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it may serve to integrate more constitutional ideals into the value systems and norms of behavior of law enforcement agencies.¹⁵⁷

MICHAEL GUNTER†

The North Carolina Bad Check Law: A Study and a Proposal

Americans annually write over twenty-two billion checks,¹ more than a hundred for every man, woman, and child in the United States. Although most of these checks are readily negotiated, a significant number are returned to the payee for "insufficient funds" or for "no account."² The problems created by these returned checks are many-faceted. For the banks upon which they are drawn, the cost of handling is greatly increased.³ The use of computerized accounts and checks with magnetic numbers has relieved the situation somewhat, but many banks are experimenting, out of necessity, with ways of further cutting the administrative costs of handling this type of negotiable paper.⁴ The most concerned, however, is the payee, who has the obvious problem of collecting the money owed him. These payees, many of whom are commercial enterprises, and the banks who handle checks have exerted considerable pressure on state legislatures to enact laws to deal with the situation. In North Carolina the result has been one of the nation's most rigorous laws dealing with makers of checks with insufficient funds.

In the pages that follow, the North Carolina "bad check" law,

¹⁵⁷See generally Kamisar, *On the Tactics of Police—Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 442-44 (1964); W. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 504-05 (1965).

†The author extends his appreciation to former Chicago District Attorney Mitchel Ware for the contribution he made to this comment.

¹BUSINESS WEEK, Feb. 13, 1971, at 88.

²Eleven banks contacted in a six-county area encountered over a three-month period 182,799 written checks for which there were insufficient funds. The records kept by the individual banks do not permit the number of worthless checks to be categorized as to whether they resulted from insufficient funds, a forgery, or "no account." However, the number returned for reasons other than insufficient funds is very small—perhaps 1% or less.

³BUSINESS WEEK, Feb. 13, 1971, at 88. Many banks have adopted one of the national credit cards, partially for the purpose of reducing the number of checks (the use of the credit card, of course, creates its own piece of paper to be processed). Another device used is the "super check," a check with multiple payees preprinted on its face. The bank's customer simply fills in the amount to be paid to each and the bank makes the appropriate disbursement.

⁴*Id.*

General Statutes section 14-107, will be examined from several different perspectives. First, after some brief background, the check-cashing and check-collection policies of merchants in the selected counties of Durham, Mecklenburg, Orange, Sampson, Wilkes, and Cumberland will be analyzed for the purpose of determining what effects the present enforcement policies of the bad-check law are having on commercial practice. Inputs into this part of the study will come primarily from a questionnaire mailed to over six hundred merchants in the six counties.

The next step will be to examine the administration of section 14-107 in the courts. Here, a survey of the six selected counties will develop the numbers of worthless-check cases disposed of, the judgments rendered, and the numbers of persons given active jail sentences. A third section of the paper will outline the objectives underlying a bad-check law and review various proposed and recently revised codes that attempt to serve these objectives. Finally, a proposed statute will be introduced and conclusions will follow.

BACKGROUND

North Carolina actually has two "bad check" statutes. General Statutes section 14-106⁵ makes it a misdemeanor to obtain anything of value by means of a check or draft with intent to defraud (and such check need not be honored by the drawee). Section 14-106 was the first bad-check statute in the state and is very similar to the bad-check laws in several other states.⁶ In 1925 the General Assembly passed the forerunner⁷ of the present General Statutes section 14-107.⁸ This statute is by far the most commonly used bad-check law in the state and the one generally thought of in connection with worthless-check prosecutions. The law makes it a misdemeanor knowingly to "draw, make, utter or issue and deliver to another, any check or draft" without having sufficient credit with or funds on deposit in the drawee with which to pay the same upon presentation. Whether or not the check or draft must actually be dishonored by the drawee has not been squarely decided. In practice, however, it is difficult to envision prosecution when a person

⁵N.C. GEN. STAT. § 14-106 (1969).

⁶E.g. ALA. CODE tit. 14, § 234(4) (Supp. 1969); FLA. STAT. ANN. § 832.05 (1965). The Florida statute has however been held by the Florida Supreme Court to require an intent to defraud. *Anderson v. Bryson*, 94 Fla. 1165, 115 So. 505 (1927).

⁷Ch. 14, [1925] N.C. Sess. L. 8.

⁸N.C. GEN. STAT. § 14-107 (1969).

"covers" his check in time for the bank to honor it, even if at the moment he wrote it he knew that his account contained funds insufficient to meet payment. The one situation especially demanding of such prosecution is in the case of a "check kiter"⁹ who uses the resources of more than one drawee over a period of time but who manages ultimately to cover his checks.

The check having been dishonored, some defendants attempt to avail themselves of the defense that the transaction with the merchant merely created a debt that they fully intended to pay or that they intended to cover before presentation of the check to the bank. This characterization of the misrepresentation as being only of a fact to occur in the future has been accepted by a few courts as a defense to the common law crime of obtaining goods under false pretenses,¹⁰ the earliest law under which passers of bad checks were prosecuted. Yet, in an early test¹¹ of the bad-check statute, the North Carolina Supreme Court cited with approval language from a Kansas case¹² that construed a similar statute to the effect that the intention, motive, or moral turpitude of the drawer was immaterial to his guilt. In short, knowledge that the check is presently worthless suffices for the purposes of conviction.¹³

THE MERCHANTS SURVEY

Even though the merchant, as the public in general, has an interest in the principles of deterring fraud and protecting the soundness of negotiable paper, his interest is much more immediate. The merchant

⁹"Check kiting" is the fraudulent practice of obtaining the use of a bank's money without paying for it. It works in the following manner. The "kiter" opens a checking account in two banks. He then writes a check on one of them for more than he has on deposit. Before the check can clear, he deposits a check drawn on the second bank to cover the check drawn on the first. This procedure can be kept up indefinitely unless the banks can spot the kiter through their bookkeeping procedures and take some action to close his account or prosecute him.

¹⁰*E.g.*, *Blackwell v. State*, 41 Tex. Crim. 104, 51 S.W. 919 (1899). Of course, such a decision makes legislation of a bad-check statute necessary. Among the writers, Perkins says, however, that a bad check "unquestionably comes under the statute on false pretenses." R. PERKINS, *CRIMINAL LAW* 315 (2d ed. 1969).

¹¹*State v. Yarboro*, 194 N.C. 498, 504-505, 140 S.E. 216, 219 (1927).

¹²*State v. Avery*, 111 Kan. 588, 207 P. 838 (1922).

¹³One justification for the requirement of a lesser degree of intent turns on the broad impact of the crime; the offense is committed not only against the payee of the check but also against the public because of the nuisance caused by putting worthless paper into circulation and the subsequent demoralizing effect on business. *State v. Yarboro*, 194 N.C. 498, 505, 140 S.E. 216, 219 (1927).

bears the brunt of the loss for uncollected bad checks and the expense of collection of those ultimately made good. This is a serious problem because most merchants feel that severely restricting the acceptance of checks places them in a disadvantageous business position. They typically feel that one who must accept checks in order to compete should have a quick, inexpensive way of recovering the money owed. The problem is particularly acute for the small businessman who must leave his supervisory position to swear out a warrant and later to spend time in court to recover his money.

Thus the author eagerly sought to assay the attitudes of the merchants in the six-county area. A merchants questionnaire, touching on six major informational areas, was designed with the help of the executive director of the North Carolina Merchants Association and was mailed to members of that association.¹⁴ The author sought to determine by type and size of business the number of checks returned to the business for no account, insufficient funds, and forgeries; the estimated annual losses from the bad checks; the check-cashing policies of these businesses; the degree of reliance on insurance as protection against loss; the methods used to recover moneys owed because of the bad check and the relative success of each; and the satisfaction or dissatisfaction of the merchant with present methods for preventing bad checks from entering the flow of commerce and methods for collecting money owed as a result of their entry. With respect to the last informational area, the author asked for and received comments on the proposed system and possible improvements.

Although the assistance from the Merchants Association was a great administrative benefit, it should be recognized as a possible limitation on the objective representativeness of the replies. Approximately 30.3 percent of the merchants queried replied.¹⁵ The replies were some-

¹⁴Six hundred members of the North Carolina Merchants Association were queried as to their check-cashing and check-collection policies. The information requested included the size of the business (by number of employees), estimated annual losses caused by worthless checks received in the subject months, and suggestions for preventing worthless checks from entering the flow of commerce and for improving the collection methods available to the merchants. Most of the information used in this section came from the questionnaire and through research in the courts. But the basic needs and problems of merchants were established through a very informative interview with the Executive Director of the North Carolina Merchants Association. Interview with Mr. Thompson Greenwood, Executive Director, North Carolina Merchants Association, in Raleigh, September 23, 1971.

¹⁵There were 200 replies to 626 mailings. The percentage of replies per county ranged from 29.6% (Mecklenburg) to 36.8% (Orange).

what arbitrarily classified and analyzed according to the size of the business replying. The classifications were by number of employees: 1-3 employees, 4-10, 11-50, 51-100, and more than 100.¹⁶ Of the entire 200 replies, 14.5% were the 1-3 category, 40.0% in the 4-10 category, 29.5% in the 11-50 category, 9% in the 51-100 category, and 7% in the over 100 category. The study is handicapped by at least two other general limitations. First, the number of mailings going to the less populated counties was very small, and since the number of replies averaged only about one-third of the mailings, the observable trends are not conclusively representative. Another problem is that many of the questionnaires were not completely answered, further limiting the reliability of the responses. Nothing more will be said of these general limitations. As each part of the study is discussed any special limitations will be pointed out at that time.

The first objective of the merchants questionnaire was to establish the nature of the problem in terms of the number of returned checks per type and size of business per month. Chart I displays the information on checks returned to the merchant for insufficient funds. The averages indicated reflect only reported returns for the months of September and August since many respondents returned their questionnaires before the end of October. Predictably, the number of checks returned are directly related to the size of the business. Chart II indicates that the dollar amount of losses follows the same pattern. Together, these charts demonstrate that the "Mom and Pop" type business could expect to take about a dozen worthless checks a year and as a result lose about one hundred dollars. Although this amount does not seem an exceptionally large risk, it does indicate that in the 1-3 employee category, as in each of the other categories, the average uncollected check may be for somewhat less than ten dollars. The cost of collecting this money through the use of the courts may be a very decisive factor in the merchant's decision to allow the maker to escape payment. Obviously this situation benefits only the wilful worthless-check writer, since presumably a person who overdrew his account by mistake would make good the debt within a reasonable time after being notified of the check's return.

¹⁶The classification by number of employees was suggested by the Merchants Association because of the reluctance of many merchants to reply to inquiries concerning their income. This classification also has the advantage of allowing the reader to spot the typical 1-3 employee, "Mom and Pop" operation.

The effort at classifying the replies by type of business was not entirely successful—first because of a very limited number of replies, and secondly because of the failure of many respondents to identify adequately their businesses. Although no firm conclusions could thus be rendered, there appears nonetheless to be a definite indication that merchants in the furniture-appliance business have less in annual loss than other businesses reported.¹⁷ The author can only speculate that this result is due to the fact that these merchants normally have an additional lever to secure payment in that most of the items they sell are also subject to being repossessed.¹⁸ The type of business and perhaps its clientele may have more of an impact on the losses suffered by the business than any other factor.

Another objective was to determine what the check-cashing policy is in each of the six counties by asking the merchants to indicate which steps were required before cashing a check. No correlation whatever was developed between what the merchants said they required before cashing a check and the amount of their losses relative to businesses of equal size and type. There are several possible explanations for this result. It is possible, of course, that so many factors go into the decision of whether or not to accept a check that it is impossible to determine by questionnaire what they are. It is also probable that some of the merchants padded their responses to this question.¹⁹ Despite the lack of correlation between losses and check-cashing policies, trends can be identified in the responses to this question. In the three most populous counties, Cumberland, Durham, and Mecklenburg, the overwhelming majority of merchants asked for identification (usually a driver's license), required approval of a person in a supervisory capacity, and established some limit on the amount of check cashed, in that order.²⁰

¹⁷These stores reported an annual average loss of only \$200 for all of the 24 (identifiable) stores replying. Of these, 11 reported *no* losses.

¹⁸It is arguable whether an unsecured seller may reclaim the merchandise purchased on credit. *R. NORDSTROM, SALES* § 165 (1970). A secured seller may of course, repossess. *N.C. GEN. STAT.* § 25-9-504 (1965).

¹⁹The author suspects that some padding may have occurred throughout the questionnaire. For example, one merchant reported that he suffered average annual losses in excess of \$5,000, even though he had only two employees.

²⁰The alternatives listed in the questionnaire were to require:

- (1) A personal acquaintance with the customer;
- (2) Identification;
- (3) A personal reference;
- (4) Some limit on the amount cashed;

In the three smaller counties, these devices were common but merchants were more likely to require a personal acquaintance with the check writer or to check with the bank, or to check against a list of known bad-check passers. Additional endorser, checks with a credit agency, and personal references were infrequently used in all the subject counties.

Other than the check-cashing policies, the author asked if any of the merchants protected themselves by insurance against losses caused by dishonored checks. Of the two hundred merchants replying, only nine had such protection, and in seven of these cases the protection was for forgeries only.

If no hard conclusions can be drawn from replies on check-cashing policies, there appear to be very definite intra-county trends in the methods used by merchants to collect moneys owed as a result of returned checks. The businessmen were asked to respond by placing a number "1" beside the method most frequently used, a number "2" by that method next most frequently used, and so on.²¹ As displayed in Chart III, the results from within each county were quite uniform, but no trends were observable in the methods used by size of business. Predictably, most merchants reported redepositing the check as the most frequently used method and contacting the maker as the next most frequently used method; however, it appears from the merchants' comments and from the data that most took these two steps before attempting another method of collection.

All of the subject counties considered, the third most frequently used collection method was to prosecute under the bad-check law. Here, however, differing patterns within the counties became apparent. A total of fifty-eight merchants reported that they resorted either to the small-

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- (5) Approval of a supervisor;
 - (6) That the check be drawn on a local bank;
 - (7) An additional endorser;
 - (8) A check on the status of the customer's checking account;
 - (9) A check with a credit agency;
 - (10) A check with a list of known bad check passers.

²¹The following methods were listed:

- (1) Sending the check back through the bank;
- (2) Contacting the maker of the check;
- (3) Using a collection agency;
- (4) Using the small-claims court (with or without an attorney);
- (5) Using an attorney other than in small-claims court;
- (6) Getting a warrant for violation of bad-check law;
- (7) Insurance company reimbursement.

claims court²² or to a collection agency rather than to the bad-check prosecution. The merchants of Mecklenburg and Wilkes counties indicated that nearly as many resorted to collection agencies or the small-claims court as those resorting to a bad-check prosecution. In Orange County alone was there a definite preference for a collection agency before swearing out a worthless-check warrant.

The number of merchants reporting use of the bad-check law as their fourth most frequently used device was again more than twice the number reporting any other method. Chart III also makes it apparent that although other methods of check collection become more frequently used as a third, fourth, fifth, or sixth choice, the use of the bad-check prosecution still remains a decided preference. Of the 167 merchants who answered the question, 110 (65.7 percent) indicated that they at some point resorted to the bad-check law as a collection device. It is interesting to note that only 4 merchants (2.4 percent of those answering the question) report using the bad-check law before either notifying the maker or redepositing the check.²³ There was no similarity among them as to type of business, but three were 9-10 employee stores and the other employed 25. Although many merchants expressed in their comments considerable dissatisfaction with the use of the statute, it is apparent that a significant number of them rely upon it rather than upon a civil remedy.

The comments fell into five general categories. Dissatisfied merchants desired stricter laws or stiffer penalties or both (35 percent of the unfavorable comments); more cooperation from officials in the criminal

²²The merchant may use the small-claims procedure in collecting debts up to \$300. N.C. GEN. STAT. §§ 7A-210 to -212, -214, -215, -217 to -221, -224 to -231 (1969); *id.* §§ 7A-213, -216, -223, -224, -232 (Supp. 1971). The merchant must file a complaint with the Clerk of Court, pay a \$5 advance costs fee, carry the complaint and summons to the sheriff, and pay a \$2 service fee. When the summons and complaint is served, a time will be set for trial before a magistrate. At the trial both sides present evidence. If judgment is rendered in favor of the merchant-plaintiff but the defendant does not pay, the merchant must execute upon the judgment by having the sheriff attach some of the defendant's property and sell it at a public sale. Obviously, the merchant would prefer a cash settlement of the debt rather than some other asset which must be liquidated before receiving payment on the bad check. POPULAR GOVERNMENT, April, 1971, at 5.

²³The low level of culpability required by the statute as presently written makes it highly susceptible to abuse. See *Melton v. Rickman*, 225 N.C. 700, 36 S.E. 2d 276 (1945) for an aggravated set of circumstances in which the payee of the check had taken the check as "security" for a small loan at usurious rates. After receiving the payment in full, the payee then cashed the check and used the bad-check prosecution to force double payment. The payor (in this case the plaintiff in a suit based on abuse of process against the payee) was found guilty by the Justice of the Peace despite an explanation of the facts. His abuse of process suit failed because he could not show that the defendant (payee) abused the process *after* it was issued.

justice system (15.6 percent); a more convenient system (22 percent); more help from the banks in screening customers before allowing them to open a checking account or in collecting the bad check (12 percent); and a better identification system (7 percent). The comments requesting more cooperation from officials were generally directed at police and sheriffs' departments for not making a sincere effort to serve the warrants and at the judge for not requiring restitution in all cases. The comments directed at the system were expressed most often in the following order: first, the merchants wanted a system that would not require their attendance in court; secondly, they expressly desired a return to the old "J.P." system;²⁴ and, finally, they wanted a reliable method of procuring personal service on out-of-state (and, in some instances, out-of-county) defendants. It is probable that the 27 percent seeking stricter laws are concerned with the deterrent effect of the law and the 37 percent seeking more cooperation from law enforcement officers and a more convenient system are concerned with its use as a collection device.

Despite the large number of unfavorable comments, some 26 percent of the total number of the merchants replying indicated that they were entirely satisfied with the present methods available for check collection. Approximately one-half of these indicated that they used the bad-check prosecution as a first, second, or third choice for collection. Significantly, 23, or 40.3 percent, of these satisfied merchants indicated that they did not use the bad-check warrant at all. Of all merchants replying, 47 percent generally approved the present methods of preventing bad checks from entering the flow of commerce.

ADMINISTRATION IN THE COURTS

The results of the court data are found in Chart IV.²⁵ The data are

²⁴In 1962 an amendment to the state constitution replaced the Justice of the Peace with a salaried magistrate. N.C. CONST. art. IV, § 12(4); C. HINSDALE, NORTH CAROLINA'S GENERAL COURT OF JUSTICE 3 (1969). This change was designed in part to eliminate certain abuses arising out of the fact that "J.P.'s" were dependent upon court costs for remuneration and the fact that court costs were uniformly charged to a guilty defendant. If the defendant was not guilty and the prosecution was not malicious, the Justice of the Peace could charge no fee. POPULAR GOVERNMENT, May, 1958, at 50. This permissiveness led to the practice by Justices of the Peace of acting as collection agencies by specializing in bad check prosecutions. *Id.* The practice, of course, was very convenient for the merchant.

²⁵This part of the study was concerned with the enforcement of the statute in the criminal justice system. The study was accomplished primarily by scrutinizing the criminal indexes in each of the six subject counties for the three-month periods of the study and by interviews with judges, magistrates, solicitors, and law enforcement officers.

displayed according to objectives the statute might reasonably be designed to achieve. Thus the total number of cases finally disposed of in a given month is compared with that number in which restitution was awarded as part of the judgment, that number in which there was some punitive aspect to the judgment (deterrent factor), and that number that resulted in verdicts of not guilty. The actual information available varied from county to county, and the statistics should be read in the light of the limitations resulting therefrom. The most common limitation was the lack of dating in the criminal indexes. In each county some entries did not disclose the date of the disposition. Although this problem could have been solved by pulling the original warrants, such a time-consuming effort was beyond the resources of the author. Instead, the author decided to include the undated dispositions on the basis of warrant number and location within a list of dispositions that occurred during the period in question. The other major limitation in the study is the absence of data from Cumberland County. That county has recently switched to a new indexing method using a card system that made it impractical for the author to obtain this data. The total figures for Cumberland County are the numbers of bad-check warrants sworn out in the month indicated.

It is apparent that the merchants' complaints about not getting restitution has some basis in fact. Although some 86.7 percent of the dispositions in Sampson County included an award of restitution, the average of the counties shown was 67.0 percent of all dispositions. The reasons for this result are not readily apparent. In fact, the author began this study under the impression that the vast majority of dispositions were "restitution and costs."²⁶ Assuming for the moment that restitution is a valid objective of this kind of criminal law, then the reason for not allowing restitution in specific cases should be determined. There are no data on this point, but it appears that the judge or magistrate rendering the judgment did not make restitution a part of his judgment because the defendant had already paid the prosecuting witness the amount owed on the check or was willing to do so at the time of trial.²⁷

²⁶This impression was created through conversations with district court judges and solicitors who were under a similar impression.

²⁷The author asked the District Court Judges in the six subject counties to complete a "checklist" on every worthless-check case in which they took evidence. The list was designed to elicit information that could not be readily obtained from either interviews or a search of the criminal records. The judge was asked to indicate in each case the following information:

(1) The date of the trial and date of the check;

Another reason appears in the comments on "checklists"²⁸ returned by the district court judges; a sort of rough justice emerged when it appeared that the prosecuting witness knew or probably knew that the maker of the check did not have sufficient funds at the time the check was accepted. At least two judges indicated that restitution would not be awarded in these cases, and one indicated that he would find the defendant not guilty.²⁹ Indeed, such conduct on the part of the prosecuting witness is illegal; under the second paragraph of section 14-107, accepting a check knowing, or having reason to know, that the maker did not have sufficient funds is an indictable offense, although such prosecutions apparently are extremely rare.³⁰

The percentage of cases in which the judgment includes a punitive element also varies widely from county to county. In Sampson County, for example, where the percentage of cases involving restitution is great-

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- (2) Whether or not the defendant had been previously convicted under § 14-107;
 - (3) Whether or not the defendant was being tried as a fourth offender;
 - (4) If the defendant alleged that the payee knew that the defendant had insufficient funds;
 - (5) If the defendant alleged that he did not have sufficient funds;
 - (6) Whether or not the defendant was found guilty;
 - (7) The defendant's guilt or non-guilt;
 - (8) The sentence;
 - (9) The factors determining the sentence (the choices provided included the defendant's prior record, the size of the check, the number of checks, the defendant's willingness to make restitution, the probability that the defendant had intended to defraud, the probability that the payee knew that the defendant had insufficient funds, and the defendant's personal circumstances);
 - (10) The prosecuting witness' business;
 - (11) Whether or not the defendant was represented by an attorney;
 - (12) Whether or not the defendant was a "bad check artist" (a "bad check artist" was defined as one who intended to defraud).

Twenty-one of these checklists were returned to the author. Since there was no way of determining what percentage of the number of cases actually heard was represented by this number, this information was used only to provide insight to problems facing the judges and magistrates.

²⁸See note 23 *supra*.

²⁹This kind of judgment appears to be generally restricted to the district court judges. Magistrates (with one notable exception) appear uniformly to award restitution. Mrs. Eloise Stilwell, magistrate in Mecklenburg County, has, in conjunction with the Clerk of Superior Court, devised a form that requires a prosecuting witness to affirm under oath that he has notified the defendant of the check's return and to indicate the dates of such notification. Mrs. Stilwell generally permits the warrant to be withdrawn if it appears that the defendant was not guilty and is willing to make restitution. Interview with Eloise Stilwell, Magistrate, Oct. 1, 1971, in Charlotte, North Carolina.

³⁰The author encountered only one such prosecution, and even it occurred sometime before the period of the study. The solicitor reporting this prosecution indicated that the district court prosecution was dismissed by the judge.

est, the percentage of judgments including a punitive element is lowest (8.8 percent). The implication in this statistic is further supported by examination of the relative percentages of judgments involving restitution and a punitive element in the other counties. In Wilkes County only 34 percent of the judgments involve restitution (the lowest of any county surveyed), and yet the percentage of judgments with a punitive element is highest (46 percent).³¹ Obviously the purpose behind the statute is not uniformly construed.

The author was particularly interested in determining the frequency with which defendants were imprisoned under this statute. In this respect, the figures in Chart IV under the "A" (active sentence) column are particularly misleading since these numbers represent charges and not defendants.³² The criminal indexes indicate that the defendants who

³¹The statistics in Orange County were affected to some extent by a large percentage of cases concluded by "unserved warrant."

³²In the counties in which data was available the number of defendants sentenced to active sentences to either the county jail (CJ) or State Department of Corrections (SDC) was as follows:

Durham	6	(3 CJ, 3 SDC)
Orange	0	
Sampson	3	(3 CJ)
Wilkes	1	(CJ)

Chart I

Monthly Average of Worthless Checks

Size of Business (Number of Employees)

County	1-3	4-10	11-50	51-100	100+
Cumberland	1.1	1.5	4.1	5.7	N/D
Durham	.51	8.3	3.5	11.5	50.5
Mecklenburg	1.1	1.6	11.8	3.6	80.1
Orange	1	3	N/D	N/D	N/D
Sampson	1.7	2.8	N/D	N/D	N/D
Wilkes	0	N/D	3.2	N/D	N/D
Mean	.73	3.4	5.7	6.9	65.3
Median	1.0	3.0	3.8	5.7	65.3

"N/D" means no available data or reported date not reliable.

Chart II

Annual Average Loss (in dollars) as a Result of Uncollected Checks

	Size of Business (Number of Employees)									
	1-3		4-10		11-50		51-100		100+	
County	Mean	Med.	Mean	Med.	Mean	Med.	Mean	Med.	Mean	Med.
Cumberland	246	300	208	300	409	375	950	500	2325	2325
Durham	155	50	437	175	356	275	521	400	3000	3000
Mecklenburg	83	37	435	150	714	500	716	425	3733	3000
Orange	50	50	133	100	N/D	N/D	N/D	N/D	N/D	N/D
Sampson	146	43	125	100	221	100	N/D	N/D	N/D	N/D
Wilkes	0	0	67	0	46	70	N/D	N/D	N/D	N/D
Mean	113	80	237	138	349	260	729	441	3016	2775
Median	114	47	284	125	356	275	716	425	3000	3000

N/D—No data available

Chart III
Collection Devices in Order of Preference

	First	Second	Third	Fourth	Fifth	Sixth	Seventh	Total
Contact maker	96	87						183
Check back through bank	117	56	1	1				175
Bad-check warrant	4	8	62	25	6	5		110
Small claims court		7	29	12	4			52
Collection agency			29	7	4	3		43
Attorney		2	6	12	7	5		32
Insurance							2	2

Chart IV
Worthless Check Judgments

	AUGUST					SEPTEMBER					OCTOBER					Total	
	R	P	A	NG	T	R	P	A	NG	T	R	P	A	NG	T		
Durham	#	91	33	15	0	121	75	25	4	1	92	78	66	21	2	149	392
	%	75.2	27.3	12.4			81.5	27.2	4.3	1.1		52.3	44.3	14.1	1.3		
Mecklenburg	#	243	136	14	3	309	217	77	14	0	298	166	121	7	6	247	854
	%	78.6	44	4.5			72.8	25.8	4.7			67.2	48.9	2.8	2.4		
Orange	#	12	17	14	0	42*	23	3	0	0	46	11	0	0	0	40	128
	%,	28.6	40.5				50	6.5				27.5					
Sampson	#	30	0	0	1	33	38	3	2	1	43	30	7	2	4	37	113
	%	90.9			3.0		88.4	6.9	4.6	2.3		81.1	18.9	5.4	10.8		
Wilkes	#	4	16	6	1	25	6	0	0	1	10	7	7	0	1	15	50
	%	16	64	24.0	4.0		60			10		46.6	46.6		6.6		
Cumberland	#					331					291					218	
TOTAL																	

R—Restitution
P—Punitive element
A—Active sentence
NG—Not guilty
T—Total

*substantial differences between total figures and judgment/element figures are made up of a number of cases closed as "unserved warrants". Many judgments included both a restitutionary and a punitive element.

are confined for writing bad checks are far more likely to have been convicted of more than one offense than are defendants who suffer a judgment of a lesser nature.³³

During the subject period, the North Carolina State Department of Correction reports that sixteen persons were confined in one of the Department's facilities for violation of either section 14-106 or section

Chart V

Comparison of number of worthless-check cases
to number of other cases disposed of by District Courts

	Durham	Mecklenburg	Orange	Sampson	Wilkes	Cumberland
Average ¹ Total Cases	6185	19407	2011	1658	1447	8033
Average ^{1 2} Non-Motor Vehicle	2189	9748	943	610	540	3404 ³
Total Worthless- Check Cases	6	4	6	7	3	10
Worthless- Check Cases as percent of all cases	392	854	128	113	50	3840
Worthless- Check Cases as percent of non-motor Vehicle Cases	18	9	14	19	9	25

1. These averages are based on the average number of cases disposed of in the three months of the third quarter and the three months of the fourth quarter. These approximations are necessary because the Administrative Office of the Courts keeps records on a quarterly basis. The figure is approximate but does give the reader some idea of the percent of all cases that are "Worthless Check."
2. This average is based on number of cases filed but not disposed of; it therefore is only an approximation.
3. This figure represents the number of warrants issued. The number of non-motor vehicle cases is the number filed, as pointed out in note b *supra*; therefore, the 25% figure indicates that approximately 25% of all non-motor vehicle cases filed in Cumberland County are for bad-check prosecutions.

³³Copy of computer printout provided by Mr. Charles G. Wilson, Director of Research, N.C. State Department of Corrections. The State Department of Corrections' records do not specify whether the convictions were for violations of N.C. GEN. STAT. § 14-106 (1969) or § 14-107 (Supp. 1971), or both.

14-107.³⁴ According to these records the mean average total sentence of these persons was 6.6 months (median 6.0) and the mean average current sentence was 2.6 months (median 2.0 months). This would tend to indicate what one might suspect, that defendants sentenced to active confinement under the worthless-check statutes served a number of fairly short sentences strung together either consecutively or concurrently. The longest total sentence indicated by the Department's records during this period was 32 months. In 1969 and 1970, 275 and 363 defendants respectively were committed to the State Department of Correction. Of this number, 224 in 1969 were "new" admissions and 285 in 1970 were "new." Through the first half of 1971 there were 192 admissions, 148 of which were "new".³⁵ These statistics, of course, do not include the numbers of persons incarcerated in county jails.³⁶ The conclusion is that any person sentenced to an active jail term is almost sure to be one with more than one conviction for passing bad checks and not one who has been caught in the system for a mere oversight in his check-keeping records.

Considering the broad scope of section 14-107, the relatively low percentage of judgments of not guilty does not seem particularly surprising. At least one district court judge commented that he thought a considerable number of the persons tried before him were actually innocent of knowingly making a bad check—yet because they were rarely represented by counsel, any evidence as to this fact was only infrequently brought out. Another judge commented that he had never had a defendant so much as offer to show his check stubs in support of a general allegation of innocence.

In general, the court study indicates a wide discrepancy in the kinds of judgments rendered by the courts. It is suggested that this result is probably caused by basic differences in what the courts consider to be the purpose of the statute. The author encountered no case in which a defendant had been imprisoned as a result of a single conviction. There is a fairly widespread misunderstanding of the role of each participant in the bad-check prosecution and no clear consensus as to the valid

³⁴NORTH CAROLINA DEPARTMENT OF CORRECTIONS, STATE CORRECTION STATISTICAL ABSTRACT (1969), (1970). The differences in new admissions is made by probation and parole revocations. The term "new" is one used by the Department of Corrections and does not mean first offender.

³⁵*Id.* (January-June 1971).

³⁶N.C. GEN. STAT. § 148-30 (Supp. 1971) requires that a defendant be sentenced to at least 30 days before he can be confined with the State Department of Corrections.

objectives of the law. It would be relevant, then, to look at the apparent objectives of the legislature in enacting the law and to compare the statute with the laws of other jurisdictions.

THE OBJECTIVES OF A BAD-CHECK LAW

The primary purpose behind any bad-check law is identical to the purpose behind the common law crime of false pretenses—the prevention of fraud. A second and equally important purpose is to discourage the use of worthless paper in commerce, even if there is no intent to defraud, and thereby avoid the demoralizing effect on business.³⁷ A third, is to facilitate prosecution by defining standards of criminal conduct in this special area. A fourth and somewhat controversial objective is to provide the merchant with a simple, effective method of recouping money owed him on the check.

In achieving the first three objectives, the basic decision to be made is what level of culpable conduct should be made criminal. Although it seems clear that North Carolina courts will find a very low level of culpability constitutionally valid,³⁸ there is more than just a theoretical argument against such a result. The Supreme Court of Colorado has recently declared³⁹ the Colorado bad-check law⁴⁰ unconstitutional as being no more than a device to force the collection of debt. The law found disfavor with the court because it failed to require a fraudulent intent and therefore attempted to make criminal an activity that could not under common law requirements be a crime. The court also objected to the practical aspects of enforcing the law. It pointed out that when a bank is presented with two "short checks," it may choose to honor one and reject the other. "Such a discretion is at odds with constitutional due process and equal protection of the laws."⁴¹

Of the states surveyed⁴² that have recently revised criminal codes,

³⁷See *State v. Yarboro*, 194 N.C. 498, 506, 140 S.E. 216, 219 (1927), in which the North Carolina Supreme Court intimated that the state legitimately exercises the police power in defining a variety of misdemeanors without regard to a specific criminal intent.

³⁸*Id.*

³⁹*State v. Vinnola*, ___ Colo. ___, 494 P.2d 826 (1972).

⁴⁰COLO. REV. STAT. ANN. § 40-14-20 (Supp. 1970).

⁴¹*State v. Vinnola*, ___ Colo. ___, 494 P.2d 826, 831 (1972).

⁴²ILL. ANN. STAT. ch. 38, § 17-1(d) (Smith-Hurd 1970); N.Y. PENAL § 190 (McKinney 1967); CONN. GEN. STAT. ANN. § 53A-128 (Special pam. 1972); COLO. REV. STAT. ANN. § 40-14-20 (Supp. 1970); TEX. PENAL CODE, A PROPOSED REVISION, § 32.41 (Final Draft, Oct. 1970); MICH. REV. CRIM. CODE § 4040 (Final Draft, Sept. 1967).

only two⁴³ have been found that do not require either an intent to defraud or a knowledge, intent, or expectation on the part of the defendant that the check would not be honored by the drawee when presented. Thus the clear emphasis behind most was on the availability of funds at the time of negotiation rather than at the time of writing.⁴⁴ Some states have gone so far as to exempt certain classes of checks from the law; for instance, post-dated checks are often excluded⁴⁵ because of the commercial practice of encouraging customers to give post-dated checks when the customer does not at present have sufficient funds to cover the check.⁴⁶

An increased level of culpability might be desirable to prevent frivolous prosecutions at the instance of merchants who want restitution but who have done little, if anything, to secure payment before swearing out a warrant. The reader will recall that in the Merchant Survey, four merchants (2.4 percent of those replying to the question) reported that their immediate response to a check returned for insufficient funds was to swear out a warrant for a violation of section 14-107.⁴⁷ Although the statistical significance of this figure may be limited because of the size of the sample, when one considers that the merchants surveyed were members in good standing with a reputable merchant's association, it is probably not unfair to assume that at least two percent of the total number of merchants in the six counties react in the same manner.⁴⁸

In short, the level of culpability can be set at more than one place depending upon which considerations motivate the legislature.

The fourth previously listed objective behind bad-check laws is to provide the merchant with a quick, simple method for restitution. The legitimacy of such an objective has been questioned but has occasionally

⁴³TEX. PEN. CODE, A PROPOSED REVISION, § 32.41 (Final Draft, Oct. 1970); COLO. REV. STAT. ANN. § 40-14-20 (Supp. 1970).

⁴⁴E.g. MICH. REV. CRIM. CODE § 4040 (Final Draft, Sept. 1967).

⁴⁵E.g. WIS. STAT. ANN. § 943.24 (1967).

⁴⁶Baldwin, *Criminal Misappropriations in Wisconsin—Part II*, 44 MARQ. L. REV. 430 (1961).

⁴⁷In *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945), the drawer of a check attempted to hold the payee civilly responsible for swearing out a bad-check warrant. The plaintiff lost because he chose to proceed on the theory of abuse of process rather than malicious prosecution, but the case implicitly recognizes that debt collection under the bad-check statute (in this case the even more stringent section 14-106) may be a valid objective.

⁴⁸There are no cases on point, but considering the broad scope of the present statute it is an open question as to whether a merchant would have probable cause to swear out a bad-check warrant with only the returned check as evidence. If the merchant has probable cause, he cannot be held liable for damages in a malicious prosecution suit.

been enthusiastically accepted.⁴⁹ For example, the Alabama bad-check law specifically requires that the value of the article obtained by the use of the worthless check be included as part of the costs and restitution to be made to the payee.⁵⁰

The requirement of restitution obviously does not diminish or detract from the deterrent effect of the statute; indeed, it seems to be an objective that would satisfy both the state and the merchant, who are the injured parties. Yet, in two situations the requirement should not be applied, or should be applied with care. First, where the merchant (payee) knowingly takes a check that is not presently covered by credit or funds on deposit, restitution should not occur because then the state would be rewarding one who has not proceeded in good faith. Secondly, it should not be applied, or should be applied carefully, where the payor unfortunately pays with the bad check a debt as to which he has a defense at law. Here the good faith of the payor should be the determinative factor. If he possessed fraudulent intent or expected that the check would not be honored upon presentation, then loss of the defense does not seem too unfair.⁵¹ Yet, under the present North Carolina statute the proscribed act is only remotely related to fraud, and therefore such a forfeiture would appear to be a bit harsh.

The overall desirability of restitution with limitations as a part of the penalty is buttressed by two other factors. First, there is adequate precedent in such a limited use of the criminal system. Most of our laws enforcing marital and family support obligations provide for judgments that require support of the neglected party.⁵² Secondly, the cost-effectiveness advantage of using the criminal system rather than the civil, in light of the high volume of worthless checks, far outweighs the disadvantage of any possible adverse effect upon the criminal process.

A PROPOSED STATUTE

The discussion above has been limited to discussing generally some factors to be considered in accomplishing the possible objectives of the bad-check statute. In light of this discussion, a specific statute can now be presented that will recognize the valid objectives of the law and

⁴⁹ALA. CODE tit. 14, § 234 (7) (Supp. 1969).

⁵⁰*Id.*

⁵¹The defendant is still left with his civil remedy.

⁵²N.C. GEN. STAT. § 49-2 (1966) (nonsupport of illegitimate child by parents made misdemeanor).

attempt to balance the effects that such a law has on the parties most directly affected:

§ 14-107. **Worthless negotiable instruments.**—(a) It shall be unlawful for any person to draw, make, utter, or issue and deliver to another any negotiable instrument with the intent, knowledge, or expectation that it will not be honored by the drawee.⁵³

(b) The fact that

(1) the maker or drawer had no account with the drawee at the time the negotiable instrument was issued and delivered; or

(2) payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days⁵⁴ after delivery and the maker or drawer failed to make good within ten (10) days after receiving notice of non-payment shall be prima facie evidence of intent, knowledge, or expectation that the negotiable instrument would not be honored upon presentation.

(c) Any person violating any provision of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment for not more than six (6) months, or both; provided, however, that if the amount of such negotiable instrument is not over fifty dollars (\$50.00), the punishment shall not exceed a fine of fifty dollars (\$50.00) or imprisonment for thirty (30) days.⁵⁵

(d) In every trial in which the defendant shall be found guilty of a violation of this section, the court shall award as an element of its judgment restitution to the payee of the negotiable instrument except in the following cases:

(1) where the negotiable instrument is post-dated; or

(2) where the payee or other holder believed or had reason to believe at the time he accepted the instrument that the maker or drawer did not have credit with or funds on deposit in the drawee sufficient to cover the instrument or that the negotiable instrument would not be paid upon presentation; or

(3) where the negotiable instrument has been held by the payee or other holder for a period in excess of thirty (30) days from

⁵³The level of culpability stated in proposed N.C. GEN. STAT. § 14-107 (Supp. 1971) is the same as that found in MICH. REV. CRIM. CODE § 4040 (Final Draft, Sept. 1967).

⁵⁴N.C. GEN. STAT. § 14-107 (Supp. 1971). The time space 30 days is used in lieu of the Michigan "reasonable time" as defined by the Uniform Commercial Code. N.C. GEN. STAT. § 25-1-204 (1965). This is to simplify the evidentiary and interpretive problems that will of necessity be presented to the magistrate for solution.

⁵⁵The punishment provisions remain the same as those found in the present N.C. GEN. STAT. § 14-107 (Supp. 1971). This preserves the magistrate's jurisdiction over checks for less than \$50.

the date of its making before presentation for payment; or

(4) where the payee has failed to notify the maker or drawer of the instrument of its nonpayment for insufficient funds and has failed to allow the maker or drawer ten (10) days to make restitution. The court shall specifically find that none of the above exceptions exists before making an award of restitution.⁵⁶

(e) For the purpose of this section notice may be given orally to the maker, or in writing. Written notice may be sent by registered or certified mail with return receipt requested or by telegram, and addressed to the maker or drawer at his address shown:

(1) on the instrument; or

(2) on the records of the bank or other drawee; or

(3) on the records of the person to whom the instrument has been issued and delivered.

If written notice is given in accordance with the procedure in this subsection, it shall be presumed that the notice was received by the maker or drawee no later than five (5) days after such written notice was mailed.⁵⁷

(f) It shall be an affirmative defense to a violation charged under this section that restitution was made to the payee within ten (10) days of receipt by the maker of notice of non-payment of the instrument, or that the defendant did not receive notice as defined in subsection (e).

(g) For the purpose of this section, "negotiable instrument" is defined as in § 25-3-104; "instrument" means negotiable instrument as defined above; and "holder" is defined as in § 25-1-201.

Although by and large the proposed statute is self explanatory, some features merit further discussion. As one might have noticed, the statute increases the level of culpability made criminal to a degree more in line with commercial practice and popular expectation.⁵⁸ Regardless of conceptual difficulty concerning the present negotiability of checks

⁵⁶This is an entirely new section, the effect of which is to make restitution mandatory except in cases in which the party seeking restitution had reason to believe that the maker did not have credit with or funds on deposit in the drawee at the time the check is received or that the instrument would not be paid upon presentation. This test is broader than that set out as the level of culpability because the author considers any information that would indicate that the check is not presently covered sufficient to put the payor on notice of its possible dishonor. This notice should serve as an acknowledgement of his acceptance of the risk of dishonor.

⁵⁷The notice section is virtually copied from the proposed Texas bad-check law. TEX. PENAL CODE, A PROPOSED REVISION § 32.41 (Final Draft, Oct. 1970). An exception is that in this statute the author proposes that the notice may be oral, if to the maker himself, as well as written—in other words need not be written—if given personally to the maker.

⁵⁸MICH. REV. CRIM. CODE § 4040 (Comment) (Final Draft, Sept. 1967).

and drafts, such an instrument is really not "worthless" until it is dishonored upon presentation for payment. It is this point in the negotiation of the instrument with which the criminal law should be concerned. The proposed statute uses the general term "negotiable instrument" rather than "check" or "draft" because there seems to be no good reason to exclude other forms of negotiable instruments if one of the purposes of the law is to prevent the infusion of worthless paper into the flow of commerce. The term "drawee" in subsection (a) limits the statute generally to three-party negotiable instruments. This proposal also conforms to the readily available Uniform Commercial Code definitions already extant in North Carolina statutes.

Although there is no statutory presumption in the present statute, the author feels that in fact a presumption of knowledge of lack of credit presently on deposit is operative in the courts. This is evidenced especially in the magistrate's court but also in the district courts because generally no direct evidence is ever presented as to the defendant's knowledge. Usually no more evidence is presented than the check itself and perhaps testimony from a bank employee indicating that the defendant did not in fact have sufficient funds on deposit. The presumptions in subsection (b) tend to indicate more than not that the defendant did expect that the instrument would not be honored upon presentation. It is felt that these statutory presumptions ease the burden of prosecution and at the same time protect the defendant from unfair inferences of his guilt.

The punitive provisions found in the present law are retained in subsection (c). But subsection (d) departs substantially from the current statute in that it explicitly recognizes that restitution may be a valid purpose of the bad-check law and provides criteria for consideration by the court in making such an award. The purpose of this subsection is actually two-fold. It not only provides for restitution but also directs that the interests of the payee be protected if the payee has not encouraged or abetted the defendant in issuing the worthless instrument. It is felt that the natural desire of the payee (typically the merchant) for restitution will do more to prevent the aiding or abetting of the maker of a worthless check than the largely unused criminal sanction that exists in the present law.

There are some problems with this provision not heretofore discussed. Article XI, section one of the North Carolina Constitution states that "death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under

this state" shall be the only punishments. Exactly where restitution fits in this list of punishments is not at all clear, but by analogy to the bastardy statutes, it is quite likely that restitution would not be a punishment at all. Section 49-2 makes it a misdemeanor wilfully to fail to provide adequate support for one's illegitimate children.⁵⁹ Section 49-7 requires the court upon an affirmative finding of paternity to "fix by order . . . a specific sum of money necessary for the support and maintenance of the particular child who is the subject of the proceedings."⁶⁰ Section 49-8 also authorizes the court to order in addition to support payments a six-month active prison sentence, a suspended sentence, probation, or a payment to the mother for the expense incurred in the birth of the child; the court may also require the defendant to sign a recognizance with security for the performance of the order.⁶¹ It is clear that this criminal statute⁶² is not limited to strictly "criminal" objectives and that in fact a primary purpose of the statute is to enforce by use of the criminal process the parent's legal and moral obligation to support his illegitimate children.⁶³ It is also clear that the provisions as to support and expense payments are not punishment within the meaning of Article XI of the North Carolina Constitution. "The support payments are not part of the punishment. All men have a moral duty to support their children—legitimate or illegitimate—and section 49-2 makes this obligation legal and enforceable with respect to illegitimate children."⁶⁴ The North Carolina Supreme Court further characterizes these aspects of the judgment as "consequences [that] are merely side effects that may or may not materialize. They have no relevance on the question of punishment. The *only* punishment authorized by law . . . is limited at most to six months in prison."⁶⁵ Payment of debt of course is not only a moral but also a legal obligation that would seem to fit more neatly under this theory than support of illegitimate children. The proposed statute separates the punitive and restitutional provisions so that it does not impose imprisonment should the defendant be too poor to make restitution and thereby avoids the constitutional proscription

⁵⁹N.C. GEN. STAT. § 49-2 (1966).

⁶⁰N.C. GEN. STAT. § 49-7 (Supp. 1971).

⁶¹N.C. GEN. STAT. § 49-8 (1966).

⁶²This is a criminal, not a civil statute. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

⁶³*E.g.*, *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965); *State v. Roberts*, 32 N.C. 350 (1849).

⁶⁴*State v. Green*, 277 N.C. 188, 193, 176 S.E.2d 756, 760 (1970).

⁶⁵N.C. CONST. art. I § 28.

of imprisonment for debt.⁶⁶

Lastly, a subsection has been included to prevent the conviction of a person who makes restitution on his own within the time limit ascribed. No doubt some persons will use this as a device to secure extra time to make payments without fear of conviction, but the author feels that this risk is more than compensated for by providing an escape for the person who has simply made an innocent mistake.

CONCLUSION

The study of the administration of the bad-check law in North Carolina indicates basic dissatisfaction on the part of almost all the parties normally involved in its enforcement. The merchant, motivated by business reasons, is basically interested in a simple, economically efficient means of collecting amounts owed him as a result of his having accepted a worthless check; he also complains of lack of sympathy from officials at all levels in our criminal justice system.

Law enforcement officers and other officials concerned with the administration of criminal justice have in many cases indicated a lack of sympathy for this use of the state criminal court system as a collection agency for private debt. Although the present statute does not provide for debt collection, the custom in some areas of the state is to limit most or a substantial percentage of worthless-check judgments to an assessment of costs plus restitution. In some areas, the worthless-check case load is a substantial part of the case load of district court.

In an attempt to balance the competing interests of the business community with the demands on the criminal system and the interests of the public at large, the author has suggested a statute. This statute recognizes that restitution (debt collection) is or may be a valid objective of this kind of law, and yet it attempts to protect the interests of the public by providing the courts with explicit instructions in making such a judgment.

In short, the statute attempts to state a legislative policy in clear unambiguous terms in order to protect the interests of the public from unnecessary and unwarranted criminal conviction, provide a simple method of obtaining restitution for the business community, and elimi-

⁶⁶*Id.* For a general but brief discussion of this type of diversion from the criminal process, see Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DENV. L. J. 211, 229 (1971).