber, 421 U.S. 684 (1975) (impermissible to shift burden of persuasion on issue of passion in homicide case); Robinson v. California, 370 U.S. 660 (1962) (impermissible to punish status of drug addiction).

428. *See* notes 415-22 *supra* and accompanying text.

429. MCCORMICK, *supra* note 331, at 800-02, 830; MODEL PENAL CODE § 1.13, Comment, at 110-12 (Tent. Draft No. 4, 1955).

430. *See* MCCORMICK 801; Christie & Pye, *supra* note 368, at 933-38.

431. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 47; C. TORCIA, *supra* note 338, § 19.

432. W. LAFAVE & A. SCOTT, *supra* note 14, at 47-48. For an extensive listing of cases pro and con, see *id.* at 47 nn. 24 & 25.

> ant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.[433]

Until recently, the leading decision on the constitutionality of shifting the burden of proof was *Leland v. Oregon*,[434] which manifested this flexibility. In *Leland*, the Court approved a state statute that required the defendant to prove beyond a reasonable doubt his affirmative defense of insanity to a first-degree murder charge. *Leland*'s precedential value is less certain, however, after *In re Winship*,[435] which held that the prosecution must establish each element of the crime beyond a reasonable doubt, and *Mullaney v. Wilbur*,[436] which held that the state cannot shift to the defendant the burden of persuasion on the issue of "heat of passion" as a mitigating factor in a homicide prosecution. An affirmative defense that denies the existence of an essential element of the prosecution's case would appear to be governed by *Winship*:[437] "For example, it is clearly a

433. *See* Morrison v. California, 291 U.S. 82, 88-89 (1934). *See* MODEL PENAL CODE § 1.13, Comment, at 110-11 (Tent. Draft No. 4, 1955). It is unclear whether Morrison's approach is still good law. *See* note 435 *infra*.

434. 343 U.S. 790 (1952).

435. 397 U.S. 358, 364 (1970). *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 48. It has been observed:

> However, *Leland* does suggest that the constitutionality of a defense on which the defendant has the burden of persuasion is measured under a broad, due process standard. Thus, the ultimate question is whether the allocation of proof is reasonable. In an appropriate case it should be possible to make a strong showing of legality. If such an affirmative defense is an integral part of a reasonable legislative solution to a difficult problem, and the evidence on the matter is particularly within the control of the defendant, it is submitted that due process standards are met.

WORKING PAPERS 18-19 (footnote omitted). On the continuing validity of *Leland*, see People *ex rel.* Juhan v. District Ct., 165 Colo. 253, 260-61, 439 P.2d 741, 745 (1968) (insanity preponderance rule violated state constitution's due process clause); Commonwealth v. Vogel, 440 Pa. 1, 9, 268 A.2d 89, 93-94 (1970) (Jones, J., concurring); 440 Pa. at 14-15, 268 A.2d at 90 (Roberts, J., concurring).

436. 421 U.S. 684 (1975). Mr. Justice Rehnquist, with whom the Chief Justice concurred, joined in the *Mullaney* majority opinion and observed: "I see no inconsistency between . . . [*Winship*] and the holding of Leland v. Oregon." 421 U.S. at 705 (citations omitted). Presumably, they would see no inconsistency between *Mullaney* and *Leland*. On *Mullaney* and affirmative defenses, *compare* People v. Balogun, 17 CRIM. L. RPTR. 2486 (N.Y. Sup. Ct. Aug. 19, 1975), *with* People v. Long, 18 CRIM. L. RPTR. 2031 (N.Y. Sup. Ct. Aug. 25, 1975).

437. W. LAFAVE & A. SCOTT, *supra* note 14, at 48. The most recent attempt of the Supreme Court to essay the scope of *Winship* is *Mullaney*. The State argued that *Winship* should be limited to elements that bear on guilt, but not degree of guilt. The court rejected this distinction, observing that *Winship* was concerned with substance and not form, and illustrated its point by noting that otherwise the state would be wholly free "to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S. at 698. The Court then held that the defendant's stake in liberty outweighed the state's inter-

denial of due process to characterize alibi as a defense and then place the burden of persuasion on the defendant, for an alibi defense is nothing more than a denial that the defendant committed the crime."[438] It would be consistent, under this reasoning, to argue that the risk of nonpersuasion on the issue of insanity ought to remain on the prosecution since the defendant is in fact denying the requisite *mens rea* exists.[439] Yet the *Winship* rational need not necessarily be applicable where the affirmative defense does not deny the existence of an essential element of the crime but rather is more appropriately characterized as an excuse or justification for it—that is, as a form of confession and an avoidance. In this case, it may be constitutional to shift the burden of persuasion to the defendant since all elements of the crime have been established beyond a reasonable doubt.[440]

Although the distinction between affirmative defenses denying an element of the crime and those purporting to justify it is not always clear,[441] this approach has been adopted by several proposals to reform the criminal code and approved by some commentators. The Model Penal Code, for example, requires "the defendant to prove by a preponderance of the evidence"[442] any affirmative de-

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est in facilitating its prosecutive burden. 421 U.S. at 701-02.

It is not clear how *Mullaney* would affect an affirmative defense of lack of knowledge of the stolen character of the property in a fencing prosecution. Clearly, the history of the due process clause would argue that knowledge is the essence of the "crime" of receiving. *See* 421 U.S. at 696. Shifting the burden of persuasion on that issue to the defendant would be hard to distinguish from *Mullaney*. Ironically, it may well be, therefore, that the Constitution here seen in an historical perspective is consistent, as presently interpreted, with strict liability on the issue of knowledge, but is not consistent with an affirmative defense on that issue. *See* State v. Giordano, 121 N.J.L. 469, 3 A.2d 290 (1939), where affirmative defense language of a New Jersey statute was construed to be a clarification of a common-law presumption in order to avoid declaring the statute an unconstitutional shift of the burden of persuasion. This demonstrates the general difficulty that is experienced when an effort is made to integrate the Supreme Court's strict liability cases with traditional notions of due process. It is ironic, too, that *Mullaney* and United States v. Park, 421 U.S. 658 (1975), the Supreme Court's most recent reaffirmations of the concept of strict liability, were handed down on the same day. This, in turn, argues for a different reading of *Mullaney* keyed to the distinction between a defense seen as a negation of an element of the offense and an affirmative defense seen as a form of confession and avoidance. *See* text at note 440 *infra*.

438. W. LAFAVE & A. SCOTT, *supra* note 14, at 48. *See* MCCORMICK, *supra* note 331, at 801; 9 J. WIGMORE, *supra* note 277, § 2512, at 415; S.1 REPORT 1091.

439. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 48.

440. *See* MODEL PENAL CODE § 1.13, Comment, at 110-11 (Tent. Draft No. 4, 1955). This argument, however, has not gone uncriticized, and may represent a minority view. *See* MCCORMICK 801-02.

441. MODEL PENAL CODE § 1.13 Comment, at 111 (Tent. Draft No. 4, 1955).

442. MODEL PENAL CODE § 1.12(2)(b) (Proposed Official Draft, 1962).

fense which "involves a matter of excuse or justification peculiarly within . . . [his] knowledge . . . on which he can fairly be required to adduce supporting evidence."[443] A similar affirmative defense provision is contained in S.1, the proposal to reform the federal criminal code.[444] Although the S.1 proposal is not expressly limited to cases of excuse or justification, the bill's legislative history clearly indicates the burden of persuasion is to be shifted only when these defenses are involved.[445] Interestingly, both the Model Penal Code and S.1 require that a defendant prove his affirmative defense by only a preponderance of the evidence. This formulation apparently is partly the product of tension between proponents of shifting the burden of persuasion beyond a reasonable doubt and those who would require that the prosecution establish beyond a reasonable doubt every element of the defendant's guilt, which includes proving all elements of its case as well as the lack of any affirmative defense once the defendant's production burden has been satisfied.

As an alternative to the negation-excuse or justification distinction, at least one commentator suggests it is constitutionally permissible to shift the risk of nonpersuasion where it is a "sensible middle position between a much broader statute or strict-liability-type of statute, on the one hand, and, on the other, a statute recognizing the defense and placing an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant."[446] Such an approach merits consideration because it properly recognizes the underlying substantive issues—the due process rights of the defendant and the need to facilitate effective law enforcement—often masked by the somewhat artificial negation-excuse or justification distinction. Under this approach, a strict liability statute for dealers coupled with an affirmative defense should receive constitutional acceptance because of the difficulties in proving guilty knowledge, the defendant's ready access to any exculpatory evidence, and the likelihood that statutory penalties will be light.

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443. MODEL PENAL CODE § 1.12(3)(c) (Proposed Official Draft, 1962). The Code's Commentary, however, indicates that its drafters did "not favor such a shifting of the burden in the absence of the most exceptional considerations." MODEL PENAL CODE § 1.13 Comment, at 112 (Tent. Draft No. 4, 1955).

444. S.1, Proposed Rule 25.1. Under S.1, any defense designated as an affirmative defense involves a shifting of the burden of persuasion. All other defenses merely require the defendant to go forward with evidence "to support a reasonable belief as to its existence." *Id.* In this case, once the defendant has successfully raised a reasonable belief, "the government has the burden of proving the nonexistence of the defense beyond a reasonable doubt." *Id.*

445. *See* S.1 REPORT 1091.

446. W. LAFAVE & A. SCOTT, *supra* note 14, at 49. *See* WORKING PAPERS 17-19.

One argument against the use of an affirmative defense approach is that it may be a legislative subterfuge functionally equivalent to an impermissible statutory presumption that effects an unconstitutional shifting of the burden of persuasion.[447] A response to this criticism can be made on both analytical and policy grounds. While the courts surely will not hesitate to expose a subterfuge for what it is, there should be different due process tests for a substantive approach that involves redefining the elements of the crime on the one hand and for a merely procedural approach on the other. Accordingly, in the case of affirmative defenses, the appropriate judicial focus for due process should concern whether the relevant provision is impermissibly designed to negate an element of the offense, and not whether it achieves the same procedural consequences as a statutory presumption.[448] More fundamentally, since legislatures have a large measure of freedom to abandon the *mens rea* element,[449] an analysis that applies the procedural due process test may leave defendants "materially worse off" by forcing the enactment of strict liability statutes with no provision for affirmative defenses.[450] Although the affirmative defense approach ought to satisfy due process, no such approach is taken in the Model Act because of serious doubts as to its constitutionality under prevailing analysis.

3. *Sentencing Convicted Receivers*

Redefining the substantive and procedural criminal law of fencing is a necessary first step but it will not bring about improved law

447. *See* J. WEINSTEIN § 303[04], at 303-23-24. Indeed, courts have construed apparent "affirmative defenses" as "permissible inferences" to avoid constitutional difficulties. *See* State v. Giordano, 121 N.J.L. 469, 3 A.2d 290 (1939); Mantell v. Jones, 150 Neb. 785, 36 N.W.2d 115 (1949). In addition to effecting a shift in the burden of persuasion, an affirmative defense provision may not have to comply with the rational connection test. *See* note 430 *supra*. *But see* Mullaney v. Wilbur, 421 U.S. 684 (1975).

448. In other words, a different due process test ought to be applicable, depending upon whether a procedural or substantive enactment is involved. Nevertheless, while it is clear that statutory presumptions are procedural devices, affirmative defenses may be in somewhat of an intermediary position, particularly in light of their procedural consequences. It is not without significance, therefore, that the Supreme Court in *Mullaney*, 421 U.S. at 702 n.31 saw fit to rely on the presumption cases in striking down an affirmative defense. The Court seemed to feel that a "more exacting standard" was required in the affirmative defense area than in the presumption area.

449. *See* notes 259-63 *supra* and accompanying text.

450. Although this argument is sound on policy grounds, the Supreme Court has twice indicated that the mere fact that Congress has the "greater" power to define criminal conduct in a certain way is not determinative. The Court's constitutional analysis has traditionally focused on what Congress *has done* rather than on what that body *could have done*. *See* United States v. Romano, 382 U.S. 136, 144 (1965); Tot v. United States, 319 U.S. 463, 472 (1943).

enforcement unless accompanied by revision in sentencing procedures. Legislative and judicial attitudes to the punishment of convicted receivers exhibit the same fundamental misunderstanding of the significance of fencing that characterizes society's definition of the substantive crime.[451] In almost every state, criminal receivers and thieves are subject to the same penalties,[452] an approach that continues "to denigrate the role of the fence in the theft microcosm."[453] Further, there is evidence that in exercising their discretion under sentencing statutes, most judges frequently treat receivers leniently.[454] Fundamental to an effective criminal law of receiving, however, is a realization that fences are a major cause of theft,[455] that fencing is a more serious crime than theft, and that, accordingly, the law ought to impose more severe penal sanctions upon criminal receivers,[456] at least where the goods are not received for personal consumption.

New legislation providing stiffer penalties for receivers would convey to judges the legislature's determination that fencing crimes are, indeed, serious and that lighter sentences for receivers are no longer appropriate.[457] Although modernization of sentencing provisions along these lines is a necessary reform, it alone is not sufficient. The criminal law of receiving must also make sophisticated distinc-

451. *See* notes 174-90 *supra* and accompanying text. For example, in eighteenth century England, thieves were punished more severely than fences. *See* Chappell & Walsh, *"No Questions Asked"* 162-63.

452. *See* REPORT, THE IMPACT OF CRIME 21; *Hearings on Fencing* 163-71. S.1 would continue this practice for those who traffic in stolen property (§ 1732) and lessen the penalties for those who merely possess it (§ 1733), presumably for personal consumption. Only the special sentencing provisions of § 2302(b) would work to impose higher penalties on certain offenders. *See* note 465 *infra.*

453. REPORT, THE IMPACT OF CRIME 21.

454. *Id.* Convicted fences are too often given suspended sentences, put on probation, or merely fined. "[I]ronically, 'burglars like to plead guilty to being receivers. Apparently, they are not as stigmatized by being receivers.'" *Id.* at 22 (quoting Los Angeles District Attorney).

455. *Id.* See notes 16-21 *supra* and accompanying text.

456. *See* REPORT, THE IMPACT OF CRIME 21.

457. One possibility is the use of mandatory sentences. Mandatory sentences, though often believed to be unwise, are generally thought to be a matter of legislative judgment. *See, e.g.*, People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S. 2d 471 (1975) (mandatory life for drug offender upheld). Appellate review by the prosecution would probably not be unconstitutional under the double jeopardy clause in light of the Supreme Court's recent decision in United States v. Wilson, 420 U.S. 332 (1975) (appeal possible except where retrial of facts required). Nor would general due process considerations seem to militate against it. *See generally* Blackledge v. Perry, 417 U.S. 21, 27 (1974); Colten v. Kentucky, 407 U.S. 104 (1972). The policy considerations supporting a "mutual review" concept are ably set out in Testimony of Professor Livingston Hall on behalf of the A.B.A., *Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 5364-69 (1973). On balance, appellate review seems preferable to mandatory sentencing.

tions among fences according to the degree of their culpability.[458] Illustrative of such a scheme is the Model Act, which sanctions differently receivers who purchase for consumption only,[459] those who purchase for resale,[460] and fences who both initiate thefts and arrange the redistribution of stolen merchandise.[461]

These suggested penal provisions have at least two somewhat interrelated advantages. First, by drafting three sets of penalty provisions instead of one, legislatures can better communicate to judges their determination of the relative seriousness of various fencing crimes. Second, multiple penal provisions would give judges more flexibility to tailor punishment to the crime, thereby presumably maximizing incapacitation, increasing deterrence, and reducing the risk of nullification by a jury not wishing, for example, to subject a consumer of stolen goods to the harsh sanction more properly reserved for a master fence.

Attempts to distinguish among receivers solely on the value of the stolen property received, the traditional approach to grading punishment in theft crimes, is inadequate for several reasons. First, establishing precisely how much stolen property a particular receiver has handled is often difficult, thus undermining the very basis of this approach to sentencing. Second, a scheme that emphasizes the particular economic function of the fence is a more accurate method of allocating punishment since, on the whole, it is highly probable that the value and volume of stolen property handled by a master fence is greater than that redistributed by a professional fence even though this may be difficult to prove. Third, a scheme that allocates punishment according to the value of the property stolen obscures distinctions based on personal blameworthiness. The occasional consumer of stolen goods is not generally an organizer of theft activity, and, by definition, his purchase is not for resale purposes. Consequently, his overall conduct is less blameworthy than that of an outlet fence or master fence because his adverse impact on society is considerably smaller. This difference in culpability, however, may not as a practical matter result in different penal treatment in a criminal code that looks only at value of the property handled. Thus, while it may often be true that distinctions based on value furnish

458. This proposal was initially made by Hall, but there has been little action on either the state or federal level. *See* J. HALL, *supra* note 5, at 155-57, 217-19. Hall, however, never went further to distinguish between a fence who was a mere dealer and one who was engaged in the trafficking of stolen goods.

459. *See* MODEL THEFT AND FENCING ACT § 2, Appendix B.

460. *See* MODEL THEFT AND FENCING ACT § 4(b)(1), Appendix B.

461. *See* MODEL THEFT AND FENCING ACT § 4(b)(2), Appendix B.

a preliminary means for evaluating the gravity of criminal conduct, value alone should not be determinative. Instead, the law ought to use distinctions based on value as a basis for differentiating sanctions *within* each category of receiver.[462]

Despite the obvious benefits of a scheme that grades criminal offenses more discriminatingly, most recent proposals for reforming the criminal laws have eschewed such an approach. Ironically, the Model Penal Code may have contributed to this failure. That proposal consolidates theft and receiving and then distinguishes various classes of thieves and receivers,[463] but treats identically thieves and receivers who are consumers, dealers, or brokers of stolen goods once a minimum level of value ($500) is involved.[464] Similar deficiencies are present in S.1, which generally provides equal penal treatment for thieves and fences and makes no enhancing distinction for penal purposes between categories of receivers for resale.[465] Ironically, S.1 does recognize a functional distinction between receiving and trafficking in stolen property,[466] but little effort is made to reflect the distinction in penal sanctions.

At the federal level, under current law such deficiencies are not as serious as they otherwise would be because title X of the Organized Crime Control Act of 1970 provides for sentences of up to

462. *See* MODEL THEFT AND FENCING ACT § 2(b)(2), Appendix B.

463. MODEL PENAL CODE § 223.1(2) (Proposed Official Draft, 1962) provides as follows:

> *Grading of Theft Offenses.*
>
> (a) Theft constitutes a felony of the third degree if the amount involved exceeds $500, or if the property stolen is a firearm, automobile, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
>
> (b) Theft not within the preceding paragraph constitutes a misdemeanor . . . .

This provision singles out dealers for particular treatment only when less than $500 is involved; the proposed statute also makes no attempt to impose heavier penalties on big-time fences when larger amounts are involved. Unfortunately, a similar, although more complicated, proposal was made by the National Commission on Reform of Federal Criminal Laws. *See* REFORM COMMN., *supra* note 190, § 1735(2)(f). The Model Penal Code, at least, has already lead, albeit unintentionally, to unwise reform at the state level. *See* note 190 *supra*. It remains to be seen whether the recommendations of the reform commission will be carried into law in a similarly unsophisticated fashion. *See* note 465 *infra*.

464. *See* MODEL PENAL CODE § 223.1(2) (Proposed Official Draft, 1962); notes 190, 452 *supra* and accompanying text. Provision is made, however, for an extended term. *See* MODEL PENAL CODE § 6.07 (Proposed Official Draft, 1962) (authorizing extended terms), § 7.03 (Proposed Official Draft, 1962) (criteria for extended terms).

465. *See* S.1, §§ 1731-1733. Provision is made, however, for an extended term. S.1, § 2301(c) (authorizing extended terms); S.1, § 2302(b) (criteria for extended terms). *See also* S.1, § 1801 (operating a racketeering syndicate); S.1, § 1802 (racketeering).

466. *Compare* S.1, §§ 111 & 1732, *with* § 1733.

twenty-five years for certain "special offenders," a category that would include professional fences and large-scale organizers.[467] Not all criminal dealers are covered, however, and title X is, of course, not applicable to those convicted in state courts on state charges. Until reformers of the criminal law of receiving recognize and correct the existing inadequacies of our penal codes, therefore, the full benefits of any substantive and procedural reforms will not be realized.

B. *Civil Remedies for Fencing Crimes*

The only adequate approach to the criminal receiver is that which deals with him as an established participant in the economic life of society, whose behavior has been institutionalized over a span of more than two centuries in Anglo-American experience.[468]

Although modernization of the criminal law of fencing should facilitate enforcement, an exclusively criminal law approach to the problem is insufficient because it ignores the opportunities for improved social control offered by civil sanctions. Appropriate provisions for civil liability can both directly reinforce the effects of newly-enacted criminal statutes and add new dimensions to law enforcement efforts. As discussed in earlier sections, a comprehensive redefinition of the substantive criminal law of theft and fencing is necessary to make redistribution financially less profitable.[469] Civil statutes can play an important supplementary role in this process in at least two ways. First, by permitting and encouraging victims of theft to initiate civil suits under fencing statutes to recover damages against purchasers of their stolen goods, appropriately drafted civil provisions will increase the likelihood a violator will be discovered and will thus greatly enlarge his penalties. Second, at least to the extent that punitive damages are awarded, civil suits provide a means for sanctioning those receivers who cannot be convicted under criminal statutes. Private plaintiffs seeking damages from receivers enjoy important substantive and procedural advantages not available to the prosecution in criminal actions since most of the constitutional protections accorded a criminal defendant are not applicable in civil litigation.[470]

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467. 18 U.S.C. § 3575-3578 (1970) provides procedures by which designated special offenders may be sentenced to a maximum of 25 years' imprisonment. *See* J. McCLELLAN, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 146-88 (1970).

468. J. HALL, *supra* note 5, at 155 (emphasis added).

469. *See* text at notes 191-273 *supra*.

470. STAFF REPORT ON SMALL BUSINESS 13. *See generally* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 124 (1975).

In most jurisdictions, only the common-law action for conversion is available to theft victims seeking recovery. A successful suit for conversion permits recovery of the market value of the goods at the time and place of their conversion on proof the defendant interfered with the plaintiff's control of the property.[471] Actions in conversion, however, have significant deficiencies in receiving cases that seriously impair the role of private enforcement as a method of control. The most significant obstacle to civil actions in conversion is the problem of proof that permeates many criminal fencing cases: A civil plaintiff generally finds it difficult to establish that his property has been converted since receivers legitimize and dispose of the goods rapidly. As a practical matter, therefore, if a civil suit is at all possible, a plaintiff's recovery is limited to the market value of those goods actually found in the defendant's possession.[472] Further, since plaintiffs in conversion cannot recover expenses of the suit, such as the costs of investigation and attorney's fees, victimized plaintiffs are never fully compensated. Punitive damages, although theoretically recoverable, are rarely awarded because of the difficulties in establishing the requisite aggravated state of mind.[473] The unfortunate result is that theft victims increasingly recover on insur-

471. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 403 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 123, at 463 (1935) [hereinafter MCCORMICK ON DAMAGES]. Under the market value formula, the defendant would most often be liable for the wholesale value of the goods. Retail value would only apply when the goods were stolen from a noncommercial victim. To do otherwise would automatically give the commercial victim a guaranteed profit on every item converted. This would not be appropriate, since every merchant purchasing goods at wholesale prices incurs a risk that he will not be able to sell the items for a profit. Assuming that problems of proof could be overcome, *see* note 472 *infra*, the victim would, however, be able to recover the selling price of those goods that a commercial defendant had sold for profit. Although sometimes limited to the bad faith converter, this rule is an application of the common law doctrine of "waiver of the tort and suit in assumpsit," that is designed to prevent unjust enrichment. D. DOBBS, *supra*, § 5.15, at 414. *See* RESTATEMENT OF RESTITUTION § 154 (1937).

Finally, since the typical commercial defendant is normally not able to recover money from the thief or fence who made the initial sale, some deterrent effect is achieved because the receiver is effectively forced to pay twice for the same goods.

472. Immediate resale is an important attribute of any successful fencing operation. *See* note 131 *supra* and accompanying text. If the business purposefully avoids maintaining detailed records of its transactions, tracing the stolen goods that have already been resold may be impossible. Even when records have been maintained, if the stolen goods have been mixed with legitimate merchandise, tracing the goods so that the plaintiff can recover the defendant's sale price (waiving the tort and suing *in assumpsit*, *see* D. DOBBS, *supra* note 471, § 5.15, at 414) may be an equally difficult task. *See* notes 137, 226-32 *supra* and accompanying text.

473. *See* D. DOBBS, *supra* note 471, § 3.9, at 205; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 9-10 (4th ed. 1971). In at least one case, however, purchase at a price substantially below market value and at an unusual hour of the night was considered sufficient to result in a jury award of punitive damages. *See Hearings on Criminal Laws* 310.

ance contracts, a convenient, less expensive alternative to civil litigation, and pass along increased insurance costs to consumers.[474] Thus, the increase in deterrence expected from private law enforcement is not realized.

Clearly, then, a new cause of action more favorable to plaintiffs needs to be created if private civil litigation is to play a substantial role in curbing fencing operations. The Model Act provides such a civil action by adopting an approach used by the federal antitrust statutes[475] and imposing civil liability on proof of the elements of a criminal violation.[476] Under the proposed statute, a receiver is liable for damages if the plaintiff establishes the receipt, requisite *mens rea*, and ownership of the property by a preponderance of the evidence. This lower evidentiary standard is especially important in cases where the prosecution decides not to file criminal charges against a purchaser of stolen goods because of the difficulties in establishing guilty state of mind beyond a reasonable doubt. The provisions for civil liability make it less likely that receivers will escape sanction since it is usually considerably easier for plaintiffs to establish the *mens rea* by a preponderance of the evidence.[477] To ease the burden of proof in civil cases, the statute extends to the civil context the presumption of recklessness[478] on proof of the possession of recently stolen property, of the purchase or sale of stolen property at a price substantially below fair market value, or of the purchase or sale of stolen property out of the regular course of business.[479] Finally, the proposed statute tolls the civil statute of limitations dur-

474. The Department of Commerce has recognized that "small firms are less able to afford the overhead required for extensive protective measures to absorb . . . losses [attributed to theft and fencing]." *Hearings on Criminal Laws* 374. Eventually, the pressure of increased insurance rates, which these competitive smaller firms cannot pass along to the public, may force many businesses to close. *See* note 51 *supra* and accompanying text. Unfortunately, insurance policies themselves do not achieve any deterrent effect. *See* CARGO THEFT AND ORGANIZED CRIME 12 (money paid by insurers enriches criminal element of society).

475. Clayton Act § 4, 15 U.S.C. § 15 (1970).

476. *See* MODEL THEFT AND FENCING ACT § 10(a), Appendix B.

477. *See* MCCORMICK 793; *Hearings on Criminal Laws* 310.

478. Although the civil remedy provision may incorporate the same state of mind requirement contained in the criminal statute, this is not an absolute prerequisite. Liability could be imposed on the basis of a civil negligence standard, that is, a failure to exercise due care. *See* STAFF REPORT ON SMALL BUSINESS 13. Indeed, strict liability in a civil context should be given serious consideration. *See generally* W. PROSSER, *supra* note 473, at 493-95. In reality, the law already imposes strict liability with respect to attendant circumstances in conversion actions. *Id.* at 83. Significantly, a series of recent statutes authorizes the recovery of treble damages against any receiver of stolen property. For the source of this legislation see 33 SUGGESTED STATE LEGISLATION 111 (Council of State Governments 1974).

479. *See* MODEL THEFT AND FENCING ACT § 10 (incorporating § 5) Appendix B.

ing criminal prosecutions[480] and gives collateral estoppel effect to issues resolved against the defendant in a prior criminal trial on the same facts.[481] The effect of these last two provisions is to ensure that civil damage suits follow successful criminal prosecutions.

This statutory cause of action is not designed to replace the common law action in conversion, which would still be available to plaintiffs who could not prove the requisite state of mind by a preponderance of the evidence but could show a substantial interference with control of their property. Nevertheless, a most significant difference between the two causes of action that makes the statutory one more desirable is the measure of damages. As a financial incentive to sue, section 10 of the Model Act authorizes recovery of treble damages, reasonable attorney's fees, and costs of investigation and litigation.[482] The treble damages provision, a concept borrowed from

480. *See* MODEL THEFT AND FENCING ACT § 11(c), Appendix B.

481. Although most courts rejected extension of a collateral estoppel effect to a subsequent civil case because of the absence of mutuality, a few jurisdictions have refused to follow this reasoning. *See* F. JAMES, CIVIL PROCEDURE § 11.35, at 607 (1965). In any event, mutuality should no longer be a bar to the application of collateral estoppel because the doctrine of mutuality itself has declined considerably. *See* R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 859 (1973). Even so, many jurisdictions have been reluctant to apply collateral estoppel in this context. Consequently, a prior criminal conviction will often have no effect. Nevertheless, although not yet the majority rule, the trend of decisions "manifest[s] an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel." FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES rule 803(22), Advisory Committee Notes, at 132 (West 1975). Accordingly, these cases have permitted prior criminal judgments (or particular issues decided therein) to be admitted in evidence for consideration by the fact-finder. *Id.* *See* F. JAMES, *supra*, § 11.35, at 607; MCCORMICK, *supra* note 331, at 740; Annot., 18 A.L.R.2d 1287, 1299-1307 (1951).

482. The concept of treble damages for theft is not new. Its origins lie in Roman criminal law. *See* 1 J. STEPHENS, A HISTORY OF THE CRIMINAL LAW 10 (1888). It can also be found in early American law. *See, e.g.*, Commonwealth v. Andrews, 2 Mass. 13 (1806). More is required, however, than the mere authorization of recovery. Although the spur provided by the possibility of treble damage suits would motivate many individual victims to institute civil proceedings, their ability to do so would be constrained by resource limitations. The investigation of theft and fencing activity and any subsequent litigation efforts would inevitably entail expending considerable time and resources. Since not every investigation or litigation effort will successfully result in a judgment awarding treble damages, costs, and fees, the individual victim may not be willing to risk his limited financial resources. Consequently, an industry-wide approach would seem to provide a more realistic way of coping with the inevitable investigatory and legal expenses inherent in any litigation effort. For example, an association of common carriers or shippers could maintain a separate fund to finance this type of litigation. Wherever successful, most of the resulting proceeds would be paid to the individual victim, while the remainder, a predetermined percentage, could be returned to the fund to finance future investigation and civil proceedings. Insurance companies would also have the resources necessary to investigate illicit activity and to bring suit against retail or wholesale receivers. An important question is whether an insurer, suing under subrogation principles, would be entitled to those damages that go beyond the amount paid in compensation to the insured—that is, whether an insurance company is entitled to the additional

federal antitrust statutes,[483] provides for triple recovery of actual damages, including consequential and incidental losses,[484] instead of the mere market value of the converted goods.

Yet as a practical matter, this financial incentive to sue would not be adequately realized in many cases if a defendant's potential liability were limited to three times the value of stolen goods actually received.[485] Such an approach would permit networks of thieves

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gains of a treble damages action. Five different rules, ranging from one that gives the insurer the complete addition to one that grants the insured the complete addition, have been discussed by the courts. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW, § 3.10(c), at 160-62. For obvious policy reasons, however, in the context of theft and fencing, the insurance company should be allowed to retain the additional gain. To do otherwise would remove the insurer's incentive to sue, an undesirable result since private parties may lack the resources necessary for this type of litigation. Moreover, if insurance companies were granted the profits of a treble damages action, they would be given the motivation to initiate prosecutions against fences instead of, as is the prevailing practice today, attempting to buy the goods back from them at a good price.

483. Clayton Act § 4, 15 U.S.C. § 15 (1970).

484. Of course, special damages must be proven, but in view of the extensive indirect costs that theft and fencing activity generate, the potential recovery will always be quite large. *See* notes 50-56 *supra* and accompanying text. Under the language of some legislation, business competitors who have suffered no theft loss could conceivably bring suit on unfair competition grounds against an establishment dealing in stolen goods. *See* S.13, 93d Cong., 1st Sess. § (2)(i) (1973); CAL. PENAL CODE § 496 (West Supp. 1975). In such a case, the plaintiff would be entitled to three times his lost profits. Most often, however, problems of proof would preclude recovery, since the plaintiff must be able to establish both his relative share of the market in comparison to the defendant's and the extent to which the defendant's sales at lower prices resulted in decreased profits. Such an effort would only be worthwhile when the amount of lost profits was high. The plaintiff committed to this mode of action would attempt to apply an antitrust-type measure of damages. *See Hearings on Criminal Laws* 328-31.

In many cases, the size of the recovery will simply reflect a measure of threefold the wholesale value of the stolen goods, a direct application of the conversion market value formula. *See* authorities cited note 471 *supra*. Currently, once a loss has occurred, the prevailing practice is for the shipper to file a claim with his insurer. The insurer pays the claim and then proceeds against the carrier or the carrier's insurance company. The matter is then settled by these parties, by court action or otherwise. Under the treble damages approach, any of these parties—the shipper, his insurer, the carrier, or its insurance company—depending on which one incurs the ultimate loss, could sue the receiver on a conversion theory. The shipper's right to sue would be based simply on its status as the owner of converted property. The right of the shipper's insurance company to sue would be based on traditional subrogation principles. *See generally* R. KEETON, *supra* note 482, § 3.10 (1971). If necessary, the carrier's right to sue could be based on his status as a bailor. *See* MCCORMICK ON DAMAGES, § 123, at 463-65; The Winkfield, Court of Appeal, 1901 [1902], at 42. Finally, his insurance company's right to sue could also be based on subrogation principles. In the event that the carrier's liability to the shipper is limited to a designated amount by law or by contract, the thief or criminal receiver would not be able to limit his liability to this amount, since well-established bailment principles hold that this is a matter strictly between the bailor and bailee. The Winkfield, Court of Appeal, 1901 [1902], at 42.

485. At least two potential measures of damages could be applied, depending on the statutory language. If the statute authorizes a recovery based on the value of the goods, and the law limits the defendant's liability merely to goods received rather

and fences to avoid the impact of the treble-damages provision by channeling the stolen merchandise through a large number of receivers. Thus, there would be little incentive to sue unless a substantial number of these receivers were located. One possible solution to this problem is to hold each receiver jointly and severally liable for the value of the entire shipment on proof it redistributed some of the stolen goods. Under this approach, a producer need only locate one large receiver with sufficient assets to satisfy a judgment. A drawback to such an approach, however, might be the apparent unfairness of imposing treble-damages liability on a receiver of only a small part of the total shipment.

The proposed statute attempts to provide the financial incentives needed to realize the deterrence value of private enforcement and yet minimize the inequities of excessive liability. For purposes of analysis, it is necessary to consider, on the one hand, receivers who purchase stolen property for personal consumption, and those who purchase for redistribution, and, on the other, receivers who both participate in the theft and redistribute the property. According to section 10 of the Model Act, receivers who purchase for personal consumption or redistribution, and who did not participate in the theft, are treated similarly: they are liable in treble damages for the value of the property actually received or redistributed. On the other hand, receivers who both participate in the theft and purchase for redistribution are liable for three times the value of the *total* amount stolen. These receivers are treated as joint tortfeasors with their thieves and are therefore jointly and severally liable for the entire theft.[486] One crucial determination for purposes of liability,

than all of the goods stolen, the measure of damages would be three times the value of the goods received. If the statute authorizes a recovery based on actual damages, but imposes liability only to the extent of goods received, the measure of damages would be based on the plaintiff's actual losses on a prorated basis reflecting the defendant's proportionate share of responsibility for the victim's damages. Either formulation based on limited liability is so impractical, from a societal viewpoint, that no serious legislative consideration should be given to it. In the absence of a specific legislative directive authorizing such limited liability, the contrary legislative intent should be presumed. Anti-trust damages are joint. *See, e.g.*, Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 166 F. Supp. 163 (E.D. Pa. 1958), *revd. on other grounds*, 365 U.S. 127 (1961). A similar rule should be followed here. In addition, given the role played by receipt, particularly receipt for resale, it does not seem unreasonable to hold him who receives as a joint tortfeasor, for the full value of what was stolen, rather than merely for the part that was received. It would not be necessary to apportion damages among joint tortfeasors. W. PROSSER, *supra* note 473, § 52, at 314. Here, it is only necessary to conceptualize the tort as "theft-receipt" rather than "receipt" to achieve this result. Clearly, this is the better view both economically and legally.

486. *See* W. PROSSER, *supra* note 473, § 46, at 291-92. The traditional rule was that there could not be contribution between joint tortfeasors. *Id.* § 50, at 306.

therefore, is whether the receiver "initiates, organizes, plans, finances, directs, manages, or supervises the theft."[487] A professional fence, however, may also be liable for the entire theft if he has established a working relationship with the thieves, even though he was unaware of the particular theft beforehand. This aspect of civil liability under the Model Act recognizes that as a practical matter an established fencing relationship is an incentive for theft. Hence, it follows that if the thief and receiver deal at "arm's length," the fence will not be liable for the entire theft. This would be the case for a legitimate businessman who only infrequently trades in stolen goods and never has an interest in a particular theft.

If the model statute is enacted, the prospect of treble-damages recovery and corresponding large legal fees will probably spur the growth of a substantial body of private attorneys specializing in plaintiffs' fencing claims, similar to the growth of plaintiffs' antitrust attorneys. A private fencing bar may develop improved litigation and investigation techniques and thereby help facilitate enforcement of the fencing laws. By the same token, plaintiffs' attorneys may supply law enforcement officials with information to help convict receivers in the hope of benefiting by collateral estoppel from a criminal prosecution. While law enforcement officials might not be as able or as willing to reciprocate with valuable information until they have successfully prosecuted the defendants, the evidence should eventually be turned over in the interest of achieving maximum deterrence,[488] as is frequently done by the Justice Department after an investigation into criminal antitrust violations. Ultimately, once the full deterrent effect of this dual approach to the problem of theft and fencing is recognized, prosecutors will probably routinely name retail and wholesale businesses in prosecutions for receiving, even if their successful prosecution may not be possible, since merely list-

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Among conscious wrongdoers, the law would not help the parties share the damages. *Id.* § 46, at 291-92. A full recovery, for example, for treble damages against one department store for the entire value of a theft would obviously end the matter. Yet it seems clear that the others who received part of the goods stolen should be given an incentive not to participate in the trade in stolen property. Suit by the first store against the others would provide the extra push that is needed. Consequently, here, if not elsewhere, the "no contribution" rule should be relaxed.

487. *See* MODEL THEFT AND FENCING ACT § 4(a)(2), Appendix B.

488. Since a lower burden of proof governs civil cases, note 477 *supra*, prosecutors may turn materials over to private parties at an early stage, because a criminal conviction may be too difficult to attain under the beyond-a-reasonable-doubt standard. Such material is not always easy to uncover, even by public bodies. *See* Application of State of California to Inspect Grand Jury Subpoenas, 195 F. Supp. 37 (E.D. Pa. 1961).

ing them will give private attorneys notice of their potential vulnerability to a civil suit.[489]

Realizing the potential benefits from private law enforcement, a few states have, in fact, recently enacted legislation that subjects criminal receivers to a civil liability for treble damages, court costs, and reasonable attorney's fees.[490] At the federal level, congressional enactment of title IX of the Organized Crime Control Act, which provides that any person or entity whose business is injured by so-called racketeer-inflenced organizations may recover treble damages, costs and fees,[491] indicates at least a preliminary acknowledgement of the role of civil suits in controlling serious crime problems. In addition to allowing treble damages, title IX authorizes the attorney general to institute civil proceedings for the purpose of obtaining injunctive relief against any act that violates the statute.[492] If necessary to restrain violations of this act, the court may order any person (or entity) "to divest himself of any interest . . . in any enterprise" and may prohibit any individual from engaging in any business activity that comes within the scope of the legislative prohibition.[493] The statute further provides that prior criminal convictions are to be given a collateral estoppel effect "in any subsequent civil proceedings brought by the United States."[494] Finally, to remove unduly burdensome jurisdictional and procedural constraints to civil actions by the attorney general, the statute contains liberal venue and subpoena-power provisions and permits nationwide service of process.[495]

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489. *See* note 488 *supra*. The traditional practice of some prosecutors of securing the names of unindicted co-conspirators may present legal problems. *See* United States v. Briggs, 514 F.2d 794 (5th Cir. 1975) (beyond the power of the grand jury). It may be necessary in light of *Briggs* to name the unindicted person as "John Doe" and to reveal his name, if at all, only through the bill of particulars.

490. *See, e.g.*, CAL. PENAL CODE § 496 (West Supp. 1976). Arizona passed similar legislation providing for costs and fees, but only for a sum twofold the market value of the property. It is also not apparent whether the measure of loss in Arizona is limited to those stolen goods actually received by the defendant, or whether liability extends to the entire stolen shipment. ARIZ. REV. STAT. ANN. § 13-621B (Supp. 1975).

Some states have authorized the recovery of damages without providing any treble damage incentive to sue. *See, e.g.*, N.C. GEN. STAT. § 99A-1 (Supp. 1975); Note, *Torts—Recovery of Damages for Interference with Property Rights Under G.S. 99A-1*, 10 WAKE FOREST L. REV. 340 (1974).

491. 18 U.S.C. §§ 1961-68 (1970). *See* King v. Veseo, 342 F. Supp. 120 (N.D. Cal. 1972).

492. 18 U.S.C. § 1964(a)(b) (1970). *See* United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) (constitutionality upheld).

493. 18 U.S.C. § 1964(a) (1970).

494. 18 U.S.C. § 1964(d) (1970).

495. 18 U.S.C. § 1965 (1970).

Title IX, however, is primarily concerned with curbing the infiltration of legitimate businesses by organized crime.[496] Consequently, any derivative civil attack on fencing activity under this statute can be accomplished only in an oblique manner.[497] Nevertheless, the statute's extensive substantive and procedural provisions for civil relief have provided a basic model for recent congressional proposals designed to deal more directly with the problem of theft and fencing.[498]

Prior to the drafting of S.1, a bill called S.13 was introduced in an attempt to amend both 18 U.S.C. § 1964, the civil remedies section of title IX, and 18 U.S.C. § 659, the most commonly used federal anti-fencing provision.[499] The bill proposed that section 1964 retain its basic provisions authorizing treble damages and appropriate judicial relief to prevent violations of title IX, and that section 659 be amended to provide treble damages recovery and injunctive relief and include liberal venue and process procedures.[500] Other proposed amendments to both sections would have allowed the federal government to sue for actual damages whenever it has been "injured in its business or property by reason of any [statutory] violation;"[501] permitted the attorney general to "intervene in any [privately initiated] civil action or proceeding" that he considers to be of "general public importance;"[502] authorized private injunctive relief, including divestiture, "to prevent and restrain violations" of either sec-

496. Despite this principal orientation, neither the civil nor the criminal provisions of this legislation are limited to the infiltration of legitimate business by organized crime. Notwithstanding a recent federal decision to the contrary, Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (limited to organized crime), these provisions encompass "any person" who comes within their prohibition. *See* United States v. Campanole, 518 F.2d 352, 363 (9th Cir. 1975) (not limited to organized crime). This is why the term "person" was so broadly defined. *See* 18 U.S.C. § 1961(3) (1970). *See* United States v. Altese, 19 CRIM. L. RPTR. 2319 (2d Cir. July 21, 1976) (not limited to legitimate business).

497. 18 U.S.C. § 1962 (1970) (emphasis added) makes it unlawful for any person, through a *pattern of racketeering activity* or any income derived therefrom, to acquire any interest or control of any enterprise engaged in interstate commerce. Racketeering activity is defined to include any conduct that is indictable under three federal statutes dealing with theft and fencing. *See* 18 U.S.C. § 1961(1) (1970). *See generally* note 185 *supra*. " '[P]attern of racketeering activity' requires at least two acts of racketeering activity . . ." within a ten-year period. 18 U.S.C.A. § 1961 (5) (1970).

498. For example, the treble damage concept is embodied in S.2221, 94th Cong., 1st Sess. (1975). *See* 121 CONG. REC. S14383 (daily ed. July 30, 1975).

499. S.13, 93d Cong., 1st Sess. (1973). *See Hearings on Criminal Laws* 323-36 (comparing S.13 and antitrust laws).

500. S.13, 93d Cong., 1st Sess. §§ 1, 2(e), (f), (i), (j), (k), (l) (1973).

501. S.13, 93d Cong., 1st Sess. §§ 1(d), 2(h) (1973).

502. S.13, 93d Cong., 1st Sess. §§ 1(f), 2(n) (1973).

tion;[503] and given collateral estoppel effect to previous criminal convictions of defendant in civil actions instituted by private parties.[504] Nevertheless, because of inaction by the House Committee on the Judiciary, S.13 never became law despite unanimous approval by the Senate.[505]

The proposals contained in S.13 are potentially important means for controlling criminal activity through civil litigation, and they have been adopted in modified form by the Model Act.[506] The availability of injunctive relief to "any person"[507] threatened by theft activity, for example, would allow businesses to take steps to avoid theft. Thus, under the broad language of these amendments, shippers could conceivably obtain injunctions requiring carriers to take appropriate security measures against theft, and carriers could seek injunctive relief directing shippers to identify their goods with appropriate markings.[508] Although S.1 would authorize injunctive relief upon petition by the attorney general, as well as the recovery of treble damages, costs, and fees by victims of crime, neither the four amendments contained in S.13, nor the proposed extension of procedural benefits to private parties suing under section 659, are contained in the new proposal.[509] The failure to give collateral estoppel effect to criminal convictions in private litigation and to provide for private injunctive relief may not be of major significance since they are arguably available under the present common law.[510] But the failure

503. S.13, 93d Cong., 1st Sess. § 2(e) (1973).

504. S.13, 93d Cong., 1st Sess. §§ 1(g), 2(o) (1973).

505. S.13, 93d Cong., 1st Sess. (1973) (119 CONG. REC. 10319 (1973)).

506. *See* MODEL THEFT AND FENCING ACT §§ 9, 11(a), 11(b), Appendix B.

507. *See* MODEL THEFT AND FENCING ACT § 9(c), Appendix B.

508. In seeking injunctive relief, both the carrier and the shipper would base their arguments on parallel grounds. The shipper would argue that his business could not survive if his goods could not be shipped. Since there are only a limited number of carriers, all of whom have demonstrated their failure to take adequate security precautions, the court should require that appropriate precautionary measures be taken as a condition of doing business. Similarly, the carrier seeking injunctive relief would argue that since he is required to accept all goods delivered to him for shipment, the court should require proper packaging and identification as a condition for any shipper doing business with the carrier.

509. S.13, 93d Cong., 1st Sess. § 4101 (1973).

510. For a discussion of the current common law with respect to the collateral estoppel effect of issues decided in a prior criminal case, see note 481 *supra*. Whether there is a right to private injunctive relief in this context is not clear. A well-established rule is that equity will not enjoin criminal conduct. D. DOBBS, *supra* note 471, at 115-16. This reluctance was based on the theory that an adequate remedy was available at law in the form of a criminal prosecution, and that an injunction, enforceable by contempt, will usually be granted only after a nonjury trial. *Id.* at 117-18. An early exception developed in both public and private nuisance cases "where a plaintiff sought to enjoin a crime that invaded his *property* interest." *Id.* at 116 (emphasis added). When a public nuisance was involved, plaintiff had stand-

to extend liberal venue and process rules to private parties will inevitably hamper their litigation efforts.

III. Conclusion: Basic Tactics and Strategy for Law Enforcement

Successful control of crimes against property ultimately requires a realization that the redistribution of stolen property is not a victimless white-collar crime.[511] Current misunderstandings concerning the impact of theft and fencing understandably reflect the same shortsighted economic view of receiving long conspicuous in our substantive laws. The private business sector must voluntarily undertake reforms on an industry-wide basis to supplement public enforcement efforts,[512] and consumers must not remain indifferent to the

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ing to sue only if he could demonstrate "special damage, in addition to that suffered by the public at large." Note, *Equitable Devices for Controlling Organized Vice*, 48 J. Crim. L.C. & P.S. 623, 627 (1958). Today, injunctions against crime seem to be granted whenever the court is willing to characterize the conduct as a nuisance. D. Dobbs, *supra* note 471, at 116. Since there has been no hesitancy in allowing the state to enjoin the operation of houses of gambling and prostitution, it would seem that a private citizen asserting special damages to a property interest could similarly obtain injunctive relief against such a public nuisance. *See* Note, *supra*, at 624-27. By characterizing fencing activity as a public nuisance, it would not be inappropriate for a court, drawing an analogy between fencing and a continuous trespass, to enjoin this type of conduct. *See generally* D. Dobbs, *supra* note 471, at 59-60, 348-49.

In the case of a shipper seeking an injunction against a carrier, or vice versa, the case for private injunctive relief is even stronger, since the court would not be enjoining the commission of a criminal act, but, rather, would be prohibiting conduct that *facilitates* the commission of theft and fencing activity. The party subject to the injunction obviously would not be a criminal defendant; he would be a shipper, or a carrier who is responsible for transporting the goods. Note that in either case, adequate relief might not be available at law, since stolen goods are often impossible to locate or identify. In the absence of proper identification, criminal prosecutions are doomed to failure and civil relief will not be available. *See* notes 226-34 *supra* and accompanying text.

511. *See* Report, The Impact of Crime 28. The public may tend to view the fence as "providing a much-needed social service for the hard-pressed consumer." Chappell & Walsh, *Receiving Stolen Property* 492. *See* notes 45-47, 49 *supra* and accompanying text. Expressions of public approval, demonstrated by the consumer's continued willingness to buy stolen goods, have caused at least some fences to view their activity as a victimless crime. *See* C. Klockars, *supra* note 12, at 147-50.

512. For example, recent Senate committee hearings, investigating criminal fencing systems, elicited the following observation:

> No greater truism has been highlighted in this committee's extensive hearings on cargo theft and fencing than the fact that law enforcement working alone cannot get the job done in this area of crime. The transportation industry must assume the responsibility for preventing thefts and accounting for the goods left in its care for transfer. Without industry's help, law enforcement's job of apprehending and successfully prosecuting thieves—not to mention the fences who induce and encourage thievery—is a most difficult task at best.

Report, The Impact of Crime 12.

Appropriate industry reforms should be initiated in at least the following areas: hiring practices, personnel policies, packaging techniques, cargo verification procedures, inventory control, accounting and bookkeeping, employee supervision, and

economic consequences of their illegal purchases.[513]

Legislatures should assume responsibility for encouraging new attitudes[514] and give private citizens a significant financial stake in detecting and reporting fencing activity. Thus, a modernization of our fencing laws to recognize that redistribution systems operate on traditional economic principles and vary considerably in sophistication and impact is a prerequisite to more effective control of modern theft and fencing operations.

Nevertheless, legislative reform alone will not guarantee success because these reforms, however well-designed, will have to be properly implemented. For instance, since fencing is now to a significant extent an interstate crime, effective investigations require increased cooperation between federal and state enforcement agencies.[515] More fundamentally, however, law enforcement agencies must restructure their priorities so that emphasis is placed on convicting the fence rather than the thief. This will frequently mean granting so-called use immunity to thieves in order to gather incriminating evidence against major fences. Additionally, law enforcement agencies must assign different priorities to the different types of receivers. No special effort should be made against neighborhood fences, since their economic impact is relatively slight and they are often detected in the course of other investigations anyway. Master fences have the gravest consequences for our society, but they are by far the most

physical plant security. A detailed discussion of security-oriented proposals for industry-wide adoption is beyond the scope of this study. Nevertheless, extensive recommendations have been made for the transportation and securities industries. *See* CARGO THEFT AND ORGANIZED CRIME 43-61; Dept. of Justice Release, Suggestions by the Dept. of Justice for Safe Handling of Marketable Securities by Financial Institutions, Including Hints for Detecting Counterfeit, Forged, Worthless, and Spurious Securities (Dec. 23, 1974); A REPORT TO THE PRESIDENT ON THE NATIONAL CARGO SECURITY PROGRAM 4-6 (1976).

To the extent that industry is unwilling to implement the necessary reforms, legislative consideration should be given to establishing administrative controls. Compliance with administrative regulations could be made a condition of doing business. On the federal level, agencies currently regulating the transportation industry and the security field provide an existing structure from which controls could be imposed.

513. *But see* C. KLOCKARS, *supra* note 12, at 150.

514. Gallup Polls have repeatedly indicated that Americans consider crime one of the most important national problems, even more important than economic issues. *See, e.g.*, Richmond Times Dispatch, July 27, 1975, at A-20, col. 1 (number one). Political leadership seems unable to translate that concern into more effective crime control programs. For a number of concrete proposals, see J. WILSON, THINKING ABOUT CRIME (1975).

515. "[F]ences . . . are no respectors of boundaries established by local and State criminal justice agencies. Vast amounts of stolen property are regularly transported across State and even National borders . . . as part of a redistribution system developed by fences." REPORT, THE IMPACT OF CRIME 11. *See* Chappell & Walsh, *"No Questions Asked"* 167. The National Wiretap Commission called for such cooperation. WIRETAP REPORT 6.

difficult to convict. To gather the evidence necessary to convict these receivers, police must frequently employ extensive undercover and electronic surveillance operations. As a practical matter, therefore, enforcement efforts are best directed at professional fences since their apparently legitimate operations can be pierced relatively easily with the help of informants and with electronic surveillance.[516] Preliminary investigation is obviously needed to obtain the probable cause required for a court order authorizing electronic surveillance, but this should not be a major barrier because professional receivers lack the protective insulation of master fences. Concentrating on professional fences also should result in the apprehension of their suppliers, who are themselves a potentially valuable source of information about other fences. Consequently, by establishing priorities along these lines, authorities can employ their limited resources in the most efficient manner.

This review of the history and development of theft and fencing has documented the need for reform in the substantive law and in law enforcement practices. The current state of the law is simply not equipped to cope with a problem that is already extremely serious, and that can only get worse. America has too much crime of all kinds. It is time that action be taken to control it. What needs to be done is relatively clear. All that stands in the way of reform is political will.

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516. A "bug," rather than a wiretap, should be used because the professional fence usually conducts his illegal transactions on a person-to-person basis in his store. the telephone is not as frequently used for fencing matters.

APPENDIX A
Analysis of Uniform Crime Reports Statistics: Stolen and Recovered Property 1960-75

For a number of years, the Federal Bureau of Investigation (F.B.I.) has collected, on a limited basis, statistics on the amount of property stolen and recovered annually. This information, however, has apparently never been comprehensively analyzed. This appendix, based on F.B.I. statistics for the years 1960 through 1975,[1] attempts to identify the major trends in the incidence of crimes against property and to evaluate the effectiveness of existing law enforcement efforts to recover stolen property.

The F.B.I. statistics analyzed in this appendix were collected each year from various local and state law enforcement agencies.[2] Six categories of statistics are reported: clothing, currency, fur, jewelry and precious metals, locally stolen automobiles, and "miscellaneous." The "miscellaneous" category includes all property not included in the other categories, such as office equipment, televisions, radios, stereophonic equipment, firearms, household goods, consumable goods, and livestock.

For purposes of this appendix, the statistics have been grouped into three broad categories: (1) automobiles; (2) miscellaneous; and (3) "all other," which includes clothing, furs, currency, and jewelry. To facilitate comparison of yearly figures, the absolute dollar amounts first have been adjusted to report the dollar value per 100 persons, in order to account for increases in population, and then converted into "constant 1960 dollars" to account for inflation.[3] Where appropriate, however, values are

* The assistance of Mr. Gregory Baldwin (J.D. 1975, Cornell Law School), Mr. Robert Elmore (J.D. 1975, Cornell Law School), Mr. William Waller (J.D. 1976, Cornell Law School) and Mr. Mark Sargent (Cornell Law School) in the preparation of this appendix is hereby acknowledged.

1. These statistics are reported annually by the F.B.I. in its series of Uniform Crime Reports under the title CRIME IN THE UNITED STATES (as part of the Uniform Crime Reporting Program which was initiated in 1930). All figures are taken from the table, entitled "Type and Value of Property Stolen and Recovered."

2. During the fifteen year period under study, the number of local enforcement agencies reporting to the F.B.I. increased significantly. In 1960, reporting agencies represented a population base of only 120.8 million people; by 1975, this population base had increased to 162.4 million. Before 1969, only statistics from cities with a population of at least 25,000 were reported, but the F.B.I.'s yearly statistical reports since then have included data from cities of at least 2,500 persons. It is also possible to use these F.B.I. data to estimate a total crime against property figures. The population for the United States in 1974 was, for example, 211.9 million people. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975 Table No. 2, at 5 (U.S. Bureau of the Census, 95th ed. 1974). This projects to a total figure of $336,285,300. It is less than the estimate employed by the Department of Commerce. *See* note 32 *supra*. Its estimate included more factors. F.B.I. figures are limited to index offenses (burglary, robbery, larceny over $50, and auto theft); the Commerce Department made an effort to be comprehensive. Finally, it is recognized that the F.B.I. figures are subject to substantial understatement. *See* Appendix A, note 4 *infra*.

3. These factors were derived from the information pertaining to consumer prices reflected in U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1975, at 414 (96th ed. 1975) (Purchasing Power of the Dollar: 1940 to 1975, Table No. 678).

quoted in both "current 1975 dollars," that is, dollar amounts *not* adjusted to reflect inflation, and "constant 1960 dollars."

A. *The Statistics Presented*

Graph 1 and tables 1 and 2 report that the current 1975 dollar value of property stolen per 100 persons rose from 502 dollars in 1960 to 1979 dollars in 1975, an increase of approximately 294 per cent. Measured in terms of constant 1960 dollars, the value of property stolen per 100 persons increased from 502 dollars to 1061 dollars, or approximately 111 per cent. Table 3 gives percentage composition of total goods stolen.

The increase in the value of stolen property reflects an across-the-board increase in all three categories reported in tables 1 and 2. Very significantly, however, the data in table 2 show the increase in the value of miscellaneous items stolen was by far the most pronounced. The value of miscellaneous property stolen in constant dollars per 100 people increased from 112 dollars to 435 dollars, or 288 per cent, during the fifteen year period. In sharp contrast, the increases in the value of stolen automobiles and "all other" items were, respectively, 60 per cent and 59 per cent.

Table 4 represents the percentage of stolen property recovered during the fifteen-year period. It shows a decline from 52.4 per cent to 29.9 per cent. Between 1960 and 1966, however, the recovery rate actually increased to a high of 55 per cent; but since then the rate has dropped by an average of more than 2.5 per cent per year.

Table 5 illustrates that the relative composition of stolen property recovered has remained remarkably similar. In 1960, automobiles accounted for 87 per cent of stolen property recovered, miscellaneous items accounted for 8.3 per cent, and "all other" property accounted for 4.7 per cent. In 1975, these percentages were 77.3 per cent for autos, 16.6 per cent for miscellaneous, and 6.1 per cent for "all other" property stolen.

B. *Observations*[4]

(1) There is a high correlation between increases and decreases in the value of miscellaneous property stolen and increases and decreases in

4. When analyzing this material, several factors necessarily qualify any conclusions. First, it can safely be assumed that since 1960 improvements in crime detection techniques and in the collection of statistics are responsible for some part of the apparent increase in crime, although the F.B.I. has tried to minimize this factor. Second, since F.B.I. figures necessarily reflect only those crimes that are actually reported to law enforcement agencies, the data used are not completely accurate indicators of the incidence of particular crimes. Recently, the Law Enforcement Assistance Administration and the Bureau of the Census have endeavored to calculate the extent of unreported crime, but until their work is completed and carefully analyzed it must be assumed that the theft of personal property is one area where this phenomenon is most apparent. *See* CRIMINAL VICTIMIZATION: SURVEYS IN 13 AMERICAN CITIES (U.S. Dept. of Justice: LEAA 1975). The rate of reported crime in Boston was, for example, robbery, 33 per cent; theft, 28 per cent, burglary, 56 per cent; and auto theft, 68 per cent. *Id.* at 22. Finally, statistics are gathered from only the most heavily populated and highest crime areas. This means the results may overstate theft rates and understate recovery rates.

the total value of property stolen. This correlation is most dramatically revealed by the data since 1966, which shows that a sharp rise in the theft rate for miscellaneous property accounts for a substantial, simultaneous increase in the overall property theft rate.

(2) By 1973, the value of miscellaneous property stolen was almost as large as the value of automobiles stolen. This is a significant reversal of a trend observable in the first half of the period studied, when the value of automobiles stolen was approximately twice as large as the value of miscellaneous items stolen. Significantly, this reversal may be largely explained by the very rapid increase in the theft of miscellaneous items.

(3) The recovery rate was constant until 1966, when it began to drop significantly. This continuous decline in the recovery rate during 1967-1975 coincides with the sharply increasing theft of miscellaneous property stolen.

(4) Despite the changes in the composition of stolen property between 1960 and 1975, the composition of property recovered has remained relatively similar. The primary explanation for this difference is the inability of law enforcement agencies to recover a substantially greater amount of stolen miscellaneous and other property even though thefts of this type of property have increased significantly.

(5) The recovery of automobiles consistently accounts for the greatest percentage of recovered property. The relative success of police in recovering stolen automobiles, however, is a misleading indicator of the ability of authorities to deal with theft for resale purposes. Very few automobiles are in fact taken with an intent permanently to deprive their owners of possession, and F.B.I. statistics include automobiles taken by joyriders or other persons needing quick, temporary transportation. After a brief time, these vehicles are abandoned and recovered. Further, stolen automobiles cannot be easily concealed because of their size; cannot be easily legitimized because they are required by statute to be marked with several permanent serial numbers; and can be relatively easily identified because they must be registered with state agencies and because there exists a national system to identify and recover stolen vehicles.[5]

(6) The theft of miscellaneous and other property is a better indicator of the incidence of theft for resale. The sudden upsurge in the theft of these items is undoubtedly the result of many factors.[6] Unlike automobiles, most miscellaneous and other items are small and therefore easy to conceal and to transport; most are not marked with serial numbers and therefore can be easily legitimized and resold without detection. Further, most of these kinds of thefts are not reported to the National Crime Information Center.

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5. These observations are not meant to underrate the increasing problem of auto theft for profit. Statistics indicate that only 62 per cent of the cars stolen in 1975 were recovered, whereas more than 90 per cent were recovered in 1960. The sharp decrease in percentage of recovered stolen autos would seem to be related largely to two factors: the smaller percentage of joy ride thefts that has accompanied the installation of wheel locks and the growing practice of theft by professionals of autos for stripping that has accompanied the use of computer assisted auto part sales.

6. Of course, different factors will not affect all items (*e.g.*, firearms, stereo equipment, etc.) in the same way.

Table 1

Stolen Property in Dollars per 100 People in Current Dollars

Year	Total	Auto	Misc.	All Other
1960	502	246	112	144
1961	508	249	112	147
1962	535	267	124	144
1963	679	346	159	174
1964	824	445	190	189
1965	840	445	190	205
1966	831	457	190	184
1967	991	535	276	180
1968	1152	588	305	259
1969	1287	656	375	256
1970	1356	637	445	275
1971	1483	653	525	305
1972	1349	588	490	271
1973	1375	558	549	268
1974	1587	579	664	344
1975	1979	737	812	428

Table 2

Stolen Property in Dollars per 100 People in Constant "1960" Dollars

Year	Total	Auto	Misc.	All Other
1960	502	246	112	144
1961	503	247	111	146
1962	524	262	121	141
1963	657	335	154	168
1964	787	425	181	180
1965	789	418	178	192
1966	759	417	173	168
1967	879	475	245	160
1968	981	501	260	221
1969	1040	530	303	207
1970	1035	486	340	209
1971	1084	477	384	223
1972	956	417	344	192
1973	917	372	366	179
1974	952	347	398	206
1975	1061	395	435	229

Table 3

Percentage Composition of Total Goods Stolen

Year	Auto	Misc.	All Other
1960	49.0	22.4	28.6
1961	49.0	22.4	28.6
1962	50.0	27.0	28.0
1963	51.0	23.5	25.5
1964	54.0	23.5	22.5
1965	52.0	23.1	24.0
1966	55.3	23.7	21.0
1967	53.5	25.1	21.4
1968	51.2	27.3	21.5
1969	51.0	28.9	20.1
1970	47.4	32.6	20.0
1971	44.3	35.6	20.1
1972	43.1	36.4	20.5
1973	40.6	39.9	19.5
1974	36.5	41.8	21.7
1975	37.3	41.1	21.6

Table 4

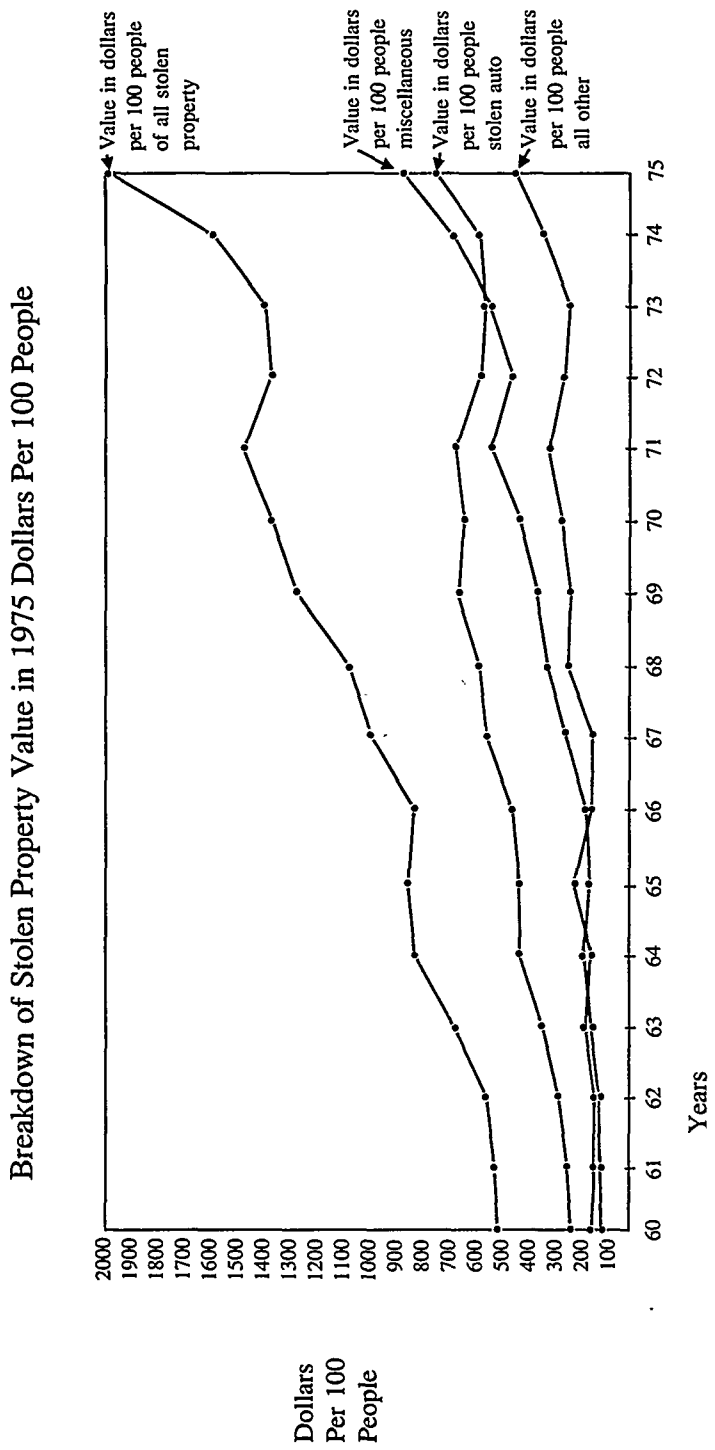
Yearly Percentages of the Total Recovery of Stolen Property

Year	%	Year	%	Year	%
1960	52.4	1965	52.0	1970	42.0
1961	52.0	1966	55.0	1971	39.0
1962	51.0	1967	51.0	1972	38.0
1963	54.0	1968	50.0	1973	37.0
1964	52.0	1969	47.0	1974	31.0
				1975	29.9

Table 5

Percentage Composition of Total Goods Recovered

Year	% Auto	% Misc.	% All Other
1960	87.0	8.3	4.7
1961	87.0	8.6	4.4
1962	88.0	7.6	4.4
1963	86.0	9.7	4.3
1964	89.0	7.3	3.7
1965	89.0	6.8	4.2
1966	89.0	6.9	4.1
1967	90.0	6.4	3.6
1968	89.0	6.6	4.4
1969	88.0	8.0	4.0
1970	87.0	8.8	4.2
1971	84.0	11.2	4.8
1972	84.0	10.7	5.3
1973	79.6	14.6	5.8
1974	76.5	17.2	6.2
1975	77.3	16.6	6.1


Breakdown of Stolen Property Value in 1975 Dollars Per 100 People
Value in dollars per 100 people of all stolen property
Value in dollars per 100 people miscellaneous
Value in dollars per 100 people stolen auto
Value in dollars per 100 people all other
Dollars Per 100 People
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
Years

APPENDIX B

MODEL THEFT AND FENCING ACT[1]

[Insert appropriate enacting clause].

[Statement of Purpose and Intent]

[It is the purpose of this Act to curtail theft and dealing in stolen property through the imposition of appropriate criminal sanctions and the provision of suitable civil remedies.]

[It is intended that this Act be construed neither strictly nor liberally, but in light of its purpose, and that its moderate sanctions be fully utilized.]

Sec. 1 [Short Title] This Act shall be known and may be cited as the "Theft and Fencing Control Act of [insert date]."

Part A

Sec. 2 [Theft]

(a) [Offense] A person is guilty of theft if he obtains or uses [, or endeavors[2] to obtain or use,] the property of another, with intent:[3]

(1) to deprive the other person of a right to the property or a benefit of the property; or

(2) to appropriate the property to his own use or to the use of another person.

(b) [Grading] A person who commits theft:

(1) shall be fined not more than $10,000 or imprisoned not more than 10 years, or both, if the property stolen has a value in excess of $100,000;

(2) shall be fined not more than $5,000, or imprisoned not more than 5 years, or both, if the property stolen has a value in excess of $500 but not more than $100,000 or, regardless of its value, the property consists of:

(i) a firearm, ammunition, or a deadly weapon;

(ii) a vehicle, except as provided in subsection (b)(4);

(3) shall be fined not more than $1,000, or imprisoned not more than one year, or both, if the property stolen has a value in excess of $100 but not more than $500; or

(4) shall be fined not more than $500 or imprisoned not more than 6 months, or both, if:

(i) the property has a value of $100 or less; or

(ii) the property is an airplane, a motor vehicle or a vessel, the defendant is less than eighteen-years-old, and the defend-

1. The legislation proposed here in a slightly different form has been endorsed by the National Association of Attorneys General for inclusion in its program of recommended legislation.

2. The optional use of the word "endeavor" here and elsewhere in the Act avoids the incorporation of the common-law learning on impossibility. *See* United States v. Osborn, 385 U.S. 323 (1966).

3. Unless otherwise stated, the statute is drafted on the assumption that the state of mind requirement to be implied for conduct is "knowing" and for attendant circumstances is "recklessness." Compare MODEL PENAL CODE art. 2 (Proposed Official Draft 1962); S.1, ch. 3.

ant intended to deprive or appropriate the property only temporarily rather than permanently.[4]

Sec. 3 [Possession of Altered Property]

(a) [Offense] A person is guilty of possession of altered property if he is a dealer in property and he possesses property the identifying features of which, including serial numbers or labels, have been removed or in any fashion altered, without the consent of the manufacturer of the property.

(b) [Grading] A person who commits possession of altered property shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 4 [Dealing in Stolen Property]

(a) [Offense] A person is guilty of dealing in stolen property if he:

(1) traffics in [,or endeavors to traffic in,]; or

(2) initiates, organizes, plans, finances, directs, manages, or supervises the theft, and traffics in [, or endeavors to traffic in,] the property of another that has been stolen.

(b) [Grading] A person who deals in stolen property in violation of:

(1) subsection (a)(1) shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; or

(2) subsection (a)(2) shall be fined not more than $15,000 or imprisoned not more than 15 years, or both.

Sec. 5 [Evidence]

(a) [Permissible inferences] In an action for theft or dealing in stolen property:

(1) Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk[5] that it had been stolen or that the person in some way participated in its theft;

(2) Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen;

(3) Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.

(b) [Accomplice Testimony] The testimony of an accomplice, if

4. Not all states key the grading of their conspiracy statutes to the substantive offense. Where conspiracy is a misdemeanor, it is recommended that a special felony level conspiracy provision be drafted. In addition, consideration should be given, if necessary, to abolishing any common-law rule that would make the receiver's conviction dependent upon the conviction of the thief.

5. On the constitutionality of this and other similar statutory presumptions, see Barnes v. United States, 412 U.S. 837 (1973), holding that a recent possession inference is constitutional.

believed beyond a reasonable doubt, is sufficient for a conviction for conduct constituting an offense in violation of this Act.[6]

Sec. 6 [Entrapment]

It does not constitute a defense to a prosecution for conduct constituting an offense in violation of this Act that:

(1) strategem or deception, including the use of an undercover operative or law enforcement officer, was employed;

(2) a facility or an opportunity to engage in such conduct, including offering for sale of property not stolen as if it were stolen, was provided; or

(3) mere solicitation that would not induce an ordinary law-abiding person to engage in such conduct was made by a law enforcement officer to gain evidence against a person predisposed to engage in such conduct.[7]

Sec. 7 [Definitions]

As used in this part:

(a) "dealer in property" means a person who buys and sells property as a business.

(b) "obtains or uses"[8] means any manner of:

(1) taking or exercising control over property;

(2) making an unauthorized use, disposition, or transfer of property; or

(3) obtaining property by fraud, and includes conduct previously known as theft, stealing, larceny, purloining, abstracting, embezzlement, misapplication, misappropriation, conversion, obtaining money or property by false pretenses, fraud, deception, and all other conduct similar in nature.

(c) "property" means anything of value, and includes:

(1) real property, including things growing on, affixed to, and found in land;

(2) tangible or intangible personal property, including rights, privileges, interests, and claims; or

(3) services.

(d) "property of another" means property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

(e) "services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

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6. Some jurisdictions follow the rule that an accomplice's testimony in a theft or fencing prosecution must be corroborated to be sufficient for conviction. This provision should, if necessary, be included in the Act to preclude the application of this rule to prosecutions under this Act.

7. This provision guarantees that mistaken interpretations of the law will not frustrate legitimate law enforcement efforts to investigate the operations of professional fences.

8. The phrase is broad enough to cover the situation where property stolen in another jurisdiction is brought into a state. It would also include possession.

(1) repairs or improvements to property;
(2) professional services;
(3) private or public or government communication, transportation, power, water, or sanitation services;
(4) lodging accommodations; or
(5) admissions to places of exhibition or entertainment.

(f) "stolen property" means property that has been the subject of any criminally wrongful taking.

(g) "traffic" means:

(1) to sell, transfer, distribute, dispense or otherwise dispose of to another person;

(2) to buy, receive, possess, or obtain control of or use with intent to sell, transfer, distribute, dispense or otherwise dispose of to another person.

(h) "value" means value determined according to the following:

(1) Except as otherwise provided, value means the market value of the property at the time and place of the offense, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

(2) The value of a written instrument which does not have a readily ascertainable market value shall, in the case of an instrument such as a check, draft or promissory note, be deemed the amount due or collectible on it, and shall, in the case of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege or obligation, be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(3) The value of a trade secret that does not have a readily ascertainable market value shall be deemed any reasonable value representing the damage to the owner suffered by reason of losing an advantage over those who do not know of or use the trade secret.

(4) If the value of property cannot be ascertained beyond a reasonable doubt pursuant to the standards set forth above, the trier of fact may find the value to be not less than a certain amount, and if no such minimum value can be thus ascertained, the value shall be deemed to be an amount less than $500.

(5) Amounts of value involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

Part B

Sec. 8 [Alternative Fine]

(a) [Twice Gain or Loss] In lieu of a fine otherwise authorized by law, a defendant who has been found guilty of conduct constituting an offense in violation of this Act through which he derived pecuniary value or by which he caused personal injury or property damage or other loss, may, upon motion of the [insert appropriate phrase] be sentenced to pay a fine that does not exceed twice the gross value gained or twice the gross

loss caused, whichever is the greater, plus the costs of investigation and prosecution.

(b) [Hearing] The court[9] shall hold a hearing to determine the amount of the fine to be imposed under subsection (a).

(c) [Pecuniary Value] As used in this section, "pecuniary value" means:

(1) anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or

(2) any other property or service that has a value in excess of $100.

Part C: Injunctions and Damages

Sec. 9 [Injunctions]

(a) [General] In addition to what is otherwise authorized by law, the [insert appropriate phrase] shall have jurisdiction to prevent and restrain conduct constituting an offense in violation of this Act. The [insert appropriate phrase] may issue appropriate orders, including:

(1) ordering any person to divest himself of any interest in any organization;

(2) imposing reasonable restraints on the future conduct of any person, including making investments or prohibiting any person from engaging in the same type of organization involved in the offense; or

(3) ordering the dissolution or reorganization of any organization, making due provision for the rights of innocent persons.

(b) [Application by [insert appropriate phrase]] The [insert appropriate phrase] may institute proceedings under subsection (a). In any such proceeding, the [insert appropriate phrase] shall move as soon as practicable to a hearing and determination. Pending final determination, the [insert appropriate phrase] may at any time enter such restraining orders or prohibitions or take such other actions as are in the interest of justice.

(c) [Application by Private Party] Any person may institute a proceeding under subsection (a). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

Sec. 10 [Damages]

(a) [Suit by the [insert appropriate phrase]] If the [insert appropriate phrase] is injured by reason of any conduct constituting an offense in violation of this Act, the [insert appropriate phrase] may bring a civil

9. Where jury sentencing is in effect, this clause would have to be altered.

action and recover damages as specified in subsection (c) and the cost of the action.

(b) [Suit by a Private Person] If a private person is injured by reason of any conduct constituting an offense in violation of this Act, the private person may bring a civil action and recover damages as specified in subsection (c), attorney's fees and costs of investigation and litigation, reasonably incurred.

(c) [Treble Damages] Damages recoverable in action brought under subsection (a) and (b) shall be threefold the actual damages sustained, and, where appropriate, punitive damages.

Sec. 11 [Procedure][10]

(a) [Intervention] The [insert appropriate phrase] may, upon timely application, intervene in any civil action or proceeding brought under this part if [insert appropriate phrase] certifies that in his opinion the action or proceeding is of general public importance. In such action or proceeding, the [insert appropriate phrase] shall be entitled to the same relief as if the [insert appropriate phrase] had instituted the action or proceeding.

(b) [Estoppel] A final judgment or decree rendered in favor of the [insert appropriate phrase] in any criminal action or proceeding under this Act shall estop the defendant in such action or proceeding in any subsequent civil action or proceeding under this Act as to all matters as to which such judgment or decree in such action or proceeding would be an estoppel as between the parties to it.

(c) [Limitations] No civil cause of action shall be brought under this Act more than five years after such action accrues. If a criminal prosecution, civil action or other proceeding is brought or intervened in by the [insert appropriate phrase] to punish, prevent or restrain any conduct constituting an offense in violation of this Act, the running of the period of limitations provided by this subsection with respect to any civil cause of action arising under this Act, which is based in whole or in part on any matter complained of in any such prosecution, action, or proceeding brought by the [insert appropriate phrase], shall be suspended during the pendency of such prosecution, action or proceeding and for two years following its termination.

Part D

Sec. 12 [General Provisions]

(a) [Severability Clause] [Insert appropriate severability clause.]

(b) [Amendments to Other Acts]

(1) [Immunity] [Whenever, in the judgment of [insert appropriate phrase], testimony or production of other evidence by any person in any criminal prosecution, civil action or other proceeding under this Act is necessary, such [insert appropriate phrase] may make application to [insert appropriate phrase] that the person be instructed to testify or produce evidence, and upon order of the [insert appropriate phrase], such person shall not be excused from testifying or otherwise producing evidence on

10. Consideration should be given to the breadth of the jurisdiction's long-arm statute to insure that out-of-state tortfeasors can be reached easily.

the ground that the testimony or evidence may tend to incriminate him, provided that no testimony or other evidence compelled under such order or any evidence directly or indirectly derived from such testimony or other evidence may be used against such person in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.][11]

(2) [Electronic Surveillance] [Insert, if necessary, an appropriate amendment to existing legislation authorizing electronic surveillance to provide for such surveillance in investigations and prosecutions under this Act.][12]

(c) [Repealers] [Insert appropriate repealers.]

(d) [Effective Date] [Insert effective date.]

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11. Authorization to grant immunity is essential in complex fencing investigations. Existing legislation does not always make it available. If necessary, this provision should be included in the Act to remedy this defect. For a collection of the laws of the various states, see THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMM. ON THE OFFICE OF ATTORNEY GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 140-48 (Jan. 1975).

12. Authorization to employ electronic surveillance is essential in complex fencing investigations. Existing legislation does not always make it clearly available. *See* THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *supra* Appendix B, note 11, at 34-36. While twenty-three states authorize electronic surveillance in specific instances, surveillance in fencing investigations may not be permitted in all situations. *See, e.g.*, FLA. STAT. ANN. § 934.07 (1974); ORE. REV. STAT. § 133.725(1)(a) (1975). Clarifying and authorizing legislation is needed.