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And Mussolini Had the Trains Running on Time: A Review of the Bad Check Offense and the Law Enforcement Debt Collector

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Josephine R. Potuto*

And Mussolini Had the Trains Running on Time: A Review of the Bad Check Offense and the Law Enforcement Debt Collector

TABLE OF CONTENTS

I. Introduction 243
II. The Bad Check Program: Why Have One? 245
III. Constitutionality and Legal Scope of the Bad Check Statute and Program Under the Nebraska Constitution .. 247
A. The Statute 247
1. Why Specific Intent Is Necessary 248
2. How the Nebraska Supreme Court Saved the Bad Check Statute 250
B. The Program 257
1. Mandatory and All-Inclusive Reach 259
a. Probable Cause: Is a Bounced Check Enough? 259
b. The Illegal Arrest Threat: In Terrorem and Ultra Vires 261
c. Merchant as Prosecutor 262
2. Restitution Prohibition 264
C. County Attorney Responsibilities to Bad Check Statute and Program 265
1. County Attorney Letter and Information Sheet... 266
2. Merchant Notice 267
3. Making the All-Inclusive Less Inclusive 267
IV. Public Collection of Private Debts 270
A. Should We? 270
B. Could We? 275
V. Presumptions and Reimbursements: Two Additional Constitutional Questions 277
A. Presumption of Knowledge (or Intent to Defraud) ... 277
B. Restitution and Merchant Fee Reimbursement 282

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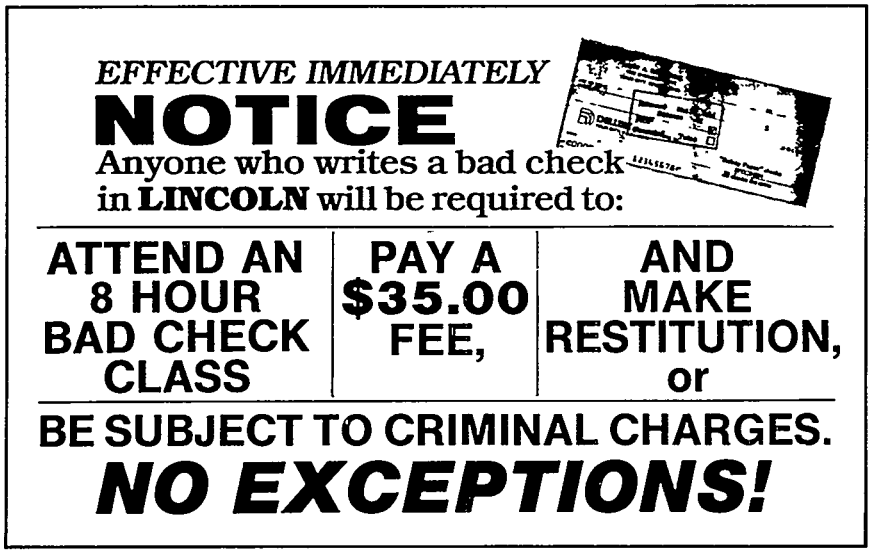
VI. Conclusion 284
Appendices 286

I. INTRODUCTION

Recently in Nebraska the following notice appeared in supermarkets and other businesses and even in the Lancaster County County-City Building:



The notice, available at the office of the county attorney and distributed by his authority,[1] obviously is designed as an attention grabber. And in attention grabbing it obviously is a success. In all other respects, however, the notice represents law enforcement policy failure.

The clear import of the notice—that the simple, inadvertent bouncing of a check is a criminal act in Nebraska—not only misdescribes the Nebraska bad check offense,[2] it describes an unconstitutional version

1. The notice reproduced in text is a copy of one obtained at the office of the Lancaster County County Attorney. It is printed and distributed by authority of the county attorney. Telephone interview with Joseph Kelly, Deputy Lancaster County Attorney (Sept. 3, 1985), recorded in memo from L. Hardy to J.R. Potuto (Sept. 4, 1985) (on file in R. 210 at U. Neb. Law College) [hereinafter cited as Bad Check Memo No. 1].
2. A bad check is one used in lieu of cash that is drawn on a closed or nonexistent account or on an account containing insufficient funds to permit payment in full. A check writer uses a nonexistent account when, for example, he uses a counter check (at one time commonly provided in rural stores, the counter check had printed on it the name of the bank on which the check would be written but was otherwise blank). *See* F. BEUTEL, STUDY OF THE ENFORCEMENT OF THE BAD-

of the offense. The notice's wide use and glaring inaccuracy, moreover, suggests county attorney delinquency in assuring accurate dissemination (or at least preventing inaccurate dissemination) of information about the Nebraska criminal law.[3] Worse yet in terms of county attorney law enforcement responsibility, the notice suggests unwise, in some ways probably illegal, and possibly even unconstitutional program operation.[4]

Since bad check programs much like this one increasingly are a coming national phenomenon,[5] I decided to look into the description

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CHECK LAWS IN NEBRASKA 256, 277 (1957). In Nebraska the bad check offense also requires that the check be exchanged for property, services, or other value present at the time of the exchange. NEB. REV. STAT. § 28-611 (Supp. 1985). For the mens rea required to be convicted of a bad check offense in Nebraska, see *infra* text accompanying notes 23-26.

3. For a discussion of the county attorney's role in information dissemination, see *infra* note 91 and accompanying text.

4. Although I believe that the county attorney is responsible for and must revise both the notice and his office enforcement policy, I certainly do not believe that present practice represents a deliberate or willful decision to circumvent the Nebraska criminal law. In fact, I was assisted considerably in understanding and reviewing the program by staff at both pretrial diversion and the County Attorney's office in Lancaster County. Of particular assistance was Joseph Kelly, Deputy County Attorney.

   The Lancaster County Bad Check Program is patterned upon a model developed by the National Corrective Training Institute and already used in more than 400 locations. The Journalist (U. Neb. School of Journalism), Nov. 28, 1984, at 2, col. 1. The class and program were probably instituted in Lancaster County in a well-meaning attempt to aid merchants, rehabilitate bad check passers, and free county attorney time to pursue other crimes and criminals. For a discussion of merchant pressures on local law enforcement officers to assist in bad check collection, see F. BEUTEL, *supra* note 2, at 286-93. In instituting the program here, however, insufficient attention was paid to underlying policy and program implications, or to the effect on the program of Nebraska constitutional and statutory law.

5. *See* Wall St. J., Dec. 2, 1985, at 19, col. 3; The Journalist (U. Neb. School of Journalism), Nov. 28, 1984, at 2, col. 1; telephone interview with E. McMasters, director of the Lancaster County Pretrial Diversion Bad Check Program (June 17, 1985), recorded in memo from L. Hardy to J.R. Potuto (July 12, 1985) (on file in R. 210 at U. Neb. College of Law) [hereinafter cited as Bad Check Memo No. 2].

   The popularity and perceived success of these programs led the Nebraska Unicameral to consider specific statutory authority for program creation. LB 445, § 3, 89th Leg., 1st Sess. (1985). The provision was rejected in committee. *Hearing on LB 445 Before the Comm. on Judiciary*, 89th Leg., 1st Sess. (1985) [hereinafter cited as *Hearing on LB 445*]. Counties still are free to adopt, as Lancaster County already has, a bad check program as an aspect of pretrial diversion. *See infra* text accompanying notes 56-58. The reason for committee rejection of specific statutory authorization apparently was four-fold. Three concerns related to underlying policy: (1) concern that the program made the county attorney the merchant's civil debt collector; (2) concern that this debt collection assistance only encouraged bad check-cashing practice by merchants; and (3) concern that indigents would be precluded from program participation because of inability to pay the class fee. The final concern related to the appropriateness of the legisla-

and operation of this Nebraska program to determine where and how it has gone wrong and whether and how to correct it. Inevitably this inquiry progressed further: first, to an examination and evaluation of the current Nebraska bad check statute and its judicial interpretation; then to an examination and evaluation of the appropriate definitional scope of a bad check offense and the policy concerns that should be reflected in law enforcement practice regarding it; and, finally, to the conclusion that too often the bad check offense perverts the legitimate use of the criminal justice system by transforming it into a civil debt collector. This Article results.

II. THE BAD CHECK PROGRAM: WHY HAVE ONE?

The effect of participation in the bad check program (as well, evidently, as the effect of the merchant's notice) is reported to be a reduction in the number of bad checks passed and an increase in the number of collections.[6] This reported positive record in controlling bad check writing and remedying its consequences obviously is popular with those merchants who know of the program and believe it is saving them money. Another advantage to merchants—one that goes unstated by those touting program merits—is the financial benefit derived from the state's active participation in and subsidization of merchant debt collection activities.[7]

From the viewpoint of bad check writers the program similarly is advanced as a boon. The thirty-five dollar fee charged a program participant is claimed to cost that person less than it would to defend against a criminal prosecution.[8] Program participation provides more

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tive role since the legislature would be encouraging, but not funding, these programs. *Hearing on LB 445, supra*; telephone interview with J. Owens, legal assistant, Unicameral Judiciary Comm. (Nov. 14, 1985). That the first three policy concerns were well founded is amply borne out by the Lancaster County practice.

6. The Journalist (U. Neb. School of Journalism), Nov. 28, 1984, at 2, col. 1; Northeast Lincoln Sun, Nov. 13, 1985, at 1, col. 1.

7. See *infra* note 112 for a description of the magnitude of the savings. Not only do collection costs "probably equal or exceed" the cost of running sheriff and county attorney offices, but sheriffs and county attorneys would earn "much more than their salaries, if paid at commercial collection agency rates . . . ." F. BEUTEL, *supra* note 2, at 293.

8. The Journalist (U. Neb. School of Journalism), Nov. 28, 1984, at 2, col. 1. Costs and charges (exclusive of restitution costs) are less expensive to a bad check passer if measured against a successful prosecution because court fees may be assessed only against *convicted* bad check passers. When measured against other potential case resolutions, savings to a bad check passer are not so clear. Even in the absence of a bad check program, court fees still are avoided whenever a bad check case is resolved pretrial, whether by plea, plea bargain, or county attorney dismissal. In such a pretrial resolution the bad check passer also avoids the $35 program cost. Trial and acquittal, moreover, obviously avoid all costs, including restitution. And program participation theoretically could be more expensive

than monetary benefit: it permits a bad check passer to avoid the stigma of a criminal prosecution and possible conviction, as well as the consequences, both direct and collateral, attendant on conviction.[9]

The program also seems to provide something for the rest of us—those who in the normal course of things expect neither to receive nor pass bad checks. Assuming the criminal treatment of the bad check offense remains a constant,[10] then within that criminal treatment a successful bad check program might result in tax dollars saved. Where bad check writing is reduced, so too are taxpayer criminal investigative costs; where prosecution is avoided, so too are taxpayer prosecution-associated costs. In a perfect world, moreover, reductions in merchant bad check losses should be matched by lower prices charged consumers. And for all these benefits, the program apparently not only costs the taxpayer nothing, it may even generate net profits to an offering county.[11]

The program appears to provide an efficient way to decrease the incidence of bad checks passed. But, with apologies for the hyperbole, so would electrocution of all bad check passers. Taking for granted that all the program benefits claimed are actual and not merely only logically anticipated,[12] at least two issues remain regarding the opera-

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than even a conviction. Although not specifically required by statute, successful check program completion requires making restitution. Upon trial and conviction, however, restitution orders are discretionary with the trial judge. NEB. REV. STAT. § 28-611(6) (Supp. 1985). For a discussion of the likelihood of restitution being ordered, see *infra* text accompanying notes 152-55.

Bad check program participation doubtless *is* less expensive than prosecution to any bad check passer who retains, and pays, private counsel to defend him. Lawyer costs, if the bad check passer does not qualify for public defender assistance, certainly would make the bad check class the less expensive alternative.

9. Direct consequences of a prosecution and conviction are the criminal trial and actual sentence. Collateral consequences are the civil consequences that adhere through statute, constitutional provision, case law, or practice. These might include public license disqualification, restriction on voting rights, and employment discrimination. *See generally* Special Project, *The Collateral Consequences of A Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

10. Incurring of investigation, prosecution, court, probation department, and correctional costs obviously depends on the definitional scope of the offense and county enforcement policy. If the offense is defined narrowly there will be fewer instances of its commission and presumably concomittantly lower criminal justice costs. Lower costs will result whether or not there is a bad check program.

11. *See* Bad Check Memo No. 2, *supra* note 5. Whether the financial benefit to merchants can justify heavy taxpayer costs necessary for full law enforcement involvement in bad check cases (including investigation and informal resolution as well as prosecution, court, and correctional costs) is, to put it mildly, more problematic. That taxpayer costs can be heavy is clear. *See* F. BEUTEL, *supra* note 2, at 345-49. That strict laws, heavy penalties, and even concerted enforcement may have little effect on recidivism also is clear. *Id.* at 349-58.

12. See F. BEUTEL, *supra* note 2, at 349-78 for a discussion of how, in some respects at least, logically anticipated results of a bad check enforcement policy do not prove out empirically.

tion of such a program. First, is the program as described in the notice (or as repackaged) constitutional? Second, is efficiency enough to justify a coercive thrust by the criminal justice system into what otherwise often would be a purely private commercial transaction, particularly if, as here, the injured party has other options available to prevent and collect on bad checks?

III. CONSTITUTIONALITY AND LEGAL SCOPE OF THE BAD CHECK STATUTE AND PROGRAM UNDER THE NEBRASKA CONSTITUTION

A. The Statute

The statute that makes criminal the passing of a bad check describes a person guilty of the offense as one who:

> obtains property, services, or present value of any kind by issuing or passing a check or similar signed order for the payment of money, *knowing* that he or she has no account with the drawee at the time the check or order is issued, or, if he or she has such an account, *knowing* that he or she does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation . . . .[13]

While it is a truism—and perhaps no truer legal truism exists—that statutory language is often ambiguous or subject to different interpretations,[14] nonetheless the Nebraska bad check statutory language is

13. NEB. REV. STAT. § 28-611 (Supp. 1985) (emphasis added). Although this statute has an effective date of Sept. 6, 1985, the language quoted remains unchanged from its original adoption in the criminal code revision. *See id.* at § 28-611. The statutory language is interesting since it reads as if passing a check with knowledge of account insufficiency is an offense even if there are funds in the account at the time it is presented for payment. Obviously that was not the legislative intent. A crime requires the temporal matching of the evil-thinking mind (mens rea) and the evil-doing hand (actus reus). *See generally* 4 W. BLACKSTONE, COMMENTARIES * 21; 2 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 78 (1883). Obviously, too, in the normal run of cases no one will be prosecuted for the bad knowledge if the check actually is honored. Suppose, however, a person with $50 in his account cashes two $50 checks, check A on Monday and check B on Tuesday. When passing check A he knows he has sufficient funds to cover; he passes check B with bad knowledge. What happens if check B is presented and paid by the bank before check A arrives? For check A his knowledge was pure: there were, indeed, sufficient funds in the account. For check B he had bad knowledge, but the check turned out to be paid. The hypothetical does not represent mere professorial sophistry since defendant's claims regarding his knowledge when passing the checks may be proved out by comparing check passing and check presentation dates on the two checks. Technically he may have committed no crime.

14. *See generally* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950). For a tongue-in-cheek example of statutory interpretation turning statutory language on its head, see 8 CRIM. L. Q. 137 (1965) (Small Birds Act construed to apply to pony with down pillow on its back).

remarkably clear at least on one point: the bad check offense requires more than simply writing a check that bounces. By express statutory terms the offense of passing a bad check is committed only when a person passes a bad check knowing at the time that he has no account or has insufficient funds in the account to cover the check.

Thus the merchant's notice set forth above, in claiming that anyone writing a bad check must participate in the bad check program or be subject to criminal charges, clearly and unequivocably contradicts the language of the statute. That the notice derives no support from judicial interpretation of the statute also is clear. In fact, the Nebraska Supreme Court not only has not undercut the clear thrust of the knowledge requirement in the statute, it has upheld its constitutionality under Nebraska law by construing the bad check offense language to require a specific intent to defraud, obviously a more culpable state of mind than actual knowledge.[15] Why, and particularly how, the Nebraska Supreme Court read the bad check statute to require specific intent makes an interesting story. First, the why.

1. *Why Specific Intent Is Necessary*

Article 1, Section 20 of the Nebraska Bill of Rights provides that "[n]o person shall be imprisoned for debt in any civil action or mesne or final process, unless in cases of fraud."[16] Although the constitutional language refers to civil, not criminal, actions, the Nebraska Supreme Court long has held the provision applicable to criminal prosecutions initiated to aid a civil creditor.[17] In *State ex rel. Norton v. Janing*,[18] the court provided its clearest articulation of the applicability to criminal prosecutions of the civil debt imprisonment prohibition.

Norton involved a general contractor who received full payment for a construction job and then failed to pay his subcontractors for their work. Although the property owner already had paid Norton in full, she still was liable to the materialmen for labor and materials and her property remained subject to a materialmen's lien. Norton was

15. *See generally* State v. Kock, 207 Neb. 731, 300 N.W.2d 824 (1981); State *ex rel.* Norton v. Janing, 182 Neb. 539, 156 N.W.2d 9 (1968).
16. NEB. CONST. art. 1, § 20 (imprisonment for debt prohibited).
17. *See, e.g.*, White v. State, 135 Neb. 154, 158-59, 280 N.W. 433, 435-36 (1938). Nebraska is not alone in requiring an intent to defraud to insulate criminal prosecutions from unconstitutionality under a state civil debt imprisonment prohibition. *See, e.g.*, Tolbert v. State, 294 Ala. 738, 321 So. 2d 227 (1975); State v. Meeks, 30 Ariz. 436, 247 P. 1099 (1926); People v. Vinnola, 177 Colo. 405, 494 P. 2d 826 (1972); Hollis v. State, 152 Ga. 182, 108 S.E. 783 (1921); State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973); Patterson v. Commonwealth, 556 S.W.2d 909 (Ky. Ct. App. 1977), *cert. denied*, 435 U.S. 970 (1978); State v. Carpenter, 301 N.W.2d 106 (N.D. 1980); Colin v. State, 145 Tex. Crim. 371, 168 S.W.2d 500 (1943); State v. Pilling, 53 Wash. 464, 102 P. 230 (1909); Locklear v. State, 86 Wis. 2d 603, 273 N.W.2d 334 (1979).
18. 182 Neb. 539, 156 N.W.2d 9 (1968).

arrested under a criminal statute making it unlawful for a general contractor to take money paid for work done and then fail to pay laborers and materialmen.[19] As the *Norton* court correctly noted, the statute was intended to assist the materialman to obtain money due him while insulating the property owner from paying twice.[20]

The legislative motives were laudable. There is no denying, and certainly the *Norton* court did not deny, the real harm done to a property owner faced with a defaulting contractor on the one side and a materialmen's lien on the other. But there is also no denying that the injury caused is through breach of contract.

The issue for the court was whether, consistent with the Nebraska imprisonment for debt provision, the state could make criminal—absent proof of fraud—the incurring of and failure to satisfy a civil debt. The court refused to permit the coercive power of a criminal prosecution to aid a creditor to obtain payment of a civil debt, absent a showing of fraud, when the creditor constitutionally could not do so.[21] The court quoted with favor a description of the limited nature of the police power as one that

> "cannot be made a cloak under which to overthrow or disregard constitutional rights. . . . The payment of debts that may be due laborers or materialmen is not calculated to conserve the safety, health, or general welfare of the community. There can be nothing so injurious to the public welfare in the failure of a debtor to pay his just debts as to require an exercise of the police power. In all free governments the good sense of mankind, since the day when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties."[22]

The *Norton* court held, therefore, that proof of fraudulent intent was necessary to imprison for failure to pay civil obligations. That which is unconstitutional if attempted directly by the creditor may not be ac-

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19. NEB. REV. STAT. § 52-119 (1943) (repealed 1969).
20. State *ex rel.* Norton v. Janing, 182 Neb. 539, 542, 156 N.W.2d 9, 11 (1968).
21. The court rejected a characterization of the funds paid the contractor as a constructive trust for the benefit of the materialmen. *Id.* at 543-47, 156 N.W.2d at 11-14. First, the court refused to add language to the statute necessary to reach this result. *See* Llewellyn, *supra* note 14, at 405 (statutory expression of one thing precludes consideration of another not expressed). The court also rejected creation of a constructive trust for what I consider a more obviously cogent and compelling reason. To create a trust out of the very relationship of debtor to creditor without a showing of fraud makes nonsense out of the constitutional prohibition against making the civil debt itself the basis for imprisonment. State *ex. rel.* Norton v. Janing, 182 Neb. 542, 545-47, 156 N.W.2d 9, 12-14 (1968). Finally, the court appeared to find that a constructive trust would violate the debtor's constitutional right to contract. *Id.* at 543, 156 N.W.2d at 11-12. The right-to-contract argument finds little support in cases construing the contract clause of the Constitution of the United States. *See generally* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512 (1944).
22. State *ex rel.* Norton v. Janing, 182 Neb. 539, 543-44, 156 N.W.2d 9, 12 (1968) (quoting People v. Holder, 53 Cal. App. 45, 53, 199 P. 832, 835-36 (1921)).

complished indirectly by the state through its power to define and prosecute crime.

As early as 1938, in *White v. State*,[23] the Nebraska Supreme Court referred to the intent to defraud element in the bad check statute in upholding the statute's constitutionality under the Nebraska Constitution. The court at that time did not need to consider directly whether intent to defraud was an essential constitutional element because the predecessor statute, unlike the present, by its terms required intent to defraud.[24] When faced under the present statute with the question whether intent to defraud is a necessary element of a bad check offense in Nebraska, the court, in *State v. Kock*, answered in the affirmative.[25] The court then upheld the constitutionality of the present statute, but only after construing the statute to require not merely actual knowledge, but an intent to defraud.[26]

2. *How the Nebraska Supreme Court Saved the Bad Check Statute*

The court arrived at its construction of the bad check statute to require specific intent through an interesting but ultimately unpersuasive reading of the statute. It saved the statute—an express purpose of the court[27]—but at the cost of reasoning both intricate and strained.

Since there is no disputing the absence of express intent to defraud language in the current statute, the *Kock* court looked to other sections of the statute to find the requisite mens rea element. Remarkably, it found the missing mens rea of specific intent in an element of the crime's actus reus, in the fact that a "key element" of the bad check offense is that the use of the check induced someone to rely to his detriment by providing goods, services, or other present value in exchange for the check.[28] Since fraud by definition is a deception with

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23. 135 Neb. 154, 158-59, 280 N.W. 433, 435-36 (1938).
24. NEB. COMP. STAT. § 28-1212 (1929) (emphasis added), described as guilty of the offense:

    > Any person who, *with intent to defraud*, shall make or draw, or utter, or deliver, 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. . . .

25. State v. Kock, 207 Neb. 731, 733, 300 N.W.2d 824, 825 (1981).
26. *Id.* at 734-36. Intent to defraud is an element in most bad check statutes. Comment, *Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals*, 38 MO. L. REV. 432, 436 (1973).
27. State v. Kock, 207 Neb. 731, 734, 300 N.W.2d 824, 825 (1981).
28. *Id.* The Kock court supported its construction that the exchange-for-value requirement of the Nebraska bad check offense demonstrated a legislative purpose to require specific intent to defraud by contrasting the statute with the Model Penal Code bad check offense. MODEL PENAL CODE § 224.5 (Proposed Official

the specific intent to induce surrender of value in reliance on the deception,[29] obviously, or so the court suggested, the legislature in employing exchange-for-value language was describing fraudulent intent.

But the fact of detrimental reliance, or, in other words, the fact that a "victim" relied on a bad check to part with something of value, does not by itself show that the check passer acted with specific intent.[30] Nor does it demonstrate a legislative purpose, when the legislature employed the word "knowledge" in the statute, to really mean to require a specific intent to defraud.

The more likely explanation for the choice of statutory language, one the court rejects,[31] is that the legislature did not think about[32] or, having thought, did not realize that a specific intent mens rea constitutionally would be required to uphold the bad check statute. That the legislature intended a knowledge mens rea amply is demonstrated by the language of the statute itself. If, after all, the legislature wanted a specific-intent-to-defraud mens rea it could just as easily have used specific-intent-as-knowledge language—with the added benefit that the statute then would have been clear and express on this point.

Draft 1962). The Model Penal Code bad check offense does not require an exchange for value; the mens rea required is knowledge. But the Model Penal Code rejection of exchange-for-value language was expressly to cover items such as post-dated checks and checks written on pre-existing debts. *See infra* note 48. Nowhere did the drafters suggest that excluding an exchange-for-value element was what permitted them to make knowledge rather than purpose the operative mens rea of the offense. If anything, the knowledge mens rea relates to the Model Penal Code characterization of the bad check offense as a misdemeanor. For a discussion of the relevance of the misdemeanor characterization, see *infra* text accompanying notes 124-32.

29. The earliest false pretense statute prohibited obtaining property by false pretenses with intent to defraud. 30 Geo. 2, ch. 24 (1757). *See also* MODEL PENAL CODE § 223.3 (Proposed Official Draft 1962) (emphasis added): "A person is guilty of theft if he obtains property of another by deception. A person deceives if he *purposely* . . . ."

"Purpose" under the Model Penal Code is generally equivalent to a specific intent requirement. "Purpose," defined as "conscious object," not only describes the mens rea of crimes carrying the heaviest sentencing consequences, but generally is the mens rea requirement of crimes that at common law and in other codes require specific intent. The drafters of the Model Penal Code likely would frown, however, on this easy equation because they purposefully avoided use of intent language (whether specific or general). *See id.* § 2.02 commentary at 124-25 (Tent. Draft No. 4, 1955). Language of specific and general intent has caused myriad difficulties for courts and commentators. *See, e.g.*, United States v. Stewart, 41 C.M.R. 58 (1969); State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979).

30. Even more clear, the absence of detrimental reliance certainly does not prove the actor had no specific intent to defraud. *See infra* text accompanying notes 41-50.

31. State v. Kock, 207 Neb. 731, 734, 300 N.W.2d 824, 825-26 (1981). The court rejects this explanation, not because it finds it incorrect, but because it employs a fiction (or, as the court describes it, a presumption) that the legislature acted with full knowledge of the court's earlier opinion. *Id.*

32. This is the explanation I favor.

Why instead would the legislature, wanting specific intent, elect to speak indirectly and ambiguously, by coupling "knowledge" with an exchange for value requirement? Of course a court should read legislation with an assumption of its constitutionality; surely it should also read both with an assumption of legislative rationality as well as with a view to upholding the sense and the rhetoric of its own constitutional pronouncements.

If, moreover, the legislature had considered whether specific intent was required constitutionally, it readily might have concluded that specific intent was not required. There are states with similar constitutional prohibitions against imprisonment for debt that have upheld bad check statutes by requiring knowledge and not specific intent as the mens rea.[33] Although these states are in the minority, they nonetheless demonstrate the possibility of reading the constitutional provision less stringently than did the *Kock* court.[34] More telling than a review of other states' treatments of imprisonment for debt provisions, it was not all that clear in *White v. State* that specific intent was a necessary constitutional requirement in Nebraska. Despite the *Kock* court's later characterization of the *White v. State* opinion,[35] the *White* court held merely that a specific intent mens rea was sufficient, not that it was necessary, to save the bad check statute from successful constitutional challenge.

The *Kock* court, therefore, in finding that "knowledge" plus an exchange for value requirement equals specific intent, was not effecting a legislative intent,[36] but, rather, was upholding the statute despite the legislative intent. To achieve this result, the court both diluted the force of the specific intent requirement and confused the mens and actus reus elements of the offense. That it did so is obvious.

The "property, services, or present value of any kind"[37] statutory

33. *See, e.g.*, State v. Berry, 358 So. 2d 545 (Fla. 1978); Commonwealth v. Mutnik, 486 Pa. 428, 406 A.2d 516 (1979). The mens rea requirement in the Model Penal Code bad check statute is "knowledge." MODEL PENAL CODE § 224.5 (Proposed Official Draft 1962). The offense is, however, a misdemeanor. For a discussion of the significance of the grading of the offense in terms of mens rea requirement, see *infra* notes 124-32 and accompanying text.

34. My difficulty here is not with the imposition of a specific intent requirement. Particularly in light of the statutory penalties, I think the Nebraska Supreme Court is right to require a specific intent mens rea. My quarrel is with the court's finding that the present statute incorporates a specific intent mens rea.

35. State v. Kock, 207 Neb. 731, 733-34, 300 N.W.2d 824, 825-26 (1981).

36. If, then, the exchange-for-value requirement in the present statute is not a remarkably roundabout way to say "specific intent," why is it in the statute? In addition to being theft offense language, the requirement obviously (and, I think, quite appropriately) narrows the scope of the bad check statute so that, for example, a bad check given as a gift is not a crime. For more on this subject, see *infra* text accompanying notes 43-53.

37. NEB. REV. STAT. § 28-611 (Supp. 1985). The common law definition of larceny required a taking of the property of another. The modern consolidated theft stat-

language is language that describes part of the actus reus element of any theft offense. The common law definition of larceny required a taking of the *property* of another; the modern consolidated theft statutes have expanded that definition to include "services"[38] as well as "anything of value."[39] The mens rea element, whether specific intent or knowledge, has nothing to do with the definiton of the property stolen.

The traditional theft offense involves a trespass—an unlawful taking—with specific intent to deprive the owner permanently. Theft by deception involves a taking by deception, not trespass, again with purpose to deprive permanently. Since there is no trespass, no thief in the night, no snatch and run, the theft by deception occurs with the knowledge, and the cooperation, of the victim. A description of the object of the crime, the "anything of value" that is taken, describes the property, not the mens rea of the thief.

The *Kock* court gloss on specific intent not only creates confusion, it also includes check passers within the scope of the statute who in fact have no specific intent to defraud. Take, for example, a customer who goes to a local store and buys a television set. He leaves a cash deposit; the remainder of the purchase price is to be paid on delivery. The set is delivered on a Saturday and the customer writes a check for the balance. He knows when he writes the check that he cannot cover it, but he intends to deposit funds first thing on Monday to cover the check.

An hour after the television is delivered, it hisses, emits smoke and blithely goes dead. The customer calls the store and is told (1) the store will repair, not replace, and (2) someone will be out to look at the set no earlier than in approximately ten days. The customer now decides, as, I assume, many of us would, not to deposit the money necessary to cover the check.[40] Leverage well may be the best weapon this consumer has.

Where an intent to defraud specifically is required by statute to convict, this customer likely has committed no offense. He had no in-

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utes have expanded that definition to include "services" as well as "anything of value."

38. *See, e.g.*, MODEL PENAL CODE §§ 223.0(6) & 223.7 (Proposed Official Draft 1962); NEB. REV. STAT. §§ 28-509 to 515 (1979).

39. "Anything of value" includes real estate, food and drink, electrical power, and contract rights. See, *e.g.*, MODEL PENAL CODE § 223.0(6) (Proposed Official Draft 1962); NEB. REV. STAT. § 28-509 (1979).

40. Contrast this case with one where there were funds in the account at the time the check was written but the customer directs a stop payment order after the TV set dies. In this latter case, clearly, he has not committed the bad check offense. Yet where is the difference in the mens rea? And how can one argue persuasively that the difference between the two cases is one that warrants a difference in criminal culpability?

tent to defraud at the time he passed the check nor, indeed, at the later time when he decided not to cover the check. Yet, under the Nebraska statute, he seems to have committed the offense: he had knowledge of check insufficiency at the time he wrote the check, and he obtained value[41] in exchange.[42] Not only is nothing more statutorily required, but the Nebraska Supreme Court had said that this much, without more, is constitutional.

Take, for another example, the case of someone, call him D, who owes $100,000 to one P. Suppose P threatens D with suit. Suppose D then writes a check for $100,000 to P, knowing he has no funds to cover the check and intending to flee the area before P has time either to learn the check is bad or to bring suit. It is difficult to see why an exchange for value (say ten dollars worth of groceries at the supermarket) with knowledge that the check is bad equates to specific intent to defraud and, thus, constitutionally may be prosecuted, when, by contrast, D's giving P the $100,000 check for payment of his pre-existing debt—on the facts provided in this hypothetical—shows no specific intent.

It is likely that the court, faced with these two situations in the second hypothetical, would find that both the ten dollar and $100,000 check passers had specific intent. The court should go on to find, however, that the $100,000 check passer has not committed the bad check offense because there has been no exchange for value. The exchange-for-value requirement here would be handled as it should be, not as an aspect of mens rea but as an additional statutory element going to the actus reus of the crime. Exchange for value, in other words, must be found even where specific intent independently may be proved.

It is possible that the court might try to find an exchange for value in the case of the $100,000 check passer. The value received, if not the $100,000 pre-existing debt itself, could be considered the delay, or forbearance, to sue as well as the time gained by D through use of the bad check.[43]

The real difficulty with this approach is that such a broad defini-

41. A dead television might not be value in any practical sense but it unquestionably is value under the bad check statute.

42. To say that exchange of a check for something of value tied to knowledge of check insufficiency is not specific intent is not to deny that it is evidentiary of an intent to defraud. Indeed, the two together are compelling evidence of such an intent. But to say one is compelling evidence of the other is nonetheless not to say that one *is* the other.

Specific intent most frequently is proved inferentially. We may show, for example, that A had the specific intent to kill by evaluating whether most people, or most reasonable people, in the circumstances, given what A knew, could or would have acted as A did without specific intent. The jury question, however, remains: "Did A have specific intent?"

43. *See, e.g.*, MODEL PENAL CODE § 223.0(6) (Proposed Official Draft 1962); NEB. REV. STAT. § 28-509 (1979).

tion of "anything of value" makes nonsense out of the *Kock* court's saving of the statute by coupling statutory "knowledge" language with the statutory exchange-for-value requirement to conclude that specific intent to defraud (although not stated expressly in the statute) remains an element of the Nebraska bad check offense. It is obvious that the "anything of value" qualification must have discernible, concrete meaning since otherwise the *Kock* court has transported us to a Wonderland[44] where words mean only what we choose them to mean—and here we choose that "knowledge" means the same thing as "specific intent."

Unfortunately, however, the Nebraska Supreme Court already has traveled quite a way down the road to Wonderland. In *State v. Spaulding*,[45] the defendant had two accounts. By writing checks back and forth on these accounts she was able for a time to show credit balances in both accounts and thereby hide an actual deficit of more than $1,100. The court found that this apparent account balance was value for purposes of the bad check statute exchange-for-value requirement.[46]

No argument was made to the court that inclusion of such a check kiting scheme within the exchange-for-value requirement in large part erodes the *Kock* court's reliance on the exchange-for-value language to translate knowledge into specific intent.[47] The *Spaulding* court thus never expressly considered the effect on the *Kock* specific intent requirement of inclusion of check kiting within the exchange-for-value language. It is possible, then (although unlikely), that the court would reverse its *Spaulding* holding if the argument were made in a subsequent case. Unless and until that time, however, the only remaining content to the exchange-for-value requirement lies in ex-

44. " 'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' " L. CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE (1896). *But cf.* State v. Wiley, 219 Neb. 740, 365 N.W.2d 844 (1985). In *Wiley* the defendant wrote a check for $148 more than the sales price of merchandise (sales price was $3,238.65). He provided a non-existent address for merchandise delivery and took the $148 in cash. No merchandise was (or, evidently, could have been) delivered. Defendant pled to a Class III felony bad check (value in excess of $1,000). The court upheld the conviction both because it was on defendant's plea *and* because the face value of the check was more than $1,000 even though the value received was only $148.

45. 211 Neb. 575, 319 N.W.2d 449 (1982).

46. The court decided that an apparent account balance produced through kiting was value under the Nebraska criminal code definition of value. *Id.* at 577-78, 319 N.W.2d at 451. *See supra* note 39. It found the criminal code language determinative in the face of an argument that value for the bad check offense should be determined according to the Nebraska Uniform Commercial Code definition. State v. Spaulding, 211 Neb. 575, 577-78, 319 N.W.2d 449, 451 (1982). *See* NEB. U.C.C. § 3-303 (1980).

47. *See generally* Brief for Appellant, State v. Spaulding, 211 Neb. 575, 319 N.W.2d 449 (1982).

cluding gifts and a pre-existing debt such as my D's in the hypothetical above. If "anything of value" includes pre-existing debts and gifts as well as checks drawn on one bank and deposited in another,[48] then "anything of value" provides no limitation at all and, so unlimited, does not qualify the "knowledge" requirement in the way the *Kock* court said produced specific intent. If anything at all is value in an exchange for value, then knowledge and specific intent necessarily must mean the same thing. If the Nebraska Supreme Court is prepared to find that anything at all is value, then it expressly should reverse its *Kock* holding and say clearly what now is suggested inferentially: that knowledge is a constitutionally sufficient mens rea for a bad check offense.

To leave anything of the *Kock* court logic, then, the court must find my absconding $100,000 bad check passer not covered by the statute. Its reason, however, would not be the absence of specific intent but that the $100,000 check passer committed no offense because his conduct was not covered by the statute.[49]

It is clear that the *Kock* court employed faulty reasoning to find an intent-to-defraud requirement in, and thereby uphold, the constitutionality of the Nebraska bad check statute. It further is clear that in *Spaulding* the court then undermined its own faulty premise by finding that check kiting was an exchange for value. Yet, even taking the *Kock* holding with its *Spaulding* gloss, it nonetheless still appears that

48. I am not suggesting here that it is bad policy to place such transactions outside the scope of a bad check offense (in fact, I think it is good policy). I merely am suggesting that the Nebraska Supreme Court should recognize that the *Kock* court decision (as well as the statutory language itself) logically compels their exclusion. For views that these transactions should not be outside the scope of the offense, see Colin v. State, 145 Tex. Crim. 371, 168 S.W.2d 500 (1943) (where intent to defraud is proved it is constitutional under the imprisonment for debt clause to prosecute for a pre-existing debt); MODEL PENAL CODE § 206.22 commentary at 117-118 (Tent. Draft No. 2, 1954).

Under the Model Penal Code no specific intent to defraud is required. A stated purpose of the Model Penal Code offense is to assure that a bad check passer does not go unpunished simply because the benefit derived was not property or because the misrepresentation might be considered one of intention to perform a promise rather than a misrepresentation of existing fact (*e.g.*, the problem with a post-dated check). *Id.* at § 206.22 commentary at 117-18 & § 206.2 comment 7. Broadening the concept of property was considered appropriate because the check passer knows that the check may be renegotiated in exchange for property or, in the case of a check drawn on Bank A and deposited in Bank B, the check passer knows he is acquiring bank credit not due. *Id.*

49. The problem is not the absence of specific intent to defraud but the absence of a "thing of value" for the theft. Similarly, if D decides to kill V, picks up a gun, aims it carefully, shoots six times and punctures the heart six times of what he believes to be a sleeping V, but V already is dead, D has not committed murder. It is not murder because D has not committed the requisite act with its requisite consequence. Surely, however, the specific intent is present.

at least one section of the present statute is unconstitutional.[50] The statute makes it a Class II misdemeanor to pass a bad check, as did my $100,000 check passer, with present knowledge of insufficient funds.[51] This section does not by its terms require an exchange for value. Since it is the exchange-for-value statutory language (however little the court thinks the value must be) that the *Kock* court said creates specific intent to defraud, and since specific intent is needed to make the offense constitutional, this section must fall.[52]

The only conceivable way to avoid this result, short of reversing *Kock* and beginning anew, would be for the court to declare specific intent a constitutionally necessary element for felonies only, not misdemeanors. Without the *Kock* opinion sitting there this result might not be all that remarkable. There is, after all, a relationship between level of mens rea provided as an element of an offense and the potential punishment upon conviction of that offense.[53] It nonetheless would take remarkable legerdemain for the Nebraska Supreme Court after *Kock* to achieve that result here.

The Nebraska imprisonment for debt provision prohibits criminalizing the non-fraudulent incurring of a debt. The Class II misdemeanor provision criminalizes the knowing (but not necessarily fraudulent) incurring of a debt (by passing the bad check). Since a Class II misdemeanor carries a potential six months behind bars,[54] it is imprisonment for debt under *Kock*.

B. The Program

Let us now return to the notice describing the Nebraska bad check statute.[55] It warns that with "NO EXCEPTIONS!," "anyone who writes a bad check" must attend the bad check class, pay a fee and make restitution, or "be subject to criminal charges."[56]

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50. The *Kock* court expressly reserved judgment on the constitutionality of any aspect of the statute other than § 28-611(1). State v. Kock, 207 Neb. 731, 736, 300 N.W.2d 824, 836 (1981).
51. NEB. REV. STAT. § 28-611(3) (Supp. 1985).
52. A finding that § 611(3) is unconstitutional would not take with it the entire statute. Nebraska specifically permits severance where, as here, the unconstitutional provision may be struck without injury to the chief thrust of the statute and where, as here, the struck section is not one whose inclusion was essential for legislative enactment. *See, e.g.*, State v. Sporhase, 213 Neb. 484, 486-87, 329 N.W.2d 855, 856-57 (1983); Linn v. Linn, 205 Neb. 218, 226, 286 N.W.2d 765, 769 (1980).
53. See *infra* notes 124-32 and accompanying text for further discussion.
54. NEB. REV. STAT. § 28-106 (Cum. Supp. 1984).
55. *See supra* text at note 1 for the full text of the notice.
56. There is no question that the "subject to criminal charges" language is meant to mean prosecution: "People know that if they don't come to class, they will be prosecuted . . . ." The Journalist (U. of Neb. School of Journalism), Nov. 28, 1984, at 2, col. 1 (quoting Eric McMasters, Director, Pretrial Diversion).

We all might agree that it would be a better world if all of us knew how to manage finances and balance a checkbook. We also might agree that it would be a better world if all of us exercised care in financial transactions. To my knowledge, however, the state's social welfare power, without more, has never been read so broadly as to compel adult attendance at classes to study subjects, such as financial planning and management, that would make this a better world. And if the social welfare power extends that far, surely statutory authority is a necessary condition precedent.

The power to compel class attendance, then, derives not from an amorphous social welfare power vested in the county attorney but from his power to prosecute crime. Diversion programs[57] such as the bad check program are derivative of that prosecutorial function. Because the county attorney may prosecute the bad check offense he can instead permit an individual the less onerous alternative to prosecution, attendance at a bad check class.

The only people who may be compelled to attend the bad check class are those who otherwise could be prosecuted for the bad check offense. If the bad check by itself justifies a decision to prosecute, then the bad check by itself justifies compelled class attendance. The prosecutorial charging function requires, however, both a probable cause determination that the offense has been committed,[58] and a determination that there is some fair chance to prove it beyond a reasonable doubt. Using the bad check by itself to trigger a decision to prosecute may not meet a probable cause determination and, in any case, hardly constitutes a reasoned or even a reasonable exercise of prosecutorial judgment.[59]

What about the actual operation of a bad check program? As indicated earlier, the whole problem may be the wording of the notice, as the notice may misstate not only the law but the actual consequences attendant on the writing of a bad check. In that case the program,

57. Diversion programs permit persons who otherwise would be prosecuted to avoid prosecution by successful program participation. Although diversion differs from a plea bargain in that there neither is a formal guilty plea nor judicial sanction of the bargain, diversion programs have been upheld as constitutional so long as there is sufficient showing that the individual diverted committed the crime.

58. For a fuller discussion of whether there is probable cause to arrest or prosecute, see *infra* notes 64-69 and accompanying text.

59. Contrast with the bad check offense and compelled program participation a good driving class offered in many jurisdictions to speeders and drunk drivers as an alternative to prosecution (or, more likely, at least for speeders, as an alternative to license points accumulation on admission of guilt by payment of the ticket). Both speeding and D.W.I. offenses normally are strict liability offenses. The speeding ticket not only constitutes probable cause, it is enough to establish proof beyond a reasonable doubt. Similarly, for a drunk driver probable cause exists on the stop together with officer observation or upon failure to pass a breathalyzer test.

notwithstanding the notice publicizing it, still would operate within legal and constitutional parameters.

A description of Nebraska bad check programs necessarily is restricted to describing the Lancaster County program since, although bad check programs are in effect all over the country, to date Lancaster County has the only program actually operating in Nebraska.[60] A close review of the Lancaster County program is useful since it is likely to be a model for other county programs. What is ill-advised or illegal about the Lancaster program, if uncorrected, may be implemented in other counties.

In Lancaster County, once a merchant pays his seven dollar fee and thereby notifies the county attorney, the bad check program mechanism begins. A letter and information sheet are mailed from the county attorney to the bad check writer.[61] The letter and information sheet describe two aspects of the program on which I want to focus. The first is the program's mandatory and all-inclusive reach. The second is the prohibition against restitution without class attendance.

1. *Mandatory and All-Inclusive Reach*

The county attorney letter describes bad check class attendance (and payment of thirty-five dollar fee and restitution) as mandatory prerequisites to avoiding arrest warrant issuance and subsequent criminal prosecution. The letter and information sheet prohibit calls to the county attorney "about this program," as well as questions or requests for excuse from attendance to personnel at pretrial diversion (who handle class registration and administration). The only stated way to avoid both the class and prosecution is by bank letter admitting the bad check was due to bank error.

With the exception of bank-confessed bank errors, then, the program does what the notice describes. As a consequence, the program exerts unlawful authority in two ways. Its scope is too broad, at least to the extent that it includes anyone for whom no probable cause exists to believe he committed a bad check offense. And it ignores the prosecutorial investigative and charging function, or at best cedes it to the reporting merchant.[62]

a. *Probable Cause: Is a Bounced Check Enough?*

A merchant's report of a bounced check, whether or not that check

60. Telephone interview with Eric McMasters, Director, Lancaster County Pretrial Diversion (Aug. 7, 1985), recorded in memo from L. Hardy to J.R. Potuto (Aug. 7, 1985) (on file in R. 210 at U. Neb. Law College) [hereinafter cited as Bad Check Memo No. 3].
61. See Appendix for text of letter and information sheet.
62. For a discussion of merchant as prosecutor, see *infra* notes 74-79 and accompanying text.

was passed inadvertently,[63] triggers the bad check program mechanism. Once in motion, the check writer cannot (or cannot easily) stop it because no explanation or defense (other than bank-confessed bank error) will be heard. The program set-up thus inexorably moves the inadvertent check passing case along with all the others. For program purposes it does not matter that the bad check resulted from an arithmetical error. It does not matter that the bad check resulted from failure to record (and, thus, reflect in the account balance) an earlier check. It does not matter that failure to record the earlier check was not the fault of the writer of the bad check, but, on a joint account, was due to failure to record by the other person on the account. It does not matter that the bad check writer had several checking accounts (business, personal, joint), and simply wrote the check on the wrong one, or that the error resulted from a check written on an account whose fund insufficiency resulted from a bank seven- or even fifteen-day hold on a check deposited in the account. It does not matter that the bank itself deducted funds from the account (without notice to the check passer) to meet a delinquent loan payment due the bank by the bad check passer.

None of these explanations matters to the triggering of the program mechanism because none of these explanations is heard. Since all these explanations obviously matter for guilt assessment and a decision to prosecute, they also should be considered before a decision is made to force program participation—or before threatening to arrest or prosecute.

Passing a bad check in exchange for merchandise unarguably is one element of the Nebraska bad check offense. But does passing such a check, without any evidence of intent (or even, possibly, without any evidence that there was an exchange for value)[64], constitute probable

63. For a description of the automatic nature of the program and county attorney failure to oversee or control a merchant's discretion to report a bad check, see *infra* notes 74-86 and accompanying text.

64. On a merchant report of a bad check two inquiries, and two inquiries only, are made with reference to a diversion decision. County physical records are reviewed to assure that a person already convicted of a bad check offense is slotted for prosecution and not diverted to the class. Similarly, county computer records are reviewed to assure that a person who already has taken the class is not again diverted. Bad Check Memo No. 1, *supra* note 1.

It is true that a merchant completes a county attorney questionnaire when filing his seven dollar fee. (See Appendix C for the full text of the questionnaire). Most of the information sought in the questionnaire is background information that would be useful if the case were ultimately prosecuted (*e.g.*, Who took the check? Can that person identify the check passer? Were there witnesses to the transaction?). Admittedly, some questions (notably questions 12, 13, 14, 17, 18 and 19) could be employed to screen at least some merchant's reports. The questionnaire answers, while insufficient to assure only probable cause bad check cases are forwarded to the bad check class, could provide at least a start on the screening function. For a discussion of the overreach of the program, see

cause to believe the offense was committed?[65] Admittedly, probable cause is not self-defining; it is founded on "the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act."[66] Factual and practical considerations here, given the myriad possibilities of bad check passing without fraudulent intent or even knowledge, seem to compel a showing of more than just the bad check itself to constitute probable cause. Although not entirely clear, the *Model Penal Code* takes the position that more than the bad check is required to make a valid arrest.[67] That "more" could be a history of bad checks by the check writer or failure to make good on a check after notice.[68] It doubtless either is constitutionally compelled, or at least eminently reasonable prosecutorial policy, to require more than the evidence of one bad check before authorizing an arrest.

b. The Illegal Arrest Threat: In Terrorem and Ultra Vires

Constitutional arrest authority and sound prosecutorial policy certainly demonstrate the need to revamp the present bad check program. There is, in addition, a statutory prohibition not only to arrests triggered by a bad check alone but also to most arrests, period (and, therefore, threats of arrest that result in coerced class attendance), under the bad check statute.[69] Nebraska has an express policy favoring citation in lieu of arrest "to the maximum extent consistent with the effective enforcement of the law and the protection of the pub-

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supra notes 61-62 and accompanying text. Unfortunately, however, the answers are not employed to help screen merchant reports.

The questionnaire answers are used for information purposes only. The merchant answers are not reviewed by an attorney before the "class or arrest" letter is mailed. Thus, for example, an answer indicating no merchant attempt to contact the bad check passer does not result in rejection of the merchant's complaint, nor avoid a "class or arrest" letter being sent to the check passer. The questionnaire answers simply are filed as part of the routine processing of a merchant report. Bad Check Memo No. 1, *supra* note 1.

Since the bad check program triggers automatically upon merchant report with no attorney evaluation, it is possible that even the statutory exchange-for-value requirement may be overlooked. Certainly the program has no internal controls designed to avoid this result.

65. The fourth amendment prerequisite for an arrest and prosecution is probable cause. U.S. CONST. amend. IV; United States v. Watson, 423 U.S. 411 (1976).
66. Brinegar v. United States, 338 U.S. 160, 175 (1949).
67. The Model Penal Code seemingly finds probable cause on the basis of the bad check *combined with* the failure of the check passer after notice to make good on the check. MODEL PENAL CODE § 206.22 comment 3 (Tent. Draft No. 2 1954).
68. In fact, failure to make good after notice is the basis of a presumption in Nebraska that the bad check writer acted with knowledge. NEB. REV. STAT. § 28-611(5) (Supp. 1985). Whatever the constitutionality of the presumption, *see infra* notes 133-150 and accompanying text, such failure, together with the bad check itself, undoubtedly is sufficient to constitute probable cause.
69. NEB. REV. STAT. §§ 29-422, -425, -427 (1979).

lic."[70] Police officers have citation authority for all misdemeanors;[71] county attorney and magistrate authority extends to felonies.[72] Certainly the average bad check passer, without or even with intent, is unlikely to constitute a public danger. Arrest authority, if it exists at all, must therefore be found in a need for "effective enforcement of the law." The term, while vague, does have statutory content. It appears to authorize arrests when there are "reasonable grounds" to believe the suspect otherwise will flee the jurisdiction.[73] While some bad check passers (most likely transients) do present this danger, most bad check passers do not.

c. Merchant as Prosecutor

Since the letter and information sheet issue automatically on a merchant's report and payment of a seven dollar fee, the merchant who cares about one bad check sets the whole bad check program in motion. The program is automatic, with not only no evaluation by the county attorney as to whether an offense has been committed and may be proven, but also with no opportunity available to make an evaluation. The result is an abdication of the prosecutorial function,[74] carrying with it the very real potential of unjustified intrusion by the criminal process into the lives of the citizens. Since, as described above, the right legally to force class attendance hinges on the right legally to prosecute, automatic and mandatory program operation permits illegal use of the prosecutorial power.

Under the bad check program prosecutorial discretion, if exercised at all, is exercised by the reporting merchants ceded the power to trigger the program mechanism. Such discretion, in practice vested in merchant, not prosecutor, may be unconstitutional either generally as

70. *Id.* at § 29-422.
71. *Id.* Their citation authority also includes infractions and ordinance violations.
72. *Id.* at § 29-425.
73. *Id.* at § 29-427. While this section specifically is directed at arresting officers, there seems no good policy reason why it is not equally applicable to the county attorney's decision whether to authorize an arrest warrant.
74. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE §§ 3 to 3.9 (1980):

> (a) . . . a prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissable evidence to support a conviction.
>
> (b) The prosecutor is not obliged to present all charges which the evidence might support. . . . Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
>
> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
>
> (ii) the extent of the harm caused by the offense;
>
> . . .
>
> (e) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial.

an unconstitutional delegation of power, or on equal protection grounds related to the specific exercise of the power.

Although no cases were found dealing with merchants as prosecutors under a bad check statute, courts *have* considered the constitutionality of statutes challenged as ceding banks the prosecutorial power.[75] The argument regarding banks is similar to that regarding merchants: a bank's policy decision whether to honor a check written on insufficient funds serves to send forward for prosecution not all bad check writing depositors, but only those depositors that bank policy fails to protect by honoring the check. Banks often honor checks on insufficient funds written by depositors with good credit records at the bank, or who also have savings accounts, or have a long history of many transactions with a bank, or who simply happen to know well the right officers at the bank. Were all these checks to bounce and all these check writers to go forward to a prosecutor, he well might make prosecutorial selection decisions different from those made by the bank. The policy interests, and therefore exercises of discretion, by prosecutor and bank will not always coincide.

Not surprisingly, courts have both upheld and rejected challenges that particular bad check statutes unconstitutionally vested prosecutorial discretion in banks.[76] Those courts that upheld the constitutionality of the statutes generally did so by finding that the bank did not preempt the prosecutor's prosecutorial decision. In the case of the reporting Nebraska merchant, however, the diversion decision effectively *is* made by him. The county attorney presumably evaluates for prosecution only those cases of bad check passers who refuse the class. Yet, since the diversion decision itself is a prosecutorial decision, it is difficult to see how the automatic and mandatory nature of the program on merchant report can be anything but an unconstitutional ceding of responsibility.

It may be argued that, whatever the legality, no real harm is done by permitting a merchant's report to trigger forced class attendance or threat of arrest and prosecution, since merchants will exercise due care in screening bad checks and will report only those they consider to represent flagrant conduct (several bad checks, very large checks, failure to make good after notice) to the county attorney. As to that,

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75. In this Article "bank" is used not in any technical sense, but includes savings and loan associations and other financial institutions offering checking accounts or equivalent accounts honoring signed orders for the payment of money. Bank discretion affecting charging decisions exists in addition to the merchant's discretion in Nebraska. Some checks on insufficient funds will be honored by Nebraska banks and thus will avoid a merchant's opportunity to report the check as bad.

76. *See, e.g.*, Tolbert v. State, 294 Ala. 738, 321 So. 2d 227 (1975) (constitutional); People v. Quinn, 190 Colo. 534, 549 P.2d 1332 (1976) (unconstitutional); State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973) (constitutional); Dunaway v. State, 561 P.2d 103 (Okla. Crim. App. 1977) (constitutional).

however, it is possible only to guess: an evaluation of the number and type of reports made and merchant practice before reporting is necessary. In guessing as to merchant conduct it seems at least reasonable to expect that some merchants might report every bounced check, or every one passed by a member of a minority group[77] (if the merchant knows or can guess minority status), or every one passed by a student or by someone new to the community. A newspaper report of one person's experience with the bad check program[78] supports the guess that even factually innocent and non-flagrant instances of bad check writing *are* reported by merchants. This person—a student—passed a nine dollar insufficient funds check. She was quoted as saying she had no opportunity to repay the check nor even knew her check had bounced until the county attorney "class or arrest" letter arrived.[79]

2. *Restitution Prohibition*

The county attorney practice revealed in the notice and letter does more than cede prosecutorial discretion to merchants. It does more than threaten illegal arrest. It does more than threaten at least some factually innocent persons with prosecution. At least in one respect it seems to run counter to provisions in the bad check statute itself.

The bad check statute presumes knowledge by a bad check passer in any case where, after notice by merchant, bank, or county attorney, the check passer fails to make good on the check.[80] The statute also provides that restitution is a sentence mitigator.[81] Obviously, then, the legislature anticipates restitution made by someone who is to be prosecuted either before or at the time of prosecution. Restitution as a sentence mitigator must be, in fact, a specific legislative attempt to encourage restitution.

The county attorney, however, evidently permits restitution (at least pretrial anyway) to be made only by those who successfully complete the bad check class and, therefore, are not to be prosecuted.[82] The directive seems contrary to the statute in that it prohibits that which the statute seems to contemplate if not encourage. Better prac-

77. The fact that county attorney and bank or merchant "prosecution" decisions might differ makes real the equal protection spectre lurking in the present operation of the bad check program. A county attorney charged with enforcing the law is, to put it mildly, unlikely to choose to prosecute only minority group bad check passers.

78. And numerous anecdotes reported by students.

79. The Journalist (U. of Neb. School of Journalism), Nov. 28, 1984, at 2, col. 5.

80. NEB. REV. STAT. § 28-611(5) (Supp. 1985).

81. *Id.* at § 28-611(7).

82. It theoretically is possible, of course, that those to be prosecuted are screened beforehand by the county attorney and offered the option to make restitution. In practice, however, there is no such screening of merchant reports. *See* Bad Check Memo No. 1, *supra* note 1.

tice probably would be to permit repayment outside the auspices of the bad check course and to have the county attorney make additional arrangements to assure class attendance.[83] At the very least county attorney practice in refusing restitution avoids any possibility of use of the statutory knowledge presumption in a bad check prosecution.[84] Failure to repay after notice hardly could give rise to a presumption of knowledge when failure to repay is due to county attorney express directive.

C. County Attorney Responsibilities to Bad Check Statute and Program

A county attorney obviously is charged with upholding the law. His chief responsibility is the prosecution of criminal cases.[85] Why, then, the hands-off approach to passers of bad checks? Why the summary treatment afforded to a bad check writer reported by a merchant? Undoubtedly the answer lies in the efficient operation of the office of county attorney as defined by the law enforcement priorities set by the office.

Investigation and prosecution of crime takes time, money, and manpower. A bad check written with specific intent to defraud certainly is a crime. But in terms of general societal needs and prosecutorial hierarchical interests the bad check offense generally is and should be low man on the totem pole.[86] The offense grades far below murder, rape, child abuse, and other violent crimes, and probably grades below—or at least not ahead of—drug offenses and trespassory theft offenses.[87] A bad check program automatic on merchant report permits the county attorney to focus on other crimes while also

83. One explanation for present county attorney practice undoubtedly is the fear that once restitution is made a merchant may lose interest in pursuing a bad check prosecution. *See* F. BEUTEL, *supra* note 2, at 359-60 ("The businessman wants collection, being interested in prosecution only as a secondary matter . . . . Once he gets his money by any process, the businessman usually seems to lose all interest in penalties."). This is just another example, however, of the shaky policy underpinnings of at least certain aspects of the bad check offense, statute, and program. For a fuller discussion of policy considerations, see *infra* text accompanying note 100 & notes 102-19.

84. County attorney practice refusing restitution might prove the old adage that there is a silver lining in every cloud since the statutory presumption likely is unconstitutional anyway. For a discussion as to whether the presumption ever constitutionally may be employed, see *infra* text accompanying notes 133-50.

85. NEB. REV. STAT. § 23-1201(1) (1979). His other major statutory duty is to provide advice and assistance to the county board and other civil officers. *Id.* at § 23-1203.

86. A good deal of the time merchants could avoid receiving bad checks simply by employing tighter check-cashing procedures. For a discussion of merchant practices as well as policy considerations underlying the bad check offense, see *infra* text accompanying notes 102-19.

87. For a brief discussion of theft offenses, see *supra* text accompanying notes 37-39. Although my information is personal or anecdotal (or both), theft offenses and straight possessory drug offenses of most drugs are the bottom rung on the ladder

keeping merchants happy by having the bad check offense dealt with. As presently described it is an efficient system. The problem is that the system also handles bad checks passed without specific intent (translated as knowledge plus an exchange for value). To a merchant, the presence or absence of specific intent is irrelevant. His concern is the bad debt, not the mens rea of the debtor. To the county attorney, however, mens rea may not be ignored. His concern must be the lawful operation of the bad check program, not efficient debt collection.

To accomplish lawful program operation, several changes need to be made. These changes require greater initial county attorney involvement in the program and probably involve county attorney continuing time commitment to program administration. Since most changes require diluting present overreaching program descriptions, they also may result in diluting program deterrent effect. Decreased deterrence likely will result in an increased call for bad check prosecutions. This, in turn, may increase county attorney time over that now given to bad check prosecutions. All in all the revamped program appears inevitably to be less efficient for the county attorney than the program as presently operating. What remains to be seen is whether a scaled-down version it is worth keeping at all.

1. County Attorney Letter and Information Sheet

The county attorney letter and information sheet presently describe a program that is overbroad and needs revamping. As the program is revamped so too must be corresponding program descriptions in the letter and information sheet. For example, since there should be afforded the opportunity to make restitution without regard to class registration or successful completion,[88] the letter should either expressly solicit or at worst be silent as to the opportunity to make restitution. Even more clearly, the letter may not threaten arrest for failure to register for the class.[89]

Toning down the letter could result in fewer "voluntary" class registrants. County attorney follow-up time to assure attendance may be required. Since more no-shows means fewer bad check writers diverted, logically more no-shows should mean more bad check writers being prosecuted.[90] This, in turn, obviously means more work for the

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of prosecutorial interest. As a consequence, they are the first jury trials entrusted to new prosecutors.

88. For a discussion of why restitution should be permitted, see *supra* text accompanying notes 80-84.

89. See *supra* text accompanying notes 69-73 for a discussion of why arrests are illegal.

90. Or at least time taken considering the case and deciding whether to prosecute. In practice, the no-shows might just be ignored, especially if the no-show is a first-time bad check writer.

county attorney.

2. Merchant Notice

The notice displayed by merchants similarly needs revising to state correct law and describe accurately the revamped bad check program. The notice, although not directly related to the county attorney's prosecutorial function, is still the county attorney's responsibility.

The county attorney has a general obligation to see that the laws are enforced and obeyed in his county. This obligation entails some responsibility affirmatively to disseminate accurate information about the criminal justice system and to impede the flow of inaccurate information.[91] His responsibility obviously is enhanced when, as here, the false information emanates from his own office. If he need not police supermarket check-out counters he does need to police the county attorney desks from which the notices are distributed.

It may be argued, and perhaps correctly, that removal of the arrest threat and refinement of the offense definition may make the notice a less effective deterrent. Even if this is so, the county attorney cannot fulfill his legal responsibility by permitting misstatements of the law and its consequences. Deterrence (as with on-time trains in Italy) surely is a worthwhile goal. Yet it cannot justify anything done in its name.

3. Making the All-Inclusive Less Inclusive

Perhaps the greatest potential usurper of county attorney time and manpower relates to the necessity to screen bad check cases reported to the office. The county attorney must devise a way to assure that the circumstances of each bad check reported give rise to a probable cause belief that an offense was committed. Only then may the bad check writer be diverted to a bad check class. Assuring probable cause that the bad check offense was committed (and not merely that a bad check was passed) could be managed in either of two fashions.

First, each case could be individually investigated and assessed and a decision made whether to pursue it at all and, if so, whether to offer diversion or to slot for prosecution. Given the number of bad checks written and, within that, the number for which probable cause for the offense can be established, this process could eat up county attorney

91. This responsibility is not specifically set forth by statute. In my college political science class we called these "informal role requirements," no less real than formal requirements. The legislature briefly considered making explicit the county attorney's obligation to disseminate information about the bad check offense. LB 445, § 3, 89th Leg., 1st Sess. (1985). The obligation, however, was in a section authorizing establishment of bad check programs. That section was deleted for reasons having nothing to do with the county attorney's obligation to provide information. *See supra* note 5.

staff and funds. Were I the county attorney faced with individual screening of each of these cases, my solution would be to go after only the egregious cases for prosecution and otherwise to dismantle the bad check program. For me, anything more would be an injudicious and indefensible use of funds.

The other alternative would have the county attorney promulgate criteria for merchants to follow in reporting bad checks.[92] The criteria would obviate county attorney need to screen each case since the criteria, when met in a particular case, would establish probable cause. For example, the county attorney could require that, before making a bad check report, a merchant must first make a good faith effort to obtain repayment.[93] I think it would be eminently good policy, in fact, to define a good faith effort to include merchant use of a private debt collection service in attempting to obtain payment on the check.[94] Combined with a requirement of merchant certification of what value was obtained in exchange for the bad check, good faith (but unsuccessful) collection effort by a merchant reporting a bad check passer would assure that a filed merchant report represents a probable cause bad check case.[95]

Another example of useful law enforcement criteria might be to permit a merchant to report a repeat bad check passer without first resorting to private debt collection efforts. Indeed, it might be that the county attorney would solicit, or at least permit, merchant reports of a repeat bad check passer even if he makes good on each bad check passed. Such a bad check passer might well be violating the statute in the hope that only some merchants will force him to pay up. He is someone who could be prosecuted and should (and could) be required to take the bad check class.

An automatic program triggered upon a probable cause bad check

92. In a way he already does this, on a limited basis, through use of a questionnaire. At present, however, merchant answers are used for informational purposes only and do not influence the diversion decision. See *supra* note 64 for a fuller discussion.

93. And make some showing, perhaps by return receipt on a registered letter, of having made the effort.

94. Probable cause would exist even if the merchant was unable to locate the bad check passer since this would at least demonstrate bad address information on the check, and bad address information in turn gives rise to an inference that the check passer intended to defraud.

95. Even here it might not be possible to convict. My TV purchaser, for example, would be a check passer who did not make good on the check. And clearly an indigent or a bankrupt might not make good on a check without having a specific intent to defraud. (In the case of the bankrupt he might be under court order not to make good. *See infra* note 99.) In these cases, however, there nonetheless would be probable cause. For each of these merchant-reported cases, then, the county attorney lawfully could send a class or prosecution (but *not* a class or arrest) letter.

offense report would no longer raise the policy overreach and constitutional questions attendant on the present program. But this approach to enforced program participation is more time-consuming and costly, and hence less attractive to a merchant who currently need make no recoupment effort before reporting his bad check. As between merchant and county attorney interests and expenses, however, I believe this approach puts the onus where it properly belongs—on the merchant.[96]

If the county attorney establishes procedures assuring that only probable cause offenses are reported, he probably can continue to require class attendance while refusing to entertain explanations or defenses. Refusal to listen coupled with merchant-screened cases would optimize county attorney time focused elsewhere. As a prosecutorial policy choice, however, I believe bad check writers should have at least some opportunity to explain.

The bad check writer whose name was reported by a merchant after a failed merchant attempt to get repayment might still be factually innocent or not be provably guilty of the offense, or be like, for example, my TV customer described above,[97] someone the county attorney might elect not to prosecute even though provably guilty. The bad check passer, even after merchant effort, still might not know about the bounced check until the county attorney letter arrives. He might have changed addresses. Or someone else in the household might either have taken the merchant's phone call and failed to relay the message, or have signed for the merchant's registered letter and then neglected to give it to the bad check passer. Failure to repay also might derive from genuine impoverishment[98] or bankruptcy.[99] Especially where there is no history of bad check writing the check passer's explanation, if believed, might lead a prosecutor to waive compelled

96. For a discussion of the reasons why, see *infra* text accompanying notes 102-11 & 118-19.

97. *See supra* text accompanying notes 40-42.

98. The problem of the indigent raises additional questions about the constitutionality of the present bad check program. Successful program completion requires payment of restitution and the $35 class charge. Suppose, however, the bad check passer is indigent. Is program certification withheld? According to the director of pretrial diversion, this problem has never arisen. *See* Bad Check Memo No. 2, *supra* note 5. To withhold certification on nonpayment by an indigent (and thereby trigger criminal prosecution) raises serious constitutional problems. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660 (1983). Concern with program treatment of indigents was, in fact, one reason why the Nebraska Unicameral declined specifically to authorize these programs. *See supra* note 5.

99. The problem of the bankrupt raises even more questions than that of the indigent. As a private debt collection mechanism payment of restitution upon merchant letter is foreclosed by an automatic stay from the bankruptcy court effective upon filing of bankruptcy. 11 U.S.C. § 362 (1982). If the restitution order arises out of the bad check program the question is whether it is a criminal prosecution exempt from the otherwise mandatory stay on bankrupt payments.

class attendance (or decide there is no power to compel). Since operation of a bad check program on probable cause prefers one citizen class—creditors (merchants)—over another—debtors (consumers)—hearing out explanations is one step toward redressing the balance.

IV. PUBLIC COLLECTION OF PRIVATE DEBTS

Suppose the Nebraska Constitution is amended tomorrow or the Nebraska Supreme Court, on reconsideration, decides that a bad check offense does not require a specific intent to defraud (translated as knowledge plus an exchange for value). Suppose, further, that the legislature considered eliminating even a knowledge requirement for commission of the offense. Would an offense so defined be wise policy, reflecting " 'the good sense of mankind?' "[100] And, whether or not wise policy, would it violate federal and state due process constitutional protections?[101] In other words, should we? And could we?

A. Should We?

To decide whether societal interests require a more intrusive bad check policy than even the one presently operating, we need to know just what are the parameters of this problem facing merchants? How many checks bounce? How many are never repaid or are repaid only after private agency debt collection? How much money actually is lost and not discounted through business bad debt loss reporting on a tax return,[102] or translated into higher prices for goods to compensate for the bad checks? Are we talking about a great deal of money lost to individual merchants or significantly higher costs passed on to each consumer?

In 1957 a bad check study was conducted in Nebraska to determine "[w]hat are the real facts?"[103] While it is clear that merchants con-

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Id. at § 362 (b)(1). *See generally* Lewis & Jennings, *Bad Checks and Bankruptcy*, 57 FLA. B.J. 531 (1983).

The question of whether it is a criminal prosecution or merely a proprietary function of the office turns, in part, on whether the county attorney exercises prosecutorial discretion and control. See *infra* note 113 for a discussion of whether the program, as presently operated, is so far outside the routine scope of his office that it subjects the county attorney to civil liability. To the extent the prosecutor acts as civil debt collector and not law enforcement officer to "[extract] a preference not accorded other creditors . . . . ," the bankruptcy action stays his hand. *In re* Caldwell, 5 Bankr. 740, 742 (Bankr. W.D. Va. 1980). *See also In re* Reid, 9 Bankr. 830, 831 (Bankr. M.D. Ala. 1981) (court stay of proceedings as long as debtor "complies with his plan"). *But see* Barnette v. Evans, 673 F.2d 1250, 1251 (11th Cir. 1982) (allowing state criminal prosecution to proceed).

100. State *ex rel* Norton v. Janing, 182 Neb. 539, 544, 156 N.W.2d 9, 12 (1968) (quoting People v. Holder, 53 Cal. App. 45, 53, 199 P. 832, 836 (1921)).

101. U.S. CONST. amend. V & XIV; NEB. CONST. art. 1, § 3.

102. *See* 26 U.S.C. § 166(a) (1982).

103. F. BEUTEL, *supra* note 2, at 257.

sider the problem as very serious, the study results showed that "both individually and collectively bad check losses to business are of no commercial consequence. In fact, they are probably the smallest expense the business suffers, so small that not a single business interviewed outside of banks was found to insure itself against such losses."[104] The 1957 data indicated that 40 percent of businesses experienced no bad check losses and the yearly average for the rest was one bad check.[105]

The study, of course, is more than twenty-five years old; the use of personal checks no doubt has increased substantially since 1957. Yet I know of no more recent empirical study governing the use and effects of bad checks, and I am inclined to believe, particularly with the explosion in use of credit cards, that its findings by and large continue to reflect the true parameters of the bad check problem as it relates to local merchants.

One aspect of the bad check problem certainly continues true today. A good deal of the time merchants could avoid receiving bad checks simply by employing tighter check cashing procedures.[106] I, as much as anyone, enjoy the convenience of paying a bill by check at a supermarket or drug store.[107] I would hate always having to pay cash or to endure long waits at checkout lines while customer credit is investigated thoroughly. Merchants certainly realize that mine is a com-

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104. *Id.* at 269. Banks today routinely impose service charges on insufficient funds checks. For a discussion of the reasonableness and legality of these charges, see Comment, *Insufficient Fund Check Charges: The Need for Legislative Action*, 45 OHIO ST. L.J. 1003 (1984).

105. F. BEUTEL, *supra* note 2, at 405. Recently, California grocers claimed they lose $100 million yearly. Wall St. J., Dec. 2, 1985, at 19, col. 3. But no breakdown was provided as to average merchant loss. For Nebraska merchants the average 1957 loss on one check was $10. F. BEUTEL, *supra* note 2, at 405. The Beutel study also found that certain businesses are much more likely than others to experience bad check losses. Six business categories—gas stations, bars and liquor stores, restaurants, clothing stores, jewelry stores, and department stores—experienced more than 75 percent of all business bad check losses. *Id.* at 269, 272.

106. *See id.* at 275-78 for a description of merchant check-cashing precautionary procedures, or, more accurately, the complete lack thereof, in 1957.

There surely are many ways a merchant could protect himself from receiving bad checks. He could refuse to accept all personal checks (most banks, for example, refuse to cash personal checks unless the check casher has an account with them) or out-of-state or out-of-county personal checks. He could phone in a credit check before cashing the check. He could cash checks only for those he knows personally or who do frequent business in the store. He could charge a check-cashing fee (and thus accumulate a fund to cover any unpaid bounced checks). He could adopt a practice common in large cities and issue a store identification card (after credit check) whose presentation is necessary for cashing checks.

107. This is a convenience notable by its absence in more densely populated areas of the country.

mon customer reaction.[108] They therefore are reluctant to institute tighter check-cashing policy for fear that customer inconvenience and annoyance might put their stores at competitive disadvantage: customers, after all, might be prompted to take their business to a more accommodating check-cashing merchant.[109]

If, to stay competitive, a merchant chooses knowingly to continue a check-cashing policy that runs him some risk, he is not an unsuspecting victim. He has made a business judgment to foster optimum customer satisfaction at the risk of an occasional bounced check that is not made good. At worst, that unpaid bad check is to him simply a cost of doing business. And if that cost is too high, the merchant can continue to please his customers simply by engaging a private debt collection service to go after these bad debts. Any cost to him not recouped by bad check passer payment (either because bad check collection costs are assessed against the merchant and not the bad check passer, or because a particular bad check goes unpaid) is still simply a business bad debt loss that he may claim on his tax return or recover in court as any other civil debt.[110] A merchant, moreover, has an advantage over other civil creditors since he can and presumably does pass on his bad check costs to consumers.

Except for the bad check passer who is a true social menace—the forger, the repeated check passer—the criminal justice system should leave the merchant to the reality of his business risk knowingly undertaken. It is and should be no business of the system to intercede—or even try to—in private, commercial, contractual relations between citizens.

When it does intercede, the state ends up in the unseemly position of acting as a debt collection agency with the taxpayer footing what otherwise would be the merchant's costs for collecting the debt. Yes, the merchant pays a seven dollar fee to trigger county attorney involvement.[111] But the fee surely does not cover county attorney investigative and prosecutorial costs.[112] Charging the fee, moreover, only

108. Liberal check-cashing policy is seen as a good will gesture. *Id.* at 275.

109. Finding a more accommodating check casher would be possible only if other merchants continued to be willing to take more risks concerning bad checks. Less liberal law enforcement cooperation might spur all merchants to reject these risks.

110. Of course, a civil suit may prove of little practical help to a merchant since he either may decide the check amount is too small to warrant suit or in any event find himself faced with a judgment-proof debtor. *Id.* at 359. These are problems faced by many judgment creditors, however. In addition, many states now permit merchants to sue for the amount of the bad check plus triple damages. Wall St. J., Dec. 2, 1985, at 19, col. 3. These statutes provide a benefit to a merchant without removing from him his obligation to redress personally his civil grievance.

111. NEB. REV. STAT. § 28-611(5) (Supp. 1985).

112. Not to mention prison costs. *See* F. BEUTEL, *supra* note 2, at 345-49. What the merchant gets in return, moreover, is a free service which often saves on this

makes clearer the debt collecting function being assumed by the county attorney.[113] The fee seems inoffensive in bad check reporting precisely because it is yet another instance, not of treating bad checks as crimes, but of criminal treatment of bad check writers primarily to assist private debt collection. In this sense only does the merchant sharing a part of the costs seem inoffensive. In other contexts we would be horrified at the notion that a fee must be paid before a crime is investigated or prosecuted.

Imagine a rape victim having to pay the county attorney seven dollars before a rape workup is ordered at the hospital. Imagine the victim of a purse snatching having to pay seven dollars before the policeman takes off after the fleeing suspect (or radios a description). Imagine a department store having to pay seven dollars before the county attorney processes a shoplifting charge. An argument that the county treasury[114] would be in better shape if a seven dollar fee accompanied the report of all crimes would not encourage us to institute such a system. Indeed, if the state of the county treasury controls, we would be in better shape if we required a $700 fee. If collection of the fee is to assure merchant bona fide interest or to deter his reports, seven dollars certainly is not enough. The fee might as well reflect, not just seven dollars, but the merchant's proportionate share of the

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item alone much more than the entire salary which the officials receive from the state or county. Many county attorneys and sheriffs would earn much more than their salaries, if paid at commercial collection agency rates on checks; and throughout the state, this item, as these offices now operate, would probably equal or exceed the cost of maintaining the offices. It is small wonder, therefore, that the pressure on officials to collect is intense, that those who yield to it are popular and that those who do not, find re-election difficult and sometimes impossible.

Id. at 293.

113. There also is a question here, beyond the scope of this Article, of the civil liability of a county attorney engaged in civil debt collection who errs by threatening arrest of or forcing class participation on a person who through inadvertence passes a bad check. The county attorney enjoys immunity for all functions relating to the conduct of his office. *See* Imbler v. Pachtman, 424 U.S. 409 (1976). Since, however, with county attorney official sanction the bad check program includes those who committed no offense and legally may not be prosecuted (those, in other words, over whom his office has no jurisdiction), the program as to these individuals may be outside the scope of the prosecutorial function and make the county attorney subject to a suit for damages. If he operates as a private debt collector he may find himself in law treated as one. *See supra* note 99. If his actions are ultra vires he may find himself without insurance protection. A factor that enhances the possibility of prosecutorial civil liability is that, by virtue of the questionnaire answers (see *supra note* 64 for a description of the questionnaire provided merchants), the county attorney may have information in his own files demonstrating that no bad check offense was committed (even though a bad check may have been passed). For example, the merchant might have answered clearly that no value was received in exchange for the check.

114. The check notice fee paid under the bad check statute is credited to the county general fund. NEB. REV. STAT. § 28-611(5) (Supp. 1985).

county attorney's running of the debt collection service. And if those are to be the merchant's costs then, of course, why not leave him to his private debt collection?

The private debt collecting function, especially as we are postulating here, with no fraudulent intent required, places the state in the position of preferring one class of citizens, its creditors or merchants, against another class of citizens, its debtors or customers. And the state would take sides, remember, with no culpable mens rea required of the debtor. Such a policy choice is abhorrent. It not only involves the criminal justice system where it does not belong, it does so without any assessment of even comparative moral or ethical culpability. It is bad enough that under the present Nebraska statute my TV customer may be found to have committed the bad check offense even though many of us would find right and justice, as it were, to be on his side.[115] With no mens rea requirement, or merely negligence or even knowledge, the incidence will increase of those who are criminally but not morally or ethically culpable.

Not only does elimination or lessening of mens rea potentially place law enforcement on the "wrong" side of a contract claim, involvement of law enforcement in a civil claim, no matter what side, markedly is inappropriate. Passing a bad check, believing it to be good or without knowing or finding out, is careless conduct. Passing a bad check knowing it is bad (but intending to deposit funds to cover it) also may be careless or at least ill-advised conduct. Not being able to cover a debt carelessly undertaken may not be nice. Even in these situations, however, the criminal justice system and citizen tax dollars are designed for better use than civil debt collecting.

One inhibitor to criminalizing all bad check writing regardless of mens rea is that we would be criminalizing conduct potentially engaged in by all of us. Philosophers may argue that conduct may be treated as criminal even though we expect that conduct might be engaged in by many, or even most, of us.[116] More normally, however, the definition of crime encompasses only the unusual occurrence or morally repugnant situation. If we recognize that we all might do it we hardly are likely to describe it as criminal. And when we do call it a crime, we run the risk of fostering disrespect for the law if many or

115. Whether in the television case there are dependent or independent promises, and whether, due to arcane distinctions, an action on the check may be successful even when there is a defense on the underlying contract claim, are questions outside the scope of this Article. Nor, for that matter, will I consider the merchant's authority, if any, to charge a bad check passer debt collection costs in addition to obtaining payment of the bad check. I leave these and related questions to a commercial law expert. I undertook what was to be a simple little project, not a life's work.

116. *See* Junker, *Criminalization and Criminogenesis*, 19 UCLA L. REV. 697 (1972).

most will continue to engage in the conduct.[117]

The criminal law supplements rather than replaces civil remedies. Its basic tenet is that it operates in as narrow an area and as limited a fashion as the dictates of compelling public policy will allow. A criminal prosecution, after all, does more than simply make easier and more likely the creditor's debt collection. It carries with it severe state-caused inconvenience and anxiety. Conviction brings social stigma and possible economic and political consequences.[118] In view of the narrow focus of the criminal law, torts become crimes as negligent conduct moves towards reckless or intentional conduct.[119] For bad checks that line should be crossed only where intent to defraud is shown.

B. Could We?

Even if Nebraska were to undertake to revamp its entire policy rationale underlying the bad check offense, the Constitution of the United States might nonetheless stand to bar the undertaking. The Supreme Court held in *In re Winship* that due process requires a state to prove beyond a reasonable doubt every fact essential to constitute the elements of the offense charged.[120] While it is clear that a state legislature has enormous latitude in defining the elements that comprise a particular crime,[121] it also is clear that a legislature can go too far in defining out elements of a crime.[122] Although it is not at all clear how far is too far, presumably, and I would think, unarguably, a culpable mens rea is and must be a core constitutional element of a

117. *See, e.g.*, Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967). Criminalizing marijuana use might be an example of a crime so widely ignored that it fosters disrespect for the law. Prior to Roe v. Wade, 410 U.S. 113 (1973), abortions might have served as another example. The continued controversy to decriminalize certain crimes—successful regarding abortions—describes another consequence of an overbroad reach of the criminal laws: public pressure to amend the laws.

118. *See supra* note 9.

119. For example, not every battery, although a tort, is a crime. *See, e.g.*, NEB. REV. STAT. § 28-310 (1979). Even a third-degree assault requires at least a reckless mens rea as well as bodily injury. *Id.*

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

121. *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (striking on due process grounds Maine requirement that defendant prove heat of passion or sudden provocation to reduce homicide to manslaughter), *with* Patterson v. New York, 432 U.S. 197 (1977) (sustaining New York requirement that murder suspect prove affirmative defense of emotional disturbance to reduce homicide to manslaughter). *See generally* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

122. Patterson v. New York, 432 U.S. 197, 210 (1977). The examples given by the Court are that (1) a legislature may not declare guilt or presumptive guilt, and (2) it may not declare presumptive guilt based on indictment or defendant identity.

malum in se offense.[123] A culpable mens rea also should be a core constitutional element of any offense carrying any, or at least more than minimal, prison exposure.[124]

Strict liability offenses, while unfortunately no longer unheard of in the criminal law,[125] remain relatively rare. They still apply almost exclusively to regulatory offenses and not to offenses malum in se. Conviction of a malum in se offense stigmatizes the defendant because the crime itself is seen as a moral wrong that announces its criminality to the world.[126] Theft is certainly a common law crime that carries social stigma.[127] And certainly fraud suggests moral wrong. A bad check statute such as Nebraska's reflects both.

A prison term of any kind also stigmatizes the convicted person since supposedly the fact and duration of potential punishment is society's declaration of how bad it considers the crime.[128] A prison term and/or a felony conviction also hand the convicted person collateral consequences and statutory, civil, and informal disablements.[129]

As a result, legislatures rarely if ever expressly describe a malum in se offense as one involving strict liability. Again as a result, a court will read a statute silent as to mens rea to include a mens rea requirement on the assumption that that must have been the legislative in-

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123. A malum in se offense is a common law offense whose nature signals its wrongfulness. At common law malum in se offenses were felonies punishable by total forfeiture of lands or goods and frequently by death. United States v. Watson, 423 U.S. 411, 439 (1976) (Marshall, J., dissenting). For a clear articulation of the concept that crime equals injury caused plus intent, see Morrissette v. United States, 342 U.S. 246, 250-54 (1952).

124. The point at which minimal exposure time becomes more than minimal relates to the purpose for which the prison time is considered. For purposes of the sixth amendment right to counsel the Supreme Court drew the line at any prison time. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). For purposes of the sixth amendment right to jury trial the line was drawn at more than six months. Baldwin v. New York, 399 U.S. 66 (1970). Where some mens rea element is retained, minimum prison time may be said roughly to correspond to a misdemeanor (as contrasted with felony) classification in most criminal codes. *E.g.*, NEB. REV. STAT. § 28-106 (Cum. Supp. 1984) (Class I misdemeanor maximum penalty is one year imprisonment or $1,000 fine or both). No conceivable argument could be made in favor of a sentence on conviction of longer than one year for an offense carrying no culpable mens rea requirement. Offenses classified as misdemeanors still normally require at least a negligent if not a reckless mens rea.

125. *E.g.*, United States v. Dotterweich, 320 U.S. 277, 281 (1943) (awareness of wrongdoing not a necessary element to uphold constitutionality).

126. *E.g.*, Sweet v. Parsley, 1970 A.C. 132, 149-50 (1968).

127. Scott v. Illinois, 440 U.S. 367, 382-83 (1979) (Brennan, J., dissenting).

128. I use "supposedly" here because we all know that statutory classifications of offenses and gradation of punishments do not always represent internally consistent categories.

129. *See supra* note 9.

tent.[130] Thus the question whether and what level mens rea requirement constitutionally is necessary in large part remains unanswered in the case law. The dearth of case law demonstrates not that a strict liability malum in se offense constitutionally is permissible but that neither courts nor legislatures ever even consider that it might be.

Nebraska's bad check offense includes prison exposure of up to twenty years (with a mandatory one-year minimum).[131] The least serious bad check offense (for a first offense when the amount of the check is less than seventy-five dollars) still carries six months exposure.[132] Both because it is a malum in se offense and also because it entails such a high level of prison exposure, under Nebraska as well as federal constitutional principles surely the bad check offense must have a mens rea requirement. I would argue, moreover, that the mens rea requirement (even apart from the Nebraska imprisonment for debt provision) must be at least knowledge.

V. PRESUMPTIONS AND REIMBURSEMENTS: TWO ADDITIONAL CONSTITUTIONAL QUESTIONS

A. Presumption of Knowledge (or Intent to Defraud)

Under present Nebraska law the knowledge element (translated as intent to defraud by the Nebraska Supreme Court's gloss) of the bad check statute is essential to the constitutionality of the statute.[133] Thus, even if *Winship*[134] and its progeny permit legislative elimination or lessening of the mens rea requirement in a bad check offense as a matter of federal law,[135] as things stand the Nebraska Unicameral still may not do so. Unicameral hands would be tied not by the due

130. *See, e.g.*, Liparota v. United States, 105 S. Ct. 2084, 2089 (1985) (Court recognizes "time-honored interpretive guideline where congressional purpose is unclear"); Morissette v. United States, 342 U.S. 246, 263 (1952) (mere omission of intent language in embezzlement statute does not eliminate element of crime).

131. These are the maximum potential penalties for a Class III felony. NEB. REV. STAT. § 28-105 (1979). A bad check offense is a Class III felony when the face value of the check is $1,000 or more. *Id.* at § 28-611(1)(a).

132. This is the maximum potential penalty for a Class II misdemeanor. *Id.* at § 28-106 (Cum. Supp. 1984). The bad check offense is at least a Class II misdemeanor. *Id.* at § 28-611(1).

133. *See supra* text accompanying notes 16-17 & 23-26. It may be that without the element of at least knowledge the statute also would be unconstitutional as a matter of federal law.

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

135. *See supra* text accompanying notes 122-32. *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (striking on due process grounds Maine requirement that defendant prove heat of passion or sudden provocation to reduce homicide to manslaughter), *with* Patterson v. New York, 432 U.S. 197 (1977) (sustaining New York requirement that murder suspect prove affirmative defense of emotional disturbance to reduce homicide to manslaughter). *See generally* Jeffries & Stephan, *supra* note

process clause of the fourteenth amendment to the United States Constitution, but by the imprisonment for debt clause of the Nebraska Constitution.

The unavoidable nature of the knowledge (intent to defraud) requirement in the Nebraska bad check statute raises yet another question about the Nebraska statute. It is clear that a state may not statutorily set forth the elements of a particular crime (such as the knowledge-intent-to-defraud element here) and then simply shift the burden of proof to the defendant to negative the existence of the element.[136]

In Nebraska, knowledge of check insufficiency is presumed if the defendant is notified by the merchant or drawee or the county attorney[137] that a check has bounced and then fails to make good on the check within ten days.[138] Since without question the state must prove knowledge (intent to defraud) beyond a reasonable doubt, the constitutionality of the statutory presumption of knowledge (intent to defraud) predicated on failure to make good after notice must be tested.

The statutory presumption obviously was a legislative attempt to ease the state's burden of proof of an element of the offense where difficulties of proof may be anticipated.[139] To paraphrase Oscar Wilde,

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121, at 1347; Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979).

136. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

137. The defendant must be notified within 30 days of the check's return unpaid. NEB. REV. STAT. § 28-611(5) (Supp. 1985).

138. As described *supra* at text accompanying notes 60-63, the county attorney becomes involved when the merchant pays seven dollars and requests county attorney follow-up. *Id.*

139. MODEL PENAL CODE § 206.22 commentary at 118 (Tent. Draft No. 2, 1954). Like the Nebraska statute, the Model Penal Code presumes knowledge from failure to make good after notice. *Id.* at § 224.5(2) (Proposed Official Draft 1962). Unlike Nebraska, the Model Penal Code also presumes knowledge from the fact that the issuer had no account with the drawee. *Id.* at § 224.5(1). Given the Model Penal Code's pedigree, its record of adoption by the states, and its almost universal use as a model by commentators and courts, the similarity of the Model Penal Code presumption to Nebraska's normally would be very persuasive evidence of the constitutionality of the Nebraska bad check presumption. For a variety of reasons the Model Penal Code offers no such support.

First, the comparative dates of Model Penal Code drafts and the current run of Supreme Court cases dealing with the constitutionality of presumptions demonstrate that the Model Penal Code treatment of presumptions never was evaluated by the drafters in terms of current constitutional law. The Model Penal Code was adopted in 1962; the final version of its bad check provision was reviewed in 1954. *Id.* at § 224.5 note on status of section. The Model Penal Code position regarding presumptions apparently became final in 1955. *Id.* at § 1.13 note on status of section. The current run of Supreme Court cases preoccupied with the constitutionality of presumptions and inferences in criminal cases began in 1970 with *In re* Winship, 397 U.S. 358 (1970) (holding that the proof beyond a reasonable doubt burden is an aspect of due process of law), and did not really take any form before Mullaney v. Wilbur, 421 U.S. 684 (1978). At worst the

"though most men write a check or two for most there is no crime."[140] The crime comes with the guilty mens rea. Picking out the criminal act from all acts of bounced checks frequently will not be easy. Hence,

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Model Penal Code drafters may be faulted as bad predictors, but they can hardly be said to have passed on the constitutionality of the bad check knowledge presumption under cases not be to decided for more than 10, 20, and even 30 years.

In any case, the Model Penal Code approach to presumptions (MPC sections for which there is no equivalent in the Nebraska Criminal Code) may preserve the constitutionality of the Model Penal Code bad check presumption. The Model Penal Code treats affirmative defenses specifically and expressly; it does not use presumptions to shift either the burden of producing evidence or of persuasion on an element. MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962) & *id.* at § 1.13 commentary at 110-12 (Tent. Draft No. 4, 1955). Under a Model Penal Code presumption the jury is charged that the state must prove beyond a reasonable doubt the existence of the presumed fact but that the jury may find, should it so choose, that the facts giving rise to the presumption are sufficient to establish the existence of the presumed fact beyond a reasonable doubt. The burden of proof on the element remains on the state; finding the presumed fact once the underlying facts are established is not mandatory. The structure of this jury charge may be enough to withstand constitutional challenge. *See, e.g.*, Francis v. Franklin, 105 S. Ct. 1965 (1985); County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Leary v. United States, 395 U.S. 6 (1969). A stronger evidentiary use of the presumption (requiring that the jury be told that the underlying facts constitute strong evidence of the presumed fact and that the presumption is established as a matter of law when no evidence is adduced to negate it) was rejected by the A.L.I. *See* MODEL PENAL CODE § 1.12 commentary at 116-18 (Tent. Draft No. 4, 1955).

The grading of the bad check offense as a misdemeanor under the Model Penal Code, *id.* at § 224.5 note on status of section (Proposed Official Draft 1962), may also assist in upholding the constitutionality of the statute. *Cf. id.* at § 206.22 commentary at 117-18 (Tent. Draft No. 2, 1954) ("Considering the minor penalties here contemplated, this behavior may properly be punished"). The Model Penal Code maximum potential penalty for a misdemeanor is one year. *Id.* at § 6.08 (Proposed Official Draft 1962). Under the Model Penal Code a prosecution for felony theft by deception is available for passers of checks over $500. *Id.* at § 224.5 note on status of section & §§ 223.1 & 223.3. As discussed, *supra* at text accompanying notes 124-32, the greater the potential punishment the less likely the constitutionality of an elimination of a mens rea requirement. Conversely, the lower the potential penalty the less culpable the mens rea needed. If, then, a lesser mens rea requirement would suffice (because of the lesser potential penalty) a persuasive argument may be made that a presumption similarly should pass muster for the crime carrying the lower penalty. Jeffries & Stephan, *supra* note 121, at 1373-74. So far, however, this is not the approach taken by the Court. *See id.* at 1397. *Compare In re* Winship, 397 U.S. 358 (1970) (requiring proof "beyond a reasonable doubt" rather than statutory "preponderance of evidence in N.Y. juvenile proceeding"), *and* Mullaney v. Wilbur, 421 U.S. 684 (1975) (striking on due process grounds Maine requirement that defendant prove heat of passion or sudden provocation to reduce homicide to manslaughter), *with* Patterson v. New York, 432 U.S. 197 (1977) (sustaining New York requirement that murder suspect prove affirmative defense of emotional disturbance to reduce homicide to manslaughter).

140. O. WILDE, THE BALLAD OF READING GAOL (1896).

the presumption is born. Its constitutionality, however, does not follow quite so easily.

The statutory language reads not just as a mandatory[141] but as a conclusive presumption since its terms admit of no possibility of rebuttal. As a conclusive presumption it eliminates the state's obligation to prove knowledge (intent to defraud) and substitutes instead a requirement that the state prove notice to the defendant of the bad check[142] and failure to repay within a specified time. The knowledge (specific intent) element is irrelevant under the presumption because it mandatorily and conclusively always will be found present once notice and failure to repay are proved.

The presumption, as conclusive, is unconstitutional. Notice and failure to make good certainly do not always prove knowledge of account insufficiency (much less specific intent to defraud) *at the time* the check was passed. A defendant inadvertently might have passed a bad check and, after notice, failed to repay because now indigent or in bankruptcy or because, although he thought the account had sufficient funds when he wrote the check, he believes his error to be his good fortune since, like my television customer described above,[143] he believes he has a defense to payment.

Suppose the Nebraska Supreme Court, once again endeavoring to save the statute, were to find in it an opportunity for the defendant to rebut the presumption.[144] The question then becomes the constitutionality of a mandatory, but rebuttable, presumption. After years of shuffling and less than clear articulation, the United States Supreme Court seems finally to have framed a test for assessing the constitutionality of a mandatory presumption that substitutes for direct proof of an element of a state's case.[145]

The Court has concluded that such a presumption must be evalu-

141. As used here a presumption is an inference of fact drawn from another fact in evidence. If the presumed fact *may* be found upon proof of the basic fact, the presumption is permissive. If the presumed fact *must* be found upon proof of the basic fact (unless answered or explained) the presumption is mandatory. A conclusive presumption is irrebutable.

142. By the merchant or county attorney. NEB. REV. STAT. § 28-611(5) (Supp. 1985).

143. *See supra* text accompanying notes 37-42.

144. There is no Nebraska pattern jury instruction regarding the presumption in the bad check statute. I attempted without success to discover if ever, how often, and how the presumption is employed.

145. County Court of Ulster County v. Allen, 442 U.S. 140 (1979). Mandatory presumptions also have been challenged as unconstitutional infringements on a defendant's fifth amendment right not to incriminate himself. The fifth amendment permits a defendant in a criminal case to remain silent; the mandatory presumption, however, stands proved if not rebutted. *See* Nesson, *supra* note 135, at 1208-15. Prior to *Allen*, Leary v. United States, 395 U.S. 6 (1969), was probably the fullest recent articulation of the Court's position on presumptions.

ated on its face without regard to the particular facts of a case.[146] The presumption is tested against the world of likely cases and, to be constitutional, the presumption in that world must follow beyond a reasonable doubt from proof of the basic fact.[147] Thus, the Nebraska mandatory presumption must fall unless knowledge at the time of check passing of account insufficiency (specific intent to defraud) follows beyond a reasonable doubt from notice and a failure to make good.

Although without question the mandatory presumption is on more solid constitutional ground than a conclusive one, I nonetheless am uncomfortable with it. I just do not believe that, over the run of possible cases, notice and failure to make good demonstrate beyond a reasonable doubt a criminal mens rea at the time the check was passed. Of course a presumption need not be "accurate in every imaginable case."[148] Yet there are so many opportunities for error in check writing, combined with reasons for failure after notice later to make good, that I do not believe the presumption, as mandatory, passes muster.[149]

I can think of examples in the run of cases in which specific intent to defraud is missing. How about a defendant who wrote a check expecting to be able to deposit funds to cover it and then later has unexpected financial reverses? Or suppose the defendant thought he had funds to cover the check? His error was one of simple addition or it might have been caused by a check *to* him that bounces. Again, at the time of notice and payment demand he may have no funds to cover the check.[150] I could go on. The point here is that subsequent failure to make good on the check does not prove to me, beyond a reasonable doubt in the full run of possible cases, intent to defraud when the check was passed. I think the statute needs revising either to delete the presumption or to make it no more than a permissive one. As the

146. Because if not rebutted it is sufficient to convict.

147. By contrast, the constitutionality of a permissive presumption is evaluated on the facts of the particular case; the presumption must follow more likely than not from the basic fact proved. *Compare* County Court of Ulster County v. Allen, 442 U.S. 140, 167 (1979) (as long as presumed fact not "sole and sufficient basis for a finding of guilt" it satisfies *Leary* test), *with* Leary v. United States, 395 U.S. 6, 36 (1969) (criminal statutory presumption fails as "irrational" unless "substantial assurance" that presumed fact is "more likely than not to flow from the proved fact").

148. County Court of Ulster County v. Allen, 442 U.S. 140, 155 n.14 (1979).

149. Just this past term the United States Supreme Court knocked down what it characterized as a mandatory rebuttable presumption. Francis v. Franklin, 105 S. Ct. 1965 (1985). *Franklin* was a murder prosecution. The defendant's defense was that his firing of the gun was accidental, not intentional. The presumption in *Franklin* required the jury to find intent as a natural and probable consequence of firing the gun. The Court found the conviction constitutionally suspect because the jury might have thought that, with the presumption, it was up to the defendant to prove that the shooting was an accident.

150. Indeed, his lack of funds may be due to the check that bounced on him.

statute now stands a trial judge should exercise caution in what and when, if ever, he charges a jury on the presumption.

B. Restitution and Merchant Fee Reimbursement

The Nebraska bad check statute provides specifically that a convicted bad check writer may be sentenced to make restitution and to reimburse the merchant for his seven dollar cost of filing with the county attorney.[151] I only casually have canvassed Nebraska sentencing practice in bad check cases, but I believe it safe to assume that restitution routinely is ordered. No matter how circumscribed the bad check offense and program, they always will exist in part to aid private debt collection efforts. Restitution awards therefore make perfect sense.[152] Even within broader criminal justice goals, restitution awards are sensible: they attempt to make the victim whole, an aim long forgotten by the criminal justice system.[153] So long as the criminal justice process does not invade provinces better (or constitutionally) left to civil resolution, I believe restitution awards should be made and are constitutional even if an indigent defendant is unable to take advantage of the sentence mitigation possible upon restitution.[154]

Payment of merchant costs, by statute tied to making restitution, raises a separate question. It is clear that a criminal justice system may distinguish between the classes of convicted and acquitted persons in assessing fees and costs without offending constitutional equal protection guarantees.[155] It also is clear that the state may exempt the acquitted but compel the payment of costs by the convicted so long as the convicted are treated equally with other judgment creditors re-

151. NEB. REV. STAT. § 28-611(6) (Supp. 1985). Restitution, and the repayment of merchant's fee, may be ordered whether or not there is prison time to be served. *Id.* Merchant filing costs also must be repaid by a bad check writer who voluntarily makes restitution. *Id.* at § 28-611(4). A diverted bad check writer must make restitution, repay the seven dollar filing fee, *and* pay a $35 class charge.

152. Restitution awards also may be sensible given the nature of the offense, offender, and the purposes of punishment. For a profile of the bad check writer as compared to other offenders, see F. BEUTEL, *supra* note 2, at 318-45. For a review of the traditional elements leading to a sentencing decision, see *generally* MODEL PENAL CODE § 1.02(2) (Proposed Official Draft 1962); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974).

153. *See generally* Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925, 960-62 (1979).

154. Indeed, the fact of the defendant's indigency might itself mitigate sentence. Motivation for committing a crime is a formal factor in sentencing in many jurisdictions. *See, e.g.*, N.J. REV. STAT. ANN. § 2C: 43-12(e)(3) (West 1982). Even without formal sentencing guidelines, most judges regard motivation as a factor weighing in the exercise of sentencing discretion. It therefore may be that the defendant making restitution gets sentence mitigation equal to how he would have been treated at sentencing had he been indigent.

155. Fuller v. Oregon, 417 U.S. 40, 49 (1974).

garding insolvency exemptions.[156] It even may be possible to assess costs against both convicted *and* acquitted defendants. It definitely is unconstitutional, however, to assess costs against some but not all similarly situated convicted persons.[157]

The Nebraska statute requires repayment of merchant filing costs not by all persons convicted of a bad check offense but only by those ordered to make restitution.[158] At first glance, then, the statute seems unconstitutionally to treat convicted persons differently as regards fee repayment. The constitutionality of the Nebraska provision likely turns on the characterization of the seven dollar fee reimbursement. The most natural characterization, and one that saves the constitutionality of the provision, is to treat the fee reimbursement simply as part of the restitution order. When viewed as part of the restitution order and not as a charge in itself it is obvious that the fee can be assessed only against those ordered to make restitution. Requiring fee reimbursement only where restitution is ordered, therefore, is no more unconstitutional than the judge's decision to order restitution in the first place.

On the other hand, if the fee is treated as a separate charge, upholding the constitutionality of the provision, although still possible, is much less likely. In *Rinaldi v. Yeager*,[159] the Supreme Court found an equal protection violation in a statutory scheme where transcript costs after unsuccessful appeal were assessed against not all convicted persons but only those actually in prison. The Court found tying transcript costs to prisoner status demonstrated irrationality "in the nature of the class singled out."[160] Under the Nebraska statute, by contrast, tying merchant fee reimbursement to a restitution order (as contrasted with tying transcript costs to prison status) may well describe a rational class. In Nebraska, moreover, although only those ordered to make restitution must reimburse the merchant's seven dollar fee all convicted persons, even those receiving prison terms,[161] are subject to restitution orders. This is somewhat different factually from *Rinaldi*, since obviously not all convicted persons in *Rinaldi* were subject to prison sentences.

If the seven dollar filing fee repayment scheme is unconstitutional

156. *Compare* James v. Strange, 407 U.S. 128 (1972) (Kansas recoupment statute held unconstitutional), *with* Fuller v. Oregon, 417 U.S. 40 (1974) (Oregon recoupment statute with exemptions upheld). The legislative determination to charge costs only of the convicted meets a test of "objective rationality." Fuller v. Oregon, 417 U.S. 40, 50 (1974).

157. Rinaldi v. Yeager, 384 U.S. 305 (1966). Similarly it would be unconstitutional to assess costs against some but not all acquitted persons.

158. NEB. REV. STAT. § 28-611(4), (6) (Supp. 1985).

159. 384 U.S. 305 (1966).

160. *Id.* at 309.

161. NEB. REV. STAT. § 28-611(4), (6) (Supp. 1985).

under *Rinaldi* the problem easily could be remedied by requiring that restitution be ordered in all cases.[162] In any case, this strikes me as the better policy choice in a bad check offense since otherwise one could argue that the bad check passer retained the benefit derived from commission of the offense.

VI. CONCLUSION

The Nebraska bad check offense implicates all three branches of government. And all three branches need to act with greater care in dealing with the bad check offense. Specifically, the Nebraska unicameral needs to take yet another look at the bad check statute. As drafted, at least two provisions—the bad check misdemeanor not requiring exchange for value, and the statutory presumption on notice and failure to pay—are of doubtful constitutionality. They should be deleted or at least reworked to offer real possibility that they could sustain constitutional challenge.

As far as the Nebraska Supreme Court is concerned, it needs to adopt a logically consistent approach to the bad check offense. If the court thinks that knowledge is a sufficient mens rea under the Nebraska Constitution, then it should say so. If it believes that specific intent, or knowledge plus more (the more being an exchange for value), is required, then it should act to assure that this requirement is met in substance and not mere form.

Finally, the county attorney, an officer of the executive branch, needs to revamp the bad check program and notice advertising it. The program should include within its net only those who realistically could be prosecuted for the bad check offense. The store notice should not threaten what the program legally cannot deliver.

And all three branches need to act with a keen sense of the policy

162. The unequal treatment problem then would arise only upon a reversal of conviction after appeal. Reversal of a conviction requires a finding of clear error that actually prejudiced the fact-finder's decision. *See, e.g.*, State v. LeBron, 217 Neb. 452, 349 N.W.2d 918 (1985); State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983). Although more efficient and easier to administer, it would be an irrational classification to distinguish between those acquitted in the first instance (perhaps because no trial error occurred to prejudice the fact-finder's decision) and those whose convictions are reversed on appeal. Obviously, as an aspect of restitution, the fee is not due (or must be repaid if paid) if the conviction is reversed on appeal. For equal protection purposes it must be returned even if treated as a separate charge. Otherwise, as regards the fee, the statute would discriminate between classes of acquitted persons. Although the statute is not entirely clear, it appears that merchant fee reimbursement is to be paid at time of sentence (or before) since the statute directs sentence mitigation for restitution "made" and costs "paid." NEB. REV. STAT. § 28-611(7) (Supp. 1985). The defendant may have to wait for reimbursement until after a decision not to retry is made or after a retrial and acquittal. He may even, as a tradeoff for no retrial, forego his right to reimbursement of restitution and merchant filing cost.

underlying their acts. Generally, I suppose, they—and we—disapprove of debts voluntarily incurred going unpaid; we would prefer that no bad check be written and that all bad checks be covered. We need to remember that there are courts and a civil process available to handle bad check claims. The criminal process, including diversion decisions, should be restricted to those who as a matter of law—defined as a matter of considered policy—we believe should be called criminals. Merchants should be left to handle the others, or not, as their business judgment dictates.

APPENDIX A

ATTACHED IS A LIST OF YOUR CHECKS REJECTED BY THE BANK PLEASE READ THE FOLLOWING CAREFULLY.

1) To dispose of this matter without criminal charges being filed, you must make full restitution, pay the check collection fee and in addition attend a bad check class (see attached sheet).

2) The class is mandatory. We will not accept restitution until you have completed the class. After you have completed the class, you must bring to our office both the graduation certificate and your restitution for the check(s), *plus* the collection fee listed on the enclosure ($7.00 per check).

3) You will have thirty (30) days from the date of this form to take and complete the class and in addition ten (10) days to make restitution. If after forty (40) days you have not taken the course and made restitution, a warrant will be issued for your arrest. If you wait to be arrested, you will be booked into jail and this office will consider prosecution.

4) Restitution (repayment of the money you owe) may be paid in cash, a cashier's check, or a money order made payable to County Attorney. It should be in the amount of the check(s), plus the check collection fee, as authorized by *Neb. Rev. Stat.* § 28-611. Neither personal checks nor partial restitution will be accepted.

DO NOT MAKE RESTITUTION TO THE MERCHANT WHO ACCEPTED YOUR CHECK. THIS MATTER CAN ONLY BE CLEARED UP BY FOLLOWING THE ABOVE PROCEDURES.

You may appear in person at the Lancaster County Attorney's Office or you may mail your restitution, fee and certificate to: County Attorney, County-City Buiding, 555 South 10th Street, Lincoln, Nebraska, 68508. Remember, you must complete the bad check class before we can accept restitution. If you go past your forty (40) days, a warrant will be issued for your arrest by the Lancaster County Attorney's Office. A conviction under this type of offense can result in both a fine and a jail sentence.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE

NOTE: The Lancaster County Attorney's Office is located at 555 South 10th Street, Lincoln, Nebraska, on the second floor of the County-City Building.

Sincerely,

Lancaster County Attorney

APPENDIX B

LANCASTER COUNTY BAD CHECK PROGRAM
Sponsored by National Corrective Training Institute

As part of Lancaster County's new bad check policy, you must attend a bad check class if you wish to avoid prosecution for your bad checks. To get your charges dropped, you must: 1) pay full restitution and fees on your bad checks, 2) complete an eight hour class and 3) pay the cost of the class which is $35.00. You will also have to pay court costs if a complaint has been filed in County Court.

You have 30 days from the date on the enclosed letter to complete the class. You must also pay restitution within 10 days after attending the class. You may not pay off your checks without a graduation certificate from class.

YOU MUST SIGN UP FOR A CLASS WITHIN ONE WEEK FROM THE DATE ON THE ENCLOSED LETTER OR CHARGES WILL BE FILED IN COURT. YOU MUST ATTEND THE CLASS YOU HAVE SIGNED UP FOR. RESCHEDULING IS NOT PERMITTED EXCEPT FOR EMERGENCIES WHICH MUST BE VERIFIED.

Several classes are offered every month, either on Saturdays or on two consecutive weeknights. Please do the following if you wish to take the class:

1) Call the Lancaster County Pre-Trial Diversion Program, 475-3604, between 8:00 a.m. and 4:30 p.m., Monday through Friday to enroll in a class. The people answering the phone can only sign you up for a class. They cannot excuse you from class or answer any other questions about your offense.

WHEN YOU CALL, BE SURE TO FIND OUT THE EXACT DATE AND PLACE OF YOUR CLASS AND WRITE IT DOWN HERE: _____
YOU MUST BRING THIS LETTER TO CLASS TO SHOW THAT YOU HAVE SIGNED UP.

A MAP SHOWING THE TWO CLASS SITES IS LOCATED ON THE BACK OF THIS LETTER.

2) Attend class as scheduled. Bring $35.00 in cash, money order or cashier's check payable to Lancaster County. You may not pay by personal check or take the class without paying the fee. If you have a joint checking account and wish your spouse to attend, he or she may do so at no extra cost.

3) After completing the class, take your graduation certificate with you to the County Attorney's office, 555 S 10th St, when you pay off your checks. Their hours are 8:00 a.m. to 4:30 p.m., Monday - Friday. You have 10 days to pay off your checks. Payment will not be accepted without your class certificate.

Saturday classes are from 8:30 a.m. to 4:30 p.m. Registration starts at 8:15 a.m. No one will be admitted after class has started. You will have one hour for lunch. Evening classes are held on two consecutive nights from 6:00 to 10:00 p.m. each night. Registration begins at 5:45 p.m.

Do not wait to take this class. If you have not taken this class within 30 days, a warrant will be issued for your arrest. Also, do not call the County Attorney's office about this program. It is mandatory that you attend to avoid charges.

If your number of bad checks were due to an error by your bank, you may avoid having to take the class if you get a letter from your bank stating it was their fault and take it to the County Attorney's office before the date of your class.

APPENDIX C

LANCASTER COUNTY ATTORNEY'S OFFICE

REQUEST FOR CRIMINAL PROSECUTION ON BOGUS CHECK(S)

1. Business/Person turning in check for prosecution:_____
2. *Business address:_____Zip:____Phone:_____
3. Name & position of person completing form:_____
4. Name & position of person who took check:_____

4a. Home phone & address of above:_____
*If for any reason this address changes, let this office know immediately.

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5. Name of person who wrote check:_____
6. Name of person who passed check, if different from above:_____
7. Address & phone of checkwriter/passer:_____

7a. Employer of above, if available:_____

8. Amount of check:_____Date received:_____
9. Was check written in presence of person who took check?_____
10. Can person who took check identify check passer in court?_____
11. Was check written and passed in Lancaster County?_____
12. What was received for this check? (i.e., cash, what type of mdse., etc.):_____
13. Was check given in payment of an account? Yes____ No____ (If yes, explain on back).
14. Did check passer ask that the check be held or was it post-dated?_____
15. Driver's license number of checkwriter: #_____
16. Other I.D., if shown:_____
17. Have you taken checks from this individual before?_____
18. On what date did you send notice of this check to the passer?_____
Was this notice returned to you?_____
19. If contact was made with passer, did he/she identify him/herself to you?_____
When was this, and what response did you get?_____
20. Any additional information which may be helpful:_____

The undersigned states that he/she has filled out this complaint, that the statements are true and that he/she is willing to testify in Court under oath to the above statements.