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Comments

INSUFFICIENT FUNDS CHECKS IN THE CRIMINAL AREA: ELEMENTS, ISSUES, AND PROPOSALS

I. INTRODUCTION

Few individuals in American society could operate their financial affairs without a checking account. A check can usually mean instant money. In fact, the process's ease of operation makes it susceptible to abuse. While only a small percentage of the checks passed every year can be termed "bad"—*i.e.*, forged, no-account, no-funds, or insufficient funds—over 80 percent of all bad checks fall in the category of insufficient funds.¹ The purpose of this comment is to make an in-depth study of how American jurisdictions treat the crime of passing insufficient funds checks (hereinafter "bad" checks will be limited to insufficient funds checks) and to make proposals aimed at treating the bad check writer and his victim more justly while at the same time protecting the system of commercial paper. The question whether issuing insufficient funds checks should be a criminal offense at all when there is a civil remedy is beyond the scope of this comment.

II. THE NATURE OF INSUFFICIENT FUNDS STATUTES

A. Language, Elements, and Issues

There were no insufficient funds crimes at common law, because the offense of false pretenses covered the same acts. The basic elements of false pretenses are: (1) The false representation of a material past or present fact, (2) made by the accused with knowledge of its falsity, (3) with intent to defraud, (4) which causes the victim, (5) to pass title to, (6) his property to the wrongdoer.² Although the offense of false pretenses covers more criminal acts than the typical insufficient funds statute,³ a comparison of the elements of the two offenses reveals several similarities.

1. F. BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE 258-59 (1957).

2. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 655 (1972).

3. Section 561.460, RSMo 1969, states:

Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose, shall make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by confinement in the county jail for not more than six months, or a fine of not more than five hundred dollars, or both fine and confinement. If the check, draft or order is one hundred dollars or more the offense is a felony punishable by a fine of not more than one thousand dollars, or by confinement in the county jail for not more than one year, or by both such fine and confinement or by imprisonment by the department of corrections for not more than five years.

First, an essential element of the insufficient funds offense, the making, drawing, uttering, or delivering a check upon a bank with knowledge that there are insufficient funds or credit for payment in full upon presentation, constitutes the false representation of a present or past fact. Also, intent to defraud is common to both crimes.⁴ Finally, about half the insufficient funds statutes require reliance and actual defrauding by obtaining something of value. The concurrent existence of a broad false pretenses statute and a specific insufficient funds statute will usually⁵ not prevent the prosecutor from initiating the proceeding under the broader statute,⁶ but he must be able to prove every element of the crime of false pretenses⁷ or whatever broader statute is applicable.⁸

Originally, the fundamental substantive, not evidentiary, distinction between false pretenses and insufficient funds statutes was that the former required a showing of actual defrauding by obtaining something of value from the victim. However, with the advent early in this century of the checking account system as the usual way of conducting business, many states enacted statutes that made the mere issuance of a worthless check a criminal act if there was an intent to defraud, regardless of reliance by the victim or of actual defrauding. Under this approach, the primary focus is upon the mischief to the system of commercial paper that a bad check causes⁹ (especially in "check-kiting" schemes)¹⁰ rather than upon the

4. As will be seen later in this comment (*see* pt. II, § A(1) & (2)), the availability of prima facie proof for this element and for "knowledge" in most insufficient funds statutes makes the statutes preferable to false pretenses statutes from a prosecutor's point of view.

5. The majority view is that the broader statute is applicable so long as there is reasonably strict adherence in the indictment and in the jury instructions to the language of the broader statute. *Williams v. Territory*, 13 Ariz. 27, 29, 108 P. 243 (1910); *People v. Khan*, 41 Cal. App. 393, 395-96, 182 P. 803, 804 (1919); *see* Annot., 35 A.L.R. 375 (1925). Some states, however, say that the insufficient funds statute excludes the broader statute in a prosecution involving an insufficient funds check.

6. *State v. Roderick*, 85 Idaho 80, 84-85, 375 P.2d 1005, 1006-07 (1962); *Marr v. State*, 227 Md. 510, 515, 177 A.2d 862, 864 (1962); *State v. Evans*, 153 Mont. 303, 305-06, 456 P.2d 842, 843 (1969); *see* Annot., 35 A.L.R. 344 (1925), 43 A.L.R. 49 (1926), 95 A.L.R. 486 (1935), 174 A.L.R. 173 (1948).

7. *Willis v. State*, 205 Md. 118, 127, 106 A.2d 85, 89 (1954); *see* *Whatley v. State*, 249 Ala. 355, 357, 31 So. 2d 665, 666 (1947); *Burnley v. Commonwealth*, 274 Ky. 18, 21, 117 S.W.2d 1008, 1009 (1938); *Commonwealth v. McCall*, 186 Ky. 301, 305, 217 S.W. 109, 110 (1920).

8. *E.g.*, *State v. Culver*, 103 Ariz. 505, 507, 446 P.2d 234, 236 (1968); *People v. Cathony*, 376 Ill. 260, 263, 33 N.E.2d 473, 475 (1941); *Bafford v. State*, 235 Md. 41, 44, 200 A.2d 142, 144 (1964). *But cf.* *State v. Perrigou*, 81 Wash.2d 640, 503 P.2d 1063 (1972).

9. *See Ex parte Shackelford*, 64 Cal. App. 78, 80, 220 P. 430, 431 (1923); *State v. Marshall*, 152 Kan. 607, 608, 106 P.2d 688, 689 (1940); *State v. Avery*, 111 Kan. 588, 590-91, 207 P. 838, 839 (1922); *Kaufman v. State*, 199 Md. 35, 39, 85 A.2d 446, 448 (1952).

10. Check-kiting is a fraudulent scheme whereby a person uses checking accounts at several different banks. The actor deposits a bad check written on another bank and then draws a check payable to an outside party on his new account. Banks can get insurance against losses from paying on a check drawn on an account that is made up of "uncollected funds" checks. *See generally* *United States v. Bessesen*, 445 F.2d 463 (7th Cir.), *cert. denied*, 404 U.S. 984 (1971); *First Nat'l Bank v. Insurance Co. of N. America*, 424 F.2d 312 (7th

harm to the individual victim caused by his being defrauded. This type of statute has carried over into more than half of the American jurisdictions.¹¹ The other states maintain a closer relation to the false pretenses formulation in that they require that the defendant obtain something of value as a result of making the bad check.¹²

Despite this major difference in the current insufficient funds statutes, the following questions are common: (1) What acts constitute a violation? (2) What is intent to defraud? (3) What is knowledge of insufficiency? (4) If there is a consideration requirement, what constitutes consideration? And, (5) what are the penalties? The remainder of section A is an attempt to answer these questions.

1. Acts Constituting a Violation

The normal description of the acts necessary to constitute a bad check violation is "any person . . . who shall make, draw, utter or deliver . . . any check, draft, or order, for the payment of money . . . upon any bank

Cir.), *cert. denied*, 398 U.S. 939 (1970); Indemnity Ins. Co. of N. America v. Pioneer Valley Sav. Bank, 343 F.2d 634 (8th Cir. 1965); National Bank of Commerce v. Fidelity & Cas. Co., 312 F. Supp. 71 (E.D. La. 1970), *aff'd per curiam*, 437 F.2d 97 (5th Cir.), *cert. denied*, 403 U.S. 906 (1971).

11. ALASKA STAT. §§ 11.20.210-250 (1962); ARIZ. REV. STAT. ANN. § 13-316 (Supp. 5, 1972); CAL. PENAL CODE § 476 (a) (West 1970); COLO. REV. STAT. ANN. § 40-5-205 (Supp. 1971); CONN. GEN. STAT. ANN. § 53a-123 (1972); DEL. CODE ANN. tit. 11, § 555 (1953); D.C. CODE ENCYC. ANN. § 22-1410 (Supp. 1970); HAWAII PENAL CODE § 857 (tit. 37, § 857, [1972] Hawaii Acts 104); IDAHO CODE § 18-3106 (Supp. 4, 1972); KAN. STAT. ANN. §§ 21-3707 to 3709 (Supp. II, 1972); KY. REV. STAT. § 434.070 (1973); ME. REV. STAT. ANN. tit. 17, §§ 1605-06 (1965); MASS. GEN. LAWS ANN. ch. 226, § 37 (1970); MICH. COMP. LAWS ANN. § 750.131-133 (1968); MINN. STAT. ANN. § 609.535 (Supp. 40, 1973); MONT. REV. CODES ANN. § 94-2702 (1969); NEB. REV. STAT. §§ 28-1213 to 1214 (Supp. 1972); N.H. REV. STAT. ANN. § 582.12 (Supp. 5, 1972), §§ 582.13-14 (1955); N.J. STAT. ANN. § 2A:111-15 to 17 (1969) (but by case law money may have to be obtained); N.Y. PENAL LAW §§ 190.00-15 (McKinney 1967); N.C. GEN. STAT. §§ 14-106 to 107 (1969), *as amended*, (Supp. 1B, 1971) (goes to both consideration and mere passing); N.D. CENT. CODE § 6-08-16 (Supp. I, 1971); OHIO REV. CODE ANN. § 2911.111 (Page Supp. 29, 1972); ORE. REV. STAT. § 165.065 (1971); PA. STAT. ANN. tit. 18, § 4105 (Supp. 18, 1973); P.R. LAWS ANN. tit. 33, §§ 1851-54 (1969); R.I. GEN. LAWS ANN. §§ 19-19-2 to 4 (1956); TEX. PENAL CODE ANN. art. 567 (b) (Supp. 1A, 1972); VT. STAT. ANN. tit. 9, § 2311 (Supp. 9, 1972), § 2312 (1970) (noncriminal); V.I. CODE ANN. tit. 14, § 835 (1964). *See also* MODEL PENAL CODE § 224.5 (Prop. Official Draft, 1962).

12. ALA. CODE tit. 14, § 234 (9)-(21) (Supp. 5, 1971); ARK. STAT. ANN. § 67-720 (Supp. 6, 1960); FLA. STAT. ANN. § 832.05 (Supp. 1973); GA. CODE ANN. § 26-1704 (1972); ILL. ANN. STAT. ch. 38, § 17-1 (Smith-Hurd Supp. 1973); IND. ANN. STAT. §§ 10-3030 (1) (b), 10-3040 (3) (f) (Burns Supp. 4, part 2, 1972); IOWA CODE §§ 713.3-4 (1973); LA. REV. STAT. § 14:71 (Supp. 1973); MD. ANN. CODE art. 27, § 142 (Supp. 3, 1972); MISS. CODE ANN. § 97-19-1 (1972); § 561.460, RSMo 1969; NEV. REV. STAT. § 205.130 (1971); N.M. STAT. ANN. §§ 40-49-1 to -9 (1972); OKLA. STAT. ANN. tit. 21, § 1541.4 (Supp. 21, 1972); ORE. REV. STAT. § 164.085 (1971); S.C. CODE ANN. §§ 8-176 to -178 (Supp. I, 1971); S.D. COMPILED LAWS ANN. §§ 22-41-1 to -3 (1967); TENN. CODE ANN. §§ 39-1959 to -1967 (Supp. 7, 1967); UTAH CODE ANN. § 76-20-11 (Supp. 8, 1973); VA. CODE ANN. §§ 6.1-115 to -118 (1973); WASH. REV. CODE ANN. § 9.54.050 (1961); W. VA. CODE ANN. § 61-3-39 (1966); WIS. STAT. ANN. § 943.24 (1958); WYO. STAT. ANN. §§ 6-39, 6-40 (1957). *See generally* Commonwealth v. Bonetti, 211 Pa. Super. 161, 164, 235 A.2d 447, 449 (1967) (dictum); State v. Cunningham, 90 W. Va. 806, 809-10, 111 S.E. 835, 837 (1922).

or other depository"¹³ This description presents four separate aspects: A person; an act; a certain type of instrument; and a specific drawee.

One type of person upon whom criminal liability obviously falls is the drawer or maker of an insufficient funds check. Less clear is the liability of a person in a position of authority who directs a subordinate to write a bad check. The statutes of some states specifically deal with this problem by referring to any person who "causes or directs" another to write the check.¹⁴ A less certain area involves imposing the criminal sanction upon a person who permits others to write checks on his account, thereby making the account insufficient for the check under prosecution. Although this situation arguably removes the maker's knowledge of insufficiency,¹⁵ at least one court has held the maker criminally liable.¹⁶

The usual formulation of the action itself is "make, draw, utter or deliver." Although "making" and "drawing" clearly refer only to the original maker, "utter" may extend to an indorser as well.¹⁷ Nevertheless, to insure that an indorser is within the statute's purview, some states include "passing" in the list of prohibited acts.¹⁸ The Michigan Revised Criminal Code—Final Draft (Proposed) shortens its formulation of the *actus reus* by using the Uniform Commercial Code term "negotiate." "Negotiate" encompasses both making and passing while also including "delivery," which the Code defines as the "voluntary transfer of possession."¹⁹

13. See statute quoted note 3 *supra*.

14. Alabama, Connecticut, Hawaii, Montana, New York, and North Dakota are such states. Colorado and New York provide for an affirmative defense for the individual who acts without personal knowledge and at the drawer's order. See statutes cited notes 11 & 12 *supra*. This problem can also be couched in terms of a corporate officer who writes a bad check on the corporate account. There is limited authority for the proposition that the corporation, and not the man, is liable for a fine. See *People v. Fleishman*, 133 Misc. 288, 232 N.Y.S. 187 (Magis. Ct. 1928). The statutes of Florida, Maryland, and North Carolina mention the corporation as a guilty party; the TEX. PENAL CODE PROP. REVISION § 32.41 (a) (Final Draft, 1971) does also. The general rule, however, is that the corporate officer himself will bear the criminal burden. *Clifton v. State*, 51 Del. 339, 145 A.2d 392 (1958); *Thompson v. State*, 85 Ga. App. 298, 69 S.E.2d 206 (1952); *State v. Dowless*, 217 N.C. 589, 9 S.E.2d 18 (1940); *In re Hertz*, 161 Ohio St. 70, 117 N.E.2d 925, cert. denied, 347 U.S. 957 (1954); Annot., 68 A.L.R.2d 1269 (1959). California, Hawaii, Maine, Montana, New Jersey, North Dakota, South Dakota, and Utah have codified this majority rule; and New Jersey extends the reasoning to member of a partnership. See statutes cited notes 11 & 12 *supra*. See also *People v. Stills*, 302 Ill. App. 302, 308, 23 N.E.2d 822, 825 (1939).

15. See pt. II, § B (3) of this comment.

16. See *Moore v. State*, 96 Okla. Crim. 118, 124-25, 250 P.2d 46, 53 (1952).

17. See generally *State v. Vandenburg*, 39 Del. 498, 507, 2 A.2d 916, 921 (1938) (dictum).

18. These jurisdictions include Colorado, Idaho, New York, and Puerto Rico. See statutes cited notes 11 and 12 *supra*. See also MODEL PENAL CODE § 224.5 (Prop. Official Draft, 1962).

19. UNIFORM COMMERCIAL CODE §§ 3-202, 1-201 (14). Constructions of "delivery" usually arise in venue challenges. Generally, the place of delivery is either the place of receipt or the place of the final act that leads to receipt. See *People v. Greenwood*, 207 Cal. App. 2d 300, 304, 24 Cal. Rptr. 337, 340 (1962); *People v. Larue*, 28 Cal. App. 2d 748, 753, 83 P.2d 725, 728 (1938). The usual ruling is that venue is proper both in the county in which the check was mailed or in the county of receipt. *Id.*; *People v. Parker*, 51 Misc. 2d 843, 845, 274 N.Y.S.2d 38, 41 (Ct. Spec. Sess. 1966). *But cf.* *State v. Athans*, 490 S.W.2d 25, 26 (Mo. 1973).

Most insufficient funds statutes define the type of instrument covered as a "check, draft, or order, for the payment of money, upon any bank or other depository."²⁰ Thus, a possible way to show the inapplicability of the statute is to characterize the instrument in question as something else.²¹ Certain jurisdictions strictly interpret what constitutes a check²² for purposes of the statute and will not include such incomplete instruments as a check without an amount or a payee.²³ The favored position, however, in the "no-payee" situation is that such an instrument authorizes any holder to fill in the blank.²⁴ Moreover, a broader view of what constitutes a check or draft in the "no-payee" situation is found in section 3-805 of the Uniform Commercial Code, which states that any instrument not payable to "order or bearer" remains negotiable, although there can be no holder in due course on such an instrument.²⁵ Since all insufficient funds statutes are at least implicitly concerned with the flow of worthless commercial paper, this broader view may be preferable because it encompasses a wider range of potentially worthless and harmful instruments.²⁶

Most statutes require that the check be drawn upon "any bank or other depository."²⁷ The vast majority of bad checks will fit this requirement as a matter of course, but the words "other depository" may be unconstitutionally vague. One jurisdiction specifically includes savings banks and trust companies²⁸ and, in effect, forecloses such a "vagueness" attack.

2. Intent to Defraud

Virtually every insufficient funds statute requires specific intent to defraud.²⁹ The prosecution must separately prove this element, and the

20. See statute quoted note 3 *supra*.

21. See *State v. Brazzell*, 248 S.C. 118, 124, 149 S.E.2d 339, 342-43 (1966).

22. UNIFORM COMMERCIAL CODE § 3-104 sets out the accepted definitions of the instruments involved in insufficient funds statutes.

23. *State v. Ivey*, 248 N.C. 316, 318, 103 S.E.2d 398, 399 (1958); *Commonwealth v. Ali*, 438 Pa. 463, 467, 265 A.2d 796, 798 (1970). *But cf.*, *State v. Kleen*, 491 S.W.2d 244, 245-46 (Mo. 1973).

24. *State v. Campbell*, 70 Idaho 408, 415, 219 P.2d 956, 960 (1950); *State v. Donaldson*, 14 Utah 2d 401, 402, 385 P.2d 151, 151-52 (1963).

25. UNIFORM COMMERCIAL CODE § 3-805 has been applied to broaden the coverage of the statute by including certain instruments that are still negotiable but of which there could be no holder in due course. *Faulkner v. State*, 445 P.2d 815, 821-22 (Alas. 1968).

26. It is pertinent to distinguish between the crime of passing insufficient funds checks and other crimes that stem from checks that appear to be valid on their faces. The most obvious example is forgery. Where there is a named payee on the check and the account is sufficient, a fraudulent endorsement is a forgery and not an insufficient funds violation. *Bafford v. State*, 235 Md. 41, 44, 200 A.2d 142, 144 (1964). There is an argument that the statutes cover only "false" or "bogus" checks and the state must therefore prove that the checks themselves are bogus. This type of argument is usually unsuccessful. *State v. Casey*, 10 Ariz. App. 516, 519, 460 P.2d 52, 55 (1969).

27. See statute quoted note 3 *supra*; UNIFORM COMMERCIAL CODE § 3-104 (2) (b).

28. R.I. GEN. LAWS ANN. §§ 19-19-2, -3 (1956). See also NEB. REV. STAT. § 28-1213 (Supp. 1971); Law of June 24, 1939, Pub. L. No. 374, § 854, [1939] Pa. Laws 18 (repealed 1973).

29. Specific intent to defraud is an element in all of the statutes cited in notes 11 and 12 *supra* except those of Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Minnesota, New Jersey, New York, North Carolina, North Dakota, South Carolina, Vermont, the Virgin Islands, and Wisconsin.

mere passing of an insufficient funds check will normally not imply such intent. Moreover, the prosecution must show that this intent was simultaneous with the criminal act.³⁰ Because proving such intent can be an elusive undertaking, the prosecutor usually has available two methods of doing so. First, he may always prove the requisite intent by direct or circumstantial evidence.³¹ In addition, most insufficient funds statutes contain a section providing for prima facie proof of intent to defraud.

All circumstances surrounding the making or delivery of the check are relevant to the issue of intent.³² The most influential of these circumstances is the defendant's commission of similar offenses (*i.e.*, passing other worthless checks). Because specific intent is an element of these other offenses, they are probative and admissible on the issue of intent with respect to the check under consideration.³³ Another circumstance that may aid the prosecutor in proving intent is that the defendant stopped payment on a check after issuing it. There are many reasons, however, why a person would stop payment, and the defendant could properly argue that stopping payment was irrelevant to his intent at the time of issuance.

The prima facie evidence section of an insufficient funds statute raises an inference, upon proof of certain facts, of defendant's intent to defraud³⁴ at the time of commission of the act.³⁵ From a prosecutor's viewpoint, this makes proceeding under an insufficient funds statute more desirable than proceeding under a false pretenses statute. A typical prima facie evidence section names the person against whom it operates and the acts of the defendant and others that will bring the section into operation. It also includes those elements of the crime upon which it will operate. Moreover, most allow the defendant some way, within time limits, of preventing the use of the inference.³⁶

Also, intent to defraud is not an express element in some of the proposed codes. MODEL PENAL CODE § 224.5 (Prop. Official Draft, 1962); MICH. REV. CRIM. CODE § 4040 (Final Draft, 1967); MONT. PROP. CODE § 94-6-130 (1) (1970); S.C. CRIM. CODE § 17.1 (6) (Prop. Draft, 1971); TEX. PENAL CODE PROP. REVISION § 32.41 (a) (Final Draft, 1970).

30. 22 C.J.S. *Criminal Law* §§ 32, 34 (1961).

31. Texas has codified this option. TEX. PENAL CODE ANN. art. 567 (b) (2) (Supp. 1A, 1972). See also TEX. PENAL CODE PROP. REVISION § 32.41 (b) (Final Draft, 1970).

32. See generally *State v. Daymus*, 90 Ariz. 294, 299, 367 P.2d 647, 651 (1961); *People v. Harding*, 171 Cal. App. 2d 465, 466, 340 P.2d 656, 657 (1959); *State v. McKay*, 79 N.M. 797, 800, 450 P.2d 435, 438 (Ct. App. 1969); *State v. Brewer*, ___ S.D. ___, 197 N.W.2d 409, 410 (1972); *Brewer v. State*, 473 S.W.2d 938, 939 (Tex. Crim. App. 1971).

33. *Swan v. State*, 245 Ark. 154, 156, 431 S.W.2d 475, 476 (1968); *People v. Bandy*, 216 Cal. App. 2d 458, 464, 31 Cal. Rptr. 10, 14 (1963); *People v. Haines*, 176 Cal. App. 2d 41, 45, 1 Cal. Rptr. 41, 43 (1959); *State v. Marshall*, 152 Kan. 607, 608, 106 P.2d 688, 689 (1940); *Crum v. State*, 427 S.W.2d 623, 623-24 (Tex. Crim. App. 1968). Of course, the prosecutor's or the judge's preoccupation with these acts in the presence of the jury may cause such evidence to become inflammatory. *State v. Kimball*, ___ Iowa ___, 176 N.W.2d 867 (1970).

34. Most of the discussion concerning prima facie evidence sections is also applicable to the element of knowledge of insufficiency.

35. 1 F. WHARTON, *CRIMINAL EVIDENCE* § 93 (13th ed. C. Torcia 1972).

36. A typical example of such a prima facie evidence section is § 561.470, RSMo 1973 Supp., which states:

As against the maker or drawer thereof, the making, drawing, uttering or
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Prima facie evidence sections usually operate against only the maker or drawer. Thus, the prosecution must generally prove a passer's or deliverer's intent to defraud without the aid of a prima facie evidence section.

The acts that must be proved in order to raise the inference usually are (1) the making or drawing of the instrument by the defendant and (2) the refusal of payment by the drawee bank.³⁷ A common, explicit addition to these acts is presentment to the drawee bank within a reasonable period of time after issuance,³⁸ even though presentment is always implicit as the link between the making and the refusal. This addition requires showing a third person's conduct in order to make the section applicable. The real importance of the presentment addition, however, is that it necessitates presentment within a reasonable period of time, thus preventing use of the section on "cold" checks. Some jurisdictions do not require a showing of refusal of payment,³⁹ but allow the section to operate only after notice of dishonor because there may be many reasons for refusal of payment that are out of the drawer's control.

Once prima facie evidence is produced, the question becomes: Upon what elements of the crime will the inference thereby raised operate? The normal approach is that prima facie proof goes to both intent to defraud and knowledge of insufficiency.⁴⁰ In addition, some statutes provide prima facie proof for the "proved" facts of making, presentment, and dishonor, as well as for insufficiency at time of issuance.⁴¹ Most statutes, however, do not specify how these latter factors may be proved. Under the latter type of statute, they must usually be established by testimony from a representative of the drawee bank.⁴² In some jurisdictions, the check with the bank's notation on it will be evidence of issuance, presentment and dishonor.⁴³

delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee.

37. These are the acts that initially establish prima facie evidence in the District of Columbia, Hawaii, Kansas, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Vermont, Virgin Islands, Virginia, and West Virginia (this state's statutory language is vague). See statutes cited notes 11 & 12 *supra*.

38. This addition appears in the statutes of Colorado, Georgia, Idaho, North Dakota, and Texas. See statutes cited notes 11 & 12 *supra*. See also *Bethune v. State*, 44 Ala. App. 30, 33, 202 So. 2d 46, 47-48, cert. denied, 281 Ala. 715, 202 So. 2d 48 (1967).

39. *State v. Posey*, 77 Wyo. 258, 267, 314 P.2d 833, 836-37 (1957). But see *Iowa Code* § 713.4 (1973), in which refusal of payment alone initially establishes prima facie evidence of intent to defraud.

40. See statute quoted note 36 *supra*.

41. N.J. STAT. ANN. § 2A:111-16 (1969); N.Y. PENAL LAW § 190.10 (3) (McKinney 1967). See also *Shargaa v. State*, 84 So. 2d 42 (Fla. 1955).

42. A bank official's testimony is not always necessary in this circumstance. See *Commonwealth v. Bonetti*, 211 Pa. Super. 161, 164, 235 A.2d 447, 448-49 (1967).

43. Compare *Christ v. State*, 480 S.W.2d 394, 396 (Tex. Crim. App. 1972) (no-account case), with *Meadows v. State*, 220 Tenn. 615, 622, 421 S.W.2d 689, 642-43 (1967) (no-account case). See also *Va. Code Ann.* § 6-1-117.1 (1973)

If the prima facie evidence section is otherwise applicable, the defendant may prevent the section's operation by taking certain actions. First, he may "make good" within a specified period after notice of dishonor. Although generally the drawer or maker must make the payments, one statute clearly allows another to act in his place.⁴⁴ There is some difference in the statutes as to who should receive the payment. Several jurisdictions specify the drawee as the recipient,⁴⁵ another points to the payee,⁴⁶ others specify the "holder,"⁴⁷ and still others are silent.⁴⁸ Another aspect of preventing use of the prima facie evidence section is the time limit in which the drawer or maker must make the payment. Depending upon the statute, the number of days after notice of dishonor in which the defendant can make good varies from 5 to 15.⁴⁹ Further problems arise, however, in determining who is to give the notice that starts the running of the time period and how such notice is to be given. Most statutes are silent as to both aspects, and in many cases, the prosecutor himself has taken on the responsibility.⁵⁰ However, the concepts found in section 3-508 of the Uniform Commercial Code,⁵¹ which covers both aspects,⁵² may provide a solution for the troubled prosecutor. Section 3-508 (1) implies that either the holder or the bank may give notice, but the comment to that section specifies that it is usually the holder himself. Sections 3-508 (3) and (4) further specify that notice may be given in any reasonable manner, oral or written,⁵³ and is deemed to have been given when sent. Many statutes, however, require certified or registered mail for effective notice under the prima facie evidence sections.⁵⁴

Since the earliest cases construing insufficient funds statutes, it has been clear that presentment, refusal of payment, and notice of dishonor⁵⁵

44. VA. CODE ANN. § 6.1-117 (1973). See also COLO. REV. STAT. ANN. § 40-5-205 (7) (Supp. 1973); N.Y. PENAL LAW § 190.15 (1) (McKinney 1967); New York makes restitution an affirmative defense.

45. Missouri, Oklahoma, and Pennsylvania are such jurisdictions. See statutes cited notes 11 & 12 *supra*.

46. NEB. REV. STAT. § 28-1214 (Supp. 1971).

47. Mississippi, New Hampshire, Tennessee, Texas, and Virginia are such jurisdictions. See statutes cited notes 11 & 12 *supra*.

48. New Mexico and West Virginia share this uncertainty. See statutes cited notes 11 & 12 *supra*.

49. E.g., Miss. CODE ANN. § 97-19-1 (1972); Wis. STAT. ANN. § 943.24 (2) (1958) (5 days).

50. Such is the practice in the Circuit Attorney's Office in the city of St. Louis, Missouri. See also NEB. REV. STAT. § 28-1214 (Supp. 1971).

51. The MICH. REV. CRIM. CODE § 4040 (2) (b) (Final Draft, 1967) incorporates the UNIFORM COMMERCIAL CODE § 3-508.

52. See generally *Chapa v. State*, 420 S.W.2d 943, 945 (Tex. Crim. App. 1967); *Hunt v. Commonwealth*, 212 Va. 737, 739, 187 S.E.2d 183, 186 (1972). Certain statutes specify that a notice of protest, not a notice of dishonor, establishes prima facie evidence. ARIZ. REV. STAT. ANN. § 13-316 (c) (Supp. 5, 1972); CAL. PENAL CODE tit. 13, § 476a (West 1970); UTAH CODE ANN. § 76-20-11 (3), (4) (Supp. 8, 1971).

53. Two of the new proposed statutes require written notice of dishonor. MONT. PROP. CODE § 94-6-130 (1970); S.C. CRIM. CODE § 17.1 (6) (Prop. Draft, 1971).

54. Such jurisdictions are Alabama, Iowa, Kansas, Mississippi, Tennessee, and Virginia. See statutes cited notes 11 & 12 *supra*.

55. Presentment and refusal of payment are almost elements of the crime under certain formulations. See N.Y. PENAL LAW § 190.10 (2) (McKinney 1967).

are not actual elements of the crime, but are merely evidentiary factors.⁵⁶ Because the crime is "making with intent to defraud" (plus consideration in some statutes), it is theoretically complete before presentment, refusal of payment, or notice of dishonor. Consequently, the state can prosecute regardless of whether these factors are present.⁵⁷ Nevertheless, at least presentment and refusal of payment are tacit elements, because they are the most common prerequisites to invoking the prima facie evidence section. While application of the prima facie evidence section is obviously not conclusive of the result in an insufficient funds prosecution,⁵⁸ the prosecution's chances of success depend on the section, because without it, elements such as intent to defraud would be virtually impossible to prove.

3. Knowledge of Insufficiency

Knowledge of insufficiency, along with intent to defraud, is the equivalent of the false pretenses statute's element of a "knowing misrepresentation of a past or present fact." The element of knowledge is present in all but eight of the insufficient funds statutes currently in effect.⁵⁹ The standard formulation of this element is "knowing at the time of such making . . . that the maker or drawer has not sufficient funds or credit with such bank . . . for payment of the check in full upon presentation."⁶⁰ Because this knowledge is difficult to prove, a prima facie evidence section may be even more helpful with respect to this element than it is with intent to defraud.

One aspect of this element is the time at which knowledge of insufficiency must exist. Some statutes are apparently based upon the theory that the insufficient funds offense must involve misrepresentation of an existing fact. These statutes thus require knowledge that the account was insufficient at the very instant of the issuance of the check.⁶¹ Some states,

56. *State v. Callahan*, 23 Conn. Supp. 374, 183 A.2d 861 (App. Div. 1962); *Merkel v. State*, 167 Wis. 512, 514, 167 N.W. 802, 803 (1918). *Contra*, *Commonwealth v. McCall*, 186 Ky. 301, 306, 217 S.W. 109, 111 (1919).

57. *See generally* *Cook v. State*, 170 Tenn. 245, 249-50, 94 S.W.2d 386, 388 (1936) (dictum).

58. A prima facie evidence section cannot create a presumption of guilt; it merely shifts the risk of nonproduction of evidence. As to those elements upon which the risk is shifted, the state can benefit from an inference of their truth until the defendant shows substantial evidence to negate them. *E.g.*, *State v. Coleman*, 17 Utah 2d 166, 169, 406 P.2d 308, 310-11 (1965). *But cf.* *Rinkov v. Commonwealth*, 213 Va. 307, 191 S.E.2d 731 (1972). Whether the defendant can do this or not, the state must still prove all of the elements of the crime beyond a reasonable doubt. *State v. Turetsky*, 78 N.J. Super. 203, 216-17, 188 A.2d 198, 205-06 (App. Div. 1963).

59. The states that omit knowledge of insufficiency as an element are: Maryland, Minnesota, North Dakota, Ohio, Rhode Island, South Carolina, Utah, and Wisconsin. *See* statutes cited notes 11 & 12 *supra*. *But cf.* *Woodall v. State*, 242 Ind. 233, 177 N.E.2d 910 (1961).

60. *See* statute quoted note 3 *supra*.

61. Jurisdictions that have a time element are: Connecticut, Delaware, District of Columbia, Indiana, Kansas, Kentucky, Louisiana, Iowa, Maine, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virgin Islands, Virginia, West Virginia, Washington, and Wyoming. *See* statutes cited notes 11 & 12 *supra*. *See also* *Henson v. United States*, 287 A.2d 106 (D.C. App. 1972) (no-account case). This

however, view this interpretation of the crime as being too narrow, reasoning that a person could easily have sufficient funds at the issuance of the check and yet at the same time know that either outstanding checks or subsequent withdrawals will make the account insufficient. Under such circumstances, there would be misrepresentation of future, not a present, fact, and the misrepresentation would be outside the criminal boundary of a false pretenses statute. Because the crime of insufficient funds is a separate and distinct offense, a number of states specifically provide for the situation in which the maker knows at the time he passes the check that outstanding checks will make the account insufficient.⁶² Also, certain statutes cover the situation where later withdrawals render the account insufficient.⁶³ The distinction between misrepresentation of a present fact and knowledge of insufficiency is sometimes expressly made by statutes which state that knowledge of insufficiency may exist even without an express misrepresentation at the time of the commission of the act.⁶⁴ Some statutes deal with these problems in very broad language, such as "knows it will not be honored,"⁶⁵ or "having reasonable cause to know . . . that it will not be paid,"⁶⁶ or has "no expectation" that it will be honored.⁶⁷ Under these statutes, insufficiency is determined at presentment,⁶⁸ not at writing, and, assuming the prima facie evidence section is not used, knowledge at presentment may be proved by circumstantial evidence.⁶⁹ Finally, at least one statute simply fails to specify the time at which the knowledge of insufficiency must be present.⁷⁰

A subtle issue under the knowledge element is whose account must be insufficient. Where the drawer or maker is the defendant, it is obviously his knowledge of the insufficiency of his own account that is pertinent. It is a more difficult case, however, when the defendant is a passer or deliverer of another's check. The passer must have knowledge of the insufficiency of the drawer's account before he is criminally liable. But

present knowledge can be refuted by the defendant by showing that unbeknownst to him there was a levy on his account. *Cowart v. State*, 123 Ga. App. 495, 181 S.E.2d 519 (1971). He can further refute it by showing that checks which he had deposited in his account were not honored. *State v. McCord*, 258 S.C. 163, 167, 187 S.E.2d 654, 656 (1972). See generally *State v. Bettis*, 27 Utah 2d 373, 374, 496 P.2d 715 (1972).

62. Alabama, Arizona, California, Tennessee, Texas, and Mississippi are such states. See statutes cited notes 11 & 12 *supra*.

63. ALA. CODE tit. 14, § 234 (15) (Supp. 5, 1971); FLA. STAT. ANN. § 832.05 (6) (1961).

64. Such statutes can be found in California, Hawaii, Massachusetts, Montana, New Jersey, Virginia, and Wyoming. See statutes cited notes 11 & 12 *supra*.

65. This language is found in the formulations of Alaska, Idaho, Iowa, and New York. See statutes cited notes 11 & 12 *supra*. See also MONT. PROP. CODE § 94-6-130 (1) (1970); MODEL PENAL CODE § 224.5 (Prop. Official Draft, 1962); N.J. PENAL CODE § 2C:21-5 (Final Draft, 1971); TEX. PENAL CODE PROP. REVISION § 32.41 (a) (Final Draft, 1970).

66. COLO. REV. STAT. ANN. § 40-5-205 (3) (a), (b) (Supp. 1971).

67. MICH. REV. CRIM. CODE § 4040 (1) (Final Draft, 1967).

68. *State v. DeNicola*, 163 Ohio St. 140, 144-45, 126 N.E.2d 62, 65 (1955).

69. See generally *Garroute v. State*, 241 Ark. 285, 286, 408 S.W.2d 485, 485-86 (1966); *Maki v. State*, 239 Md. 311, 313, 211 A.2d 711, 712 (1965); *State v. Martin*, 177 Neb. 209, 212-13, 128 N.W.2d 583, 586 (1964).

70. E.g., MASS. GEN. LAWS ANN. ch. 266, § 37 (1970).

most prima facie evidence sections are inoperative with respect to a passer. Many states only implicitly refer to the problem of the passer's knowledge of the insufficiency of the drawer's account;⁷¹ few face the problem directly.⁷²

The insufficiency of "funds" in an account is seldom at issue, because the bank can accurately show the state of the drawer's account at a given point in time. There may be a question, however, as to the insufficiency of "credit." The statutes often define "credit" as an "arrangement or understanding" with the bank for the payment of such checks.⁷³ A drawer may point to the bank's habit of paying overdrafts as being such an understanding.

The phrase "payment in full upon presentation," which is standard in most statutes, further complicates the time factor discussed above. The phrase requires that the defendant have knowledge at the time of drawing that upon presentation there will be insufficient funds. This puts an act that constitutes part of an element of the criminal offense in the control of a third person, because the maker has no control over when the presentation will be made. This has been the basis for a constitutional attack upon insufficient funds statutes.⁷⁴

Proof of knowledge of insufficiency depends, even more than proof of intent to defraud, upon the prima facie evidence sections.⁷⁵ Usually, such sections apply to both elements. Because more statutes require knowledge than require specific intent, there is a greater variety of methods to establish prima facie evidence on the knowledge element. For example, one state's statute provides that the mere making of a bad check constitutes prima facie evidence of knowledge unless payment is made before trial.⁷⁶ Other statutes provide that the drawee's refusal of payment⁷⁷ or the drawer's withdrawal of funds⁷⁸ is prima facie evidence. Some ignore these factors and merely look to the drawer's failure to make good after receiving notice of dishonor.⁷⁹ The two most common statutory prescriptions for establishing prima facie evidence of knowledge are: (1) Proof of making, refusal of payment, and failure to make good within the prescribed period after

71. Section 561.460, RSMo 1969, states in part: "[A]ny person who . . . shall . . . utter or deliver . . . any check . . . knowing at the time of such . . . uttering or delivering that the *maker* or *drawer* has not sufficient funds" (emphasis added). The language specifies the bad actor as *any person*, but provides that such person's knowledge of insufficiency must be with respect to the *maker's* or *drawer's* account.

72. See N.Y. PENAL LAW § 195.05 (1), (2) (McKinney 1967); S.C. CRIM. CODE § 17.1 (6) (Prop. Draft, 1971).

73. E.g., § 561.480, RSMo 1969 states:

The word "credit" as used in sections 561.460 to 561.480 shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order.

74. See text accompanying notes 151 & 152 *infra*.

75. Only Louisiana, Kentucky, and Washington do not provide a prima facie evidence section for the element of knowledge of insufficiency. See statutes cited notes 11 & 12 *supra*.

76. W. VA. CODE ANN. § 61-3-39 (1966).

77. IND. ANN. STAT. § 10-3040 (3) (f) (Supp. IV, part 2, 1972).

78. FLA. STAT. ANN. § 832.05 (6) (1965).

79. DEL. CODE ANN. tit. 11, § 555 (c) (1953).

notice of dishonor;⁸⁰ and (2) proof of presentation of the check within 30 days of its issuance, refusal of payment, and failure to make good.⁸¹ Both of these methods involve problems similar to those arising from the application of prima facie evidence sections to the element of intent to defraud.

The second approach represents the trend in many of the newer insufficient funds statutes.⁸² The 30-day period applies the time limit set forth in section 3-305 (2) (a) of the Uniform Commercial Code. Because presentment, refusal of payment, notice of dishonor, and the actor's failure to make good are the factors establishing the prima facie evidence of knowledge, it is also the trend in the newer statutes to allow "notice of protest" to be prima facie evidence of all three.⁸³ Notice of protest is defined in section 3-509 of the Uniform Commercial Code as a certificate of dishonor made under a seal of a notary or other person who is authorized by local law to certify a dishonor. Use of the notice of protest would not only ease the prosecutor's burden of giving notice, but it would also negate the defendant's argument that presentment and dishonor have not been proved because the check itself fails to indicate that they have occurred.

4. Consideration

Slightly fewer than half of the current insufficient funds statutes require, as an element, that the actor obtain property or "something of value."⁸⁴ Among the statutes that do not have this element, there are several that elevate the crime to larceny by check when consideration is received.⁸⁵ The theory behind this latter type of statute is that the mere issuance of a bad check, with its consequent mischief to the business world, is an act that the legislature deems criminal.⁸⁶

80. Jurisdictions following this method include Kansas, Iowa, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, Pennsylvania, Texas, and the Virgin Islands. See statutes cited notes 11 & 12 *supra*.

81. Colorado, Connecticut, Alaska, Idaho, Iowa, Georgia, and New York follow this rule. See statutes cited notes 11 and 12 *supra*. For a construction of "presentation," see *Fortune v. State*, 125 Tex. Crim. 11, 12, 66 S.W.2d 304, 304 (1933).

82. MODEL PENAL CODE § 224.5 (Prop. Official Draft, 1962); N.J. PENAL CODE § 2C:21-5 (Final Draft, 1971); TEX. PENAL CODE PROP. REVISION § 32.41 (b) (Final Draft, 1970).

83. Arizona, California, Michigan, Minnesota, New Jersey, and New York provide for "notice of protest." Tennessee and Mississippi allow the bank's own notation, if clearly marked, to be evidence of presentment and dishonor. See statutes cited notes 11 & 12 *supra*.

84. See statutes cited note 12 *supra*. See generally *State v. Davis*, 26 N.M. 523, 525, 194 P. 882, 882 (1921); *Simpson v. State*, 267 P.2d 1008, 1011 (Okla. Crim. App. 1954).

85. MASS. GEN. LAWS ANN. ch. 266, § 37 (1970); N.H. REV. STAT. ANN. § 582:12 (Supp. 5, 1972); VA. CODE ANN. § 6.1-117 (1973). See generally *Helms v. State*, 128 So. 2d 756, 758 (Fla. App. 1961); *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005, 1006-07 (1962); *State v. Covington*, 59 N.J. 536, 537-38, 284 A.2d 532, 533 (1971); *People v. Miller*, 29 App. Div. 2d 921, 286 N.Y.S. 2d 488 (1968); *Persinger v. Rhay*, 52 Wash. 2d 762, 766-67, 329 P.2d 191, 194 (1958).

86. *State v. Avery*, 111 Kan. 588, 590-91, 207 P. 838, 839 (1922); *State v. Bradley*, 190 Wash. 538, 546, 69 P.2d 819, 822-23 (1937); see text accompanying notes 9 & 10 *supra*.

Where consideration is an element, the most frequent formulation is "obtain money, property or thing of value."⁸⁷ "Obtain," which has been the subject of some litigation, is usually held to mean getting all rights of immediate possession.⁸⁸ It also covers the situation where the actor has converted the property into cash or otherwise disposed of it so as to prevent its recovery.⁸⁹

Unquestionably, the most complex issue under the consideration element is whether a pre-existing debt is a "thing of value."⁹⁰ Some statutes specifically state that a pre-existing debt is consideration.⁹¹ The rationale behind the statutes that do not is that the bad check does not defraud the victim of anything because the debt still exists.⁹² Even states that do not require consideration sometimes confront the pre-existing debt issue in determining whether the defendant had intent to defraud. In this situation, the normal rule is that while the fact that a check written for a pre-existing debt will not overcome prima facie evidence of intent to defraud,⁹³ it may be indicative of the defendant's innocence in the absence of strong evidence of intent.⁹⁴

There are a variety of particular types of pre-existing debts that cause difficulty. Earned wages are a prime example. Although it has been held that an employer obtains nothing of value when he issues a bad check in purported payment of wages,⁹⁵ some statutes specifically include wages as valid consideration.⁹⁶ The same argument can be made as to payments for services rendered (where there is no actual employer-employee rela-

87. Iowa, Louisiana, Missouri, Utah, West Virginia, and Wyoming employ this formulation. See statutes cited notes 11 & 12 *supra*.

88. Compare Gill v. State, 235 So. 2d 751, 752 (Fla. App. 1970), with State v. Kulow, 255 Iowa 789, 793, 123 N.W.2d 872, 874-75 (1963).

89. Moore v. State, 96 Okla. Crim. 118, 122, 250 P.2d 46, 50-51 (1952).

90. Annot., 59 A.L.R.2d 1159 (1958).

91. The statutes in Alabama, Maryland, Missouri, and Wyoming so provide; but those in Colorado, Georgia, Mississippi, and Wisconsin are expressly to the contrary. See statutes cited notes 11 & 12 *supra*. See also Hutson v. State, 154 Tex. Crim. 380, 227 S.W.2d 813 (1950); Bailey v. State, 408 P.2d 244 (Wyo. 1965).

92. Moore v. People, 124 Colo. 197, 205-08, 235 P.2d 798, 802 (1951); State v. Harris, 136 So. 2d 633 (Fla. 1962); Berry v. State, 153 Ga. 169, 173-75, 111 S.E. 669, 672 (1922); Pollard v. State, ___ Miss. ___, 244 So. 2d 729, 730 (1971); Jackson v. State, 251 Miss. 529, 531, 170 So. 2d 438, 439 (1965); State v. Jarman, 84 Nev. 187, 190, 438 P.2d 250, 252-53 (1968); Hoyt v. Hoffman, 82 Nev. 270, 416 P.2d 233 (1966); State v. Stout, 142 W. Va. 182, 186-88, 95 S.E.2d 639, 643 (1956). *But cf.* State v. Turetsky, 78 N.J. Super. 203, 213, 188 A.2d 198, 203-04 (App. Div. 1963).

93. Clarke v. United States, 263 F.2d 269 (D.C. Cir. 1959).

94. State v. Riccardo, 32 N.J. Super. 89, 94, 107 A.2d 807, 810 (App. Div. 1954). Although most jurisdictions do not regard a pre-existing debt as something of value, there remains the possibility of bootstrapping such a debt. The defendant may give an insufficient funds check for the debt and then, when it is returned insufficient, exchange the first check for a second. If the second check is also bad, the jurisdiction may view the exchange of checks as a separate transaction and find consideration in the victim's giving of the first check. See McCormick v. State, 161 So. 2d 696, 698 (Fla. App. 1964); Williams v. State, 198 Tenn. 439, 442, 281 S.W.2d 41, 42-43 (1955).

95. Maggard v. Commonwealth, 262 S.W.2d 672 (Ky. App. 1953); League v. State, 1 Md. App. 681, 688, 232 A.2d 828, 832 (1967) (services).

96. States with such statutes include Maryland, Tennessee, Texas, Utah, and Wisconsin. See statutes cited notes 11 & 12 *supra*.

tionship). Again, certain statutes explicitly include services rendered as consideration.⁹⁷

Because of defendants' many imaginative attempts to avoid the "thing of value" characterization, legislatures have made piecemeal efforts to foreclose such arguments as to certain items. For example, the terms "goods" and "wares" have been added in some statutes to insure that such items will be consideration.⁹⁸ Some statutes use the terminology "obtain control over property"; there is an indication, however, that the criminal act is complete if the check is given with the purpose to obtain control over property.⁹⁹ More specific statutes include "lodging,"¹⁰⁰ "rent,"¹⁰¹ and "materials or labor [for construction]."¹⁰² A difficulty with such detailed listings is that a court may limit the items available as consideration to those listed. This may be avoided by such general language as "where the maker receives a benefit or thing of value."¹⁰³ However, the word "benefit" may be too broad, because it arguably includes a pre-existing debt. Although the bad check does not erase the debt, the maker may "benefit" by having put off his creditors for awhile.¹⁰⁴ Some states include the term "credit," despite the argument that a bad check given as collateral for a loan is arguably noncriminal because the debt still exists.¹⁰⁵ Because "credit" can mean extension of credit on a pre-existing debt, some states use the words "additional credit"¹⁰⁶ to insure that the statute applies only where a new debt is created.

5. Penalties

Insufficient funds prosecutions often involve a series of checks. This may allow for a separate count on each check,¹⁰⁷ which may, in turn, lead to a cumulation of sentences. Such cumulations may be subject to attack as cruel and unusual,¹⁰⁸ but most current statutes include them.

Another feature in some statutes is a "totalling" provision whereby all of the checks written over a given period are totalled, and the total

97. Such statutes can be found in Georgia, Illinois, Iowa, Maryland, Massachusetts, New Mexico, South Carolina, and Utah. See statutes cited notes 11 & 12 *supra*.

98. FLA. STAT. ANN. § 832.05 (3) (a) (1965); N.M. STAT. ANN. § 40-49-2 (D) (1972).

99. MONT. PROP. CODE § 94-6-130 (1) (1970).

100. N.M. STAT. ANN. § 40-49-2 (D) (1972); S.C. CODE ANN. § 8-176 (Supp. I, 1971).

101. UTAH CODE ANN. § 76-6-505 (1) (Supp. 8, 1973).

102. MD. ANN. CODE art. 27, § 142 (Supp. 3, 1972).

103. OKLA. STAT. ANN. tit. 21, § 1541.4 (Supp. 21, 1972).

104. *Clarke v. United States*, 263 F.2d 269, 270 (D.C. Cir. 1959) (dictum).

105. These states are Iowa, Maryland, South Carolina, Tennessee, West Virginia, and Wyoming. See statutes cited notes 11 & 12 *supra*.

106. COLO. REV. STAT. ANN. § 40-5-205 (2) (Supp. 1973); S.C. CRIM. CODE § 17.1 (6) (Prop. Draft, 1971).

107. MISS. CODE ANN. § 97-19-1 (1972).

108. *Faulkner v. State*, 445 P.2d 815, 818-19 (Alas. 1968); Comment, *The Kansas Habitual Criminal Act*, 9 WASHBURN L.J. 244, 260-61 (1970). The normal penal treatment for a single offense by a small check is to classify it a misdemeanor. See generally 14 U. MIAMI L. REV. 486 (1960). States that consider the successive number of bad check offenses in allotting the penalty include Alabama, California, Colorado, Iowa, Michigan, Mississippi, North Carolina, South Carolina and Texas. See statutes cited notes 11 & 12 *supra*.

amount is used to determine whether the single prosecution will be for a felony or a misdemeanor.¹⁰⁹ Such totalling provisions have been subject to attack on the grounds of vagueness¹¹⁰ and denial of due process.¹¹¹ The complicated nature of statutes involving numbered offenses and totalling provisions (with the consequent uncertainty as to the possible penalties) may enable the defendant to defeat a guilty plea in a habeas corpus proceeding on the ground of ineffective counsel if the defendant's attorney has not properly apprised him of the penalty.

B. Defenses

Throughout the foregoing discussion of the elements of the crime of passing insufficient funds checks, there have been implicit treatments of defenses. Although any factor that will deny the existence of one of the elements of the crime will, in a sense, serve as a defense to prosecution,¹¹² there are several traditional areas, which the statutes seldom mention, that provide points for arguments by the defendant. These areas include post-dated checks, reasonable expectation of payment, and restitution. Beyond these, there are also the defenses that can be raised at any criminal prosecution such as duress¹¹³ and entrapment.¹¹⁴

Theoretically, the scienter essential to a violation of the statute is absent with regard to a post-dated check. The inference from post-dating is that while the defendant may know that there are insufficient funds at issuance, he expects that on the written date there will be sufficient funds.¹¹⁵ The defendant's culpable intent is further absolved through the recipient's compliance in taking a post-dated check, since the understanding is that present payment of the check is impossible. Thus, this transaction takes on the appearance of a credit arrangement, and failure of sufficient funds at the later date may well be for reasons beyond the maker's control and intent at the date of issuance. Following this rationale, some statutes expressly exclude post-dated checks.¹¹⁶ In some jurisdictions, post-dating is not alone a defense; there must also be evidence that the

109. Totalling provisions can be found in Alabama, New Mexico, Oklahoma, and Utah. See statutes cited notes 11 & 12 *supra*.

110. *State v. Ferris*, 80 N.M. 663, 665-67, 459 P.2d 462, 464-65 (Ct. App. 1969).

111. *Mathis v. State*, 266 F. Supp. 841, 845 (M.D.N.C. 1967).

112. See generally Warner, *Bad Checks*, 37 Miss. L.J. 86 (1965).

113. *State v. Lee*, 78 N.M. 421, 423, 432 P.2d 265, 267 (Ct. App. 1967). See also COLO. REV. STAT. ANN. § 40-5-205 (7) (b) (Supp. 1971); N.Y. PENAL LAW § 190.15 (2) (McKinney 1967).

114. *State v. Jackson*, 243 N.C. 216, 220, 90 S.E.2d 507, 510 (1955). An exotic defense could be lack of knowledge through blackouts. *State v. Bettis*, 27 Utah 2d 373, 374, 496 P.2d 715 (1972). Further potential defenses are insufficiency of the indictment or of the jury instructions. *State v. Brookshire*, 104 Ariz. 349, 351, 452 P.2d 703, 704-05 (1969); *State v. Veres*, 7 Ariz. App. 117, 126, 436 P.2d 629, 638, *cert. denied*, 393 U.S. 1014 (1968). Inflammatory statements to the jury is also a trial defense. *Sherman v. State*, 255 So. 2d 263, 265 (Fla. 1971).

115. See Annot., 29 A.L.R.2d 1181 (1953).

116. Florida, Minnesota, New Mexico, North Dakota, and South Carolina have such statutes. See statutes cited notes 11 & 12 *supra*. See also *State v. Stout*, 8 Ariz. App. 545, 547-48, 448 P.2d 115, 117-18 (1968); *People v. Kubitz*, 37 Misc. 2d 453, 454, 235 N.Y.S.2d 971, 972 (Monroe County Ct. 1963); *State v. Crawford*, 198 N.C. 522, 524, 152 S.E. 504, 505 (1930).

actor called the payee's attention to the post-dating.¹¹⁷ Other statutes provide that post-dating merely prevents the operation of the prima facie evidence section.¹¹⁸

A situation analogous to the post-dated check situation is where the payee agrees to withhold presentment for a given period.¹¹⁹ This, like the post-dated check, is a credit-type arrangement. An argument against the credit rationale is that the legislature's primary intent in passing a bad check statute, aside from its desire to combat fraudulent schemes, was to curb the flow of worthless commercial paper in the business world and that an insufficient, post-dated check is still worthless.¹²⁰

The defendant may argue his reasonable expectation of payment as a defense.¹²¹ This is practically the mirror image of the post-dated check situation. One aspect of that defense is that the payee has no reasonable expectation of present payment, whereas here the defendant claims that he had reasonable expectation of payment and, therefore, no criminal intent. No statute, however, expressly provides for this defense. While some statutes *do* set up as a defense the *payee's* reasonable belief, from the surrounding circumstances or by direct notification, that the check will be dishonored,¹²² the term "reasonable expectation of payment" normally refers to the actor's intent or state of mind. Originally, the defendant would show that through the ordinary course of the bank's business he

117. ALA. CODE tit. 14, § 234 (12) (Supp. 5, 1971); KAN. STAT. ANN. § 21-3707 (3) (Supp. II, 1972); N.D. CENT. CODE § 6-08-16 (1) (Supp. 1, 1971). Whether such disclosure was made constitutes a difficult factual question (*e.g.*, *State v. Ramsbottom*, 89 Idaho 1, 7-8, 402 P.2d 384, 387-8 (1965)), upon which such evidence as the course of dealings between the parties (*Pollard v. State*, ___ Miss. ___, 244 So. 2d 729, 730 (1971)); *Commonwealth v. Kelinson*, 199 Pa. Super. 135, 142, 184 A.2d 374, 377 (1962)) and the fact that the payee held the check until the specified date (*People v. Burnett*, 39 Cal. 2d 556, 560, 247 P.2d 828, 830 (1952)) is relevant.

118. CONN. GEN. STAT. ANN. § 53 (a)-128 (b) (1972); N.J. PENAL CODE § 2C:21-5 (Final Draft, 1971); TEX. PENAL CODE PROP. REVISION § 32.41 (b) (Final Draft, 1970). This would force the state to bring other evidence on intent and knowledge. *See People v. Poyet*, 15 Cal. App. 3d 717, 720-25, 93 Cal. Rptr. 393, 396-99 (1971), *rev'd & vacated*, 6 Cal. 3d 530, 429 P.2d 1150, 99 Cal. Rptr. 758 (1972); *State v. Bruce*, 1 Utah 2d 136, 139, 262 P.2d 960, 962 (1953); *State v. Etheridge*, 74 Wash. 2d 102, 107-09, 443 P.2d 536, 540-41 (1968).

119. *See People v. Will*, 289 N.Y. 413, 415-16, 46 N.E.2d 498, 499 (1943); *People v. Nibur*, 238 App. Div. 233, 264 N.Y.S. 148 (1933); *State v. Myers*, 15 Utah 2d 130, 131, 388 P.2d 801, 802 (1964); KAN. STAT. ANN. § 21-3709 (Supp. II, 1972); N.D. CENT. CODE § 6-08-16 (1) (Supp. 1, 1971).

120. *Windle v. Wire*, 179 Kan. 239, 241-42, 294 P.2d 213, 215 (1956) (dictum); *State v. Avery*, 111 Kan. 588, 593, 207 P. 838, 840 (1922); *State v. DeNicola*, 163 Ohio St. 140, 143-44, 126 N.E.2d 62, 64-65 (1955).

The reasoning behind this argument is the same reasoning that supports the omission of consideration as an element in an insufficient funds statute. *See* text accompanying notes 9 & 86 *supra*.

121. *See* Annot., 9 A.L.R.3d 719 (1966).

122. N.M. STAT. ANN. § 40-49-6 (1972); S.C. CODE ANN. § 8-176 (Supp. I, 1971). *See also Gilmore v. United States*, 273 F.2d 79, 82 (D.C. Cir. 1959). Florida goes one step further by providing that the payee is assessed all the costs of the proceeding if at trial he is found to have had reason to believe that the account was insufficient. FLA. STAT. ANN. § 832.05 (6) (1965). *Compare George v. State*, 203 So. 2d 173, 176 (Fla. App. 1967), *with Deitle v. State*, 363 S.W.2d 939, 940 (Tex. Crim. App. 1963).

had a reasonable expectation that the check would be paid.¹²³ The tendency today, however, is to depart from the restrictive "ordinary course of business" language and to consider all circumstances.¹²⁴ In any case, to constitute a successful defense the expectation must be more than a mere hope, based, for example, on the success of a questionable business enterprise.¹²⁵ Although most jurisdictions do not expressly recognize it as a defense, evidence of reasonable expectation can be relevant in a more limited capacity to combat the state's evidence of intent to defraud. In this regard, defendants' arguments based on deposited checks that were unknowingly bad,¹²⁶ arrangements with third parties,¹²⁷ and the defendant's disclosure to the payee that his account was insufficient¹²⁸ have prevailed.

Restitution is a statutory defense in one state;¹²⁹ the older cases recognize it only to a limited extent.¹³⁰ However, evidence of restitution, if admissible,¹³¹ may rebut prima facie evidence of intent to defraud¹³² or direct evidence on that element.¹³³ If the crime is considered complete at the passing or making of the bad check, restitution must be viewed as a collateral matter because it can only follow the commission of the crime. Practically, however, there often will be no prosecution if the parties

123. *People v. Rubin*, 223 Cal. App. 2d 825, 834, 36 Cal. Rptr. 167, 172 (1963); *People v. Griffith*, 120 Cal. App. 2d 873, 880, 262 P.2d 355, 359 (1953); *State v. Johnson*, 77 Minn. 267, 271, 79 N.W. 968, 969 (1899); *State v. Shock*, 58 N.D. 340, 344, 226 N.W. 525, 526-27 (1929).

124. *People v. Poyet*, 6 Cal. 3d 530, 492 P.2d 1150, 99 Cal. Rptr. 758 (1972). *But cf.* *United States v. Bessemen*, 445 F.2d 463, 471 (7th Cir.), *cert. denied*, 404 U.S. 984 (1971).

125. *See Williams v. United States*, 278 F.2d 535, 537 (9th Cir. 1960); *United States v. Broxmeyer*, 192 F.2d 230, 232 (2d Cir. 1951) (dictum); *People v. Croxton*, 162 Cal. App. 2d 187, 193-94, 327 P.2d 611, 614 (1958).

126. *People v. Brown*, 141 Cal. App. 2d 299, 301, 296 P.2d 560, 561 (1956); *State v. Sills*, 2 Conn. Cir. Ct. 349, 352-53, 199 A.2d 186, 187 (Ct. App. 1963); *People v. Hasto*, 236 App. Div. 533, 534-35, 260 N.Y.S. 97, 99-100 (1932); *State v. McCord*, 258 S.C. 163, 167, 187 S.E.2d 654, 656 (1972). *But see Rice v. State*, 240 Ark. 674, 678, 401 S.W.2d 562, 564 (1966).

127. *United States v. Frazier*, 444 F.2d 235, 239 (5th Cir. 1971); *People v. Rush*, 172 Cal. App. 2d 431, 436-38, 341 P.2d 788, 791-92 (1959); *Nora v. People*, ___ Colo. ___, 491 P.2d 62, 64 (1971) (dictum); *People v. Coats*, 16 Mich. App. 652, 654-55, 168 N.W.2d 463, 465 (1969); *Reeves v. State*, 428 S.W.2d 320, 323 (Tex. Crim. App. 1968).

128. Evidence of a disclosure to the payee that the account is insufficient has been held admissible on the issue of intent even though a fraudulent purpose to pay accompanied the disclosure. *State v. Zent*, 92 Ariz. 334, 336-37, 376 P.2d 861, 863 (1962); *People v. Jacobson*, 248 Mich. 639, 642-43, 227 N.W. 781, 782 (1929); *State v. Creachbaum*, 24 Ohio App. 2d 31, 37-39, 263 N.E.2d 675, 679 (1970); *State v. Vice*, 33 Ohio Op. 544, 545, 70 N.E.2d 125, 127 (Ct. C.P. 1946).

129. N.Y. PENAL LAW § 190.15 (1) (McKinney 1967).

130. *State v. Nelson*, 58 S.D. 562, 567, 237 N.W. 766, 768 (1931); *Miller v. State*, 166 Tex. Crim. 613, 613-14, 317 S.W.2d 542, 543 (1958); *State v. Cunningham*, 90 W. Va. 806, 809-10, 111 S.E. 835, 837 (1922).

131. Not all courts will allow such evidence. *See People v. Privitier*, 200 Cal. App. 2d 725, 729, 19 Cal. Rptr. 640, 643 (1962).

132. *Maki v. State*, 239 Md. 311, 314, 211 A.2d 711, 712-13 (1965).

133. *Compare State v. Johnson* ___ Iowa ___, 196 N.W.2d 563, 570-71 (1972), *and Cook v. Commonwealth*, 178 Va. 251, 259-60, 16 S.E.2d 635, 638 (1941), *with State v. Spitko*, 2 Conn. Cir. Ct. 99, 104, 195 A.2d 577, 578 (App. Div. 1963), *and Haines v. State*, 135 Neb. 433, 439-40, 281 N.W. 860, 864 (1938).

can make an arrangement for payment of the check or restoration of the goods.¹³⁴

Each element of the crime supplies the basis for a defense. For instance, the defendant may succeed in proving that he and the payee actually treated an instrument as a promissory note and not as a check;¹³⁵ that there were sufficient funds at the passing of the check and for some time thereafter, but the presentation was unduly late;¹³⁶ or that the defendant had sufficient "credit" at the time of issuance.¹³⁷

C. *Constitutionality of Insufficient Funds Statutes*

Because making good on the check is either explicitly or practically a defense or at least a mitigating circumstance under nearly every insufficient funds statute, such statutes have constantly been vulnerable to constitutional attack on the ground that they allow imprisonment for debt.¹³⁸ The basic counterargument is that the statute punishes intent to defraud, not the failure to pay a debt.¹³⁹ It has been argued, however, that this *must* be a specific intent (which it is in most statutes), not a general criminal intent, because the criminal act always "grows out" of a debt.¹⁴⁰

There is also a due process argument with respect to the prima facie evidence sections. The courts, however, have nearly always upheld the prima facie proof sections. They say that these sections merely allow the prosecution to get to the jury on the issues covered in the given section; but they do not raise a presumption of guilt. The constitutionality of such a provision must rest on one of two theories: rational relationship or comparative convenience.¹⁴¹ The United States Supreme Court prefers the rule that there must be a natural and rational relation between the fact proved and the fact presumed.¹⁴² However, few state courts have directly met the issue of the application of the rational relationship rule to

134. It is the practice in some prosecutors' offices to discourage prosecution before notice of dishonor is sent, if there is a strong possibility that the victim will be restored to the status quo.

135. *Gibbs v. Commonwealth*, 273 S.W.2d 583, 584-85 (Ky. 1954); *Jackson v. State*, 251 Miss. 529, 532, 170 So. 2d 438, 439 (1965); see text accompanying note 21 *supra*.

136. *Edwards v. State*, ___ Miss. ___, 217 So. 2d 14, 16 (1968); *Arnwine v. State*, 167 Tex. Crim. 386, 389-90, 320 S.W.2d 353, 355 (1959).

137. See text accompanying note 73 *supra*. An arrangement with the bank for credit is difficult to prove without a written agreement. See *State v. DeVinney*, 98 Ariz. 273, 277, 403 P.2d 921, 923 (1965); *Kaufman v. State*, 199 Md. 35, 40, 85 A.2d 446, 448 (1952); *People v. Cimini*, 33 Mich. App. 461, 463-64, 190 N.W.2d 323, 324 (1971).

138. See Annot., 23 A.L.R. 459 (1923). But the court will not always take jurisdiction over the constitutional issue. *Christ v. State*, 480 S.W.2d 394, 397 (Tex. Crim. App. 1972).

139. *State v. Yarboro*, 194 N.C. 498, 501-03, 140 S.E. 216, 219 (1927); *Colin v. State*, 145 Tex. Crim. 371, 373, 168 S.W.2d 500, 501 (1943).

140. *State v. Yarboro*, 194 N.C. 498, 513, 140 S.E. 216, 224 (1927) (dissenting opinion).

141. *Smithson v. State*, 222 Tenn. 499, 508-10, 438 S.W.2d 61, 65 (1969); 1 F. WEARTON, *CRIMINAL EVIDENCE* § 94 (13th ed. C. Torcia 1972).

142. *Leary v. United States*, 395 U.S. 6, 36 (1969); *Tot v. United States*, 319 U.S. 463, 467-68 (1943). See also *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *Abrams, Statutory Presumptions and* <https://scholarship.law.missouri.edu/mlr/vol38/iss3/6>

the prima facie evidence sections of insufficient funds statutes.¹⁴³ Those who believe that the issuance of an insufficient funds check should not be a criminal offense argue that there is no rational relationship between the proved facts of making the check, refusal of payment, and failure to make good, and the presumed facts of knowledge of insufficiency and intent to defraud at the time of the making. The doctrine of comparative convenience, on the other hand, holds that where the defendant has more convenient access than the state to the fact inferred and where requiring the defendant to bear the risk of nonproduction does not subject him to unfairness or hardship, the state's proof of certain facts should allow the inference of others. As with the rational relationship test, the successful application of the comparative convenience standard to a prima facie evidence section is certainly arguable. A defendant could well claim that the role is patently unfair to him and, therefore, unconstitutional. The resolution of this dilemma would depend upon the court's characterization of "unfairness" and hardship with respect to the prima facie evidence section in question.¹⁴⁴

Successful constitutional arguments against an insufficient funds statute were made in *People v. Vinnola*.¹⁴⁵ That case struck down Colorado's statute¹⁴⁶ as being a denial of due process and of equal protection. The Colorado Supreme Court looked first to the many changes in the statute and said that these indicated some confusion as to the legislative intent.¹⁴⁷ More specifically, with respect to the element of knowledge of insufficiency the court focused on the language "knowing or having reasonable cause to know . . ." The court said that the "reasonable cause" language was vague.¹⁴⁸ The court then said that the statute's definition of "insufficient funds" ("no legal right to require the drawee to pay the check in accordance with the ordinary course of banking business") was equally vague.¹⁴⁹ Next, the court struck the prima facie evidence section, which required presentment within 30 days of issuance and dishonor to establish its prima facie effect. The statute also provided, as a defense, that the maker or a person acting for him could make restitution. The court regarded this formulation as nothing more than a debt-collecting device that dangled imprisonment precariously above the maker's head, forcing

the Federal Criminal Law: A Suggested Analysis, 22 VAND. L. REV. 1135 (1969); Brown, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966); Note, *Statutory Criminal Presumptions; Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967).

143. See *Smithson v. State*, 222 Tenn. 499, 508-10, 438 S.W.2d 61, 65 (1969).

144. Other constitutional arguments have been levelled at *totalling provisions*. See *Faulkner v. State*, 445 P.2d 815, 818-19 (Alas. 1968); *Siegel v. Commonwealth*, 176 Ky. 772, 777-79, 197 S.W. 467, 468 (1917); *State v. Ferris*, 80 N.M. 663, 665-67, 459 P.2d 462, 464-65 (Ct. App. 1969).

145. ___ Colo. ___, 494 P.2d 826 (1972).

146. The statute under attack was COLO. REV. STAT. ANN. § 40-5-205 (Supp. 1971). The repeal of this statute caused its predecessor to come back into effect, COLO. REV. STAT. ANN. § 40-14-20 (1963). Prosecutions under this older law ignited new attacks on appeal. See *White v. District Court*, ___ Colo. ___, 503 P.2d 340 (1972).

147. ___ Colo. at ___, 494 P.2d at 829.

148. *Id.* at ___, 494 P.2d at 830.

149. *Id.* at ___, 494 P.2d at 831.

him to pay a debt against which he may have had a legal defense.¹⁵⁰ The court then focussed on what it considered the statute's worst defect, the fact that criminal liability was dependent to too great an extent on the "unfettered discretion" of third parties because the payee's presentment, the bank's dishonor, and restitution by a third party were all conditions over which the maker had no direct control.¹⁵¹ Finally, *Vinola* summarized the statute's lack of clarity and resulting unfairness by pointing to the possibility of inconsistent conclusions that result from an inquiry into whether the penalty is imposed "for issuing the bad check, for failure to make satisfaction of the check, or for not being able to cover the check when presented . . ."¹⁵²

Whether *Vinnola* represents a growing trend toward the overturning of insufficient funds statutes or merely a specific attack on a particularly vulnerable one remains to be seen. Certainly, any statute of this type can be characterized as a debt-collecting law because there will seldom be a prosecution if the parties to the check have reached an agreement as to restitution. Reliance on third party action for the proof of guilt is also unavoidable because the payee does not know, at issuance, that the check is bad, and the bank can only dishonor upon presentment. However, almost every criminal offense bases prosecution on the acts of a person other than the defendant himself, because if the victim fails to make a complaint or the complainant seeks to drop charges, prosecution can seldom be successful. In this regard, however, *Vinnola* criticizes the unfettered discretion of third parties, not the allowance of some discretion. Thus, perhaps the constitutional validity of reliance upon third party discretion depends upon the degree of such reliance, not upon the mere fact of some reliance.

One safeguard for an insufficient funds statute is a severability provision that maintains the constitutionality of the whole, if a part is stricken; this assumes, of course, that the crime's essential elements remain.¹⁵³ Moreover, the severity and ingenuity of the constitutional arguments against these statutes may be disguised indicators of hostility towards viewing insufficient funds checks as criminal in nature.

D. Deceptive Practices and Civil Remedy Statutes

Not all states follow the standard approach of providing a criminal penalty for writing an insufficient funds check. Some jurisdictions maintain the criminal offense, but couch it in terms of a broadly stated deceptive practices statute.¹⁵⁴ Vermont, on the other hand, uses the normal language to describe the wrongful act, but provides for only a *civil* remedy.¹⁵⁵

The current deceptive practices statutes require both a specific intent

150. *Id.* at ___, 494 P.2d at 832.

151. *Id.* at ___, 494 P.2d at 831-32.

152. *Id.* at ___, 494 P.2d at 832.

153. CAL. PENAL CODE tit. 13, § 476a (e) (West 1970); MISS. CODE ANN. § 97-19-1 (1972).

154. ILL. REV. STAT. ch. 38, § 17-1 (1969); IND. ANN. STAT. §§ 10-3030 to -3040 (Supp. IV, part 2, 1972); ORE. REV. STAT. § 164.085 (1971); KY. PENAL CODE § 1515 (Final Draft, 1971).

155. VT. STAT. ANN. tit. 9, § 2311 (Supp. 9, 1972).

to defraud and the obtaining of money or property.¹⁵⁶ Accepted formulations impose liability for "creating or reinforcing a false impression as to law, value, or other state of mind"¹⁵⁷ or for "promis[ing] a performance which the actor does not intend to perform or knows will not be performed;" in this latter formulation, no inference is to be drawn from the failure to perform the promise.¹⁵⁸ Because this last qualification would seem to make an insufficient funds offense virtually impossible to prove, prima facie evidence sections are inserted specifically to deal with that offense. But there is also an implicit defense through the addition of a provision removing from "deception" any representation "not likely to deceive an ordinary person in the group addressed."¹⁵⁹ Because only one deceptive practices statute has been in existence for any significant period of time,¹⁶⁰ it is difficult to determine how many of the insufficient funds issues this approach resolves. If nothing else, such statutes achieve brevity by including several crimes within a concise formulation.

Vermont is the only state without a criminal remedy for the issuance of an insufficient funds check. This reflects the attitude that the offense is at best quasi-criminal and, if the actor can be reached at all, restitution should end the process.¹⁶¹ Sections 2311 and 2312 of title nine, Vermont Statutes Annotated (1972), describe a normal insufficient funds offense minus intent to defraud. The penalty is the amount of the check with interest, the cost of collection, and attorney's fees.¹⁶² This civil statute allows for a variety of defenses unknown to the criminal statutes. For example, estoppel is applicable where there is an agreement not to resort to the statutory remedy; of course, no one can waive the operation of criminal statutes.¹⁶³ Studies show that no greater percentage of bad checks are passed in Vermont than in other states of comparable makeup.¹⁶⁴

E. Malicious Prosecution

Insufficient funds statutes lend themselves to use by anxious creditors who seek only payment on the check and not a criminal remedy. To avoid a deluge of such creditors upon their offices, prosecutors seek to insure

156. See generally *People v. Stewart*, 3 Ill. App. 3d 699, 279 N.E.2d 53 (1971); *People v. Tenen*, 132 Ill. App. 2d 786, 788, 270 N.E.2d 179, 180 (1971); *People v. Greene*, 92 Ill. App. 2d 201, 206, 235 N.E.2d 295 (1968); *People v. Samples*, 80 Ill. App. 2d 182, 186, 224 N.E.2d 284, 286 (1967); *Ferrell v. State*, 219 N.E.2d 804, 806 (Ind. 1966).

157. ORE. REV. STAT. § 164.085 (1) (a) (1971); KY. PENAL CODE § 1515 (1) (a) (Final Draft, 1971).

158. IND. ANN. STAT. § 10-3040 (3) (f) (Supp. IV, part 2, 1972).

159. ORE. REV. STAT. § 164.085 (3) (1971); KY. PENAL CODE § 1515 (3) (Final Draft, 1971).

160. IND. ANN. STAT. §§ 10-3030 to -3040 (Supp. IV, part 2, 1972).

161. The VT. PROP. CRIM. CODE tit. 13, § 2006 (1970), specifies a criminal sanction for the insufficient funds violation, but the legislature of that state has yet to enact this provision into law.

162. Body attachment is also provided as a statutory remedy, but the statute's legislative history casts doubt as to the current applicability of this remedy. See generally *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967).

163. *Neverett v. Towne*, 121 Vt. 447, 457-58, 159 A.2d 345, 351-52 (1960), *aff'd*, 123 Vt. 45, 55, 179 A.2d 583, 589-90 (1962).

164. F. BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE 356 (1957).

that once they have initiated criminal prosecution, the complainant will not drop charges if he later gets restitution from the maker or drawer of the check. Similarly, the innocent drawer who may be wrongfully harassed by impending prosecution has the remedy of malicious prosecution against the payee or holder.¹⁶⁵

The roles of the parties in a malicious prosecution action are reversed: the maker or drawer is the plaintiff and the victim in the criminal action becomes the defendant. The drawer, as plaintiff, must usually show that there was no probable cause¹⁶⁶ for the initiation of the criminal proceeding and that there was a termination of that proceeding in his favor.¹⁶⁷ A *nolle prosequi* is such a favorable termination.¹⁶⁸ If the drawer makes any payment on the check, however, he has made a tacit admission that there was probable cause for the institution of the proceedings.¹⁶⁹ Moreover, the standard for probable cause is less stringent in a malicious prosecution action than in a criminal proceeding. The test is stated in terms of knowledge of such facts and circumstances as would induce in the mind of a reasonable man, not a well-educated lawyer, the conclusion of the drawer's possible guilt.¹⁷⁰ Several statutes expressly state that probable cause, taken in a legal sense, will be a defense to any civil action for false arrest or malicious prosecution.¹⁷¹ Other states presume the existence of probable cause if the payee himself sends notice of dishonor by registered mail and waits the prescribed period before filing the complaint.¹⁷² Another approach to the probable cause question is to allow prima facie evidence of the bad check crime to operate as a defense to a civil action.¹⁷³ Finally, one jurisdiction permits proof of collateral agreements to show the lack of probable cause only if the collateral agreement appears on the check.¹⁷⁴

Some states try to discourage the filing of frivolous criminal complaints by punishing as a misdemeanor any action taken by a payee or holder when he had knowledge of either insufficiency of funds or post-dating,¹⁷⁵ or when he requests dismissal of the proceedings.¹⁷⁶ Coverage of this latter situation is an attempt to maintain the integrity of the criminal proceeding by ruling out restitution as a reason to drop the charge. Another method to prevent the filing of half-hearted and malicious complaints is to assess all costs of the proceeding to a complainant who is

165. *Kitchens v. Barlow*, 250 Miss. 121, 134, 164 So. 2d 745, 751-52 (1964).

166. *But cf. Bell v. Capital Bakers, Inc.*, 88 Dauphine County R. 203, 207 (Pa. Ct. App. 1967).

167. *See Warner, Bad Checks*, 37 Miss. L.J. 86, 100 (1965).

168. *White v. Coleman*, 277 F. Supp. 292, 297 (D.S.C. 1967).

169. *Marchbanks v. Young*, 47 N.M. 213, 216, 139 P.2d 594, 596 (1943).

170. *White v. Coleman*, 277 F. Supp. 292, 297 (D.S.C. 1967).

171. GA. CODE ANN. § 26-1704 (c) (1972).

172. *Id.*; S.C. CODE ANN. § 8-177 (Supp. I, 1971); VA. CODE ANN. § 6.1-118 (1973).

173. MISS. CODE ANN. § 97-19-1 (1972); TENN. CODE ANN. § 39-1967 (Supp. 7, 1967). Courts may narrowly read the statutory exemption from civil liability. *Johnson v. Zale Corp.*, 484 S.W.2d 531, 534 (Tenn. 1972).

174. VA. CODE ANN. § 6.1-118 (1973).

175. KAN. STAT. ANN. § 21-3709 (Supp. II, 1972).

176. TEX. PENAL CODE ANN. art. 567 (b), § 6 (Supp. 1A, 1972). This applies to the informant who institutes the proceedings and to a witness.

found at the criminal trial not to have had reasonable cause to believe that there were insufficient funds¹⁷⁷ or who seeks a dismissal of the proceedings.¹⁷⁸

III. MISSOURI LAW

Missouri insufficient funds statutes have maintained the same elements and language, except in one respect, since 1917.¹⁷⁹ The original statute made the mere passing of an insufficient funds check with the intent to defraud a criminal act. A 1925 amendment introduced the requirement that the maker receive consideration, thus manifesting a clear legislative intent to bring the Missouri statute closer to the traditional false pretenses formulation.¹⁸⁰ The only other alterations since 1917 have been minor.¹⁸¹

The current Missouri insufficient funds statute, section 561.460, RSMo 1973 Supp., reads:

Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose, shall make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor

The language "for any other purpose" has caused some confusion.¹⁸² This language may indicate an intent to establish a very broad spectrum of types of consideration. The inclusion of "past due debts" substantiates this interpretation, because few jurisdictions include them.¹⁸³

Case law clearly treats the Missouri statute as a branch of false pretenses.¹⁸⁴ This is evident from the courts' reference to the issuance of

177. FLA. STAT. ANN. § 832.05 (6) (1965).

178. ALA. CODE tit. 14, § 234 (21) (Supp. 5, 1971); N.M. STAT. ANN. § 40-49-9 (1972). To guard the bank against civil actions for divulging information about the drawer's account to the prosecutor, at least one state specifically exempts the bank. COLO. REV. STAT. ANN. § 40-5-205 (11) (Supp. 1973).

179. Missouri's insufficient funds statutes since 1917 are as follows: §§ 561.460-.480, RSMo 1969; §§ 561.460-.080, RSMo 1959; §§ 561.460-.480, RSMo 1949; §§ 4695-97, RSMo 1939; §§ 4305-07, RSMo 1929; §§ 3553-55, RSMo 1919.

180. See statute quoted note 3 *supra*.

181. In 1963, the Missouri legislature made the writing of bad checks over \$100 felony offenses and the writing of bad checks under that amount misdemeanors. Another minor amendment occurred in the prima facie evidence section, where the legislature increased the amount of time after notice of dishonor in which the actor can rebut the inference was from 5 to 10 days. See statute quoted note 36 *supra*.

182. *State v. Phillips*, 430 S.W.2d 635, 637 (St. L. Mo. App. 1968).

183. Past due debts have not always been viewed as consideration in Missouri. *State v. Hack*, 284 S.W. 842 (St. L. Mo. App. 1926). See generally *State v. Benson*, 110 Mo. 18, 19 S.W. 213 (1892); *State v. Willard*, 109 Mo. 242, 19 S.W. 189 (1892); *State v. Clay*, 100 Mo. 571, 13 S.W. 827 (1890).

184. *State v. Kleen*, 491 S.W.2d 244, 246 (Mo. 1973) (dictum); *State v. Garner*, 432 S.W.2d 259, 260 (Mo. 1968); *State v. Baity*, 494 S.W.2d 425, 425 (St. L. Mo. App. 1973).

the check as a misrepresentation of a present fact.¹⁸⁵ This treatment may open up insufficient funds prosecutions to false pretenses defenses.¹⁸⁶

Intent to defraud is an element in Missouri's insufficient funds statute, and proof of such intent can be by circumstantial evidence¹⁸⁷ as well as by use of the prima facie evidence section.¹⁸⁸ In either case, the relevant intent is that existing at the time of issuance of the check.¹⁸⁹ Allowing proof of intent by circumstantial evidence prevents the abuse of withdrawing funds after issuance and covers the situation where there are other outstanding checks at the date of issuance. The statute fails to reach either of these areas. There is old precedent to the effect that mere presentment and dishonor suffice to show intent,¹⁹⁰ but this approach would be inapplicable today. A frequently used way to prove intent is to show the commission of "similar offenses." The test for the admissibility of such evidence is whether at the time of issuance of the check under consideration the other checks constituted sufficiently similar offenses to shed light on the intent issue.¹⁹¹ In making this determination, a prime factor is the proximity in time between the check under consideration and the others¹⁹² (fourteen months has been held to be too long an interval).¹⁹³

Another area of controversy deals with post-dated checks, along with no-date checks.¹⁹⁴ A 1934 Missouri case reasons that because post-dated checks were not expressly excepted by the statute, the statute must cover them.¹⁹⁵ The court in this case said that the language "shall be guilty" gave the statute an element of futurity, thereby negating the position that a post-dated check was not criminal. Further bolstering its argument, the court said that the Negotiable Instruments Law's definition of "check" made no reference to the date on the check.¹⁹⁶ Despite the ingenuity of these points, the present Missouri law strongly resists applying criminal

185. *State v. DeClue*, 400 S.W.2d 50, 53 (Mo. 1966) (no funds case); *State v. Griggs*, 361 Mo. 753, 763, 236 S.W.2d 588, 590 (1951) (no funds case). These cases involve prosecutions under section 561.450, RSMo 1973 Supp., which is aimed at, among other offenses, checks written on banks in which the actor has *no funds*. The reasoning in these cases is closely analogous to that in insufficient funds cases.

186. One such defense is the victim's failure to avail himself of the means at hand to determine the falsity of the representation. *State v. Herman*, 162 S.W.2d 873, 874 (Mo. 1942) (false pretenses case).

187. *State v. Brookshire*, 329 S.W.2d 252, 256 (St. L. Mo. App.), *on remand from* 325 S.W.2d 497 (Mo. 1959).

188. § 561.470, RSMo 1973 Supp; *see* statute quoted note 36 *supra*.

189. *State v. DeClue*, 400 S.W.2d 50, 54 (Mo. 1966) (no funds case) (dictum).

190. *State v. Moss*, 94 S.W.2d 920, 921 (Spr. Mo. App. 1936).

191. Checks that are returned *uncollected funds* do not constitute similar offenses for this purpose. *State v. Klosterman*, 471 S.W.2d 175, 177-78 (Mo. 1971). *See also* *State v. DeClue*, 400 S.W.2d 50, 55 (Mo. 1966) (no funds case).

192. *State v. Klosterman*, 471 S.W.2d 175, 180 (Mo. 1971).

193. *State v. Stegall*, 353 S.W.2d 656, 658 (Mo. 1962) (false pretenses case).

194. *See* *State v. Humphrey*, 74 S.W.2d 86, 87 (Spr. Mo. App. 1934) (no date check).

195. *State v. Taylor*, 335 Mo. 460, 468, 73 S.W.2d 378, 382 (En Banc 1934).

196. *Id.* at 469-70, 73 S.W.2d at 383.

sanctions to the makers of post-dated or undated checks,¹⁹⁷ even in the presence of circumstances that indicate fraudulent intent.¹⁹⁸

Other factors besides post-dating that the actor can use to combat the state's evidence on intent are the bank's custom of allowing overdrafts,¹⁹⁹ a later agreement with the victim to settle the problem,²⁰⁰ and the fact that the defendant was writing for a corporation and so informed the victim.²⁰¹

Missouri employs a standard prima facie evidence section²⁰² and follows the general rule that such evidence creates a rebuttable inference of fact, not an irrebuttable presumption of law.²⁰³ The section requires notice of dishonor, but does not specify who should send it. There is sufficient notice, however, if the bank sends a letter to the actor's last known address.²⁰⁴ There is no directive as to what constitutes prima facie evidence of presentment and dishonor, but the bank's notation on the check will not alone suffice as proof of presentment in the ordinary course of business.²⁰⁵ Probably, testimony from a bank official is necessary. If the provisions of the prima facie evidence section are met, the inference thus created goes to both the intent to defraud and knowledge of insufficiency at issuance.²⁰⁶

The phrase "not sufficient funds in or credit with" has been a source of considerable litigation in Missouri. For instance, close adherence to the statutory language is a requirement, because failure to allege insufficient credit²⁰⁷ in the information can render it fatally defective.²⁰⁸ Of greater significance is the problem that exists in Missouri as to the point in time when sufficiency is determined. The accepted judicial view is

197. This is the rule whether or not attention was called to the post-dating. It is also the rule where there was an agreement to hold the check before cashing it. *State v. Young*, 226 Mo. 723, 733, 183 S.W. 305, 308 (1916) (no funds case); *State v. Phillips*, 430 S.W.2d 635, 637 (St. L. Mo. App. 1968).

198. *State v. Brookshire*, 329 S.W.2d 252, 256 (St. L. Mo. App.), *on remand from* 325 S.W.2d 497 (Mo. 1959). *See also* *State v. Benson*, 110 Mo. 18, 19 S.W. 213 (1892).

199. *State v. Felman*, 50 S.W.2d 683, 684 (St. L. Mo. App. 1932).

200. *State v. Mullins*, 292 Mo. 44, 52, 237 S.W. 502, 504 (1922).

201. *State v. Kaufman*, 308 S.W.2d 333, 337 (St. L. Mo. App. 1957) (by implication).

202. § 561.470, RSMo 1973 Supp.; *see* statute quoted note 36 *supra*.

203. *State v. Phillips*, 430 S.W.2d 635, 637 (St. L. Mo. App. 1968).

204. *State v. Euge*, 359 S.W.2d 369, 375 (St. L. Mo. App.), *cert. denied*, 372 U.S. 960 (1962), *rehearing denied*, 373 U.S. 954 (1963).

205. *State v. Scott*, 230 S.W.2d 764, 767 (Mo. 1950).

206. Of course, the defendant can counter this inference with evidence of a previous arrangement with the bank to pay an overdraft or restitution after notice of dishonor. *State v. Morris*, 470 S.W.2d 467, 470 (Mo. 1971); *State v. Kaufman*, 308 S.W.2d 333, 339 (St. L. Mo. App. 1957). But he must be able to substantiate these claims to effectively halt the operation of the prima facie evidence section.

207. *State v. Friedman*, 398 S.W.2d 37, 40 (St. L. Mo. App. 1965) (no funds case).

208. *State v. Forsythe*, 406 S.W.2d 633, 635 (Mo. 1966). However, the State can make a timely amendment. *State v. Morris*, 470 S.W.2d 467, 469 (Mo. 1971). *But cf.* *State v. Euge*, 359 S.W.2d 369, 371 (St. L. Mo. App.), *cert. denied*, 372 U.S. 960, (1962), *rehearing denied*, 373 U.S. 954 (1963).

that the test of sufficiency is at presentation.²⁰⁹ Obviously, this test represents an attempt to bring within the statute's coverage the problems of subsequent withdrawals and other outstanding checks. Although this approach seems reasonable in that the victim will file no complaint if the check is honored at presentation, it seemingly runs afoul of the concept that the relevant knowledge of insufficiency, as well as the relevant intent to defraud, is that existing at issuance. The statute refers to "knowing at the time of such making . . . that the maker or drawer has not sufficient funds . . ." Moreover, under false pretenses rationale,²¹⁰ issuing the check should be a misrepresentation of a *present* fact (*i.e.*, insufficiency at issuance). The *prima facie* evidence section glosses over the timing dilemma. Some prosecutors, however, hesitate to use judicial test, and apply the statutory and false pretenses reasoning by refusing to initiate a proceeding unless there were insufficient funds on the date of issuance.²¹¹ This variance between the judicial and prosecutorial views shows that the Missouri statute's capacity to reach the situations involving subsequent withdrawals and other outstanding checks is tenuous at best.

The defendant has several opportunities to prevail on the insufficiency issue. One is to show an arrangement with the bank or a bank policy that allows overdrafts.²¹² Another possibility is to show that there were deductions from the account without defendant's knowledge. The defendant, however, has constructive knowledge of any permissible bank charges that deplete the account.²¹³ The argument that there were other accounts in the bank that could cover the check probably will not succeed; one case reads into the statute the language that there must be insufficient funds in the account "which can be reached by that check."²¹⁴ A savings account in the same bank that contained sufficient funds would, therefore, be no defense at all.²¹⁵

No case defines an extensive constitutional justification for the existing insufficient funds statute in Missouri. One case takes the standard approach that the statute does not allow imprisonment for debt because it is the fraud that is punished and not the failure to fulfill a "future promise."²¹⁶ An older rationale views bad check writing as a public nuisance, thus placing control of the activity within the legal exercise of the state's police power despite the existence of a civil remedy both on the instrument and on the underlying obligation.²¹⁷ The Missouri statute

209. *State v. DeClue*, 400 S.W.2d 50, 54 (Mo. 1966) (no funds case); *State v. Taylor*, 335 Mo. 460, 471, 73 S.W.2d 378, 384 (En Banc 1934).

210. See text accompanying note 184 *supra*.

211. This is the practice in the Circuit Attorney's Office of the city of St. Louis, Missouri.

212. *State v. Felman*, 50 S.W.2d 683, 684 (St. L. Mo. App. 1932); cf. text accompanying note 199 *supra*. But the mere fact of an overdraft will seldom be sufficient to prove the existence of an arrangement. *State v. Kaufman*, 308 S.W.2d 333, 339 (St. L. Mo. App. 1957).

213. *Hulett v. State*, 468 S.W.2d 636, 638 (Mo. 1971).

214. *State v. Klosterman*, 471 S.W.2d 175, 180 (Mo. 1971).

215. *State v. Euge*, 359 S.W.2d 369 (St. L. Mo. App.), *cert. denied*, 372 U.S. 960 (1962), *rehearing denied*, 373 U.S. 954 (1963).

216. *State v. Brookshire*, 329 S.W.2d 252, 256 (St. L. Mo. App. 1959).

217. *State v. Taylor*, 335 Mo. 460, 465, 73 S.W.2d 378, 380 (En Banc 1934).

seems less susceptible than the Colorado statute in *Vinnola*²¹⁸ to the "vague" and "unfettered-discretion-of-third parties" arguments that the court accepted in that case. Case law well defines the statutory language, and the defendant's actions, not those of third parties, invoke the prima facie evidence section.

IV. PROPOSALS FOR A MORE EFFECTIVE INSUFFICIENT FUNDS STATUTE

There is considerable controversy on the question whether the writing of an insufficient funds check should even be a criminal offense. Those in favor of the criminal sanction point to the deterrent effect of a criminal statute and the need for the protection of the negotiability of checks; those opposed argue that an adequate civil remedy exists, that the prosecutor has become a debt-collecting agent, and that merchants are careless in accepting checks because there is a criminal sanction.²¹⁹ Apparently, a vast majority of the states believe that a criminal remedy does serve a worthwhile purpose.²²⁰ There are improvements, however, that would make the statutes more workable while lessening the burden on the prosecutor.

For example, the statute should include within its purview one who "passes" a bad check (an indorser).²²¹ Under most current formulations, the passer is only implicitly covered. Another example is the inclusion of subsequent withdrawals as a part of the criminal act. Without this inclusion, many jurisdictions have no sanction for subsequent withdrawals because there has been no misrepresentation of present fact.

A more provocative area for improvement is the intent to defraud element. Several of the new proposed codes avoid the problem of determining whether the relevant intent to defraud is at issuance or presentment by making either presentment²²² or dishonor²²³ express, not tacit, elements. The timing difficulty would be partially resolved in that intent at issuance and insufficiency at presentation would, on the face of the statute, be separate requirements; no need would exist to stretch the scienter over the period of time between issuance and presentment. While this approach could subject the statute to *Vinnola's* "unfettered-discretion-of-third parties" argument because presentation is in the control of a third party, public policy might dictate a denial of such an attack. Also, this clarification would more readily cover the problem of "subsequent withdrawals."

A further problem under the intent element is the mechanical working of the prima facie evidence section, which is nearly always at the heart of an insufficient funds prosecution. Two proposals are appropriate; both would ease the prosecutor's burden while maintaining the statute's effectiveness. First, the statute should specify that the victim (*i.e.*, the defrauded party) or the drawee bank must send notice of dishonor by reg-

218. See text accompanying notes 148-151 *supra*.

219. F. BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE 352-53 (1957); Missouri Commission to Draft a Modern Criminal Code, Minutes of Subcommittee Meeting, Sept. 29, 1972.

220. The Vermont experience, however, shows no greater incidence of bad checks than in any other state. F. BEUTEL, *supra* note 219, at 356.

221. See N.Y. PENAL LAW § 190.05 (2) (McKinney 1967).

222. MICH. REV. CRIM. CODE §§ 4040 (1), (2) (b) (Final Draft, 1967).

223. N.Y. PENAL LAW § 190.05 (1) (McKinney 1967).

istered mail either to the address on the check or to any address that the actor gave for official purposes.²²⁴ Second, the statute should require the victim to obtain a notice of protest as defined in section 3-509 of the Uniform Commercial Code and specify that this will serve as prima facie evidence of presentment, dishonor, and protest. These suggestions would streamline the procedure, because the prosecutor would become involved only after some of the preliminary work had been done and at a time when the victim would be certain that he wants to prosecute. If these requirements were within the statute, they would relieve the prosecutor of his implied responsibility (*i.e.*, public relations) to handle the notices of dishonor.

The final problem with regard to intent is that of the post-dated check. Few current statutes reach this issue.²²⁵ The simplest approach would be to remove post-dated checks from the boundaries of the statute, even though this approach would not mesh either with the policy that any bad check is a nuisance to the commercial world²²⁶ or with the fact that post-dated checks can also be used in fraudulent schemes.

The element of knowledge of insufficient funds or credit needs to be stated in a straightforward manner. First, knowledge of insufficient funds should include knowledge of all other outstanding checks that will make the account insufficient. Second, the definition of the term "credit" should foreclose any argument based upon an oral or tacit "understanding" by specifying that a written arrangement is required. The potential inconvenience that such a requirement might visit upon innocent parties would be offset by the added difficulty that it would present to a fraudulent drawer.

Virtually every new or proposed insufficient funds statute removes the element of consideration and makes the mere issuance of the bad check the criminal act.²²⁷ The basic justification for this is that the mere writing of a bad check should be a misdemeanor, perhaps having no provision for imprisonment, while actual defrauding should fall under false pretenses or larceny, with the penalty based on the value obtained by means of the check. Substantially the same result might be achieved under a statute like Missouri's, where the check must be written "to procure anything of value or for the payment of any past due debt . . . or for any other purpose."²²⁸ The italicized phrase may well include those situations that do not encompass actual defrauding through receipt of consideration, but in which the check enters into commerce nonetheless. Restrictive case law, however, may limit this language to those areas traditionally covered by false pretenses.

In any event, if consideration is required, it is wise to include past due debts as an element of consideration, because the normal case law

224. TEX. PENAL CODE PROP. REVISION § 32.41 (c) (Final Draft, 1970).

225. See text accompanying notes 115-120 *supra*.

226. MICH. REV. CRIM. CODE § 4040, Comment (Final Draft, 1967).

227. N.Y. PENAL LAW § 190.05 (McKinney 1967); MICH. REV. CRIM. CODE § 4040 (Final Draft, 1967); MONT. PROP. CODE § 94-6-310 (1) (1970); N.J. PENAL CODE § 2c:21-5 (Final Draft, 1971); TEX. PENAL CODE PROP. REVISION § 32.41 (a) (Final Draft, 1970).

228. § 561.460, RSMo 1973 Supp. (emphasis added).
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