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AN ANALYSIS OF CRIMINAL REDISTRIBUTION SYSTEMS AND THEIR ECONOMIC IMPACT ON SMALL BUSINESS

STAFF REPORT

PREPARED FOR THE

SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

OCTOBER 26, 1972

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PREFACE

Since 1969 the Select Committee on Small Business has been conducting a series of public hearings and investigations into the economic impact of crime on small business. Initially, these hearings examined into ordinary property crimes and were based on a report prepared by the Small Business Administration (Crime Against Small Business, S. Doc. 91–14) at the direction of the Congress (Small Business Protection Act of 1967, Public Law 90–104). Subsequently, the committee moved its hearings into cargo theft and pilferage from air, truck, rail, and maritime carriers and issued reports making recommendations thereon.*

This report, an outgrowth of those hearings and investigations, deals primarily with fencing, the criminal redistribution system supporting hijacking and thievery costing business what the Department of Commerce crime survey says is $16 billion per year. The staff was directed to prepare this report as a foundation for anticipated hearings into the criminal redistribution or fencing. We believe these activities play a vital role in the successful completion of crimes involving major thefts and affecting the business economy generally and small businesses particularly. As this report explains, a theft itself is not complete until the stolen goods have been disposed of, probably through resale in legitimate channels in many instances.

The appendix to this report provides a summary of legislative approaches. It was prepared to permit a more thorough understanding of those economic problems that result from activities of those individuals who steal, fence or receive stolen property.

We believe this report is the first ever prepared by a committee of the Congress examining into this particular aspect of criminal activity.

The assistance of the American Law Division, Library of Congress, and Mr. Ed Gottfried, a member of the Congressional Fellow Intern Program, in the preparation of this report is gratefully acknowledged.

ALAN BIBLE, *Chairman,*
Senate Select Committee
on Small Business.

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*See Hearing, report summary, p. 1.

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AN ANALYSIS OF CRIMINAL REDISTRIBUTION SYSTEMS AND THEIR ECONOMIC IMPACT ON SMALL BUSINESS

I. Hearing, Report Summary

1. U.S. Small Business Administration, Crime Against Small Business, A Report of the Small Business Administration. Transmitted to the Select Committee on Small Business, U.S. Senate, 91st Congress, first session, Senate Document No. 91–14, April 3, 1969.
2. Hearings before the Select Committee on Small Business, 91st Congress, first session, on Impact of Crime on Small Business—1969 (General Business Crime and Air Cargo Loss-Theft), part 1, May 21, 22, 23 and July 22, 1969.
3. Report—Part I, An Overview of the Effects of Crime on Small Business based on hearings May 21 and 22, 1969 (General Business Crime), Senate Document No. 91–612, part I, December 19, 1969.
4. Report—Part II, Effect of Cargo Loss and Theft in Air Commerce based on hearings May 23 and July 22, 1969, Senate Document No. 91–612, part II, December 16, 1969.
5. Hearings before the Select Committee on Small Business, 91st Congress, first and second session, on Impact of Crime on Small Business—1969–70 (Cargo Theft-Maritime Industry), part 2, July 23, 1969, and June 24, 1970.
6. Report—Part III, Effect of Cargo Loss and Theft in Maritime Commerce based on hearings July 23, 1969, and June 24, 1970, Senate Document No. 91–1547, December 30, 1970.
7. Hearings before the Select Committee on Small Business—1970–71, 92d Congress, first session, on Impact of Crime on Small Business (Cargo Theft-Trucking Industry), part 3, June 25, 1970, and June 8, 1971.
8. Report—Part IV, Effect of Cargo Loss, Theft, and Hijacking in the Trucking Industry based on hearings June 25, 1970, and June 8, 1971, Senate Document No. 92–839, June 8, 1972.
9. Hearings before the Select Committee on Small Business—1970–71, 92d Congress, first session, on Impact of Crime on Small Business (Cargo Theft-Joint Conference), part 4, June 17–18 and July 6–7, 1971 (appendix to pt. 3).

II. Introduction

Mr. Chairman, this report is an effort by your staff to provide for your committee preliminary information on the problem of criminal redistribution systems of stolen goods. This report was prepared in accordance with the activity agenda for the 92d Congress, adopted by the full committee on March 10, 1971.

Your committee has been concerned with the economic impact of crime on small business since 1967 when your committee proposed the Small Business Protection Act of 1967 (Public Law 90–104), which required the Small Business Administration to conduct a study on crime as it affects the small business community nationwide. That study showed that crime was a serious multibillion-dollar problem which affects small business profits 35 times greater than it does larger business.

Your committee opened hearings in May of 1968 and subsequently filed a series of reports with the Senate urging that more attention be given by the Federal Government to the crime problem as it affects small business.

In May, 1969, consistent with your committee's determination to seek solutions to the small business crime problem, hearings were begun into cargo theft and pilferage from the different modes of transportation. Your committee discovered that those most seriously affected by this type of crime were small businesses. Throughout the hearings on transportation crime and in the report of the Small Business Administration, published by your committee, evidence that there was a serious hidden middle criminal level supporting thievery became evident.

This report has been prepared by your committee staff to provide a compilation of information on this criminal redistribution activity supporting thievery—fencing.

The report is based on extensive research and field investigations by your staff. To the best knowledge of your staff, it is the first definitive work undertaken by a committee of the U.S. Congress to identify this particular problem which your staff feels is the foundation for virtually all crimes against property—from shoplifting to cargo theft.

Areas covered include:

(1) A general description of the problem;

(2) A survey of Federal and State statutes designed to reach the problem; and

(3) A section identifying areas requiring further study and public hearings to develop proper and effective solutions.

III. Description of the Problem

There are two basic elements of a property theft crime: the theft itself and second, the distribution of the stolen property. This report is directed at the distribution element, which occurs after the thievery, rather than with the theft element. Most prevention efforts have been geared toward combating the crime of theft itself, but little is being done to stop the equally—if not more—important aspect of illegal distribution of stolen property or, as it is more commonly known, "fencing." Your staff believes that it is time to seek out and stop the criminal profiteer who is not recognized by society as a criminal but more as a shady businessman. It is time to expose the quasi-legal business functions of crime, without which there would be no profit in theft.

The relatively little research and published material that is available on the distribution of stolen property is astonishing in view of its

vital criminal function. Aside from an analysis made by Jerome Hall in 1935 [1] and a recent report by Ted Roselius and Douglas Benton of Colorado State University prepared for the Law Enforcement Assistance Administration,[2] very little substantive material on the distribution of stolen goods could be found.

However, the significance of these silent hidden middlemen of crime is well known to students of crime and criminals themselves. Solderman and O'Connell in "Modern Criminal Investigation" wrote:

> It has been truthfully said time and again that if there were no receivers of stolen goods there would be very little crime against property and against persons who are attacked and robbed of property. Criminal receivers are responsible for most of the dishonest and unethical practices in business, for youths committing crime, and for professional criminals continuing in crime.[3]

Twenty years later, Robert Earl Barnes, one of the better known thieves, said:

> Perhaps the most underrated criminal in the underworld is the receiver of stolen property, the burglar's fence. Few citizens actually understand just how essential the fence is to the burglar. When you think about where your stolen property has gone, don't think about the burglar. He usually doesn't have it, and probably would have trouble getting rid of it alone.
>
> The fences are the key, not only to the burglar but also to the shoplifter, the petty thief, the automobile-parts thief, mail parcel-post thieves, shipping-dock thieves, hijackers, and narcotics addicts—all dealers in merchandise which can be resold in a legitimate market. In connection with all of these criminal acts, the fence indeed plays as major a part as the persons actually doing the stealing. In some cases he may be more important.
>
> Without the receiver of stolen property, none of the burglars—cat burglar, monkey man, or business specialist—could survive. For their efforts, they would have garages full of goods, and merchandise is useless to the thief unless he can sell it.[4]

As a basic premise, this report makes the following assumptions:

First, fences play a vital role in the successful completion of a crime involving a major theft. Without the fence, the theft is a meaningless act.

Second, stolen goods eventually reach a legitimate marketplace. The magnitude of theft is so great that the only reasonable outlet must be to legitimate consumers.

Third, the illegal distribution system from the thief to the marketplace must adversely affect legitimate business enterprises such as storage companies, transporters, manufacturers, wholesalers, retailers, lending institutions, and others who are normally involved in a legal distribution system.

The logic that follows is that whether the theft and distribution process takes place interstate, intrastate, intracity, or even intracommunity, the detrimental effects on legitimate business and commerce have national ramifications.

Eugene T. Rossides, Assistant Secretary for Enforcement and Operations, U.S. Department of the Treasury, said that "stolen merchandise may be put into the stream of commerce by the underworld

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[1] "Theft, Law and Society, Indianapolis, Ind.," The Bobbs Merrill Co., Inc., 2d edition, 1952, chapter 5, by Jerome Hall.

[2] "Marketing Theory and the Fencing of Stolen Goods," August 1971, by Ted Roselius and Douglas Benton.

[3] "Modern Criminal Investigation," New York, 1969, p. 356 ,by Solderman and O'Connell.

[4] "Are You Safe from Burglars?" New York, Doubleday & Co., Inc., 1971, p. 142; by Robert Earl Barnes.

in competition with legitimate business, oftentimes in direct competition with the importers of the property which has been stolen." [5]

This report will (1) define terms associated with the illegal distribution of stolen goods, (2) attempt to explain the criminal distribution system, (3) summarize related existing laws and current proposed legislation, (4) discuss a marketing theory vis-a-vis fencing, and (5) make recommendations for future action for consideration by your committee.

IV. Definition of Terms

For purposes of this report, organized crime, as defined by the Task Force Report on Organized Crime,[6] is used. It is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.

Other terms used in this report that require explanations are:

Fence (verb)—To buy or sell stolen property with criminal intent.

Fence (noun)—A receiver of stolen goods.

Swag—Stolen property.

Swagman—Receiver of stolen goods.

Booster—A thief who supplies the fence with stolen property.

Downed—Sold.

Drop—A place for receiving stolen property.

V. The Fencing System

A clear distinction should be made between fences and thieves. It is generally true that fences don't steal and that thieves don't fence. But there does exist a definite interdependency between these two principals of the property theft crime. This relationship is as necessary as a manufacturer and distributor, a wholesaler and retailer, a slaughterhouse and a butcher shop. Between the thief and the fence, a whole marketing network is carried out. There is little wonder why the fence is so concerned over the welfare of his supplier. As Fitzgerald [7] wrote:

> Not only does a fence purchase stolen property, but he also acts as a finger-man for many thieves. He advises them just what kind of property he can get rid of and where it can be stolen.
>
> In many instances a fence will loan money to a thief and get him in debt so he is forced to steal. Some even hire lawyers to defend thieves upon their trial or furnish their bail, safe in the knowledge that the thief or his friends will steal to repay the loan.

In describing the fencing system in this report, five elements are discussed: Who are fences; what are their sources; what kinds of stolen

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[5] Hearings before the Senate Select Committee on Small Business on the "Impact of Crime on Small Business," 1970–71, pt. 4, p. 827.

[6] "Task Force Report: Organized Crime," p. 1, by the President's Commission on Law Enforcement and Administration of Justice, 1967.

[7] "Handbook of Criminal Investigation," New York, 1951, p. 127 by Maurice J. Fitzgerald.

goods do they deal with; how do they distribute stolen goods; and to whom do they sell?

A. *Who are fences?*—They vary in size of operation, method of receiving and distributing, source of goods, and underworld involvement. However, as Jerome Hall said in his classic analysis on fencing, they all must have some business acumen: "The business of dealing in stolen goods requires a trained personnel. It requires most of the qualifications necessary to carry on any business and a number of additional ones." [8]

There are individuals who hold down regular jobs, in fields unrelated to the distribution of merchandise, who supplement their salaries by selling stolen goods. Indicative of this type of fence is the subject of an article of the New Yorker magazine.

> Thomas Hicks (an alias) is a 38-year-old electronics technician who more than doubles his $9,000-a-year take-home salary by selling stolen merchandise.
>
> He is, in the street talk, a swagman, one of perhaps hundreds of hustlers in the city who distribute an estimated $5 million worth of goods ripped off each year at New York's airports, waterfronts, factories and truck ports.[9]

Another type of fence is the businessman who operates a legitimate business in addition to, or as a front for a fencing operation. He is best described by Jerome Hall:

> Most professional receivers seem, indeed, to be offshoots from legitimate businesses. This is especially true of furs, silks and automobiles. The fur industry generates considerable human energy which is finally devoted to carrying on illegal traffic. The jewelry receiver may have been an ex-jeweler; and he has frequently become a gambler and money lender, whose contacts with thieves are numerous. The automobile receiver is apt to emerge from the garage business.
>
> In brief, the executives in this business of dealing in stolen goods are experienced men, frequently specialists in their chosen fields, able to evaluate merchandise expertly and to compete generally on the basis of their special skills. Indeed, many criminal receivers re-enter legitimate business. * * * Besides, a large number of receivers are engaged in legitimate business at the same time they are carrying on illegal traffic in stolen goods. Their legitimate business masks the illegitimate. [10]

And there are fences who are professional criminals, who served their apprenticeships with, and are an integral professional and social part of organized crime. To a degree, of course, all fences are part of organized crime as defined in this report; but, here we are identifying fences who are members of a large crime syndicate. From a Scripps-Howard survey:

> * * * large-scale stealing of trucks, stock certificates or autos has to be run on an organized basis that provides for getting stolen merchandise back into the commercial stream. Thus law officials are convinced that organized crime is behind much of the large-scale stealing in the United States.
>
> The Waterfront Commission of New York Harbor says: "Container thefts would not be possible without a variety of larcenous individuals, for such thefts require the aid of persons who can identify the contents of the container and its location, require persons who have storage facilities to hide the huge amounts of cargo and also require a tractor and trailer to move the stolen container. Organized crime has the ability and the organizations—and has used these qualities—to secure such information and the contacts to distribute and fence in large volume.[11]

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[8] Supra 1, p. 156.
[9] "They Can Get It for You Better Than Wholesale," New Yorker magazine, November 22, 1971, by Frank E. Emerson.
[10] Supra 8, p. 156.
[11] "Theft: The Hidden Tax," Washington Star, July 12, 1971, pt. 1, by Robert Dietsch.

B. *Sources for obtaining stolen property.*—A breakout of the principal sources of stolen property which supplies the illegal distribution system was made as part of a Scripps-Howard report on theft:

Retail stores lose $3.5 billion a year through shoplifters, who account for 90 percent of the losses, or to employees who steal from their bosses.

A total of 915,500 automobiles, costing over $250 million, were stolen in 1970.

The Penn Central Railroad reported 5,809 cases of theft or pilferage in 1970.

Cargo thefts accounted for almost $1.5 billion a year, broken down by: $900 million from trucks, $110 million from airlines, $250 million from railroads, and $210 million from ship terminals.

The sum of $3 billion is stolen each year by employees from their companies.[12]

C. *Kinds of stolen property.*—The most frequently stolen goods from the New York port, according to the Waterfront Commission of New York Harbor, include whisky, cigarettes, radios, television receivers, and TV tubes.[13] The swagman referred to earlier in this report deals primarily with clothing. Automobile thefts may reach a million this year. Construction material and equipment, watches, cameras, cattle—virtually anything is fenced.[14]

A witness before your committee, during the cargo theft hearings, told of a tremendous market for stolen wigs. Another reported losses of imported salami.

The Scripps-Howard report sums it up:

> Almost anything seems to lure today's thieves: Hotpants are a hot item for today's department store shoplifters. Typewriters, adding machines, electric clocks, and Xerox copiers—anything that isn't securely nailed down—are disappearing from offices and warehouses.[15]

D. *Distribution of stolen goods.*—There are various ways for stolen property to reach the marketplace. The methods depend on size, volume, value, and demand. Roselius and Benton relate the illegal distribution of stolen property to the legitimate marketing system. Among the marketing functions they cover are buying, selling, transportation, storage, financing, risk-taking, and market research. They wrote:

> *Selling of stolen goods.*—Sales to various buyers differ in the amount of involvement of the seller. The quantity of items to be sold dictates in part the role of the middleman in selling. If there is a large quantity to be sold, the middleman or fence plays a larger part in arranging and facilitating the sale.
>
> *Buying of stolen goods.*—The buying function is probably the most important function that the fence provides—he is getting the goods off the hands of the thief. Statistics indicate that the number of buyers or fences of stolen goods is less than the number of sellers or thieves. * * * There may be reciprocal buying agreements where one fence agrees to buy a certain type of goods from another fence in return for the same agreement.
>
> *Transportation and storage of stolen goods.*—The transportation and storage functions can be most critical to the successful fencing of goods. The ability to move goods from the thief to the next user is one of the prime responsibilities of the middleman. * * * By token of their complexity and importance, the

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[12] Ibid.
[13] "Waterfront Crime," Wall Street Journal, May 14, 1971.
[14] Supra 11.
[15] Ibid.

transportation and storage functions would seem to be among the most vulnerable links in the fencing operation.

Financing of stolen goods.—The fence provides a major source of financing for the thief. The fence almost always has cash available and usually pays the thief directly and immediately in cash—a necessary requirement for addicts and criminals in need of bail. As a middleman, the fence is in a position to turn the goods for cash and consequently is a major financier.

Risk-taking in stolen goods.—The thief faces one major type of risk—the risk of detection during and after the theft. The fence faces two major types of risks—the risk of detection while performing any one of the middleman functions and a significant economic risk. The latter risk arises because he has committed resources for goods and he may not be able to sell them at a profit. * * *

The fence faces risk in all of the middleman functions such as deterioration or obsolence during storage or transportation, decrease in retail price of the goods in legitimate channels, and poor intelligence or market information.

Market research for stolen goods.—The dominant form of market information is apparently word-of-mouth communications between consumers, fences, information-brokers (bartenders, for example) and thieves.[16]

Roselius and Benton summarized that it was reasonable to expect that each of the middleman functions had to be performed to some degree in order to distribute stolen goods.[17]

The marketing functions can be applied to a theoretical crime. For example, a thief locates a warehouse filled with TV sets. He notes the quantity and quality of the merchandise and informs his fence. The fence offers the thief a price for about one hundred sets and names a drop or delivery location. The drop may be another warehouse, a garage, or loft or store. The fence makes sure that the drop is set to receive the goods. When delivery is made, the fence checks the goods and pays the thief. He then removes identification marks from the goods and the containers, or he may repackage the goods. The fence removes the goods in a truck to his place of business which has the appearance of a legitimate establishment. The fence informs retail merchants, jobbers or other buyers that he has exceptional buys on TV sets, well below the market price.[18]

E. *Sales Outlets for Stolen Goods.*—As stated earlier in this report, the ultimate buyer of stolen property is the consumer, usually unaware that the goods were stolen. However, the awareness among the channels that the goods pass through on the way to the consumer is questionable. There is a strong feeling among law enforcement people that legitimate businessmen too frequently purchase stolen goods, knowingly, from fences for resale through their wholesale or retail outlets.

The Illinois Crime Commission said:

> There is a disturbing lack of interest on the part of some legitimate business concerns regarding the identity of the persons with whom they deal. This lackadaisical attitude is conducive to the perpetration of frauds and the infiltration and subversion of legitimate businesses by the organized crime element.[19]

And from the Scripps-Howard report:

> New York police think much stolen merchandise turns up in small retail outlets which have continuous discount or fire sales. But there's growing feeling that even established businessmen, faced with rising costs and taxes, sometimes buy stolen merchandise.[20]

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[16] Supra, pp. 42–44.
[17] Ibid.
[18] Supra 3.
[19] Supra 6.
[20] Supra 11.

Organized crime often is instrumental in handling stolen property by infiltrating apparently legitimate business channels by applying pressure on businessmen who are in debt to loan sharks.[21]

VI. Current Laws

The following is based on reports on Federal and State law concerning the receipt of stolen property prepared by the American Law Division of the Library of Congress, at the request of the committee staff.

A. RECEIPT OF STOLEN PROPERTY: FEDERAL LAW

Current Statutes

At the present time there are at least 10 sections of title 18 of the United States Code which outlaw various types of receipt of stolen property.[22] While in a given case reference should always be made to the statute in question, there are a number of aspects common to all of them.

Receiving

The Federal statutes prohibiting receipt of stolen property not only cover receiving but also concealment or retention,[23] purchase or possession,[24] or possession, concealment, storing, bartering, selling, or disposing of stolen property.[25]

Since one cannot receive from himself a defendant cannot be convicted for both the theft and receipt.[26] At one time the Federal courts permitted conviction of a defendant as both a receiver and an accessory before the fact.[27] Since accessories before the fact are treated as principals the result was that an accessory before the fact could be convicted for both the theft and receiving. This is no longer the case.[28] Nevertheless, the thief may be convicted of both the theft and possession or concealment.[29]

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[21] "Underworld Linked to Truck Hijackings," New York Times, July 8, 1971, p. 70.

[22] 18 U.S.C., sec. 641 (receipt of property stolen from the United States); 18 U.S.C. sec. 659 (receipt of property stolen from an interstate or foreign carrier or depot); 18 U.S.C., sec. 662 (receipt of stolen property within the special maritime or territorial jurisdiction of the United States); 18 U.S.C., sec. 842 (h) (receipt of stolen explosives); 18 U.S.C. sec. 1660 (receipt of property taken by an act of piracy or robbery prohibited by the laws of the United States); 18 U.S.C., sec. 1708 (receipt of property stolen from the U.S. mails); 18 U.S.C., sec. 2113 (c) (receipt of property stolen from a federally insured bank); 18 U.S.C. sec. 2312 (receipt of a stolen vehicle moving in interstate or foreign commerce); 18 U.S.C., sec. 2315 (receipt of stolen goods, securities, moneys or fraudulent State tax stamps which are part of interstate or foreign commerce). Sec. 341 of title 18 outlaws conspiracy to commit any of these offenses and as such may be considered a receiver statute.

[23] 18 U.S.C., sec. 641.

[24] 18 U.S.C., sec. 659.

[25] 18 U.S.C., secs. 2113, 2313, 2315, and 2317.

[26] *Heflin* v. *United States,* 223 F. 2d 371 (5th Cir. 1955); *Matlock* v. *United States,* 309 F. Supp. 398 (W.D. Tenn. 1970); *Keating* v. *United States,* 413 F. 2d 1028 (9th Cir. 1969); *United States* v. *Minchew,* 417 F. 2d 218 (5th Cir. 1969); *United States* v. *Suel,* 435 F. 2d 1272 (5th Cir. 1970).

[27] *Aaronson* v. *United States,* 175 F. 2d 41 (4th Cir. 1949).

[28] *Milanovich* v. *United States,* 365 U.S. 551 (1961); *United States* v. *McNeil,* 436 F. 2d 251 (9th Cir. 1970); *Baker* v. *United States,* 357 F. 2d 11 (5th Cir. 1966).

[29] *United States* v. *Brown,* 246 F. 2d 541 (2d Cir. 1957); *United States* v. *Cordo,* 186 F. 2d 144 (2d Cir. 1951). Possession as used in these statutes means the exercise of dominion and control over the property. *United States* v. *Cordo, supra; Pearson* v. *United States,* 192 F. 2d 681 (6th Cir. 1952); *United States* v. *Nitti,* 444 F. 2d 1956 (7th Cir. 1971); *United States* v. *Kearse,* 444 F. 2d 62 (2d Cir. 1971). Although possession must be exclusive, it may be constructive. *United States* v. *Cousins,* 427 F. 2d 383 (9th Cir. 1970); *United States* v. *Casalinuovo,* 350 F. 2d 207 (2d Cir. 1965).

Stolen property

While all the Federal statutes prohibit receipt of stolen property, most expand the prohibition to include receipt of property acquired by embezzlement or other felonious taking or conversion.[30] As a result, the courts have held that the property received need not have been taken in violation of the common law definition of larceny.[31] Yet the property must have been taken unlawfully within the language of the statute,[32] and there can be no unlawful receipt where the property has been returned to the control of the owner immediately prior to receipt.[33] The property received must also be clearly identified although such identification need not include identification of the true owner.[34]

Knowledge

All Federal receipt statutes require that the receiver know that the property was "stolen." Such knowledge is an element of the offense which must be alleged and proven.[35] In view of the fact that the state of mind of the accused at the time of receipt may be difficult to prove by direct evidence, the courts permit proof of the defendant's knowledge by circumstantial evidence.[36] The Federal courts have also recognized the doctrine of recent possession which permits the jury to infer guilty knowledge from unexplained possession of recently stolen property.[37] In a proper case, the trial court may instruct the jury as to this inference. In applying the doctrine whether or not possession is "recent" is a question to be determined by the jury [38] considering all the circumstances including the kind, value and volume of the property and the difficulty with which it may be assimilated into legitimate commerce.[39] The inference which may be drawn from possession of recently stolen property weakens as the time of the theft becomes more remote [40]

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[30] E.g., 18 U.S.C., secs. 641, 659.

[31] *Bergman* v. *United States,* 253 F. 2d 933 (6th Cir. 1958) ; *Cummings* v. *United States,* 289 F. 2d 904 (10th Cir. 1961) ; *Lyda* v. *United States,* 279 F. 2d 461 (5th Cir. 1960).

[32] *United States* v. *Harris,* 346 F. 2d 182 (4th Cir. 1965) ; *Robertson* v. *United States,* 168, F. 2d 294 (5th Cir. 1948).

[33] *United States* v. *Cawley,* 255 F. 2d 338 (3d Cir. 1958).

[34] *United States* v. *Linderman,* 20 F.R.D. 459 (D. Mont. 1957) ; *Sterling* v. *United States,* 333 F. 2d 443 (9th Cir. 1964) ; *United States* v. *Licausi,* 413 F. 2d 118 (5th Cir. 1969) ; *United States* v. *Bradley,* 447 F. 2d 657 (3d Cir. 1971).

[35] *Teel* v. *United States,* 407 F. 2d 604 (8th Cir. 1969) ; *United States* v. *Bucur,* 194 F. 2d 297 (7th Cir. 1952) ; *United States* v. *Russo,* 123 F. 2d 420 (3d Cir. 1942) ; *United States* v. *Werner,* 160 F. 2d 438 (2d Cir. 1948) ; *Corey* v. *United States,* 305 F. 2d 232 (9th Cir. 1962).

[36] *Welch* v. *United States,* 386 F. 2d 189 (5th Cir. 1967) ; *Jenkins* v. *United States,* 361 F. 2d 615 (10th Cir. 1966) ; *Overton* v. *United States,* 405 F. 2d 168 (5th Cir. 1968) ; *Carrison* v. *United States,* 353 F. 2d 94 (10th Cir. 1965).

[37] *Wilson* v. *United States,* 162 U.S. 613 (1896) ; *McNamara* v. *Henkel,* 226 U.S. 520 (1913) ; *Dunlop* v. *United States,* 165 U.S. 486 (1897) ; *Rugendorf* v. *United States,* 376 U.S. 528 (1964) ; *United States* v. *Browning,* 439 F. 2d 813 (1st Cir. 1971) ; *United States* v. *Coppola,* 424 F. 2d 991 (2d Cir. 1970) ; *United States* v. *Allegrucci,* 258 F. 2d 70 (3d Cir. 1958) ; *United States* v. *Fisher,* 440 F. 2d 654 (4th Cir. 1971) ; *Hale* v. *United States,* 410 F. 2d 147 (5th Cir. 1969) ; *United States* v. *Prujansky,* 415 F. 2d 1045 (6th Cir. 1969) ; *United States* v. *Riso,* 405 F. 2d 134 (7th Cir. 1968) ; *Aron* v. *United States,* 382 F. 2d 965 (8th Cir. 1967) ; *United States* v. *Redd,* 438 F. 2d 335 (9th Cir. 1971) ; *Gregory* v. *United States,* 364 F. 2d 210 (10th Cir. 1966) ; *Bray* v. *United States,* 306 F. 2d 743 (D.C. Cir. 1961).

[38] *United States* v. *Redd, supra; Hale* v. *United States, supra; United States* v. *Riso, supra; Travers* v. *United States,* 335 F. 2d 698 (D.C. Cir. 1964) ; *Christensen* v. *United States,* 259 F. 2d 192 (D.C. Cir. 1968).

[39] *United States* v. *Prujansky, supra; Aron* v. *United States, supra; United States* v. *Gordon,* 421 F. 2d 1068 (5th Cir. 1970) ; *Jenkins* v. *United States, supra; Teel* v. *United States, supra.*

[40] *United States* v. *Redd, supra; Hale* v. *United States, supra; United States* v. *Wolfenbarger,* 426 F. 2d 992 (5th Cir. 1969) ; *United States* v. *Teresa,* 420 F. 2d 13 (4th Cir. 1969) ; *Wangrow* v. *United States,* 399 F. 2d 106 (8th Cir. 1968) ; *Travers* v. *United States, supra; Christensen* v. *United States, supra; Morandy* v. *United States,* 170 F. 2d 5 (9th Cir. 1948) ; *Boehm* v. *United States,* 271 F. 454 (2d Cir. 1921).

until a point in time at which the court must hold that as a matter of law possession is no longer "recent." [41] The doctrine applies where possession is unexplained, or more precisely, where the evidence suggests no straightforward, truthful, reasonable and satisfactory explanation consistent with the innocence of the possessor.[42]

In instructing the jury as to the inference, the court must be careful to make clear that the inference is one that may be drawn rather than one which must be drawn,[43] that the burdens of proof, coming forward with the evidence, and persuasion always lie with the Government,[44] and that no inference can be drawn from the defendant's failure to testify.[45]

While the receiver must know that the property is stolen, there is no requirement that he be aware of the element of the offense which gives rise to Federal jurisdiction. Thus, the defendant need not know that the property was stolen from the U.S. Government for conviction under 18 U.S.C. section 641 or be aware of the interstate aspects of the theft for prosecution under 18 U.S.C. section 2315.[46]

Recommendations of the National Commission on Reform of Federal Criminal Laws

Section 1732 of the final report of the National Commission on Reform of Federal Criminal Laws [47] provides in part: "a person is guilty of theft if he: * * * (c) knowingly receives, retains or disposes of property of another which has been stolen, with the intent to deprive the owner thereof." Several of the States include receiving within their definitions of larceny or theft.[48] The drafters of the Model Penal Code which stimulated this trend felt that:

> Analytically, the receiver does precisely what is forbidden by [Model Penal Code] section 206.1, namely, he exercises unauthorized control over property of another with the purpose of applying or disposing of it permanently for the benefit of himself or another not entitled. From the practical standpoint, it is important to punish receivers in order to discourage theft. The existence and

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[41] *Van Gorder* v. *United States,* 21 F. 2d 939 (8th Cir. 1927) ; *Balman* v. *United States,* 94 F. 2d 197 (8th Cir. 1938) ; *Gargotta* v. *United States,* 77 F. 2d 977 (8th Cir. 1935).

[42] *Aron* v. *United States, supra; United States* v. *Pounds,* 323 F. 2d 419 (3d Cir. 1963) ; *United States* v. *McGlamory,* 441 F. 2d 130 (5th Cir. 1971) ; *United States* v. *Jones,* 434 F. 2d 232 (5th Cir. 1970) ; *United States* v. *Reed,* 414 F. 2d 435 (5th Cir. 1969) ; *Moody* v. *United States,* 377 F. 2d 175 (5th Cir. 1967) ; *Beufve* v. *United States,* 374 F. 2d 123 (5th Cir. 1967) ; *Broom* v. *United States,* 342 F. 2d 419 (5th Cir. 1965) ; *Travers* v. *United States, supra; United States* v. *McNeil, supra; Seefeldt* v. *United States,* 183 F. 2d 713 (10th Cir. 1950) ; *Loftus* v. *United States,* 46 F. 2d 841 (7th Cir. 1931).

[43] *Bollenbach* v. *United States,* 326 U.S. 607 (1946) ; *Aron* v. *United States, supra; McAbee* v. *United States,* 434 F. 2d 361 (9th Cir. 1970) ; *Sewell* v. *United States,* 406 F. 2d 1289 (8th Cir. 1969) ; *Battaglia* v. *United States,* 205 F. 2d 824 (4th Cir. 1953) ; *Travers* v. *United States, supra.*

[44] *United States* v. *Prujansky, supra; McAbee* v. *United States, supra; Lee* v. *United States,* 363 F. 2d 469 (8th Cir. 1966) ; *United States* v. *Allegrucci, supra.*

[45] *United States* v. *Prujansky, supra; Glavin* v. *United States,* 396 F. 2d 725 (9th Cir. 1968) ; *Cloud* v. *United States,* 361 F. 2d 627 (8th Cir. 1966).

[46] *United States* v. *Boyd,* 446 F. 2d 1267 (5th Cir. 1971) ; *Clark* v. *United States,* 213 F. 2d 63 (5th Cir. 1954) ; *Pilgrim* v. *United States,* 266 F. 2d 486 (5th Cir. 1959) ; *Baker* v. *United States,* 429 F. 2d 1278 (9th Cir. 1970) ; *Corey* v. *United States,* 305 F. 2d 232 (9th Cir. 1962) ; *United States* v. *Sherman,* 171 F. 2d 619 (2d Cir. 1949) ; *United States* v. *Allegretti,* 340 F. 2d 243 (7th Cir. 1964) ; *United States* v. *Slaughter,* 255 F. 2d 770 (7th Cir. 1958).

[47] The National Commission on Reform of Federal Criminal Laws was created by Public Law 89–801, 80 Stat. 1516 (1966), and charged with the responsibility of making "a full and complete review and study of the statutory and case law of the United States which constitutes the Federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the Federal system of criminal justice." Its final report was submitted to Congress and the President on Jan. 7, 1970.

[48] E.g., Colo. Rev. Stat., sec. 40–5–2 ; 19–9 Conn. Sess. Laws, Pub. Act No. 828, sec. 128.

functioning of the "fence," a dealer who provides a market for stolen property, is an assurance especially to professional thieves of ability to realize the unlawful gain.

Consolidation of receiving and other forms of theft affords the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving what is stolen. One who is found in possession of recently stolen goods may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief. Consolidation also has a consequence favorable to the defense by making it impossible to convict of two offenses based on the same transaction, as has occasionally happened under existing law, when a man is held guilty as a principal in the original theft because he helped plan it and also of the "separate" offense of receiving because he took his share of the proceeds.[49]

By the judicious use of definitions, the terms used in section 1732(c) have been expanded so as to preclude some of the problems which ordinarily accompany their use. As used throughout the Commission's final report an accused "knowingly" engages in conduct "if, when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so."[50]

As the Commission staff noted:

The typical receiving statute speaks only of one who "knows" the property has been stolen, and in effect leaves to the jury the inference of such knowledge from such facts as the recent possession of stolen goods. The proposed draft, following the lead of the Model Penal Code on the point, would permit in the alternative the inference that the defendant believed that the goods probably were stolen. The extent of the defendant's culpability should not turn, it is felt, on the extent to which he inquired into whether the particular goods actually were the subject of the theft. If he holds himself out to receive stolen goods, and if he is essentially indifferent to whether in fact particular goods have been stolen, then the law is entitled, it is submitted, to treat him as a receiver if it can be concluded that he believed that they probably were stolen.[51]

The Commission has also expanded the definitions of "property," [52] "property of another," [53] "receiving," [54] and "stolen." [55] By the same

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[49] Model Penal Code, sec. 206.8, comment at 93–94 (Tent. Draft No. 2, 1954) cited in 2 "Working Papers of the National Commission on Reform of Federal Criminal Laws," 933–34 (1970). Under the Commission's proposals conspiracy is ordinarily an inchoate offense, sec. 1004. This coupled with the sentencing provisions of sec. 3204 has the effect of merging the conspiracy and the substantive offense rather than treating them as two separate offenses as is now the case.

[50] Sec. 302(1)(b).

[51] "Working Papers of the National Commission on Reform of Federal Criminal Laws," 934 (1970).

[52] Sec. 1741. Definitions of Theft and Related Offenses. In sec. 1731 to 1741 * * * (f) "Property" means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. "Property" also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property.

[53] (g) "property of another" means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement * * *.

[54] (h) "receiving" means acquiring possession, control or title, or lending on the security of the property.

[55] (j) "stolen" means property which has been subjected to theft or robbery or a vehicle which is received from a person who is then in violation of section 1736 [Unauthorized Use of a Vehicle].

token, the phrase "with intent to deprive the owner thereof" "includes, but is not limited to, a purpose permanently to appropriate the property to the actor's own benefit" [56] and seems to envision any intent to treat the property in a way inconsistent with the property rights of another.

Section 1739(b) of the Commission's earlier tentative draft provided:

> (*b*) *Presumption.*—It shall be presumed that the actor knows that the property has been stolen or believes that it has probably been stolen if it is shown that:
>
> (i) he is in possession or control of recently stolen property or of property stolen from two or more persons on separate occasions; or
>
> (ii) he has received stolen property in another transaction within the year preceding the transaction charged; or
>
> (iii) being a dealer in property of the sort received, retained or disposed of, he acquired it for a consideration which he knew to be far below its reasonable value.[57]

This language was omitted in favor of section 1739(2)(b), "It shall be prima facie evidence that the actor knows that property has been stolen if it is shown that, being a dealer, he acquired it for a consideration which he knew to be far below its reasonable value. 'Dealer' means a person whether licensed or not, who has repeatedly engaged in transactions of the type of property involved." As tersely noted in the comment to section 1739:

> Other common fact situations—possession of recently stolen property or property stolen from two or more people on separate occasions—also imply culpable knowledge, and depending on other facts and circumstances in a given case may warrant submission of the issue of knowledge to the jury; but it is not clear that the existence of either set of facts without other evidence makes it more likely than not that the actor had knowledge that the property was stolen. Accordingly, those situations have not been included.[58]

Problems and Suggested Solutions

The problems involved in effective enforcement of Federal statutes outlawing receipt of stolen property fall into three categories (1) those resulting from jurisdictional questions, (2) those created by the restricted definitions of the words and phrases used for the substantive provisions of the statute, and (3) investigative and evidentiary difficulties involved in proving illegal receipt of stolen property. While the proposals of the National Commission on the Reform of Federal Criminal Law seem designed to exhaust the limited Federal jurisdiction over receipt of stolen property,[59] the fact remains that the Federal Government does not have plenary criminal jurisdiction and any proposed Federal criminal statute dealing with receipt of stolen property must face jurisdictional challenges. The Commission's proposals would appear to eliminate most of the traditional problems created by the limitations in definition of such words as "stolen" and "receiving." Investigative and evidentiary problems seem far more burdensome. The use of permissible inferences has relieved some of the pressure

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[56] 2 "Working Papers of the National Commission on Reform of Federal Criminal Laws," 920 (1970).

[57] Cited in 2 "Working Papers of the National Commission on Reform of Federal Criminal Laws," 935 note ** (1970).

[58] "Final Report of the National Commission on Reform of Federal Criminal Laws," sec. 1739, comment at 215 (1970).

[59] See sec. 1740.

created by the difficulty of proving guilty knowledge. However, the due process requirement that presumptions be rationally related to human experience to the extent that upon proof of fact A one would likely assume the truth of fact B seriously restricts the development of either statutory or judicial presumptions designed to mitigate evidentiary problems. This is especially true where one attempts to establish criminal liability of a large distributor. Isolated from the theft by two, three, or more receivers his culpable conduct may be no more than negligent at most. The commingling of legally and illegally received goods may make identification impossible. The purchase price of the goods as to him will probably not be so low as to even suggest wrongdoing. Moreover, in all likelihood the distributor will be a corporate entity. As such, knowledge of the circumstances which would suggest the illegal status of the goods may be so fragmentized as to preclude any inference of guilty knowledge in a single person, real or fictional.

Regulation under the taking power

Suggestions have been made that the flow of stolen property be stemmed and unlawful receivers be identified and prosecuted by creating a Federal system of regulation involving tax stamps such as has been used to control the flow of illegal drugs and to regulate gambling. In view of the practical and constitutional difficulties experienced in the regulation of gambling and drugs [60] it is doubtful that an effective system could be developed for the regulation of the flow of stolen property.

Civil liability

The prosepct of enacting legislation which would impose civil liability for receiving stolen property seems more encouraging. By imposing civil rather than criminal liability, the burden of proof is reduced from a standard of proof beyond a reasonable doubt. Liability could be established on the basis of negligence rather than actual knowledge. Many of the constitutional rights available to the accused in criminal cases would not be required in civil cases. However, it seems unlikely that the recovery of actual damages would provide either a sufficient deterrent to receivers or an adequate inducement for their victims. Moreover, this approach does not eliminate the investigative difficulties. While the civil rules of pretrial discovery are unquestionably more liberal than their criminal counterparts, the owner must still trace his property to the receiver—a task which will be made more difficult by the more surreptitious and potentially violent tendencies of thieves and their confederates as opposed to the ordinary tortfeasor. Similar problems have been overcome in the antitrust field, but in such cases the actual damages are likely to be much more substantial than in stolen property cases.

B. STATE STATUTES

Currently, every State has a general statute penalizing the receipt

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[60] See *Marchetti* v. *United States,* 390 U.S. 39 (1968) ; *Grasso* v. *United States,* 390 U.S. 62 (1968) ; *Leary* v. *United States,* 395 U.S. 6 (1969).

of stolen property.[61] In considering the status of State law concerning receipt of stolen property it is important to remember that receiving is a statutory offense and the first and final point of reference must always be the language of the particular statute in question.

These statutes generally prohibit receiving stolen personal property knowing it to have been stolen.

Receiving

Traditionally the receipt statutes not only outlawed "receiving" but "buying," "concealing," or "aiding in concealment." [62] A few include mere possession [63] and the recent general revisions of State criminal codes only require that the accused acquire the stolen property.[64] However, even with these developments it seems uncontradicted that the thief cannot be held accountable under the statute outlawing receipt of stolen property.[65]

Under English law one could not be convicted of receipt where the goods had been stolen outside of the realm.[66] This concept and the jurisdictional difficulties have led several legislatures to enact provisions covering those who bring stolen property into the State which has been stolen and/or received in another and those who receive within the State property stolen in another State.[67]

Conscious of the close relationship that was required under early English treatment of receivers as accessories or as those guilty of misprison or compounding of a felony, both State courts and legislatures have declared prior conviction of the thief unneccesary for the conviction of the receiver.[68]

Stolen

Obviously one cannot be guilty of receiving stolen property when the property is not stolen. This truism has created more problems then might be apparent at first blush. The traditional and statutory defini-

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[61] Ala. Code tit. 14 sec. 338; Alaska Stat. sec. 11.20.350; Ariz. Stat. Ann. sec. 13–621; Ark. Stat. Ann. secs. 41–3934, 41–3938; Cal. Pen. Code sec. 496; Colo. Rev. Stat. sec. 40–5–2; Conn. Sess. Laws, Pub. Act no. 828 sec. 128 (1969); Del. Code Ann. tit. 11 secs. 791, 792; Fla. Stat. Ann. sec. 811.16; Ga. Code Ann. sec. 26–1806; Hawaii Rev. Stat. sec. 761–1 to 761–10; Idaho Code sec. 18–1307; Ill. Ann. Stat. ch. 38 sec. 16–1; Ind. Ann. Stat. sec. 10–3030; Iowa Code Ann. sec. 712.1; Ky. Rev. Stat. Ann. sec. 433.290; Kan. Stat. Ann. sec. 21–3701; La. Rev. Stat. sec. 14:69; Me. Rev. Stat. Ann. tit. 17 sec. 3551; Md. Ann. Code art. 27 sec. 466; Mass. Sess. Laws ch. 681 (1971); Mich. Comp. Laws Ann. sec. 750.535; Minn. Stat. Ann. sec. 609.53; Miss. Code Ann. sec. 2249; Mo. Stat. Ann. sec. 560.270; Mont. Rev. Codes Ann. sec. 94–2721; Neb. Rev. Stat. sec. 28–507 to 28–510; Nev. Rev. Stat. sec. 205.275; N.H. Rev. Stat. Ann. sec. 582:10; N.J. Stat. Ann. secs. 2A:139–1 to 2A:139–4; N.M. Stat. Ann. sec. 40A–16–11; N.Y. Pen. Law secs. 165.40 to 165.65; N.C. Gen. Stat. secs. 14–71, 14–72; N.D. Cent. Code sec. 12–40–19; Ohio Rev. Code Ann. sec. 2907.30; Okla. Stat. Ann. tit. 21 sec. 1713; Ore. Rev. Stat. sec. 165.045; Pa. Stat. Ann. tit. 18 sec. 4817; R.I. Gen. Laws sec. 11–41–2; S.C. Code of Laws sec. 16–362; S.D. Comp. Laws sec. 22–37–18; Tenn. Code Ann. secs. 39–4217, 39–4218; Tex. Pen. Code art. 1430; Utah Code Ann. sec. 76–38–12; Vt. Stat. Ann. tit. 13; 2561 (cf. Vt. Proposed Crim. Code sec. 1957); Va. Code Ann. sec. 18.1–107; Wash. Rev. Code Ann. sec. 9.54.010; W. Va Code sec. 61–3–18; Wis. Stat. Ann. sec. 943.34; Wyo. Stat. sec. 6–135.

[62] *E.g.* Alaska Stat., sec. 11.20.350; Fla. Stat. Ann., sec. 811.16.

[63] *E.g.* Conn. Sess. Laws Pub. Act, no. 828, sec. 128 (1969); Ga. Code Ann., sec. 26–1806; Idaho Code, sec. 18–1307; Pa. Stat. Ann., title 18, sec. 4817.

[64] *E.g.* Colo. Rev. Stat., sec. 40–5–2; Ill. Ann. Stat., ch. 28, sec. 16–1; Ind. Ann. Stat., sec. 10–3030; Kan. Stat. Ann., sec. 21–3701. The more recent statutes also usually include the knowing possession of property wrongfully obtained from another within the definition of larceny thus avoiding the questions as to who the thief was, whether he had been convicted and where the theft took place.

[65] *People* v. *Marquez,* 237 Cal. App. 2d 627, 47 Cal. Rptr. 166 (1965); *Thomas* v. *State,* 216 So. 2d 25 (Fla. App. 1968); *Hair* v. *State,* 294 P. 2d 846 (Okla. Crim. App. 1956).

[66] *Regina* v. *Debruiel,* 11 Cox Crim. Cas 207; 2 Bishop, "Criminal Law," sec. 1142a (9th edition 1923).

[67] E.g. Cal. Pen. Code, sec. 497; Hawaii Rev. Stat., sec. 761–7; Pa. Stat. Ann., title 18, sec. 4817; Utah Code Ann. sec., 76–38–13. See also, *Thompson* v. *State,* 219 Ark. 680, 182 S.W. 2d 386 (1944).

[68] *E.g.* Va. Code Ann., sec. 18.1–107; R.I. Gen. Laws, sec. 11–41–2; Michigan Comp. Laws Ann., sec. 759,536; *Yeagain* v. *State,* 57 Okla. Crim. 136, 45 P. 2d 1113 (1935); *State* v. *Tindall,* 213 S.C. 484, 50 S.E. 2d 188 (1948).

tions of the words "stolen" and "larceny" as used in the earlier statutes do not, strictly speaking, always include burglary, acquisitions by false pretenses or embezzlement. As a result those who received property which had been taken under false pretenses in a burglary or by embezzlement were not covered by the receipt statutes.[69] Moreover, the receiver who took from a receiver was not considered within the coverage of the statutes because the goods were not considered stolen as to him since he took from one who did not steal the goods.[70] Most of the States have eliminated this problem by expanding their definitions of what constitutes stolen property for purposes of unlawful receipt.[71]

Property

Although there was originally some question as to whether statutes which spoke in terms of stolen goods covered receipt of such things as currency or securities, modern statutes have been expanded to cover all "stolen property" or "anything of value" which is stolen.[72]

Indentity of the goods stolen represents a more demanding problem. While the courts are willing to permit proof of the theft by circumstantial evidence,[73] identity of the goods may have to be established with some precision [74] and in statutes where the intent to deprive the rightful owner or the property is required the identity of the owner may have to be established.[75]

With the knowledge that the property is stolen

Both the courts and legislatures have sought to overcome the difficulty of proving the state of mind of the accused at the time he received the property. Several States have enacted receipt statutes which require either actual knowledge or proof of circumstances which indicate the accused should have known or believed the property was stolen.[76] A number of State statutes also include rebuttable presumptions of knowledge predicated upon the proof of other facts. These presumptions are based upon the type of goods received,[77] the character or the receipient [78] and/or the character of the person from whom the goods were received.[79]

Such statutory presumptions present several sensitive constitutional problems.[80] Due process requires that the State establish the guilt of

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[69] *State* v. *Bright,* 269 S.W. 2d 615 (Mo. S. Ct. 1954) ; *Lyall* v. *State,* 247 Ind. 465, 217 N.E. 2d 154 (1966) ; 2 Bishop, "Criminal Law, sec. 1137 (9th edition 1923).

[70] *State* v. *Ives,* 35 N.C. 338 (1852) ; *Foster* v. *State,* 106 Ind. 272 (1885) ; 2 Bishop, "Criminal Law," sec. 1140 (9th edition 1923).

[71] *E.g.* Hawaii Rev. Stat., sec. 761–1 ; Mich. Comp. Laws Ann., sec. 750.535 ; N.C. Gen. Stat., secs. 14–71, 14–72 ; Tenn. Code Ann., secs. 39–4217, 39–4218.

[72] *E.g.* R.I. Gen. Laws, secs. 11–41–2 ; Ohio Rev. Code Ann., sec. 2907.30 ; Wyo. Stat., sec. 6–135 ; W. Va. Code, sec. 61–3–18 ; Vt. Stat. Ann., title 13, sec. 2561.

[73] *James v. State,* 8 Ala. App. 255, 62 So. 897 (1913) ; *Bell* v. *State,* 220 Md. 75, 150 A. 2d 908 (1959).

[74] *State* v. *Bundy,* 91 Ariz. 325, 372 P. 2d 329, 99 A.L.R. 2d 808 (1962) and cases cited in annotation beginning 99 A.L.R. 2d at 813.

[75] *State* v. *Bean,* 49 Del. 247, 113 A. 2d 875 (1955) ; *contra, Williams* v. *State,* 216 Tenn. 89, 390 S.W. 2d 234 (1965) ; *State* v. *McGraw,* 140 W. Va. 547, 85 S.E. 2d 849 (1955).

[76] *E.g.* Ga. Code Ann., sec. 26–1806 ; Ill. Ann. Stat., ch. 38, sec. 16–1 ; La. Rev. Stat., sec. 14 :69 ; Okla. Stat. Ann., title 21, sec. 1713.

[77] E.g. Mont. Rev. Codes Ann., sec. 94–2721 ; N.J. Stat. Ann., sec. 2A :139–1 ; N.Y. Pen. Law., sec. 165.55.

[78] E.g. Cal. Pen. Code, sec. 496 ; Idaho Code, sec. 18–1307 ; Mich. Comp. Laws Ann., sec. 750.535 ; N.Y. Pen. Law, sec. 165.55.

[79] *E.g.* Mont. Rev. Codes Ann., sec. 94–2721 ; N.J. Stat. Ann., sec. 2A :139–1.

[80] Christie and Pye, "Presumptions and Assumptions in Criminal Law : Another View" 1970 Duke Law Journal 919 ; "Constitutionality of Rebuttable Statutory Presumptions" 55 Columbia Law Review 527 (1955) ; "Due Process, Self-Incrimination and Statutory Presumptions in the Wake of Leary and Turner" 61 Journal of Criminal Law, Criminology and Police Science 367 (1970).

the accused beyond a reasonable doubt; neither the burden of coming forward with evidence nor the burden of persuasion may be shifted to the defendant.[81] Of course, the defendant may not complain if the statutory presumption merely reenforces human experience. Thus, if upon proof of fact A a reasonable man would assume the truth of fact B, codification of that assumption is not constitutionally infirmed. The courts are divided on the validity of the statutory presumptions created to facilitate proof of guilty knowledge in receipt of stolen property cases.[82]

However, the courts have long recognized the doctrine that guilty knowledge may be inferred from unexplained possession of recently stolen property.[83] Historically, the doctrine only applied to larceny cases and as a result some courts have refused to acknowledge its applicability in receipt cases.[84] However, this is not the situation in most cases.[85] The doctrine requires exclusive possession in the accused,[86] although both joint and constructive possession are sufficient for operation of the doctrine.[87] The question of whether possession is "recent" is one to be determined by the jury considering all the circumstances of a given case.[88] While the doctrine is couched in terms of "unexplained" possession, not every explanation will serve.[89] Finally, the courts have been bothered by the weight to be given the doctrine.

It has long been customary in England to use the language of presumptions for such a situation; but the opinions (as reported) seldom made clear whether the language was intended merely to mean that the specific fact alone was sufficient evidence on which the jury *might* reach a conviction if they desire (ante, sec. 2494), or whether it meant that the specific fact alone created a presumption, that is, placed on the accused a duty of producing evidence, so that if he failed to do so (that is, to offer any "explanation") the jury must convict (ante, sec. 2490). This obscurity continued in many of the judicial rulings of the United States. But the general trend is to repudiate any rule of presumption in the strict sense. 9 Wigmore, "Evidence" sec. 2413 (1940). [Emphasis in the original.]

In discussing the application of this doctrine Professor Christie and Dean Pye noted:

One of the few almost universally recognized presumptions in the State courts is the jury instruction that, in a prosecution for the knowing possession of stolen goods, knowledge that the goods are stolen may be inferred from the unexplained possession of recently stolen goods. Typically, this so-called presumption is not the result of any legislative action but merely the result of a State supreme court's approval of a jury instruction of this effect or affirmance of a conviction in which the only evidence of knowledge was the unexplained possession of recently stolen goods. The only important issue involved here is whether a sufficient rational

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[81] Compare *Payne* v. *State,* 435 P. 2d 424 (Okla. Crim. App. 1967) with *State* v. *Kurowski,* 100 R.I. 25, 210 A. 2d 873 (1965); see also *State* v. *Bundy, supra,* note 19.

[82] Compare *Payne* v. *State,* 435 P. 2d 424 (Okla. Crim. App .1967) with *State* v. *Kurowski,* 100 R.I. 25, 210 A. 2d 873 (1965); see also *State* v. *Bundy, supra,* note 19.

[83] *Wilson* v. *United States,* 162 U.S. 613 (1896); *Rugendorf* v. *United States,* 376 U.S. 528 (1964); 1 "Wharton's Criminal Evidence," sec. 135 (1955) (197 Supp.); Lawson, "Presumptive Evidence," 599–611 (1899).

[84] *State* v. *Yow,* 227 N.C. 585, 42 S.E. 2d 661 (1947); *State* v. *Hoskins* 23 N.C. 412, 72 S.E. 2d 876 (1952).

[85] *Fields* v. *State,* 219 Ark. 373, 242 S.W. 2d 639 (1957); *People* v. *Putty,* 251 Cal. App. 2d 991, 59 Cal. Rptr. 881 (1967); *Kincer* v. *State,* 5 Md. App. 80, 245 A. 2d 411 (1968); *Mansfield* v. *State,* —— Miss. ——, 231 So. 2d 774 (1970); *Gossett* v. *State,* —— Tenn. ——, 445 S.W. 2d 585 (1970); *Jesko* v. *State,* 458 S.W. 2d 927 (Tex. Crim. App. 1970); *Parish* v. *Commonwealth,* 206 Va. 627, 145 S.E. 2d 192 (1965).

[86] *Little* v. *Commonwealth,* 261 S.E. 2d 620 (Ky. App. 1953).

[87] *People* v. *Candiotto,* 182 Cal. App. 2d 348, 6 Cal. Rptr. 876 (1960); *United States* v. *DeSisto,* 329 F. 2d 929 (2d Cir. 1964).

[88] *State* v. *Giordano,* 121 N.J.L. 469, 3 A. 2d 290 (1939); *Jenkins* v. *State,* 62 Wis. 49, 21 N.W. 232 (1884); *People* v. *Grushkin,* 161 Misc. 38, 291 N.Y.S. 922 (Cty. Ct. 1936).

[89] *State* v. *Dwinells,* 259 Iowa 945, 146 N.W. 2d 231 (1966); *Mansfield* v. *State, supra,* note 30; *Kessler* v. *State,* 220 Tenn. 82, 414 S.W. 2d 115 (1967).

connection exists between the unexplained possession of such stolen goods. For, whether or not the jury is instructed on the point, it is very likely to make this inference even if no specific reference is made to a presumption. Accordingly, even if all "presumptions: were struck down—position that Justice Black advocated in *Turner*—because they place the burden of coming forward on the defendant and because they deny the defendant the right to have the evidence on which he may be convicted presented to the jury, the defendant is still confronted with the same dilemma. If the jury is likely to convict him on the basis of the evidence of recent possession that has been presented by the prosecution, he will have to come forward with evidence, regardless of his constitutional right to remain silent. The situation is not like that in a narcotics prosecution where the jury is told, from unexplained possession it may infer that the narcotics were distributed in a package not bearing tax stamps or were illegally imported—something that would not ordinarily occur to the jury. Christie and Pye, supra, note 25, at 925–26.

Nevertheless, the courts have overturned convictions where the trial judge's instructions to the jury failed to make perfectly clear that the presumption or inference created by the doctrine of unexplained possession of recently stolen property was one which the jury *might* make rather than one it was *required* to make.[90] Even under these circumstances, some courts have refused to uphold such an instruction.[91]

Where the receipt statute permits conviction not only for knowledge but under circumstances where the defendant should have known or believed the property was stolen, the courts have upheld convictions in cases where the defendant knew of circumstances which would have put a reasonable man with the defendant's expertise on notice to inquire into the status of the goods.[92]

With intent to deprive the true owner

A few States require receipt of stolen property to hold with the intent to deprive the true owner of the benefit of the property.[93] However, in the absence of specific language no such intent need be established.[94]

Receivers from receivers

The preceding discussion suggests why establishing the criminal liability of those who receive property which has passed through the hands of several others since being stolen is a different subject. While a number of the semantical problems have been eliminated by recent revisions of the State criminal codes,[95] a great many difficulties still exist. Some years ago Professor Hall summarized some of the problems which remain unsolved:

> Despite substantial progress in adapting rules of evidence to conform to sound policy regarding the social facts of criminal receiving * * * the conviction of these offenders continues to be exceptionally difficult. The reasons may be readily surmised.
>
> First, before recent possession may raise the so-called presumption against the defendant, "the possession must be *unexplained* by any innocent origin * * *" In the case of such shrewd offenders as those found among professional receivers, plausible explanations are always forthcoming * * *

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[90] *State* v. *Rowe,* 57 N.J. 293, 271 A. 2d 897 (1970); *State* v. *Larkin,* 229 N.C. 126, 47 S.E. 2d 697 (1948); *Miller* v. *State,* 481 P. 2d 590 (Okla. Crim, App. 1969).

[91] *Commonwealth* v. *Owens,* 441 Pa. 318, 271 A. 2d 230 (1970).

[92] *Seymour* v. *State,* 246 So. 2d 155 (Fla. App. 1971); *Kincer* v. *State,* supra, note 30; *State* v. *Rowe,* supra. note 35; *Kessler* v. *State,* supra, note 34.

[93] E.g. N.D. Cent. Code, sec. 12–40–19; Tenn. Code Ann., secs. 39–4217, 39–4218.

[94] *State* v. *Smith,* 88 Iowa 1, 55 N.W. 16 (1893); Perkins, "Criminal Law," 280 (1957).

[95] See, McClellan, "Codification, Reform and Revision: The Challenge of the Modern Federal Criminal Code: 1971" Duke Law Journal 663, appendix.

The so-called presumption of guilt, arising from proof of the possession of stolen goods shortly after the commission of the theft, was undoubtedly a helpful rule several centuries ago. The society was simple; concealment and disposal of stolen property was difficult. But it may be questioned whether the rule remains very helpful at the present time. Certain types of property like jewelry and securities can be easily concealed for an indefinite period of time. Compact stolen goods can be transferred many times, which increases the interval between the theft and the acquisition of the property by more remote receivers * * *

The peculiar difficulty in the prosecution of receiving cases is of two kinds:

First, it is absolutely necessary to prove the identity of the goods received * * * In many cases an owner is well able to state that the goods viewed are goods manufactured or at one time owned by him, but very often he is not able to state beyond a reasonable doubt that the goods were stolen from him * * *

Not only must the stolen goods found in the receiver's possession be identified, but other essential elements of the original theft must be proved * * *. Hall "Theft, Law and Society," 189–93 (1952). [Emphasis in the original].

Professor Hall also suggests that prosecution would be a great deal more effective but for the existence of the constitutional rights placed at the disposal of a criminally accused, id. at 193–94. Each of the problems mentioned is intensified as the number of receivers increases and their connection with legitimate business becomes more prominent.

The marketing concept

If there is one central theme that continually runs through this report and all other discussions of fencing, it is the analogy of fencing operations to the operations of legitimate business. Terms used regarding illegal distribution of stolen goods are business and marketing terms: buying, selling, storing, transporting.

This committee staff is in agreement with Roselius and Benton's assumption that property theft and criminal redistribution are operated on the same basis as a legitimate business.[96] And thus the criminal distribution of stolen goods inherently contains legitimate business and marketing problems. But, the fence has the additional handicap of having to perform most of his marketing functions under cover, thereby multiplying the normal marketing problems. It follows logically that a valid approach to combating fencing operations would be to determine his most vulnerable marketing functions and trying to obstruct them. The hopeful result would be to make the distribution of stolen goods so expensive, time consuming, or risky that the incentive to deal with stolen goods would not be profitable. If the price of stolen goods were not below the marketplace cost there would be no inducement for "legitimate" buyers to deal with them.

Additionally, if distribution becomes as risky as theft, the chance of a profit to the thief would decrease. The thief's ratio of risk to profit would shift unfavorably, with the risk remaining the same and the chance of profit subsiding, thereby reducing the thief's risk/profit margin.

In summary, by obstructing the flow of stolen goods (1) the selling price is raised and the incentive for buying is lessened, and (2) the thief's risk/profit margin is unfavorably shifted.

Ted Roselius and Doug Benton of the Colorado State University detail their marketing theory, which most of the above stems from, in their fine report previously referred to.

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[96] Supra 2, p. 7.

VII. Findings and Conclusions

The figures on page 6 of this report, although far from complete, add up to a total major cost of ordinary crimes against business of $16 billion per annum. The increase in crimes against property, according to the Federal Bureau of Investigation, in the categories of robbery, burglary, and larceny increased 182 percent between 1960 and 1970.[97] It is believed that the bulk of this multibillion dollar loss has the greatest impact on small business, particularly those in the manufacturing and retail sector.

We have attempted to show by this report that the middle-man fence is the basic supportive element of this enormous level of crimes against property. Until the middleman fence is removed from his activities, there is little evidence to indicate that property crime will decrease. Your staff feels that it is imperative that a thorough examination be given to the problem of the illegal distribution of stolen goods. As pointed out hereinabove, little study has been given to this problem; law enforcement activities have been centered on the thief. As long as the fence remains, he will always find thieves to do his "dirty work." As long as he remains untouched, there can be no effective solutions to thwarting this massive national problem affecting small business.

VIII. Recommendations

1. Your staff recommends that the Select Committee on Small Business begin public hearings into illegal distribution of stolen goods through the criminal fence systems. We suggest that law enforcement officials and other experts in this field as well as illegal practitioners be called to testify in order that light might be shed on this mystery area of criminal activity.

2. Legislation such as that proposed by the chairman in Senate bill S. 2426 and amendment 994 to S. 2994, are significant measures which should have the effect of adding to the risk of the fence and make the market for stolen goods much less stable than is now the situation.[98]

3. Your staff recommends that the committee encourage the Department of Justice, especially the Law Enforcement Assistance Administration, to undertake appropriate studies to assist in formulating solutions to this most serious problem.

If a start can be made in applying the same degree of effort in combating the illegal distribution of stolen goods as there is in fighting thievery, a major step toward reducing property crime in this country will have been taken. It will enforce the belief that without profit, crime will be reduced to an absolute minimum.

ARTICLES

New York Times, "Shift In Crime Patterns Adds To 'Fences' Here," by Eric Pace, October 21, 1971.

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[97] "The Economic Impact of Crimes Against Business," preliminary staff report, Bureau of Domestic Commerce, U.S. Department of Commerce, February 1972, p. ii.

[98] Both of these measures have been incorporated into S. 16 "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" which passed the Senate Sept. 5, 1972. This act was subsequently made an amendment to H.R. 8389 on Sept. 18, 1972. (See app. II.)

Washington Star, "Theft: The Hidden Tax," by Robert Dietsch, July 12–16, 1971.
Washington Post, "The Heroin Economy: Millions a Day," by Ronald Kesler, May 12, 1970.
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[99] Prepared for the use of the staff of the Select Committee on Small Business, U.S. Senate.

APPENDIXES

Appendix I

"No Questions Asked": A Consideration of the History of Criminal Receiving

(By Duncan Chappell* and Marilyn Walsh**)

A paper presented at a conference on "Present Day Implications of the History of Violence and Other Crime" held at the State University College at Brockport, N.Y., on February 19, 1972.

Not to be quoted or used in published references without the permission of the authors.

"Lost on Friday evening 19th March last, out of a Compting House in Derham Court in Great Trinity Lane, near Bread Street, a Wast Book and a Day Book; they are of no use to anyone but the Owner, being posted into a ledger to the day they were lost. Whoever will bring them to Mr. Jonathan Wild over-against Cripplegate-Church, shall have a guinea reward and *no Questions asked.*" (Daily Courant, 26 May 1714) [1]

The above, Gerald Howson [2] tells us, was the first of many hundreds of advertisements which Jonathan Wild was to place in London's newspapers to facilitate the safe return of stolen and lost property. Of particular interest in the notice is its final phrase, "no questions asked." From the start, this was a protective device used by Wild to allay any suspicions that he could possibly be any more than a disinterested third party, performing a public service. It was especially important to avoid creating the impression that he might have had some doing in the theft and that the advertisement was only compounding a felony.

As time went on, however, and Wild had extended his influence and virtual control over most of London's underworld, the phrase became more and more absurd. It became painfully obvious that Wild could have asked no question for which he did not already have the answer. For, if he had not actually commissioned a theft himself, his control over thievery was such as allowed him to be immediately apprised of the particulars of anything which did occur, often before the owner himself was aware of it.

Going beyond Wild, the phrase "no questions asked" has special significance for us. It is, after all, a most apt historical description of the state of affairs surrounding the activity of criminal receiving. Wild at the time of his demise had acquired a notoriety equalled or excelled by few criminals to the present, and yet, both his rise to power and the eventual disclosures about his most incredible empire, occasioned few questions. His ancestors today enjoy a similar neglect. Cynically one might suggest that this is because of the service the criminal receiver performs for his customers and that, just as the dispossessed owners of property who came to Wild in 18th century London were more interested in the return of their goods than the intricacies of the theft-return process, so the 20th century customer of a fence, happy for a bargain, has no questions to ask regarding the origin of his purchases.

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[1] Howson, Gerald, "Thief-Taker General," "The Rise and Fall of Jonathan Wild," (1970); Hutchinson and Co.: London, p. 66.

[2] The narrative material throughout is taken from Howson, ibid.; unless otherwise indicated.

It is more likely, however, that the historical neglect of the criminal receiver has led to a most conservative and shortsighted view of his actual and potential role in the area of property crime and to an undeserved relegation of his activities to a category of insignificance about which conventional wisdom tells us, "no questions need to be asked." And that is why Jonathan Wild is a good place to begin in looking at the history of criminal receiving. He does in effect three things for us. First, he provides a remarkable example of the heights to which a receiver can ascend in both power and scope of operation. Second, his exploits prove to be a valuable perspective from which to begin to review the laws relating to criminal receiving. And finally, he serves to point up some of the general dynamics of criminal receiving which we can use to ask questions about his counterparts today.

It is best to begin by describing briefly exactly what Jonathan Wild was up to in 18th century London, for, whether it is because he was at base a receiver or because he was just too notorious to romanticize, his name is today far from a household word. Jonathan Wild, a bucklemaker by trade, first came to official attention as a debtor, for which he was committed to the Wood Street Compter. Unlike many debtors of his time, he managed not only to survive but also to endear himself to enough officials to remove himself to the more comfortable part of the prison and become a trusty.

In 1712, therefore, when an act for the relief of insolvent debtors was passed, Wild was one of the first to be granted release and pardon. At this point it is said that a woman introduced him to crime, or at least to the London "street scene," as a way of life. More likely is that the corruption of officials such as jailees and magistrates which he observed while in the compter had convinced him that crime was a most lucrative field in which to make one's way in the world.

Wild began, in fact, by working in close association with the somewhat notorious under city-marshall Charles Hitchen who introduced Jonathan to the specific enterprises of "recovering" property and extorting allegiance from thieves, as well as the fine art of bribery. Hitchen's tactics were, however, something less than subtle; and whether it was because Wild found these too crude or because he felt he had learned enough from the city-marshal, he struck out on his own in 1714 with the advertisement quoted above. In 9 short years, Jonathan had built from a modest lost property business an organization which exerted almost total control over London's underworld. From recovering "lost" property, Wild first branched out into the enterprise of thief-taking (i.e., locating, "arresting," and actively pursuing the conviction of thieves).

This activity evinced the spirit of public service by which Wild chose to be known and served to further allay any suspicions that his lost property office might be founded on dealings of a distinctly unsavory nature. It had the additional advantage of being extremely lucrative. When he began, reward for bringing a thief to justice was £40 being changed to £140 in 1721 (on the basis of a suggestion Wild himself made to the Privy Council in 1720.) [3] The combination of thief-taking and recovering property, then, made him not only especially knowledgeable but also financially secure. His interests began to spread. He bought a sloop and kept busy a smuggling trade between London and the Continent; he made arrangements with the agent who contracted the ships used to transport criminals to North America such that he was immediately notified of those who returned prematurely and could commit them to Newgate (at £40 per head) for the reward; he employed specialists to instruct bands of his pickpockets and thieves in the fine art of "mixing well" in high places so that they could be discharged to the same in pursuit of valuable booty.

Jonathan began also to upgrade his personal life style; moving to Old Bailey and purchasing a private coach and team. At the time of his death, a conservative estimate of his fortune could be put at over $1½ million [4] and there was no question that little or nothing happened in and around the metropolis that Jonathan didn't know about, have some interest in, or first approve. Even more significant, there seemed to be very little indeed that could happen without his approval and manage to escape his wrath as well.

Because Jonathan Wild was such an extraordinary criminal, it is easy to lose sight of the fact that first, he was at base a receiver and second, that his whole

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[3] Ibid., p. 125.
[4] Ibid., p. 281.

organization was geared to facilitate that primary enterprise. Thus, thief-taking and bribery were his means of exercising control over the underworld which did his bidding. Smuggling provided him with outlets for "lost" property which he could not safely dispose of in England. Similarly his activities with regard to transportees gave him a source of operatives to carry out theft as well as a pool of patsies to whom he could ascribe crimes committed by his more favored "associates." His elaborate training of thieves allowed him to exert quality control over his employees as well as providing him with the opportunity of endearing himself to "the quality" by "recovering" their property.

But if we, possessing an historical perspective, can be deceived into thinking that Wild was something more than a very clever fence, his contemporaries were overwhelmed by that impression. Wild was toppled because he was Wild, "a perfectly new scene" [5] in Defoe's words. And when all the indignation surrounding his death had died down, there was little doubt that it was the man and not the machinations which were objected to. Wild's life, as we shall see, "taught no lessons, brought no reforms, and alleviated no suffering." [6]

Receiving and the law: The patching of gaps

For many centuries the English common law almost totally ignored the receiver of stolen goods.[7] The focus of the law was upon the receiver of men, not goods.[8] To give aid and assistance to a fleeing felon made a man guilty as an accessory after the fact to that felon's crime. But mere receiving of stolen goods with knowledge did not make the receiver an accessory after the fact in any case.[9]

Perhaps this attitude of the common law can be explained, in part, by the relative unimportance of dealings in stolen property in the early stages of the development of the law of crimes. Until the 17th century the amount of moveable property available for theft was probably limited and opportunities to dispose of this property, other than by personal consumption, rather restricted.[10] Lacking a professional police force, the attention of the community, and the law, was therefore primarily directed towards apprehending offenders rather than tracing and recovering stolen property. The victims of property crimes were left to rely upon their own ingenuity, holstered by several shaky legal remedies, to secure the return of their plundered goods and chattels.[11]

It was only in the late 17th century that the legislature moved for the first time to combat the problem of the receiver of stolen goods. In 1691, by 3 and 4 William and Mary C. 9, S. IV, the receiver was made subject to prosecution as an accessory after the fact. The preamble to this statute recited that many "thieves and robbers are much encouraged to commit such offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods." However, the legislative desire to prescribe this trade and business was largely thwarted by the rule that no prosecution could be brought against the receiver until the principal felon, the thief, had been brought to justice.[12] Despite a subsequent statutory modification of this rule in the early 1700's permitting the receiver to be punished as for a misdemeanor if the principal felon could not be taken, the tradition remained throughout the 18th and early 19th century that the receiver was an accessory rather than a principal to the crime.[13]

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[5] "The Works of Daniel Defoe," vol. XVI, "The King of Pirates," including "The Life and Actions of Jonathan Wild," published by The Jenson Society, New York, (1901), p. 234.

[6] Howson, ibid., p. 283.

[7] The only criminal actions which seem to have been available against the receiver prior to 1691 were for misprison or compounding of a felony. Clark and Marshall "A Treatise on the Law of Crimes" (edition 1967) ; Callaghan & Co. : Mundelein, p. 968.

[8] Hall, Jerome, "Theft Law and Society" (2d edition 1952), Bobbs Merrill : Indianapolis, p. 53. Hall's treatise represents the most comprehensive review of the historical development of the criminal law relating to receiving. See in particular pp. 52–62 ; 70–76 ; 173–189.

[9] Hall, op. cit., p. 53.

[10] A description of the remarkable growth in trade and commerce in England during the 17th and 18th centuries, and the impact of this growth upon the development of the entire law of theft, will be found in Hall, pp. 77–79.

[11] The nature of these legal remedies is discussed in Holdsworth, Sir William "A History of English Law" (3d edition 1922) London : vol. 3, pp. 322–63.

[12] This proviso flowed from the grafting of this new remedy against the receiver upon the existing law relating to accessories. Hall, ibid. ; pp. 54–55.

[13] The statutory modification was achieved by 1 Anne C. 9 (1702) and 5 Anne C. 31 (1706).

Jonathan Wild's career clearly demonstrated the fallacy surrounding this tradition of the common law. Wild showed that it was the receiver who dominated the thieves, supplying services without which most thieves would have found a life in crime impracticable. While the claim that "if there were no fences there would be no professional thieves" may be somewhat exaggerated, there seems little doubt that the criminal receiver, from Wild's day to the present, has represented the lynch pin in the stolen property market. But to remove or damage this pin is no easy task. As Jerome Hall has emphasized, a case study of Wild is profitable if for no other reason than that it dispels the illusions of "those well intentioned souls who imagine that by any simple device such as passing a new law or restoring capital punishment on a wholesale scale antisocial behavior can be made to disappear." [14]

The new laws aimed at criminal receivers passed by the English Parliament prior to the commencement of Wild's operations, did have the effect of making dealing in stolen goods a much more hazardous occupation than it had been in the past. Undaunted, Wild adapted his operations to the situation at hand, becoming a semiofficial agent for the "recovery" of stolen goods. Wild's efficiency and success in this capacity led ultimately to the passage of 4 Geo. I, C. II (1717).[15]

The preamble to this statute recited that "there are several persons who have secret acquaintance with felons, and who make it their business to help persons to their stolen goods, and by that means gain money for them, which is divided between them and the felons, whereby they greatly encourage such offenders."

The statute then went on to provide that "wherever any person taketh money or reward, directly or indirectly, under pretence or upon account of helping any person or persons to any stolen goods or chattels, every such person so taking money or reward, as aforesaid (unless such person doth apprehend, or caused to be apprehended, such felon to be brought to his trial for the same, and give evidence against him) shall be guilty of felony, and suffer the pains and penalties of felony, according to the nature of the felony committed in stealing such goods, and in such and the same manner as if such offender had himself stolen such goods and chattels, in the manner, and with such circumstances as the same were stolen."

It was upon an indictment brought under this statute that Jonathan Wild was eventually tried, convicted and executed in 1725. But with his departure from the London scene the trade in stolen property did not end. Although no single successor to Wild emerged who could remotely equal his organizing genius, receivers of stolen goods continued to conduct a brisk business. The "no questions asked" system of recovery of stolen property also continued after Wild's death for, in the absence of any effective police force, victims of property crime really had no other method of securing the return of their possessions.

Having eliminated Wild by means of a specific statute aimed at his peculiar business operations, the legislature waited over a century before giving formal recognition to the principal part played by the receiver in property crimes. In 1827, by 7 and 8 Geo. IV. C. 29, S. 54 a person receiving stolen property knowing the same to be stolen, was deemed guilty of felony and could be indicted and convicted either as an accessory after the fact or for a substantive felony.

In the period between 1725 and 1827 numbers of informed observers testified to the prevalence of the trade in stolen property, and commented on the apparent immunity to prosecution of receivers. Spasmodic attempts to regulate dealers in second-hand goods, like pawnbrokers, failed to stop this trade. In 1770, for instance, Sir John Fielding, one of the pioneers of the modern police force, gave evidence before an English parliamentary committee that one of the principal causes of the increase in burglaries and robberies in London was that felons now had new and safe outlets through which to dispose of their stolen property.[16]

Formerly, said Fielding, burglars and housebreakers had carried their stolen goods to pawnbrokers. However, by the False Pretences Act of 1757, pawnbrokers were required to keep a record of all goods accepted for pawn, and the name

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[14] Hall, ibid. ; pp. 70–71.

[15] For a description of the operation of this statute see Radzinowicz, L., "A History of English Criminal Law" (1948) ; Steven & Sons : London, vol. 1, pp. 682–684.

[16] The minutes of evidence and proceedings of this Committee are reported in the "Journal of the House of Commons" (1768–70), vol. 32, pp. 784, 798, 874, 878–883.

and address of the owner. If the person seeking to pawn the goods failed to give a satisfactory account of how they came to be in his possession, or if the pawnbroker suspected for any other reason that they were stolen, he was authorized to detain him. It would seem that this statute, together with notification of stolen articles to pawnbrokers and others dealing with silver and jewelry, had been successful in closing one means of disposal of stolen goods. But other means of disposal sprang up, one of these being the Jews to whom burglars and housebreakers now resorted. The Jews were said by Fielding immediately to melt plate brought to them and destroy other articles which might be used as evidence against them.[17]

The Committee of 1770 made a number of recommendations for more effectual methods of preventing burglaries and robberies, including a suggestion that receivers of stolen goods, especially those taken by burglary or highway robbery, should be made principals, reserving a power of mitigation to the judge. This particular recommendation was accepted by Parliament and became law as the Receiving Stolen Goods Act, 1770.[18] This act provided that any person who bought or received jewels, gold, or silver knowing it to be stolen, where such stealing had been effected by burglary or highway robbery, could be tried before or after the principal felon had been convicted. The penalty for this offense was transportation for 14 years.[19]

The act of 1770 was indicative of the piecemeal approach adopted throughout this century by Parliament toward combating the problem of receiving. The legislature, when moved to act against this category of offender, preferred regulations aimed at receivers of particular types of goods rather than more sweeping measures designed to encompass all receivers of stolen property.[20]

The limited legislative action had little apparent impact on the trade in stolen goods. Receivers continued to flourish in a society which lacked any effective means of enforcing the criminal laws in general. A draconian code of penalties, which prescribed the death penalty for a host of crimes failed to balance the absence of efficient enforcement machinery. Thieves remained willing to supply stolen goods to receivers even though most faced the possibility of capital punishment if caught and convicted. For receivers, the maximum penalty upon conviction was transportation, a fact which suggests that the legislature still failed to appreciate the importance of the receiver in the field of property crime. As late as 1783, a proposal that transportation be replaced by capital punishment for receivers was rejected by Parliament.[21]

One man who did understand the function and importance of the receiver at this period was Patrick Colquhoun. Colquhoun, a London magistrate, was keenly interested in evolving an efficient system of detection and control of crime. In his book, "A Treatise on the Police of the Metropolis (1795)," he devoted considerable attention to the subject of receiving.[22] Colquhoun's description of the pattern of thefts of goods from the London docks bears a remarkable resemblance to the contemporary reports of cargo thefts from airports and docks in this country.[23]

He estimated that nine-tenths of all crimes in the Port of London were committed not by professionals but by persons whose presence in the area was essential or at least fully justified (watchmen, sailors, revenue officers, and so forth). Especially important, in Colquhoun's view, was the culpability of revenue officers who were long in service and knew both masters of ships and receivers of stolen goods. Money for bribing reluctant masters and revenue officers was supplied by receivers. In cooperation with these people, receivers were able to arrange for substantial quantities of goods to be stolen and transported from the docks in watermen's barges.

The plundering of goods from the docks was no new problem even in Colquhoun's time. In 1749, for instance, the West India Co. invited public subscriptions to

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[17] Op. cit., p. 882.
[18] 10 Geo. III, C.48.
[19] See also Radzinowicz, ibid., vol. 3, pp. 71–73.
[20] Thus 29 Geo. II, C.30 (1756) dealt with receivers of lead, iron, copper and brass; 21 Geo. III, C.69 (1781) with receivers of stolen pewter.
[21] Radzinowicz, ibid., vol. 3, p. 71.
[22] 4th ed. (1797) ch. 8. For a summary of Colquhoun's views on the subject of receiving see Radzinowicz, ibid., vol. 3, pp. 507–533.
[23] These reports are well documented in the hearings before the Committee on Commerce of the U.S. Senate, Sept. 29 and 30, 1970. See "Cargo Security Legislation" Ser. No. 91–99 (1971); U.S. Government Printing Office, Washington.

fund a force of constabulary to guard against thefts from the docks.[24] Rewards were also offered by this and other companies for information leading to the conviction of receivers of goods stolen from the port area. But spasmodic action of this type was not sufficient to prevent wholesale theft continuing from ships and wharves.

Colquhoun concluded in his treaties that what was needed in place of this fragmented attack upon receivers was a law based on the principle that receiving stolen property was an original offense, subject to the same punishment as the principal felony. Colquhoun also advocated an extension of the reward system as an incentive to apprehension of receivers, and further regulation of dealers in second-hand goods. These dealers, who primarily kept old iron and metal shops, were thought to be the principal receivers of stolen goods in the metropolis.

Colquhoun's recommendations were not acted upon although his writings on police and allied topics were undoubtedly influential in securing later reforms of the English criminal law and criminal justice system. It was not until Sir Robert Peel came to office as Home Secretary in 1822 that the proposals of reformers like Colquhoun and Fielding began to be implemented.[25] The major consolidation and digestion of the criminal law effected by Peel in 1827 included measures which substantially improved the law relating to receivers of stolen property. Seven earlier statutes dealing with receivers were consolidated into four sections of 7 and 8 Geo. IV, c. 29.[26] As mentioned earlier, this statute for the first time made criminal receiving an original felony. Henceforth the receiver could be tried as an accessory after the fact, or as a substantive felon. Where the offense was a misdemeanor he could be prosecuted as a misdemeanant, and where the offense was a summary, he could be summarily convicted. A receiver could also be tried either at the same location as the principal offender, or where he had the property, or where the receiving took place.

Subject to a number of later consolidations of this branch of the criminal law culminating in the English Larceny Act of 1916, the reform of the law relating to receiving achieved in 1827 represented the last major statutory action in this area until the English Theft Act of 1968. But so far as the deveolpment of the law of receiving in this country is concerned, the English history described so far represents the broad substantive position of American legislation on this subject.[27] Here, as in England, the history of receiving since the early 19th century has mainly centered around a struggle by the courts "to compensate for an inadequate substantive law . . . by adapting rules of procedure, especially evidence, to overcome the unusual obstacles in the way of convicting these astute offenders." [28]

The nature of this struggle has been ably documented by Jerome Hall.[29] Suffice it to say here that despite such marked procedural improvements as adopting the "recent possession" rule to criminal receiving and largely eliminating the need for corroboration of the thief's testimony against the receiver, the conviction of these offenders remains extremely difficult. This difficulty has existed throughout the history of receiving. Wild, as we saw earlier, was only convicted after the passage of specific legislation directed at his activities. His spiritual successors have in Hall's words "been shrewd enough to devise methods of operation which escaped public notice. They dress their illegal traffic in all the paraphernalia of lawful enterprise; they conduct their businesses secretly; they are equipped both mentally and financially to take full advantage of the weaknesses in the administrative machine, should prosecution be initiated." [30]

We have, it seems, come one incredibly full circle. For, after more than two centuries of legal development and of vast socioeconomic and political changes, Hall's comment above on the 20th century American fence could just as easily be a description of Jonathan Wild in early 1725. Unlike his 20th century counterparts, however, Wild was good enough to leave a full and dramatic account of

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[24] Noted in Radzinowicz, ibid., vol. 2, pp. 354–355.

[25] Peels' contribution to the reform of the criminal law and criminal justice system is reviewed in Radzinowicz, ibid., vol. 1, ch. 18, p. 567 et seq.

[26] Sections 54–57 of this act which dealt with larceny and allied offenses.

[27] For a general description of the development of the American law relating to receiving see Hall, ibid., pp. 173–189; See also Clark and Marshall, ibid., pp. 968–978; Chamberlin. J.P. "Anti-Fence Legislation" (1928) 14 A.B.A.J. 517; Association of Grand Jurors of New York County "Criminal Receivers in the United States" (1928) Putnam: New York.

[28] Hall, ibid., p. 173.

[29] Op. cit., pp. 173–189.

[30] Op. cit., p. 195.

himself. And so we return to Wild to find some answers long overdue, to find not only the dilemmas but also the dynamics of criminal receiving, to find that complex interplay of factors that earned him fame and his successors obscurity.

Three elements present themselves as the cornerstones of Wild's activities. For our purposes we have chosen to call them the organization equation, the power equation, and the property equation.

The organization equation

Wild brought to his disparate collection of public and private activities an astonishing organizational sophistication that speaks more of the 20th century than of the 18th. His was not an age known for subtle imagery nor for a precision in the functioning of organizational structures. And yet Wild's activities had both of these characteristics. His understanding of the utility and exploitative possibilities of public relations is quite remarkable. The media choices of his time were of course limited but by carefully timed personal appearances and strategically placed advertisements and news releases, Wild created for press and populace an unassailable image of himself. Wild was careful always to keep his name before the public and in the best possible light. Thus, if by chance any shady dealing should be ascribed to him, his prearranged image would be sure to belie it.

At first this may appear neither subtle nor particularly relevant to the contemporary scene, since fencing is acknowledged to be a low visibility activity anonymously conducted. But to maintain this view is to be hopelessly tied to the subtleties of our own age where image building is a well-developed process and where legitimacy is a presumption conferred on any activity which conforms to its very superficial trappings. Thus the 20th century need only "dress [his] illegal traffic in all the paraphernalia of lawful enterprise" (the given image) to be presumed legitimate. Wild, on the other hand, had first to establish a legitimacy. Until then, no enterprise in which he engaged would be presumed lawful or above suspicion. Thus, image creation is as important an element of the program of the modern fence as it was for Wild, except that our contemporary presumptions and our wholesale acceptance of the Madison Avenue ethos have made the task today much easier and far less perceptible.

But beyond his understanding of image creation, Wild was a master in the art of precisely fitting together a complex of activities into an integrated whole consistent with that image. He was probably the first to realize that crime is a business and as such, must be organized and planned for. Thus everything he undertook, contributed to the other enterprises in which he was already engaged. We saw earlier, e.g., the circular relationship existing between the lost property office and thief-taking activities.

Wild called his activities a "corporation," delegating authority where the task seemed perfunctory or risky, but never failing to jump into the fray when necessary. In this way he allayed the fears of his subordinates that he might not stand behind them while he retained them to use as patsies if and when trouble came. His voluminous records and account books attest, however, that he was as fully aware of the extra effort as of the advantages which a full-blown organization brings with it.

We must assume that Wild's modern day counterparts have at least as much organizational sophistication as he exhibited if not a great deal more. They have, after all, many more relevant models from which to fashion their enterprises. The organizational structure, with responsibilities and accountability diffused through hierarchies of company officers, only an infant in Wild's time, is an aged and commonplace reality today. Most interesting, however, is that contemporary fence is part of a relatively new field [marketing] which, though still an infant in our time, has been the subject of considerable research and analysis in the past 20 years. With as much aplomb as Wild had for his time, then, his successors in our time should be taking full advantage of the developments around them and modifying their operations to meet new situations and to anticipate changes in their environment. Then, too, the corporate models of today are more suited to the receiving activity than was Wild's organization for they have developed significantly the delegation of responsibility and the divorce of power from accountability. The modern fence, therefore, does not need to place himself so directly in the fray as did Wild. He can, from a location quite removed in both distance and aura, direct an organization far more complex than Wild's.

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Jonathan did not have the 20th century's communication marvels at his disposal and although his sophistication was for his time quite unique, analogous sophistication is more likely to be the norm today.

The power equation

It was not only Wild's organizational genius which contributed to his success, however. He was even more expert in his assessment and manipulation of the power structure of his society. To begin with, London had in his time no organized police force and those bodies of constituted authority which did exist (apart from being highly corruptible) were fragmented and often counter-productive. Wild probably became acutely aware of this situation from his association with Hitchen. But being a man of greater ingenuity than the under city-marshall, Jonathan was able to use it to greater advantage. First, he used the jealousy and corruption of public officials to bring selected ones into league with him. In this way some of his more questionable activities were overlooked while any official assistance he might need in his thief-taking enterprse was readily available. But Jonathan also saw the vacuum that the lack of unified law enforcement created. He determined to fill that gap himself. Through his thief-taking activities. Wild at any one time easily knew more of what was happening in London's underworld than all the law enforcement bodies in Great Britain combined.

Today's fence does, of course, face organized police forces but the fragmentation that Wild noted has not everywhere improved. The receiver's operations today are not likely to be confined neatly according to law enforcement jurisdictions, and where lack of cooperation exists, it can be manipulated and exploited as surely as was the disorganization of Wild's time. But an even subter manipulation of the "powers that be" can be gleaned from Wild, that is a control over information. Just as authorities in 18th century England had to depend on Wild for information on the theft scene, so police forces today may rely on the fence to clear stacked up burglaries. And just as it is suggested in the area of drug addiction that police effectiveness is tainted by the use and maintenance of addicts as informers, so the fence may have acquired a tacit immunity on the basis of information only he can provide. This is not likely to be as obvious a process as it was with Wild, nor even as conscious and collusive on the part of authorities, but neither is it likely to be any less important.

Wild, however, not only manipulated power; he also exerted it directly—and often brutally. He knew that the key to his complex organizational structure was control. He could not afford gross variations in the expectations he had for each component in his system. Thus, for example, the existence of gangs of thieves who were not under his control posed the possibility of thefts from which he could not "recover" the property. This in turn might damage his reputation and make him vulnerable to suspicion and attack. He set about, then, to control as much of London's underworld as possible. Against those whose compliance was not immediate he constructed charges, brought witnesses, and sought conviction and elimination. He used the devices of the established judicial system to do this. The situation became one, then, in which the whole of the machinery of justice in the metropolis was being used to the purpose of one man. Few men in history have brought such power to bear for their own personal vengence. And Jonathan accomplished this without ever holding public office and serving in no official capacity whatever.

It is easy to point to the evils of the bounty system and the severity of punishments in Wild's time as being the foundations for his control but that is to overlook the fact that control for the receiver is imperative. And just as no one turned on Wild until the end—and then not without significant prodding—so thieves today are not known to betray their fences. Why this is, cannot be determined for certain, but at least two possibilities exist. First, it may be simply that the fence's services for the thief are just too compelling and too recurrent in nature to risk their loss. In other words, a ready market for stolen goods is the thief's most urgent need. To jeopardize that market the thief would be hurting himself, exposing himself to being caught in possession. Any ancillary services which the fence provides, such as loans, setups for particular thefts, or transportation in case of trouble, then, would tend only to increase the thief's dependence and strengthen his silence. Second, there is the possibility that a subtle form of thief-taking is still very much a part of the receiver's control mechanism. He is after all in a position to know who commits thefts and when and where, and if displeased, he may use the criminal justice system as his own personal discrimi-

nary tool as Wild did in his time. And, because of the prevalence of anonymous tipsters, neither the thief nor the police may be aware that they are playing out a complex game whose shots are called from far beyond.

Thus, both the manipulation and the exercise of power are important elements for the contemporary receiver, but just how he accomplishes the control he needs may not be as easy to assess as it was in Wild's case.

The property equation

Having looked, then, at Wild's organizational and control abilities, we turn to the final factor that gave shape and direction to his affairs—the whole question of personal property, its abundance, its distribution, and its nature. At first, the allusion to Wild as the father of criminal receiving may seem peculiar since the dynamics of his activities do not fit the pattern of the "fence" as we conceive of him today. The specifics of Jonathan's program were, however, an appropriate accommodation to his time. Then, what personal property there was, still tended to be concentrated in the upper classes and to be of a distinct and highly individualized nature, (snuff boxes, watches, jewelry, et cetera). It made, therefore, much more sense to recover property for its owner than to receive and resell it as the fence does today. There were, after all, only a finite number of people whose possession of these items would not arouse suspicion or who could even afford to buy them. Fencing as we know it, therefore, was hardly practicable in Wild's society. He did see its possibilities elsewhere, however. Hence his interest in shipping. His sloop carried caches of the personal property of English gentlemen and ladies to their counterparts on the continent, bringing back goods for which there was a broader based demand at home.

Though not the most obvious, then, the property equation was perhaps the most critical factor in shaping Wild's enterprise. It is also the factor on which Wild and his successors differ the most. For, unlike Wild, today's fence does not face the situation of highly individualized property owned on a limited scale. Instead he faces an economy in which consumer goods are mass owned and mass produced with at best imperceptible differences between them, and for which there seems to be an insatiable desire. Today's fence does not have to involve himself in the complicated and risky system of recovering property. He is a marketer now, reselling what has originally been bought and sold elsewhere. Neither must he be overly concerned with traceability or recognition of property by the owner (except for unique items such as art work, et cetera), since most property items possess no individual identities.

This is not to say, however, that the fence need not concern himself with the property equation. In effect, he is probably more aware of it than any of us, since it has been a significant boost for him.

Suggestions in answer to this dilemma are of course easy to formulate though more difficult to administer. They involve systems for placing identifying marks on personal property and keeping close records of these items as well as of those which are already serialized in some way. But in this we may be no different from Wild's contemporaries who thought they could defeat him by passing a statute. In looking for easy solutions we may miss the lesson which Wild's example should have taught and which Hall tried to update over two centuries later. And that is, that to deal effectively with the fence, we must first alter our perceptions of him. We must look below the paraphernalia of lawful enterprise. We must see the imagery and sophistication in his organizational equation; the manipulation and exploitation in his power equation; and the adaptive mechanisms he brings to the property equation. The law, after all, can only proscribe and protect against that which we can describe and demonstrate for it. And until we are willing to perceive the fence as something more than a little man on Times Square with 10 watches on his sleeve, we will not have described him to the law; and neither will the law protect us from him.

It is hoped that the sophistication and cynicism of our age will allow us to understand not only Wild but his lesson as well. It is hoped that we will begin at last to ask questions relating to the fence. It is most discouraging however to note that even after Wild, after 200 years of legal revision, after the admonitions of countless commentators and pamphleteers and amidst a situation of soaring theft rates, a Presidential Crime Commission should still remark: [31]

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[31] Task Force report," Crime and Its Impact—An Assessment, President's Commission on Law Enforcement and Administration of Justice" (1967) p. 99.

"Little research has been done on fencing, despite its central role in professional crime. More information is needed about the nautre of the market for illicit goods the extent to which demand for various types of goods affects the incidence of theft. More should also be learned about the relationship of legitimate and illegitimate markets. Little is known about the pattern of distribution of stolen goods. . . . it would be desirable to have more information about the organization and operations of large scale fencing operators, to aid in the development of better methods of law enforcement."

APPENDIX II

92D CONGRESS
2D SESSION

S. 16

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 6, 1972

Referred to the Committee on the Judiciary

AN ACT

To amend title 18 of the United States Code to provide civil remedies to victims of racketeering activity and theft, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972."

SEC. 101. It is the purpose of this Act to promote the general welfare by strengthening the civil remedies available to the victim of racketeering activity and theft.

RACKETEER CIVIL REMEDIES

SEC. 102. (a) Section 1964 of title 18 of the United States Code is amended by—

(1) inserting in subsection (a) ", without regard to the amount in controversy," immediately after "jurisdiction".

(2) inserting in subsection (b) "subsection (a) of" after "under" each time it appears;

(3) striking the word "action" in subsection (b) and inserting in lieu thereof "proceedings"; and

(4) striking subsections (c) and (d) of such section and inserting in lieu thereof the following:

"(c) Any person may institute proceedings under subsection (a) of this section. In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and showing of immediate danger of irreparable loss or damage, a temporary restraining order and a preliminary injunction may be issued in any action before a final determination thereof upon its merits.

"(d) Whenever the United States is injured in its business or property by reason of any violation of section 1962 of this chapter, the Attorney General may bring a civil action in a district court of the United States, without regard to the

amount in controversy, and shall recover the actual damages sustained by it, and the cost of the action.

"(e) Any person who is injured in his business or property by reason of any violation of section 1962 of this chapter may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

"(f) The United States may upon timely application intervene in any civil action or proceeding brought under this chapter, if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if it had instituted the action or proceeding.

"(g) A final judgment or decree rendered in favor of the United States in any criminal or civil action or proceeding under this chapter shall estop the defendant in any subsequent civil proceeding as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

"(h) Except as hereinafter provided, any civil action under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever

any civil or criminal action or proceeding, other than an action under subsection (d) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of section 1962 of this chapter the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsections (c) and (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.".

(b) Section 1965 of title 18 of the United States Code is amended by—

(1) striking out in subsection (b) "action under section 1964 of" and inserting in lieu thereof "civil action or proceeding under";

(2) striking out in subsection (c) "instituted by the United States"; and

(3) inserting in subsection (d) "civil or criminal" immediately before "action".

(c) Section 1966 of title 18 of the United States Code is amended by striking "any civil action instituted under this chapter by the United States" in the first sentence and inserting in lieu thereof "any civil action or proceeding under this chapter in which the United States is a party".

(d) Section 1967 of title 18 of the United States Code

is amended by striking "instituted by the United States", and inserting in lieu thereof "or proceeding".

(e) Section 1968 of title 18 of the United States Code is amended by—

(1) striking out "prior to the institution of a civil or criminal proceeding" in the first sentence of subsection (a) and inserting in lieu thereof "before he institutes or intervenes in a civil or criminal action or proceeding";

(2) striking out "case" the first time it appears and inserting in lieu thereof "civil or criminal action" in paragraph (4) of subsection (f) and striking out "case" each time it appears thereafter and inserting in lieu thereof "action";

(3) striking out "case" each time it appears in paragraph (5) of subsection (f) and inserting in lieu thereof "action"; and

(4) striking out "case" and inserting in lieu thereof "action" in paragraph (6) of subsection (f).

THEFT CIVIL REMEDIES

SEC. 103. (a) Section 659 of title 18 of the United States is amended to read as follows:

"§ 659. Interstate or foreign shipments by carrier; State prosecutions; civil remedies for victims of theft

"(a) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud

or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property which is moving as, or which is a part of, or which constitute an interstate or foreign shipment from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform, or depot, or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal, or air navigation facility, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained.

"(b) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property, which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce, or to break into, embezzle, steal, unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any of the contents of such baggage, goods, chattels, or other property, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing or having reason to know that it

has been embezzled or stolen or otherwise unlawfully taken, carried away, concealed, or obtained.

"(c) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce, or from any passenger thereon, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing or having reason to know that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained.

"(d) Whoever violates any provision of subsection (a), (b), or (c) of this section shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods, chattels, or other property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(e) The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to prevent and restrain violations of this section by issuing appropriate orders, including, but not limited to: ordering

any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

"(f) The Attorney General may institute proceedings under subsection (e) of this section. In any proceedings brought by the United States under subsection (e) of this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions as it shall deem proper.

"(g) Any person may institute proceedings under subsection (e) of this section. In any proceeding brought by any person under subsection (e) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a temporary restraining order and preliminary injunction

may be issued in any action before a final determination thereof upon its merits.

"(h) Whenever the United States is injured in its business or property by reason of any violation of this section, the Attorney General may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual damages sustained by the United States, and the cost of action.

"(i) Any person who is injured in his business or property by reason of any violation of this section may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

"(j) Any civil action or proceeding under this section against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"(k) In any civil action or proceeding under this section in any district court of the United States in which it is shown that the ends of justice require that any other party residing in any other district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"(l) In any civil or criminal action or proceeding under this section in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(m) All other process in any civil or criminal action or proceeding under this section may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

"(n) The United States may, upon timely application, intervene in any civil action or proceeding brought under this section if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if he had instituted the action or proceeding.

"(o) A final judgment or decree rendered in favor of the United States in any criminal action or proceeding under this section shall estop the defendant in any subsequent civil proceeding as to all matters respecting which

said judgment or decree would be an estoppel as between the parties thereto.

"(p) Except as hereinafter provided, any civil action or proceeding under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding, other than an action under subsection (h) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of this section, the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsection (g) or (i) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

"(q) A violation of this section shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, chattels, or other property.

"(r) The carrying or transporting of any such money, baggage, goods, chattels, or other property in interstate or foreign commerce, knowing, or having reason to know, it

had been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained, shall constitute a separate violation and subject the violator to criminal penalties and a civil cause of action under this section and the violation shall be deemed to have been committed in any district into which such money, baggage, goods, chattels, or other property, shall have been removed or into which it shall have been brought by such violator.

"(s) To establish the interstate or foreign commerce character of any shipment in any criminal or civil action or proceeding under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property. Proof that a person was found in unexplained possession of any money, baggage, goods, chattels, or other property, recently embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section, shall be prima facie evidence that such person knew that such property was, or that such person had, embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception such money, baggage, goods, chattels, or other property in violation of this section. Proof

that a person bought or received for a consideration substantially below its fair market value money, baggage, goods, chattels, or other property embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section shall be prima facie evidence that such person knew that such property was embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section.

"(t) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any criminal prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof."

(b) The analysis at the beginning of chapter 31 of title 18 of the United States Code, for section 659, is amended to read:

"659. Interstate or foreign shipment by carrier; State prosecutions; civil remedies for victims of theft.".

SEVERABILITY

SEC. 104. If the provisions of any part of this Act are found invalid or any amendments made thereby or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 105. This Act shall become effective upon the date of enactment.

Passed the Senate September 5, 1972.

Attest: FRANCIS R. VALEO,

Secretary.

EXCERPTS FROM REPORT OF THE SENATE JUDICIARY COMMITTEE ON S. 16, PROVIDING LEGISLATIVE HISTORY OF THE ACT AND A SECTION BY SECTION ANALYSIS

Calendar No. 999

92D CONGRESS, 2d Session } SENATE { REPORT No. 92–1070

CIVIL REMEDIES FOR VICTIMS OF RACKETEERING ACTIVITY AND THEFT

AUGUST 16, 1972.—Ordered to be printed

Mr. MCCLELLAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 16]

The Committee on the Judiciary, to which was referred the bill (S. 16) to amend title IX of the Organized Crime Control Act of 1970 to provide civil remedies to victims of activities prohibited by said title, and for other purposes, having considered the same, reports favorably on it with an amendment in the nature of a substitute and recommends that the bill as amended pass.

LEGISLATIVE HISTORY

S. 16, as reported with an amendment in the nature of a substitute bill, consolidates the basic provisions of the following proposals:

(1) S. 16, a bill introduced by Senators McClellan and Hruska to provide strengthened civil remedies to victims of activities prohibited by title IX of the Organized Crime Control Act of 1970;

(2) S. 2426, a bill introduced by Senator Bible to provide a civil action for damages resulting from violations of section 659 of title 18 of the United States Code, which relates to crime involving property in interstate or foreign commerce; and

(3) amendment 944 to S. 2994 intended to be proposed by Senator Bible which was to be proposed as an addition to title IV of S. 2994.[1]

STATEMENT

S. 16 would strengthen the antitrust-type civil remedies available to the victims of crimes of racketeering activity and theft to assist them in meeting the financial consequences of such crimes. Upon the introduction of S. 16, Senator McClellan observed:

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[1] The provisions of the reported substitute bill are identical to the provisions of title IV of S. 2994. See "Victims of Crime," hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate (92d Cong., 2d sess. (1972)) at pp. 35 and 53. (Hereinafter cited as hearings.)

> * * * [O]n October 15, 1970, the President signed into law S. 30, the Organized Crime Control Act of 1970. Attorney General Mitchell has termed this act "one of the most imaginative and comprehensive proposals to combat organized crime ever introduced in the Congress." Title IX of that act adapted certain of the time-tested remedies of antitrust law to the typical techniques employed by racketeers to invade legitimate businesses.[2]

Senator McClellan then went on to quote from this committee's report on the Organized Crime Control Act of 1970 as follows:

> There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime.[3]

Senator McClellan then continued:

> As S. 30 passed the Senate, title IX was fashioned as a tool to be employed by the Government against the racketeers. Detailed consideration was not then given to carrying the antitrust parallel out by according the private victims of racketeering activity similar civil antitrust type remedies.
>
> During the processing of S. 30 in the House of Representatves, however, an amendment was added (at the suggestion of the American Bar Association) authorizing private treble damage suits and the recovery of attorney fees.[4]

Senator McClellan then urged the enactment of these provisions to round out the implementation of the suggestions made by the Bar Association in the House of Representatives.

The American Bar Association in a letter to the subcommittee voiced its support for the provisions as follows:

> Title IX of the Organized Crime Control Act of 1970 (P.L. 91–452), as originally proposed, authorized the Attorney General to use equitable remedies developed in the antitrust field as an additional tool to meet the problems posed by organized crime. At the suggestion of the American Bar Association initiated by the Section of Criminal Law, title IX was, however, amended during the course of the legislative process to include a private right to treble damages along with attorney fees for those injured by violations of the act. (See testimony of the ABA president-elect, Edward L. Wright, House

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[2] Hearings at p. 668.
[3] S. Rept. No. 91–617, 91st Cong., 1st sess., pp. 80–81 (1969).
[4] Hearings at p. 668.

hearings on S. 30, 91st Congress, second session, pages 543–44 (1970)). This recommendation was premised upon the belief that, since experience had shown that suits by private plaintiffs had become an important avenue of enforcement of the antitrust laws, the adoption of as many of the procedures currently utilized in the antitrust field as possible might be a profitable course of action in any attempt to restrict the entry of organized crime into legitimate business.

* * * * *

* * * [W]e are in general accord with bringing the procedural aspects of title IX [further] into line with the antitrust provisions of Federal law.[5]

In proposing his amendment No. 994, Senator Bible observed:

I introduced this amendment * * * with the avowed purpose of taking the profit out of cargo thievery and making those individuals who steal, receive, or market stolen property civilly liable in damages for their acts. I believe it will provide a major step to curb the biggest billion dollar national racket today—the theft, pilferage, and hijacking of truck, air, rail, and maritime shipments.

This amendment would strike at the middleman "fences" where it would hurt them most, their pocketbooks.

This amendment would enable persons in legal possession of goods to sue for treble damages persons responsible for stealing, buying, or reselling goods moving in interstate commerce.

This amendment would provide that if goods are sold at less than fair market value, it is prima facie evidence that a person is trafficking in stolen goods.

This amendment would permit the Attorney General of the United States to enter a private civil damage suit on a class action basis for all citizens of the United States.

This amendment would grant the Federal district courts the power to issue injunctive orders to force persons engaged in the sale of stolen goods to divest themselves of business fronts or efforts used in the marketing of these stolen goods.

* * * * *

Senator Bible continued:

Law enforcement officials plus shipper, carrier, and insurance executives believe most of this massive cargo theft finds its way back into legitimate commerce as a result of the operations of criminal, middlemen fences. Today, legitimate merchants, salvage companies, discount stores, as well as the more shady dealers operating behind the scenes are believed to be the link supporting widespread fence operations. It is believed that many of these merchants are engaged in selling goods which were originally stolen from interstate and foreign commerce shipments. It is charged that these merchants buy goods from middlemen fences who in turn buy directly or control the operations of thieves preying on cargo shipments from all modes of transportation.

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[5] Id. at pp. 489–490.

> Most legislative efforts have been geared toward combating the crime of theft itself, but very little is being done to stop the equally important aspect of the illegal distribution of illegal goods. My amendment . . . is a vehicle which would go a long way in rectifying the inequitable legislative approach to the prevention of theft. It is aimed at not the thief, but the criminal profiteer who is not recognized by society as a thief, but more as a shady businessman. It is directed at the quasi-legal business functions of crime, without which there would be no theft.[6]

These provisions of S. 16 have received the endorsement of the following organizations:

American Institute of Marine Underwriters.
American Trucking Associations, Inc.
Association of American Railroads.
Transportation Cargo Security Council.[7]

Illustrative of the support voiced by these organizations is the testimony of Mr. Dale E. Taylor, President of the American Institute of Marine Underwriters. He stated:

> The criminal element in our society has been shielded for too long from civil responsibility for its acts. If an honest business is liable in civil law for his acts, there is no logical reason for the criminal element to be excluded from a code for which it has no respect.[8]

The Chairman of the Transportation Cargo Security Council, Mr. Harold Hammond, also indicated:

> A large amount of the stolen cargo moves through fences to distribution outlets and in many cases, the buyer knows or should have good reason to suspect the goods offered to him are stolen.
>
> Although we have no statistics to document the case, we are certain that law enforcement officers, prosecutors, and judges will attest to the extreme difficulty in criminal prosecution and conviction of persons for possession of stolen goods. As a consequence, those who profit most from stolen goods, the fences and ultimate buyer, have sufficiently insulated themselves from any great likelihood of conviction in criminal court.
>
> (This bill) will help provide a significant penalty primarily because the burden of proof required in a civil suit can more easily be satisfied than that required for criminal conviction.
>
> Enactment of this legislation will increase the risk to fences and buyers of large quantities of stolen goods which, in turn, will increase their costs and take a lot of profit out of handling stolen merchandise. The treble damages provisions would persuade buyers . . . to assure themselves of the

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[6] Ibid.
[7] Id. at pp. 319, 547.
[8] Id. at pp. 317–318.

> source and authenticity of goods offered to them in great quantities at below-market prices.[9]

There is little doubt that our country's transportation industry has become a favorite and lucrative target for organized as well as unorganized crime. In discussing this problem in the transportation industry, a witness told the Senate Committee on Small Business:

> * * * Many of these things are stolen for order and they are handled by organized crime. The markets are already established and the property is absorbed into our economic system just like a huge dry sponge. . . .
>
> If we can eliminate the profit motive from a lot of these activities, I believe we have nailed them. . . . We do not penetrate the activities of the receivers, the fences and the people in possession of this stolen property. . . . The percentage of recovery of stolen property is almost negligible.[10]

Based upon investigations and public hearings by the Senate Small Business Committee, under the Chairmanship of Senator Alan Bible, it has been estimated that losses through cargo theft in 1970 amounted to $1½ billion, distributed among air, truck, rail and maritime carriers.[11] This figure represents only the wholesale or released liability value of the lost goods. If to this figure is added the indirect costs—the retail market markup, the cost to the shipper in loss of market share, claims processing expense, increased insurance premiums, capital tied up in the claims process, loss of customer goodwill, etc.—the cost to the national economy must approach many additional billions. Of course, to offset these losses the legitimate customer pays a higher price for his goods.

Obviously, action to stem these losses is in the public interest.

Position of the Administration

In reporting that the Department of Justice is in favor of the enactment of provisions of this bill, the Associate Administrator of the Law Enforcement Assistance Administration, commented:

> * * * We believe that the availability of a civil remedy could have a dual effect. First, an injured party would be able to more than recoup his actual loss through a treble damage action. Second, the mere fact that such a civil action is possible could act as a strong deterrent against the fencing and purchase of the stolen property. Hopefully, this would tend to decrease the market for stolen property and thereby reduce the profitability of cargo theft, with the ultimate benefit being passed on to the American consumer.[12]

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[9] *Id.* at 320.

[10] Testimony of Mr. Gilbert H. Myer, Chief Special Agent, American Insurance Association, *Impact of Crime Against Small Business,* hearings before the Senate Committee on Small Business, 91st Cong., first sess., p. 641 (1969).

[11] Hearings at 380. Statistical evidence of one major aspect of air cargo theft was reported by Chief Postal Inspector William J. Cotter who states that thefts of U.S. mails at New York's John F. Kennedy Airport between 1967 and 1969 were $65 million. *Cargo Security,* hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 92d Cong., 2d sess., p. 48 (1972).

[12] Hearings at 159.

Civil Remedies

Title IV would strengthen the procedural implementation of the civil remedies available to victims of racketeering activity under title IX of the Organized Crime Control Act of 1970,[13] and incorporate into the present section 659 of title 18 of the United States Code various venue and other procedural aspects of treble damage suits in the antitrust area to cover civil suits for theft of interstate or foreign cargo shipments.

Title IX of the Organized Crime Control Act of 1970 adapted certain remedies from the field of antitrust law to the techniques employed by organized crime. One of the valuable tools incorporated in title IX was the authorizing of civil actions by private individuals injured in their business or property through racketeering activity for the recovery of treble damages and costs of the action. The amendments proposed by S. 16 would:

permit the United States itself to sue for actual damages when it is injured in its business or property by reason of a violation of section 1962;

permit the United States to intervene in private suits of general public importance;

authorize private injunctive relief from racketeering activity; and

refine and make applicable parallel language in antitrust provisions relating to the doctrine of estoppel between criminal and civil proceedings, statute of limitations and nationwide venue and process serving.

In providing, under revisions to section 659 of title 18 of the United States Code, a process for the recovery by private persons of damages sustained through the embezzlement or theft of cargo, the proposed statutory framework would be also based upon the time-tested remedies of the antitrust laws. The thrust of the revision of section 659 is to afford civil remedies to those victims who suffer loss due to theft or embezzlement of cargo by allowing injunctive relief and civil actions to recover threefold actual damages and costs of the action. Further, the Attorney General may bring a civil action based on injury to the business or property of the United States, and may intervene in any civil action brought under the section.

Section 659 has also been strengthened by incorporating into the revision case law relating to possession of recently stolen property. Unexplained possession of money or property recently unlawfully taken will become prima facie evidence that the possessor knew that such money or property was unlawfully taken or that the possessor had unlawfully taken such money or property.

Proof that a person bought, at a price considerably below its fair market value, any unlawfully taken property will become prima facie evidence that such person knew the property to have been unlawfully taken.

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[13] 18 United States Code, secs. 1961–68 (Public Law 91–452).

At common law, one in possession of recently stolen goods who was unable to offer a reasonable explanation of his possession was "presumed" to be the thief.[14] This "presumption" is still recognized by both State and Federal courts.[15]

At early common law, the offense of receiving stolen property did not exist. When this crime was created by statute, this presumption previously applied to stolen property was expanded. Late in the 19th century, the Supreme Court declared:

> * * * Possession of the fruits of crime recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.[16]

This statement of the law has been reaffirmed by the Supreme Court several times and accepted in all of the Federal courts of appeal.[17]

In the area of "knowledge" requirement on the part of the receiver of stolen goods under section 659, the pertinent phrase reads: "knowing or having reason to know that it has been embezzled or stolen or otherwise unlawfully taken. . . ." "Knowledge" on the part of the receiver of the stolen property, of course, would be an essential element of the crime or the newly created tort. By adding the phrase "or having reason to know" the new section rests on numerous court cases illustrative of prosecutorial presentations to show knowledge on the part of the receiver.[18]

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[14] 2 Hale, *History of the Pleas of the Crown* 289 (1778 ed.).

[15] 1 Whaton's Criminal Evidence § 135 (1955) (1971 Supp.) ; 9 *Wigmore* on Evidence section 2513 (1940) (1970 Supp.) ; Lawson, *Presumptive Evidence,* 599–611 (1899).

[16] *Wilson* v. *United States,* 162 U.S. 613, 619 (1896).

[17] *McNamara* v. *Henkel,* 226 U.S. 520 (1913) : *Dunlop* v. *United States,* 165 U.S. 486 (1897) ; *Rugendorf* v. *United States,* 376 U.S. 528 (1964) ; *United States* v. *Browning,* 439 F. 2d 813 (1st Cir. 1971) ; *Freije* v. *United States,* 386 F. 2d 408 (1st Cir. 1967) ; *United States* v. *Coppola,* 424 F. 2d 991 (2d Cir. 1970) ; *United States* v. *Izzi,* 427 F. 2d 293 (2d Cir. 1970) ; *United States* v. *Pounds,* 323 F. 2d 419 (3d Cir. 1963) ; *United States* v. *Allegrucci,* 258 F. 2d 70 (3d Cir. 1958) ; *United States* v. *Ross,* 424 F. 2d 1016 (4th Cir. 1970) ; *United States* v. *Fisher,* 440 F. 2d 654 (4th Cir. 1971) ; *Hale* v. *United States,* 410 F. 2d 147 (5th Cir. 1969) ; *United States* v. *Gordon,* 421 F. 2d 1068 (5th Cir. 1970) ; *United States* v. *Stroble,* 431 F. 2d 1273 (6th Cir. 1970) ; *United States* v. *Prujansky,* 415 F. 2d 1045 (6th Cir. 1969) ; *United States* v. *Riso,* 405 F. 2d 134 (7th Cir. 1968) ; *United States* v. *Scoleri,* 374 F. 2d 859 (7th Cir. 1967) ; *Aron* v. *United States,* 382 F. 2d 965 (8th Cir. 1967) ; *Lee* v. *United States,* 363 F. 2d 469 (8th Cir. 1966) ; *United States* v. *Redd,* 438 F. 2d 335 (9th Cir. 1971) ; *McAbee* v. *United States,* 434 F. 2d 361 (9th Cir. 1970) ; *Jenkins* v. *United States,* 361 F. 2d 615 (10th Cir. 1966) : *Gregory* v. *United States,* 364 F. 2d 210 (10th Cir. 1966) ; *McKnight* v. *United States,* 309 F. 2d 660 (D.C. Cir. 1962) ; *Bray* v. *United States,* 306 F. 2d 743 (D.C. Cir. 1961).

[18] It is well settled that knowledge that goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. *Melson* v. *United States,* 207 F. 2d 558 (4th Cir. 1953). See also *United States* v. *Danzo,* 164 F. 2d 200 (2d Cir. 1947) ; *Chass* v. *United States,* 258 F. 911 (3d Cir. 1919) ; *Kasle* v. *United States,* 233 F. 878 (6th Cir. 1916) ; *United States* v. *Spatuzza,* 331 F. 2d 214 (7th Cor. 1964), *cert. denied* 379 U.S. 829 (1964). Within limitations, the prosecution has been able to introduce evidence of other acts of a similar nature to prove knowledge. *Tingley* v. *United States,* 34 F. 2d 1 (10th Cir. 1929), *cert. denied* 280 United States 508 (1929). See also, *United States* v. *Machen,* 430 F. 2d 523 (7th Cir. 1970). Deviation from usual business practice may also entitle the jury to infer that the defendant had knowledge of the illegal source of the goods in his possession. *Henry* v. *United States,* 361 F. 2d 352 (9th Cir. 1966), *cert. denied* 386 U.S. 957 (1967).

Section-by-Section Analysis

Section 101 sets out the purpose of this bill.

Racketeer Civil Remedies

Section 102(a) amends section 1964 of title 18 of the United States Code, which provides civil remedies for the violation of prohibited racketeering activities enumerated in section 1962, title 18, United States Code, as follows:

Subsection (1) amends subsection (a) which provides that the district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1972 by allowing such courts to have jurisdiction "without regard to the amount in controversy."

Subsection (2) amends subsection (b) which authorizes the Attorney General to institute proceedings by adding new language to clarify that proceedings are brought under subsection (a) of section 1964.

Subsection (3) amends subsection (b) by using the term "proceedings" in each instance to refer to the action of the Attorney General.

Subsection (4) strikes and substitutes a new subsection (c) to permit any person to institute proceedings under subsection (a) of section 1964 and to be granted injunctive relief from threatened loss or damage; and to be granted a temporary restraining order and a preliminary injunction upon the execution of proper bond and showing of immediate danger or irreparable loss or damage.

A new subsection (d) provides that whenever the United States is injured in its business or property by reason of a violation of section 1962 of this chapter the Attorney General may bring a civil action in a district court of the United States and shall recover the actual damages sustained, plus the cost of the action.

A new subsection (e) provides that any person injured in his business or property by reason of a violation of section 1962 of this chapter may bring a civil action in a district court of the United States and shall recover threefold the actual damages, the cost of the action, and a reasonable attorney's fee.

A new subsection (f) would permit the United States to intervene in any civil action if the Attorney General certifies that the case is of general public importance. In such action, the United States would be entitled to the same relief as if it had instituted the proceeding.

A new subsection (g) provides that upon a final judgment in favor of the United States the doctrine of estoppel between criminal and civil proceedings shall apply.

A new subsection (h) provides that any civil action under section 1964 shall be barred unless it is commenced within 5 years after the cause of the action. It further provides for the suspension of such action during the pendency of criminal proceedings by the United States and for 2 years thereafter.

Section 102(b) amends section 1965 (venue and process) of this chapter by—(1) clarifying language substituted in subsection (b) to identify the action as "civil action or proceeding under this chapter" rather than "action under section 1964" in the matter of summons and process serving; (2) striking language in subsection (c), relating to process serving, which would have allowed such actions only in proceedings "instituted by the United States" thus broadening the statute

in regard to process serving in private actions or proceedings, or actions or proceedings intervened in by the United States; and (3) adding clarifying language in subsection (d) that nationwide venue and other process serving applies to both civil and criminal actions or proceedings under this chapter.

Section 102(c) amends section 1966 (expedition of actions) to provide that in any civil action or proceeding under this chapter in which the United States is a party, rather than limited to actions instituted by the United States, the Attorney General may file with the clerk of the district court a certificate stating that in his opinion the case is of general public importance for purposes of expediting the action.

Section 102(d) amends section 1967 (evidence) to provide that any civil action or proceeding under this chapter may be open or closed to the public at the discretion of the court, rather than limiting such procedure to actions instituted by the United States.

Section 102(e) amends section 1968 (civil investigative demand) to broaden the language authorizing the Attorney General to issue civil investigative demands to include actions or proceedings in which the United States intervenes as well as those actions instituted by the Attorney General; and substitutes the term "action" for the word "case" to more clearly include injunctive relief and restraining orders under the provisions of the section.

Theft Civil Remedies

Section 103(a) amends section 659 of title 18 of the United States Code. The section captain is amended by adding the phrase "civil remedies for victims of theft." The new subsections are as follows:

Subsection (a) of section 659 makes it unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property which is moving as, or which is a part of, or which constitute an interstate or foreign shipment from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station station house, platform, or depot, or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft teminal, or air navigation facility o to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained.

Subsection (b) of section 659 makes it unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property, which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce, or to break into, embezzle, steal, unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any of the contents of such baggage, goods chattels, or other property, or to buy, receive, have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know that it has been

embezzled or stolen or otherwise unlawfully taken, carried away, concealed, or obtained.

Subsection (c) of section 659 makes it unlawful for any person to embezzle, steal, or unlawfully take, carry away, conceal, or by fraud or deception obtain with intent to convert to his own use any money, baggage, goods, chattels, or other property from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce, or from any passenger thereon, or to buy, receive, or have in his possession any such money, baggage goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled stolen or otherwise unlawfully taken, carried away, concealed, or obtained.

Subsections (e) through (p) add new substantive language to sec- (b), and (c) as a fine of not more than $5,000 or imprisonment for not more than 10 years, or both; but should the value of such property not exceed $100, the fine shall be not more than $1,000 or imprisonment for not more than 1 year, or both.

Subsection (e) through (p) add new substantive language to section 659 to provide civil remedies for violations under the section.

Subsection (e) gives the district courts of the U.S. jurisdiction to prevent and restrain violations of this section. Certain remedies are set out, such as ordering any person to divest himself of any interest in any enterprise, and prohibiting any person from engaging in certain enterprises, but the remedies are only limited by making due provisions for the rights of innocent persons.

Subsection (f) provides that the Attorney General may institute proceedings under subsection (e). In such proceedings the court shall proceed expeditiously and may, prior to final determination, enter restraining orders or other actions as it deems proper.

Subsection (g) would permit any person to institute proceedings under subsection (e) seeking relief in conformity with the principles which govern the granting of injunctive relief from threatened loss in other cases. A temporary restraining order or a preliminary injunction may be issued, following the showing of immediate danger of loss and upon the execution of a proper bond against damages for an injunction improvidently granted.

Subsection (h) provides that the Attorney General may bring a civil action under section 659 whenever the United States is injured its business or property and shall recover the actual damages sustained and the cost of the action.

Subsection (i) provides that any person who is injured by reason of any violation of section 659 may bring a civil action in a district court of the United States and shall recover threefold the actual damages sustained, the cost of the action and a reasonable attorney's fee.

Subsection (j) establishes venue wherever the defendant resides, is found, has an agent, or transacts his affairs.

Subsection (k) provides nationwide service of process on parties, if the ends of justice require it.

Subsection (l) provides nationwide subpena power for witnesses in civil or criminal actions or proceedings under section 659. In civil actions, a court order on good cause shown is required for issuance if the witness resides more than 100 miles from the court.

Subsecton (m) provides for the service of process in civil or criminal actions under section 659 wherever the person resides, is found, has an agent or transacts his affairs.

Subsection (n) permits the United States to intervene in any civil action or proceeding brought under section 659 certified by the Attorney General as being of general public importance.

Subsecton (o) provides specifically for collateral estopped between criminal judgments and civil actions.

Subsection (p) sets a 5-year statute of limitation on civil actions under section 659 and provides for the suspension of the running of the period of limitations during the pendency of civil or criminal actions brought or intervened in by the United States and for 2 years thereafter.

Subsection (q) is taken from the original section 659 and provides that a violation of the section shall be deemed to have been committed not only where it first occurred, but in any dstrict in which the defendant may have taken or been in possession of the money or property.

Subsection (r), also, is taken from the original section 659 and provides that the transporting of money or property in interstate or foreign commerce knowing or having reason to know that such was unlawfully taken shall constitute a separate violation subject to criminal penalties and civil remedies. The violation shall be deemed to have been committed in any district into which such money or property shall have been taken. The previous language has been strengthened by the addition of the phrase "or having reason to know" that such property was unlawfully taken.

Subsection (s) enlarges on language which provided that the waybill or other shipping document shall be prima facie evidence of the interstate or foreign commerce character of any shipment in any criminal or civil action. It further provides that proof that a person was found in unexplained possession of unlawfully taken property shall be prima facie evidence that such person knew that such property had been unlawfully taken, or that such person had unlawfully taken such property. Proof that a person bought or received property at a price substantially under its fair market price shall be prima facie evidence that such buyer or receiver knew that such property had been unlawfully taken.

Subsection (t), from the original section 659, provides that a judgment under the laws of any State shall be a bar to any criminal prosecution under this section for the same act. It further sets forth the intent of the Congress that this section shall not be construed to operate to the exclusion of State statutes covering provisions of this section unless such State law is inconsistent with the provisions and purposes of this section.

Section 103(b) amends the analysis of chapter 31 of title 18 of the United States Code by adding to the reference language covering civil remedies for victims of theft.

Section 104 contains a severability clause.

Section 105 provides that this act shall become effective on the date of enactment.

[Excerpts from Congressional Record, Sept. 5, 1972, p. S 10492, providing legislative debate prior to passage of S. 16]

Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972

The Presiding Officer. Under the previous order the Senate will now proceed to the consideration of S. 16, which the clerk will report.

Mr. McClellan. Mr. President, this bill was originally introduced by Senator Hruska and myself on January 25, 1971. It was favorably reported by the Committee on the Judiciary on August 16, 1972.

As reported, it includes the provisions of two proposals by the Senator from Nevada (Mr. Bible), one introduced as S. 2426 and the other as amendment No. 994 to S. 2994. It also reflects the provisions of titles IV of S. 2994 and S. 2995, which are omnibus victims of crime bills. In those forms, the bill was cosponsored by 45 of my colleagues: Senators Baker, Bayh, Beall, Bennett, Bible, Boggs, Burdick, Cannon, Case, Cook, Cranston, Eastland, Fannin, Gravel, Griffin, Gurney, Hansen, Hart, Harris, Hollings, Hruska, Hughes, Humphrey, Kennedy, Mansfield, Mathias, Metcalf, Miller, Mondale, Moss, Muskie, Nelson, Pell, Percy, Randolph, Ribicoff, Roth, Schweiker, Scott, Stafford, Stevens, Stevenson, Thurmond, Williams, and Young.

Mr. President, on October 15, 1970, the President signed into law S. 30, the Organized Crime Control Act of 1970—Public Law 91–452. Then Attorney General, John N. Mitchell, termed this act "one of the most imaginative and comprehensive proposals to combat organized crime ever introduced in the Congress." Title IX of the 1970 act adapted certain of the time-tested remedies of antitrust law to the typical techniques employed by racketeers to invade legitimate businesses.

As S. 30 passed the Senate, title IX was fashioned as a tool to be employed by the Government against racketeers. Detailed consideration was not then given to carrying the antitrust parallel out by according the private victims of racketeering activity similar civil antitrust-type remedies.

During the processing of S. 30 in the House of Representatives, however, an amendment was added, at the suggestion of Edward L. Wright of Little Rock, Ark., then president of the American Bar Association, authorizing private treble damage suits and the recovery of attorney fees.

S. 16 would round out the implementation of Mr. Wright's idea. In addition to authorizing recovery of treble damages and attorney fees in a private civil action, it would permit the United States itself to sue for actual damages, when it is injured in its business activity, and to intervene in private suits under the act of general public importance.

S. 16 also authorizes private injunctive relief from racketeering activity, regulates the application of the doctrine of estoppel between criminal and civil proceedings, provides for a statute of limitations for civil actions and its appropriate suspension during pendency of criminal actions, and makes applicable to suits under the amended act nationwide venue and service of process provisions.

During the subcommittee's hearings, the American Bar Association voiced its support for this bill, noting that—

"The adoption of as many of the procedures currently utilized in the anti-trust field as possible might be a profitable course of action in any attempt to restrict the entry of organized crime into legitimate business."

At the suggestion of the Senator from Nevada (Mr. Bible), the bill has also been broadened to strike at the massive and costly problem of cargo theft, attacking the middle man of crime by enabling persons in legal possession of goods to sue for treble damages persons responsible for stealing, buying, or reselling goods moving in interstate commerce.

This aspect of S. 16 has received the endorsement of the following organizations: American Institute of Marine Underwriters; American Trucking Associations, Inc.; Association of American Railroads; and Transportation Cargo Security Council.

And I am pleased to note the administration's support of this bill.

All of us are aware of the depth and breadth of the activities of organized crime, and we know of the diversity of its activities. Organized crime strikes at the very heart of the economy of country. We ought not to deny to the Government or to the victim any legitimate means of halting such activity.

Cargo has become a favorite and lucrative target for organized crime—direct costs of cargo losses are estimated at $1½ billion a year.

So this provision will both aid the victim of organized crime and reduce the profitability of cargo theft, hopefully aiding the average consumer.

Mr. President, I urge the enactment of this bill.

Mr. HRUSKA. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Nebraska is recognized for 5 minutes.

Mr. HRUSKA. Mr. President, S. 16 as reported by the Judiciary Committee is a well-conceived and very useful proposal in the field of criminal justice and it is my hope that the Senate will approve it today.

This bill, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, is basically an amalgam of two proposals: The original S. 16 introduced by Senator McClellan and this Senator in 1971 to provide strengthened civil remedies to victims of activities prohibited by title IX of the Organized Crime Control Act of 1970; and S. 2426, Senator Bible's bill to provide a civil action for damages to victims of crimes involving property in interstate or foreign commerce.

The marriage of these two bills is a good one which adds additional weapons to the arsenal of weapons available to combat crime in this country.

Title IX of the 1970 act adapted certain antitrust law remedies to the typical techniques employed by racketeers to invade legitimate business enterprises. S. 16 would extend this principle by providing the individual citizens who are the victims of racketeering activities with antitrust remedies similar to those granted to the Government by the 1970 act. Under this proposal, private civil suits can be a valuable adjunct to governmental actions aimed at organized crime.

Section 102 of the bill would:

Permit the United States itself to sue for actual damages when it is injured in its business or property by reason of a violation of section 1962;

Permit the United States to intervene in private suits of general public importance;

Authorize private injunctive relief from racketeering activity; and

Refine and make applicable parallel language and antitrust provisions relating to the doctrine of estoppel between criminal and civil proceedings, statute of limitations, and nationwide venue and process serving.

The administration supports this portion of S. 16. In testimony before the Criminal Laws Subcommittee, Richard Velde, the Associate Administrator of the Law Enforcement Assistance Administration, said:

"The Department of Justice favors enactment of S. 16. We believe that the extension of civil remedies, as contemplated by this bill, would provide additional valuable tools with which to combat organized crime. Our experience has shown that a two-pronged civil and criminal approach has proved successful in the antitrust area. Organized crime has continued to burden society because, over the years, it has been immensely profitable, and criminal sanctions by themselves do not necessarily reduce the riches. Any legal machinery therefore which would have the effect of rendering organized criminal activity less profitable would take us one notch closer to eliminating the problem. The Department believes that S. 16 would strengthen the existing civil remedies provided by Title IX and accordingly favors enactment."

Section 103 of the bill utilizes timetested antitrust remedies to provide private persons with a means to recover damages sustained through the embezzlement or theft of cargo in interstate or foreign commerce. This bill would authorize injunctive relief and civil actions to recover threefold actual damages plus costs to those persons who are the victims of this type of illegal activity. Additional authority would be granted to the Attorney General to bring civil suits based on injury to the business or property of the United States and to intervene in other actions brought pursuant to section 659, title 18, United States Code.

With regard to this provision of S. 16, Mr. Velde, speaking for the administration, said:

"S. 2426 [now section 103 of S. 16] would also provide civil relief, in this case to any person who has been injured in his business or property because of a violation of section 659 of Title 18 of the United States Code. That section basically proscribes the embezzlement, theft, concealment, or unlawful receipt or purchase of any money, goods, chattels or baggage which are moving as an interstate shipment of freight or express. The principal target of the section is cargo theft.

"The bill would permit any injured party to sue in the appropriate district court for treble damages. The purpose of the bill, clearly, is to help prevent cargo theft by reducing the profitability. Today, cargo thefts result in an added cost to consumers of approximately $1.5 billion annually. Here again, criminal penalties do not always affect the profit of these activities and the aggrieved party is often no better off after a criminal conviction.

"The Department is in favor of enactment of S. 2426 [now section 103 of S. 16]. We believe that the availability of a civil remedy could have a dual effect. First, an injured party would be able to more than recoup his actual loss through a treble damage action. Second, the mere fact that such a civil action is possible could act as a strong deterrent against the fencing and purchase of the stolen property and thereby reduce the profitability of cargo theft, with the ultimate benefit being passed on to the American consumer."

Mr. President, I join with the Senator from Arkansas (Mr. McCLELLAN) in urging my colleagues to vote favorably on the measure with the hope that it will soon ripen into a form that is signable into law by the President of the United States.

I reserve the remainder of my time.

Mr. COOPER. Mr. President, will the Senator yield for questions?

Mr. HRUSKA. I yield 3 minutes to the Senator from Kentucky.

Mr. COOPER. Mr. President, I do not know of any opposition to the bill and I consider the explanations given by the Senator from Nebraska and the Senator from Arkansas very good, indeed.

Is it not correct that the acts defined in the bill are already crimes?

Mr. HRUSKA. They are, indeed, under the Organized Crime Control Act of 1970 and 18 U.S.C. 659.

Mr. COOPER. It is correct that a change we made in the bill is to provide jurisdiction shall lie not only in the district where the act occurs, but also in any other district where the defendant might be found or where the property might be found?

Mr. HRUSKA. That is correct, in part. There is a provision for nationwide venue.

Mr. COOPER. Is it not correct that under law the victim can now bring an action for damages?

Mr. HRUSKA. Yes.

Mr. COOPER. What distinction does this bill provide? Does it provide for triple damages?

Mr. HRUSKA. There would be triple damages, plus cost and attorney's fees which is the equivalent remedy available under the law in antitrust cases.

Mr. COOPER. Among other provisions of the bill, is it correct to say that perhaps the most far reaching, and it could be the most effective, is that it would provide to the Attorney General the right to take action under subsection (e) on page 11, that is, to enable the Attorney General to go into the district courts and secure orders which are now appropriate in antitrust actions. Is that the basis for this section?

Mr. HRUSKA. Yes.

Mr. McCLELLAN. I think there is something else that should be observed here. It also enables the citizens to bring his action in Federal court, whereas heretofore he might have had to sue in the State court. This would enable the suit to be brought in Federal court, and it would carry with it all the superior resources of Federal process.

Mr. COOPER. I am not against the legislation. I think it has great merit. But is the purpose of subsection (e) to authorize the Attorney General to proceed against an individual or individuals who conducted unlawful activities? Will it be possible to secure orders to require the divestiture of property in connection with, for instance, unions, banks, hotels, or any other enterprise?

Mr. HRUSKA. It would indeed, have a wide scope.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. I yield 2 additional minutes.

Mr. COOPER. This is important because it is a remedy I did not know now existed. On page 11, line 14, subsection (e) it is stated:

"(e) The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to prevent and restrain violations of this section by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise: imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

Mr. HRUSKA. The thrust of that subsection would arm the Federal law enforcement authorities to prevent violations. It would be a very, very important part of making it less attractive to engage in this type of business.

Mr. COOPER. We know there are unlawful and criminal interests that have moved into banks and all kinds of businesses, with the attempt to take them over, and conduct them for unlawful purposes.

I assume there may be constitutional problems involved, such as taking property without due process. I assume the courts will take care of the constitutional provision.

Mr. MCCLELLAN. All these procedures are already well established in the antitrust law. They have court approval on the issue of constitutionality.

Mr. COOPER. That is correct so far as antitrust law is concerned.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. COOPER. I thank the Senator.

Mr. HRUSKA. Mr. President, I have no further requests for time. I am prepared to yield back the remainder of the time on this side if there is a similar thought on the other side.

Mr. MCCLELLAN. Mr. President, if there are no further amendments, I ask that the committee amendment in the nature of a substitute be agreed to.

The PRESIDING OFFICER. If there be no further amendment to be proposed, the question is on agreeing to the committee amendment in the nature of a substitute.

The committee amendment was agreed to.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. Do Senators yield back their time?

Mr. MCCLELLAN. I yield back my time.

Mr. HRUSKA. I yield back my time.

The PRESIDING OFFICER. All time is yielded back.

[Excerpts from Congressional Record, Sept. 18, 1972, p. S 15137, providing legislative debate prior to passage of amended version of H.R. 8389]

Mr. MANSFIELD. Mr. President, I seek recognition to offer a substitute on behalf of the Senator from Arkansas (Mr. McClellan), the Senator from Massachusetts (Mr. Kennedy), myself, and the following cosponsors:

LIST OF COSPONSORS

Senators Allen, Bayh, Bentsen, Bible, Burdick, Cannon, Case, Chiles, Church, Cook, Cranston, Eastland.

Senators Gravel, Griffin, Gurney, Harris, Hart, Hartke, Hollings, Hughes, Humphrey, Inouye, Jackson, Kennedy, Mansfield, Mathias, McClellan, McGovern, McIntyre, Metcalf, Mondale.

Senators Moss, Muskie, Nelson, Pell, Percy, Randolph, Ribicoff, Roth, Schweiker, Stevenson, Tunney, Williams.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

That this Act may be cited as the "Victims of Crime Act of 1972".

Mr. MANSFIELD. Mr. President, this amendment would include the Victims of Crime Act of 1972 in the pending measure. Its major thrust is to provide an omnibus program in behalf of victims of crime. This is a single amendment, a complete substitute and in no way represents a Christmas tree. Its provisions encompass four measures already approved by the Senate: The compensation program for the criminal victim; the group insurance program for public safety officers—a proposal sponsored chiefly by Senator Kennedy; the death and disability benefit program for public safety officers, a proposal of Senator McClellan's passed earlier this month; and the victims of racketeering program, also authored by Senator McClellan and passed by the Senate earlier this month.

Let me read from the statement of findings and purposes of the act:

"The Congress finds that (1) there is an increase of crimes of violence not only in urban, but also in suburban and rural areas; (2) the increase in crimes of violence is disproportionate to the increase in population; (3) the increase in crimes of violence increases the chances of a person becoming a victim of crime; (4) on an increasing basis crimes of violence are being directed at public safety officers, including policemen, firemen, and correctional guards; (5) law enforcement identification, apprehension, and conviction of perpetrators of crimes of violence is decreasing; (6) the perpetrators of crimes of violence, when identi-

fied, apprehended, and convicted are often not financially responsible; and (7) the victims of crimes of violence, their families and dependents, are often themselves unable to bear the consequent pecuniary losses without undue hardship.

"It is, therefore, the purpose of this Act to commit the United States to meet its moral obligation to assist the innocent victims of violent crime, their families and dependents in financial need, by direct aid to those within the area primarily of Federal responsibility, by assistance to the States to aid those within the area primarily of State responsibility, by the establishment of insurance and benefit programs for public safety officers and their families and dependents, and by the strengthening of the civil remedies available to victims of racketeering activity."

This Victims of Crime Act substitute would modify the Law Enforcement Assistance Act as would the pending measure. The Victims of Crime Act substitute is designed to improve the quality of criminal justice as is the pending measure. In short, the pending proposal, designed to provide needed impetus in the rehabilitation of the criminal drug user serves as a most appropriate vehicle for the establishment of a program that provides for the innocent victim of the drug user's crime.

Mr. President, the Senate has acted affirmatively with respect to each feature of this proposal.

Its passage in this fashion provides the only prospect for the enactment of an overall program in behalf of the criminal victim during this Congress.

I hope the Senate will not now turn its back on the criminal victim, the policeman, killed or wounded in the line of duty, or the innocent citizen bilked at the hands of the criminal racketeer.

To repeat: The amendment under consideration would combine four separate bills which have already received Senate approval. It would put back together S. 2994, the Victims of Crime Act of 1972.

S. 2994 has as cosponsors 44 Senators: McClellan, Baker, Bayh, Beall, Bennett, Bible, Boggs, Burdick, Cannon, Case, Cook, Cranston, Eastland, Fannin, Gravel, Griffin, Gurney, Hansen, Harris, Hollings, Hruska, Hughes, Humphrey, Mansfield, Mathias, Metcalf, Miller, Mondale, Moss, Muskie, Nelson, Pell, Percy, Randolph, Ribicoff, Roth, Schweiker, Scott, Stafford, Stevens, Stevenson, Thurmond, Williams, and Young.

This represents a true cross section of the Senate.

As S. 2994 was considered by the committee on the Judiciary, the decision was made to separate its four titles into four separate bills. Since then, the Senate has given its approval to S. 750, providing for the compensation of the financial losses suffered by the innocent victims of violent crime; S. 33, establishing a contributing group life, accidental death and dismemberment program for public safety officers; S. 2087, authorizing a noncontributing death and dismemberment benefit for public safety officers in those situations where the death or dismemberment occurs in the line of duty as the result of a crime; and S. 16, providing expanded civil remedies for the victims of certain types of organized crime, or theft activity.

The 92d Congress will soon become a matter of history. If we are to hold any reasonable expectation of final congressional action responding to the various needs of criminal victimization, this step is essential.

Adoption of the amendment under consideration followed by passage of H.R. 8389 will allow this program of legislation to be considered in conference. I understand the House Judiciary Committee would be willing to consider this program as a whole. I do believe that it would be a positive step to take in the interest of all who fall prey to criminal behavior.

I urge its adoption on behalf of all who suffer the ravages of crime and violence.

Mr. McCLELLAN. Mr. President, will the Senator yield for purposes of clarification?

Mr. MANSFIELD. Yes, indeed.

Mr. McCLELLAN. I understand the amendment of the distinguished Senator would add to this bill the provisions of S. 750, Victims of Crime Act of 1972 that we passed earlier today.

Mr. MANSFIELD. Our substitute would do that. I say "Our substitute would do that. I say "our substitute" because we are cosponsors of the substitute.

Mr. McCLELLAN. It would also include the gratuity program for public safety officer—S. 2087.

Mr. MANSFIELD. The Senator is correct.

Mr. MCCLELLAN. Would it also include the group life insurance program for public safety officer—S. 33?

Mr. MANSFIELD. The Senator is correct.

Mr. MCCLELLAN. Might I ask if it would also incorporate the civil remedies provision of S. 16?

Mr. MANSFIELD. The Senator is correct.

Mr. MCCLELLAN. Those bills would be added here as part of this bill, and they would go to the House.

Mr. MANSFIELD. The Senator is correct.

Mr. MCCLELLAN. The House would have the opportunity of either taking all of them in this bill or acting on them independently.

Mr. MANSFIELD. The Senator is correct.

Mr. MCCLELLAN. But they will all go to conference on this bill.

Mr. MANSFIELD. Absolutely.

Mr. MCCLELLAN. So we will have an opportunity to get them enacted into law in this session.

Mr. MANSFIELD. This is the only chance to have that done in this fashion.

Mr. MCCLELLAN. I wanted everyone to realize that that was the purpose—to try to get the will of the Senate and the Congress enacted into law in this session.

Mr. MANSFIELD. The Senator is correct.

Mr. KENNEDY. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. KENNEDY. Mr. President, I join in commending the recommendation of the distinguished majority leader.

I feel all the programs we are considering today, the ones we passed earlier, on policemen and firefighters, all refer to the very central concern about victims of crime. This approach is consistent with the central theme of the bills that have been passed and they offer us the best opportunity to meet our responsibility to those needs. I commend the distinguished majority leader for the initiative he has provided in this area. As one extremely interested in two particular parts of this package and in general support of the others, I think this is a commendable step and I hope the Senate will support the mapority leader in this approach. I think it is the best way to provide relief for those who are the victims of crime.

Mr. MANSFIELD. I thank the distinguished Senator and I call to his attention that he, too, is a cosponsor of the substitute.

Mr. President, I yield back the remainder of my time.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. MCCLELLAN. I yield to the Senator from Nebraska.

Mr. HRUSKA. Mr. President, I rise in opposition to the substitute bill and I do so very reluctantly.

There is a mix here of a number of aspects of legislation that Congress is considering in the field of law enforcement and criminal statutes. There is a wide mix with some new innovative ideas, while some are extensive of things we now have. It has been suggested it was not a Christmas tree; it is not a Christmas tree but it is a Christmas tree. The substitute includes several bills that have been considered in this body and that have been debated and on which there have been hearings. That is not true as to the other body. In all fairness to the other body there should be opportunity for it to consider the several bills severally and not jointly. This is true not only in fairness to the House but also in fairness to the President because there is considerable impairment and there is dilution of his veto power when we get an omnibus Christmas tree bill of this kind. It would certainly be a miscarriage of legislative purposes here if it were found on balance that it was not possible for the Chief Executive to go with the entire bill, and that he would be compelled, if that were his final decision, to turn down the whole package because one portion was unacceptable. What we are doing may be perfectly legal, but it is not wise.

We witnessed an example of that technique on the extension of the debt ceiling, when there was adopted a measure for a 20-percent increase in social security benefits. It deprives those who wanted to vote one way or another of their right to choose and the President was not able to exercise his veto power if he choose to do so. I do not know that he would have, but it impaired his veto power.

There is sufficient difference on each of these separate titles to the bill for a consideration of each one of them on its own merits by the other body, and not

on the basis of a power play, and I say that in a kindly way, not in a way that would indicate that there is anything improper about it parliamentarily. There is not, but the impact of it is bad, Mr. President, and it seems to me that in all fairness to the other body we should go to them with these bills on a several basis, a several and separate basis, and give them a chance to take part in this process of selection. It is for that reason, and not because of the merits or the demerits of the individual basic bills, that I do suggest that the substitute bill not be accepted, but that H.R. 8389, as amended up to this time, be accepted and enacted and approved by this body.

The PRESIDING OFFICER. Does the Senator from Arkansas desire further time or does he yield back the time?

Mr. MCCLELLAN. I yield back the time.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment in the nature of a substitute by the Senator from Montana.

Mr. HRUSKA. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read the third time.

The bill (H.R. 8389) was read the third time.

The PRESIDING OFFICER. Do Senators yield back their time?

Mr. MCCLELLAN. I yield back the remainder of my time.

Mr. HRUSKA. I yield back the remainder of my time.

The PRESIDING OFFICER (Mr. Brock). All remaining time having been yielded back, the question is, Shall the bill pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

The result was announced—yeas, 74, nays 0.

Appendix III

Statement by Senator Alan Bible on S. 2426, a Bill to Add a New Section to Title 18 of the United States Code Relating to Crimes Involving Property in Interstate or Foreign Commerce to Provide a Civil Action for Damages Resulting From Violations of Section 659 (Theft in Interstate Shipments Act)

Mr. President: If we can take the profit out of cargo thievery and make those individuals who steal, fence or receive stolen property civilly liable in damages for their acts, I believe a major step will have been taken to curb the biggest billion dollar racket nationally today—the theft, pilferage and hijacking of truck, air, rail and maritime shipments.

This is the goal of a bill I introduce today to permit transport carriers, shippers or those lawfully in possession of goods moving in interstate or foreign commerce to recover treble damages from any person who steals them during the course of such movement or who buys, receives or has them in his possession after they have been stolen, having knowledge of their stolen character.

This bill would permit recovery of damages for losses sustained as a result of a violation or conviction under the Theft In Interstate Shipments Act (18 Stat. 659), providing criminal penalties for the theft or purchase of stolen goods moving in interstate commerce. It would add the civil remedy to the present criminal statute.

In brief, this legislation is designed to help take the profit out of marketing stolen goods. Certainly, if a thief does not have a buyer to purchase or "fence" for resale his stolen or "hot cargo", then his market will dry up.

As Chairman of the Senate Small Business Committee, I have listened to two years of testimony during our transportation theft hearings about how the American shipping public conservatively loses over $1 billion per year in cargo thefts, a loss that the consumer pays much more than that for when the substantial crime-inflated price tag is added.

Numerous witnesses from the transportation, insurance and shipping industries have repeated the same theme, namely, that the huge amounts of cargo stolen must be passed along to unscrupulous buyers

for eventual resale in the shady market to make those original thefts profitable. As an example, Mr. Gilbert H. Meyer, Chief Special Agent, American Insurance Association, told our committee:

> . . . many of these things are stolen for order and they are handled by organized crime. The markets are already established and the property is absorbed into our economic system just like a huge dry sponge. It just sucks it all up and it disappears . . . under the veil of secrecy that is very difficult to penetrate. . . .
>
> . . . If we can eliminate the profit motive from a lot of these activities, I believe we have nailed them. In my opinion and experience, we do not penetrate the activities of the receivers, the fences and the people in possession of this stolen property. The convictions are very infrequent. They are few and far between. The percentage of recovery of stolen property is almost negligible. I do not think it exceeds 5 percent of all property stolen that is recovered. This is one of the fields which goes back to a further facet of this problem.
>
> I think that law enforcement officers have not developed sufficient criminal intelligence concerning the activities of those people who are engaged in this activity. There is a lack of information concerning their activities and people who participate. We are faced with a problem of having a weak link in the chain. The organized criminals do not participate in the actual stickup. They hire people to go out and do these jobs. The participant is paid off as soou as the job is accomplished. He delivers the truck to an intermediary. The intermediary then delivers it to a warehouse. From the warehouse, it is disposed of and put into the channels of disposition.

Mr. President, that statement points up precisely at what this legislation is directed, the seller of stolen goods who may mask as a legitimate merchant but whose source of supply is stolen property. Actually, this probably accounts for a large share of the nearly $1½ billion worth of cargo stolen from all modes of transport in 1970, a 17 to 23 percent increase over the previous year.

As I have said previously, neither government nor industry has yet been able to mount an effective response to control these losses, whose sources we believe are both highly organized criminals and lesser organized groups, as well as the occasional thief. Our hearings have showed that cargo, especially in air, truck and maritime areas, have overwhelmed facilities. Efforts by carriers to substitute insurance payments for adequate security measures have left both the carriers and insurance companies in difficult straits in many instances. And the criminal element, knowing about the richer pickings in the crowded terminals and on loading and unloading docks, have had profitable days at the public's expense.

Wherever the blame lies, it is obvious that more needs to be done to control this growing national problem. We believe our bill, S. 942, to establish a Presidential Commission on the Safety and Security of Cargo and recently ordered reported to the Senate after approval by the Commerce Committee, will help. But more needs to be done on other fronts.

A recent tort action in Georgia is one example that may aid in discouraging the theft of goods in transit. In that case a judgment was entered under a Georgia State law for the value of merchandise stolen from a commercial trucking firm and punitive damages assessed against those who participated in the theft and the owner of a company who purchased the stolen goods.

Briefly, the facts were these: The thieves stole $26,000 worth of wire fencing from a motor carrier, contacted a fence, who, by a middle-of-the-night phone call, sold the fencing to the owner of a retail building supply firm for $2,600. Subsequently, the Federal Bureau of Investigation solved the case, recovering some of the wire. The two

thieves and the fence were subsequently tried and found guilty under Federal criminal law. The final buyer was not brought to trial on criminal charges because of a decision that proving he had knowledge of the theft at the time of his purchase might be too difficult to secure a criminal verdict but not in a civil suit for money damages under the receiving-stolen-property Georgia State law. The plaintiff trucking company was awarded full actual damages of $11,877.12 and $4,375 in punitive damages were assessed against each of the four defendants, the two thieves, the fence and the buyer. The fence and the buyer defended the civil action charges but did not appeal the judgment.

Had it not been for the Georgia tort statute, the ultimate purchaser of the stolen goods would have gone untouched.

We can only speculate about the number of times that a comparable fact pattern has existed where a criminal action may be successfully prosecuted against all but the final purchaser, who, though known, escapes both criminal prosecution and civil liability presently.

This bill should furnish a valuable addition to the arsenal of weapons our Federal courts can use against those who engage in the theft of goods moving in interstate commerce, those who "fence" such goods and the buyer who has knowledge of their stolen characteristics.

Mr. President, I believe we have ample precedent for a civil remedy for damages to be maintained along with a criminal statute. The distinguished senior Senator from Arkansas (Mr. McClellan) introduced and saw enacted into law the Organized Crime Control Act of 1970 (84 Stat. 922) which allows those injured as a result of the racketeering conduct of others, to recover in treble damages without a dollar limitation.

Certainly the recovery in civil damages will give to businessmen, shippers and carriers, who pay the brunt of losses for cargo theft, an opportunity to recover some of their dollar losses and at the same time tighten up the shady market area where thieves sell their stolen goods.

And Lois Rosen had some advice for cargo buyers in the April, 1971 issue of *Modern Retailer*, when she quoted an FBI agent's suggestions: "It's like cashing a check. Know your endorser; know your supplier. If you're dealing with a legitimate supplier, chances are it's legitimate."

As I recall it, our hearings were told that professional underworld thieves have established substantial footholds in many manufacturing, distributive and merchandise industries to move their loot through "legit mate business" channels.

If I remember correctly, in the heyday of the Al Capone reign in Chicago, he was convicted not for murder, theft, the Volstead Act or other mobster activity, but for income tax evasion. Perhaps, it is time we go after the modern day cargo thieves indirectly too as this bill proposes and more directly as other pending legislation suggests.

Mr. President, in conclusion, I ask unanimous consent that there be inserted into the *Record* at the conclusion of my remarks a copy of my bill, a news article from *The Atlanta Constitution* of March 5, 1971, citing the Georgia case and an article from the March edition of *Modern Retailer* magazine on "Organized Crime Moves Into the Theft/Hijacking of Merchandise."

92D CONGRESS
1ST SESSION

S. 2426

IN THE SENATE OF THE UNITED STATES

AUGUST 4 (legislative day, AUGUST 3), 1971

Mr. BIBLE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To add a new section to title 18 of the United States Code relating to crimes involving property in interstate or foreign commerce to provide a civil action for damages resulting from violations of section 659.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a new section be added following section 659 of title 18 of the United States Code and sections 660 through 664 be redesignated as sections 661 through 665, respectively.

SEC. 2. (a) Chapter 31 of title 18 of the United States Code is amended by inserting after section 659 a new section as follows:

"(a) Any person injured in his business or property

by reason of a violation of section 659 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

"(b) Any civil action or proceeding under this section against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"(c) In any action under this section in any district court of the United States in which it is shown that the needs of justice require that any other party residing in any other district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"(d) All other process in any action or proceeding under this section may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."

(b) The analysis at the beginning of chapter 31 of title 18 of the United States Code is amended by inserting after section 659 the following new item:

"660. Civil remedy for injuries resulting from violation of section 659."

(c) Sections 660 through 664 are redesignated as sections 661 through 665, respectively.

(d) The amendment made by this section shall be effective after thirty days following the date of enactment of this Act.

Section-by-Section Analysis

Section 1: Would amend the Federal theft from interstate commerce act and the stolen property act, Sec. 2314 and 2315, Title 18 of the U.S. Code by reducing the statutory limits from $5,000 to $500.

Section 2: Would add a new section 2319 to Title 18 USC to provide for treble civil damages against any person in wrongful possession of a person's property which was moving in interstate or foreign commerce. This includes actions against the thief and the purchaser of such stolen goods.

Any action under this section would be brought in a District Court of the United States in any district in which the defendant resides.

[From the Atlanta (Ga.) Constitution, March 5, 1971]

Truck Firm Gets $30,000 Judgment

A federal jury Thursday made a $30,000 judgment against four men accused of involvement in the theft of fencing and purchase of merchandise stolen from a commercial trucking firm.

It was the first known instance of a motor common carrier collecting damages in a theft case, and gives carriers a legal opening to move against receivers of stolen goods, according to attorney Paul Daniell.

The fencing wire was stolen in September 1967 from a trailer owned by Watkins Carolina Express, after the cargo had been shipped to Atlanta but before delivery to its receiver, Daniell said.

A portion of the wire shipment was found by FBI agents at a north Georgia building supply firm, but was in such damaged condition that Watkins Carolina sustained an $11,877.12 loss, according to Daniell.

The company filed suit in U.S. District Court against Robert Lee Rice, Willy Curtis Durrah, James Frank Pinyan and Norris Howard, owner of the Coal Mountain Supply Co. in Cumming.

The federal jury awarded *Watkins Carolina* full actual damages, and assessed each defendant $4,375 in punitive damages.

Daniell said the Georgia law used in the case has been on the books "for a long time," but had "just never been used in these particular circumstances before."

[From Modern Retailer, March 1971]

Organized Crime Moves Into Theft/Hijacking of Merchandise

(By Lois Rosen)

NEW YORK CITY—Retailers, who already lose about $2.5 billion from all kinds of internal and external thefts and shrinkages, now have another problem: the rising number of cargo disappearances.

The condition is so rampant that it is adding to markon all the way down the line from mill to retailer and consumer. And where is this "hot" merchandise going? It is being funnelled through "legitimate" channels such as manufacturing retail, and wholesale companies now controlled by racketeers. In many cases, it shows up in the odd-lot and fire sale and close-out markets where the original disposition of the goods is very difficult for even the most vigilant potential buyer to track down.

The rising curve of merchandise thefts has become so great that there is no indication that (at least in the short range) it will do anything but go higher still. It is a ticklish factor that retailers will be facing more and more in their buying and selling activities.

In the past year, over a billion dollars worth of merchandise was stolen in transport from trucks, ships, railroads, and airports. Trucks have been hit hardest, according to "U.S. News and World Report," with cargo losses climbing from $275,000,000 in 1966 to an estimated $994,000,000 for the year just ended. In New York City alone, for the first 11 months of 1970, the Police Department's Safe, Loft and Truck Squad reported 2,134 grand larcenies of trucks and contents plus 269 hijacks. (A hijack is a larceny in which force or the threat of force is used.)

But, no mode of transportation is theft-proof. 1970 estimates for losses via theft from transportation categories are: trucking, $900,000,000; airlines, $110,000,000; railroads, $250,000,000; and waterfront, $210,000,000. As staggering as these figures appear, they are generally considered conservative estimates because hundreds of cargo-theft cases go unreported.

One incident that was reported was the hijack last August 5 of more than $25,000 worth of Italian-made boots and shoes from a truck passing through Brooklyn. Captain Thomas Kissane of the New York City Police Department's Safe, Loft and Truck Squad told Modern Retailer that the goods were being shipped "by a large retailer" to a branch store in another borough. In this particular case, thanks to "inside information," much of the cargo was recovered and arrests made within three weeks.

But most cargo thefts remain unsolved. Gilbert Meyer, consultant for inland marine matters at the American Insurance Association, a group representing 150 insurance companies, estimates that only 5 per cent of the cargo stolen from trucks is recovered. Although New York City has been hit hardest by cargo theft (along with Boston and Washington, D.C.) no area is immune.

DISCOUNTERS HIT

Last year, a large discounter with a warehouse in the Far West was transferring merchandise from a warehouse to four stores via commercial trucker. Merchandise pinpointed for Easter selling disappeared from the trucks to the tune of over $100,000. Part of the merchandise was later recovered 100 miles away in a small flea market. The original tickets were still on the clothes. "The merchandise was insured, but the company didn't have it in time for its Easter sales and it was too late to get replacements," related Lincoln Zonn, a security consultant for many mass merchandisers.

Incidents such as this one involving retailers are infrequent compared with the number of incidents involving importers and manufacturers who supply the retailers. Either way the retailer loses. You'd better believe cargo theft affects the mass merchandiser. If garments are stolen out of the garment center from manufacturers, the cost of doing business with them goes up. Manufacturers have to tack something on to the price. The retailer then either has to tack something on to his price or work on a lower margin," Lincoln Zonn stated.

Richard Maxwell, an executive of Associated Dry Goods which runs 15 department-store organizations with 77 units, notes that the

retailer suffers when cargo disappears even though it is insured. "We got insurance coverage, of course. But we also have escalating insurance premiums. The cost of doing business is rising. And the retailer is losing," he said in a telephone interview.

Adding to the rise in insurance rates is the limited liability of the airlines. (The limit is $7.48 per pound in international transport whether the cargo is potatoes or diamonds.)

William P. Sirignano, executive director and general counsel for the Waterfront Commission of New York Harbor, summed up the problem when he testified before Nevada Senator Alan Bible's Select Committee on Small Business. The Committee has been holding hearings on cargo theft and is working on legislation to establish a commission on cargo safety and provide for a centralized cargo-loss reporting system.

"There is no dobut that the protection of cargo is important to the economy of the entire nation. The actual dollar value of lost cargo is of the least importance. The real serious effects of cargo losses are that manufacturing schedules are not met; job layoffs may occur for lack of raw materials; seasonal markets are lost; custom revenue is lost; insurance premiums are increased; and the stolen goods are put into commerce by the underworld in competition with legitimate business, oftentimes in competition with the very owners of the stolen property," Sirignano told members of the Senate Committee.

Who is doing the stealing? The answer seems to be just about everyone who can get his hands on the cargo. This includes the professional racketeers as well as amateur thieves.

Captain Thomas Kissane believes there are more amateurs involved in truck larcenies today than there were in the past. "Recently, we came up with a case involving $100,000 worth of left shoes. (Shoes are often shipped this way to discourage theft.) Now, unless you happen to run into a group of one-legged, left-footed men, this merchandise is not particularly marketable. We're also finding more cases of abandoned cargo these days. This wouldn't have happened in the past when hijackers were technicians and not amateurs," he commented. And then there was the case last year of the truck held up at gun point. Its cargo—$20,000 worth of onions!

Mario T. Noto, executive director of the Airport Security Council, believes most of the air-cargo thefts are "crimes of opportunity" and not organized. "If you leave stuff around and don't watch it, someone is bound to take it," one of Noto's staff advisers opined.

The Council, now including 43 air carriers, was established by the airlines themselves to cope with the problem of rising air-cargo thefts. It has been working hard to remove "opportunities" for stealing by imposing tighter security regulations at the four major New York and New Jersey airports. This past year, the Council reports that its efforts have paid off at Kennedy with a 29.5 per cent reduction in thefts.

Still, things are far from rosy at this airport where one day last August $232,268 worth of diamonds simply disappeared. Many law enforcement officials such as Eugene T. Rossides, assistant secretary of the treasury for enforcement and operations, believe professional mobsters are behind much of the cargo crime.

And Kennedy Airport, in fact, has a rather unsavory history in this respect. The New York State Commission of Investigation's report on racketeer activities in the air-freight industry in March, 1968, reads

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like a Perry Mason mystery. Big name racketeers, it was revealed, were holding top jobs in both a labor union and a trade group operating out of Kennedy. The whole grisly history was related by a reporter, Fred Cook, in a "New York Times" article last April 12 entitled "The Jackals at J.F.K." and updated last month by a reporter, Denny Walsh, in an article in "Life Magazine."

A problem, of course, is collecting enough evidence to bring known racketeers to trial. The problem is compounded by the fact that "organized crime has been able to cloak itself with a certain amount of legitimacy," points out Nathan Skolnik, deputy commissioner of the New York State Investigation Commission.

"MIXED BLESSING"

Both organized crime and petty thievery still flourish at the waterfront, although conditions have improved considerably since the 40's and early 50's when loot was considered a "fringe benefit" of almost every waterfront job. The Waterfront Commission of New York Harbor, which was established in 1953 to crack down on mobsters, reports that the advent of "containerized cargo" (shipping in huge sealed containers) has proved a "mixed blessing" for importers.

The Commission in making its report last April to New York Governor Rockefeller and New Jersey Governor Cahill had this to say about containerization: "While it has deterred petty pilferage, it has attracted large-scale organized crime theft (most containers hold cargoes valued generally from $50,000 to $200,000) . . . The larceny of a container—unlike thefts of goods from a pier—is obviously not the result of impulse. Such a major theft requires planning and cooperation among many larcenous individuals; persons who can identify the contents of a container and its location; persons who have storage facilities to hide the huge quantity of cargo; and a tractor and trailer to move the stolen container. It is obvious that the container has become the target of professional thieves with underworld connections with the ability and organization to secure valuable information and the contacts to distribute and 'fence' stolen cargo in large volumes."

What kinds of cargo are most tempting to thieves? Ready-to-wear clothing, probably because it is so easy to dispose of, tops the list of most-stolen merchandise from trucks and airports. "They take sweaters from Ireland, leather coats from Spain; you name it," said one airport security official.

On the waterfront, "tobacco, liquor, and electronic equipment are leading the hit parade," according to Jerry Sullivan, executive vice president of the Security Bureau, an organization made up of 200 steamship lines and insurance companies.

In many cases, theft is done to order, believes Gilbert Meyer of the American Insurance Association. "The hoodlums know what will sell and they go after whatever is seasonable, attractive, and disposable. They deal in theft every day just the way Macy's does its buying. The business is so set up that the thief is often a hired gunman who does the job and gets paid for it without ever knowing who hired him," Meyer reported.

In the cases when cargo is recovered, the problem of identification is a real one. Joseph E. Poser, vice chairman of the American Fur Merchants Association, said that he was called in by the police one day to identify some furs stolen from his own company. "It was

impossible. We had shipped the furs raw and these skins had been dressed. Sometimes an identifying mark is put on the leather, but this is costly and time consuming and generally nobody does it," Poser said.

Where does the almost $1 billion worth of stolen goods wind up? The "twilight retailers" (as Security Consultant Sol Astor calls them) the so-called discount shops, the flea markets, the outdoor peddlers, are an obvious funnel for stolen merchandise. But they can't absorb huge amounts. Stolen goods eventually find their way into legitimate business, many insurance people and law enforcement officials believe.

A recent report cited by Carl McDowell, executive vice president of the American Institute of Marine Underwriters, before the Senate Committee on Small Business described the problem: "The most disturbing aspect of the large-scale thefts is the suspicion that much of the loot moves through channels of legitimate business.' Professional thieves have established substantial footholds in many manufacturing, distributive, and merchandise industries," he said.

A N.Y. magazine recently published the confessions of a master fence who has since retired to Switzerland to live on the more than $1 million he accumulated while "in business." He related how he established himself in the business with capital derived from a $3,500 stolen shipment of Betsy Wetsy dolls.

"Getting established" said "New York Magazine," "meant setting up drops all over the city; building a network of reliable buyers who had a good eye for merchandise; and choosing salesmen who could unload the stuff to legitimate and semilegitimate outlets—unknowing retailers, jobbers, and manufacturers' representatives."

The master fence, himself, remains undercover throughout all this activity, according to reporter, Michael Pearl. "He seldom comes in contact with the stolen goods. He buys everything through intermediaries, sight unseen. Until it is sold, the merchandise is kept in 'drops' which the fence never goes near. Finally, other intermediaries sell the stuff to salesmen, jobbers, or retail stores. The master fence is completely insulated. Only his money is exposed."

In the meantime, legitimate distributors are naturally quick to take advantage of the so-called closeout or fire sale. As Captain Kissane of the New York City Police Department points out, "If you hear you can get a load of odd-lot merchandise from a fire sale, who is going to call and see if there actually was a fire?"

Statement by Senator Alan Bible on an Amendment to S. 2994, "Victims of Crime Act of 1972"

Mr. President. I send to the desk an amendment I intend to propose to S. 2994, the "Victims of Crime Act of 1972."

On August 4, 1971, I introduced S. 2426, a bill to provide for civil damage for cargo theft losses. (117 *Cong. Rec.* 13062 [daily ed. August 4, 1971]). At that time, I expressed my belief that if we could take the profit out of cargo thievery and make those individuals who steal, fence, or receive stolen property civilly liable in damages for the acts, we would have taken a major step to curb the biggest billion-dollar racket nationally today—the theft, pilferage and hijacking of truck, air, rail and maritime shipments.

Mr. President, since the introduction of S. 2426, the Subcommittee on Criminal Laws and Procedures, under the able leadership of the distinguished senior Senator from Arkansas (Mr. McClellan) has held hearings on the bill and a series of related items. I am pleased to note that these hearings have produced impressive support for the basic concept of S. 2426. It has been endorsed by the Department of Justice, the Transportation Cargo Security Council, the American Trucking Associations, the Association of American Railroads, and American Institute of Marine Underwriters.

Typical of the support voiced was the letter of W. A. Bresnahan, President of the American Trucking Associations, Inc., which said:

> The theft of cargo from the trucking industry is one of the most serious problems confronting our industry today. We do not know the exact total dollars lost to thieves. Based on fragmentary information available to us, we estimate it to be in the 600 to 700 million dollars range. Further, we believe the bulk of the freight stolen is taken by "professional thieves"; that is, thieves who steal and convert the goods to cash through established fences or directly to buyers who purchase under circumstances and at prices which would cause a reasonable man to believe that the goods are "hot".
>
> The burden of proof which must be met to obtain conviction on a charge of possession of stolen goods is so great that it sharply limits successful prosecutions for that crime. The burden of proof required in a civil action is considerably less. In other words, evidence insufficient to obtain a criminal conviction could well be strong enough to warrant a successful damage judgment in a civil action.
>
> The treble damage provision increases the monetary risk of the fence and the buyer, resulting in a decrease of price to the thief and reduction of profit to each in the chain.
>
> We do not consider the enactment of S.B. 2426 to be a panacea but rather another means for use in getting to the fences and buyers of stolen goods. These latter two groups are the ones who make stealing profitable for the actual thief—without their finances and distribution network, the professional thief cannot exist.
>
> May I again urge your favorable consideration of this bill.

Mr. President, the amendment to S. 2994 that I now send to the desk is based on S. 2426. As indicated by Senator McClellan on December 11, 1971, when he introduced the bill (117 *Cong. Rec.*

21327 [daily ed., Dec. 11, 1971]), S. 2994 combines the essential feature of six bills dealing with victims of crime, which were pending before the Subcommittee on Criminal Laws and Procedures. Because of limitations of time, it was not possible to have the provisions of S. 2426 worked into the text of S. 2994 prior to its introduction. My amendment, however, would not integrate the basic concept of S. 2426 into Title IV of S. 2994. As formulated in the amendment, the provision adapts the various venue and other procedural aspects of treble damage suits in the anti-trust area to civil suits for cartage theft.

I am pleased to indicate that this amendment has been discussed with the distinguished Senator from Arkansas. It is my firm belief that this amendment perfects the initial concept of S. 2426 and strengthens the provisions of S. 2994. Senator McClellan has also promised to see that the amendment is given every consideration in the mark up process of S. 2994, which should begin soon after the last round of hearings on victims of crime legislation of the Subcommittee now scheduled for March 7, 1972. I am confident that the Subcommittee will accept it.

For the benefit of other Senators, I would like to give you a brief background of cargo thievery from interstate shipments which my amendment seeks to reach.

Early in 1969 the Senate Small Business Committee, of which I have the honor of being Chairman, began an investigation and public hearings into the impact of crime against small business growing out of our interest in the Small Business Protection Act of 1967.

The first phase of our series of hearings centered on air cargo thefts, then maritime and truck losses, and finally the railroads, our oldest cargo transport system.

It is graphically clear that a near crisis in the movement of cargo in this country by our commercial carriers is upon us today. Up to this point, law enforcement agencies, our Federal transportation regulatory and policy bodies, and our transport carrier industries generally have not been able to mount an effective response.

Conservative estimates by the Senate Small Business Committee show that such theft losses were approximately $1½ billion in 1970, distributed among air, truck, rail and maritime carriers. These loss figures represent only the wholesale or released liability values of such goods. They do not take into consideration the retail profit markup, the cost to the shipper in loss of market share, claim processing expense, increased insurance premiums, capital tied up in the claims pipeline, the loss of customer good will, loss due to the dislocation of a manufacturer's production line, or a variety of other costs.

Therefore, if we add the direct dollar theft loss, the carrier's indirect cost of $2 to $5, and the shipper's indirect cost of $5 to $7, we may be talking of costs to the national economy approaching $8 to $10 billion. Again, it is the consumer who pays the crime-tagged price as the inflation spiral goes round and round.

There seems little doubt that the country's transport industry has become the favorite target of organized and unorganized crime. The pickings are richer and easier.

Law enforcement officials plus shipper, carrier, and insurance executives believe most of this massive cargo theft finds its way back into legitimate commerce as a result of the operations of criminal, middlemen fences. Today legitimate merchants, salvage companies,

discount stores, as well as the more shady dealers operating in dimly lit shabby stores, are believed to be the lifeblood of cargo theft operations. It is believed that many of these merchants are engaged in selling goods which were originally stolen from interstate and foreign commerce shipments. It is charged that these merchants buy goods from middlemen fences who in turn buy directly or control the operations of thieves preying on cargo shipments from all modes of transportation.

If we can dislocate this criminal market, take the profit out of cargo thievery and make those individuals who steal, fence, or receive stolen property civilly liable in damages for their acts, we are going a long way towards taking the profit out of marketing stolen goods. This amendment is designed to reach that goal.

Mr. President, I wish to commend the distinguished senior Senator from Arkansas for his most outstanting cooperation in attempting to raise this problem now preying on the very viability of U.S. commerce. His concern for the problems of the small businessman shipper who bears the brunt of these criminal acts is certainly commendable. His entire concern for victims of crime represents a true and outstanding turnaround in the concept of the role of Government in the protection of the life and property of the citizen. If through the normal criminal justice system, Government is unable to protect the lives and property of our citizens, then it would seem proper and correct that the Government make some effort to compensate for losses suffered by our citizens by events over which they have no control.

I submit to the members of this body that crime today has reached such national proportions, that affirmative steps contemplated by S. 2994, sponsored by the distinguished gentleman from Arkansas, are essential for the statute books to hopefully bring the relief so sorely needed.

Mr. President, I ask unanimous consent to have the text of the amendment and a section by section analysis printed in the *Record* at the conclusion of my remarks.

92D CONGRESS
2D SESSION

S. 2994

IN THE SENATE OF THE UNITED STATES

MARCH 3, 1972

Referred to the Committee on the Judiciary and ordered to be printed

AMENDMENTS

Intended to be proposed by Mr. BIBLE to S. 2994, a bill to provide for the compensation of innocent victims of violent crime in need; to make grants to States for the payment of such compensation; to authorize an insurance program and death and disability benefits for public safety officers; to provide civil remedies for victims of racketeering activity; and for other purposes, viz:

On page 51, line 18, insert the following word "ACTIVITY" add "AND THEFT".

On page 51, line 22, insert immediately before the period the words "and theft".

On page 55, between lines 19 and 20, insert the following new section:

"SEC. 403. (a) Section 659 of title 18 of the United States Code is amended to read as follows:

"'§ 659. **Interstate or foreign shipments by carrier; State prosecutions; civil remedies for victims of theft**

"'(a) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property which is moving as, or which is a part of, or which constitute an interstate or foreign shipment from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform, or depot, or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal, or air navigation facility, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained.

"'(b) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property, which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce, or to break into, embezzle, steal, unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to

convert to his own use, any of the contents of such baggage, goods, chattels, or other property, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know that it has been embezzled or stolen or otherwise unlawfully taken, carried away, concealed, or obtained.

"'(c) It shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce, or from any passenger thereon, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained.

"'(d) Whoever violates any provision of subsection (a), (b), or (c) of this section shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods, chattels, or other property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"'(e) The district courts of the United States shall have jurisdiction, without regard to the amount in controversy, to prevent and restrain violations of this section by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

"'(f) The Attorney General may institute proceedings under subsection (e) of this section. In any proceedings brought by the United States under subsection (e) of this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

"'(g) Any person may institute proceedings under subsection (e) of this section. In any proceeding brought by any person under subsection (e) of this section, relief shall be granted in conformity with the principles which govern

the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any action before a determination thereof upon its merits.

"'(h) Whenever the United States is injured in its business or property by reason of any violation of this section, the Attorney General may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual damages sustained by the United States, and the cost of the action.

"'(i) Any person who is injured in his business or property by reason of any violation of this section may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

"'(j) Any civil action or proceeding under this section against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"'(k) In any civil action or proceeding under this section in any district court of the United States in which it is shown that the ends of justice require that any other party

residing in any other district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in an judicial district of the United States by the marshal thereof.

"'(l) In any civil or criminal action or proceeding under this section in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"'(m) All other process in any civil or criminal action or proceeding under this section may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

"'(n) The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under this section if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if he had instituted the action or proceeding.

"'(o) A final judgment or decree rendered in favor

of the United States in any criminal action or proceeding under this section shall estop the defendant in any subsequent civil proceeding as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

"'(p) Except as hereinafter provided, any civil action or proceeding under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding, other than an action under subsection (h) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of this section, the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsection (g) or (i) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

"'(q) A violation of this section shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, chattels, or other property.

"'(r) The carrying or transporting of any such money,

baggage, goods, chattels, or other property in interstate or foreign commerce, knowing, or having reason to know, it had been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained, shall constitute a separate violation and subject the violator to criminal penalties and a civil cause of action under this section and the violation shall be deemed to have been committed in any district into which such money, baggage, goods, chattels, or other property, shall have been removed or into which it shall have been brought by such violator.

"'(s) To establish the interstate or foreign commerce character of any shipment in any criminal or civil action or proceeding under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property. Proof that a person was found in unexplained possession of any money, baggage, goods, chattels, or other property, recently embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section, shall be prima facie evidence that such person knew that such property was or that such person had embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception such money, baggage, goods,

chattels, or other property in violation of this section. Proof that a person bought or received for a consideration substantially below its fair market value money, baggage, goods, chattels, or other property embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section shall be prima facie evidence that such person probably knew that such property was embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section.

"'(t) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any criminal prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.'

"(b) The analysis at the beginning of chapter 31 of title 18 of the United States Code, for section 659, is amended to read:

"'659. Interstate or foreign baggage, express or freight; State prosecutions; civil remedies for victims of theft'.".

Analysis of Proposed Amendment to S. 2994 The Victims of Crime Act of 1972 and Changes in 18 U.S.C. Section 659

This amendment would amend Title IV of S. 2994, which provides civil remedies for victims of racketeering activity, by extending its provisions to victims of theft. A new section (403) is added to Title 4, which amends and rewrites Section 659 of Title 18 of the U.S. Code, entitled "Interstate or foreign shipments by carrier; State prosecutions." The proposed new section 659 consists of twenty paragraphs designated "a" through "t." The existing section 659 consists of 9 paragraphs, not number or lettered.

An analysis of the proposed new section 659 by paragraph follows. Significant change from the present section 659 are pointed out.

I

PARAGRAPH "A"

Paragraph "a" restates and consolidates Paragraphs 1 and 2 of Section 659 to provide essentially that it shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property which is moving as, or which is a part of, or which constitute an interstate or foreign shipment from any pipeline system, railroad car, wagon motor-truck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal, or air navigation facility, or to buy, receive or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen or otherwise unlawfully taken, carried away, concealed, or obtained.

New to this section are the words "money," "baggage," "or other property" and the phrase at the end of the paragraph "knowing, or having reason to know, that it has been embezzled, stolen or otherwise unlawfully taken, carried away, concealed, or obtained."

PARAGRAPH "B"

This paragraph restates paragraph 3 of section 659 to provide that it shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, or conceal, or by fraud or deception obtain with intent to convert to his own use, any money, baggage, goods, chattels, or other property, which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce, or to break into, embezzle, steal, unlawfully take, carry away, or conceal, or by fraud or deception obtain with intent to convert to his own use any of the contents of such baggage, goods, chattels, or other property, or to buy, receive, or have in his possession any such money, baggage, goods, chattels or other property, knowing, or having reason to know that it has been embezzled or stolen or otherwise unlawfully taken, carried away, concealed or obtained.

New to this section are the words and phrases "money," "goods, chattels, or other property," and "or having reason to know."

PARAGRAPH "C"

This is a restatement of paragraph 4 of section 659 which provides that it shall be unlawful for any person to embezzle, steal, or unlawfully take, carry away, conceal, or by fraud or deception obtain, with intent to convert to his own use, any money, baggage, goods, chattels, or other property from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce, or from any passenger thereon, or to buy, receive, or have in his possession any such money, baggage, goods, chattels, or other property, knowing, or having reason to know, that it has been embezzled, stolen, or otherwise unlawfully taken, carried away, concealed or obtained.

New words and phrases are "other property," "having reason to know," "or otherwise unlawfully taken, carried away, concealed or obtained."

PARAGRAPH "D"

This is a restatement of paragraph 5 of section 659, which carries the penalty provisions. Language has been perfected; the penalties are the same.

II

Paragraphs "e" through "p" are new to section 659. They provide:

PARAGRAPH "E"

The district courts of the United States are given jurisdiction, without regard to the amount in controversy, to prevent and restrain violations of this section by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

PARAGRAPH "F"

The Attorney General may institute proceedings under subsection (e) of this section. In any proceedings brought by the United States, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

PARAGRAPH "G"

Any person may institute proceedings under subsection (e) of this section. Relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate

danger of irreparable loss or damage, a preliminary injunction may be issued in any action before a determination thereof upon its merits.

PARAGRAPH "H"

Whenever the United States is injured in its business or property by reason of any violation of this section, the Attorney General may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual damages sustained by the United States, and the cost of the action.

PARAGRAPH "I"

Any person who is injured in his business or property by reason of any violation of this section may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

PARAGRAPH "J"

Any civil action or proceeding under this section against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

PARAGRAPH "K"

In any civil action or proceeding under this section in any district court of the United States in which it is shown that the ends of justice require that any other party residing in any other district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

PARAGRAPH "L"

In any civil or criminal action or proceeding under this section in the district court of the United States for any judicial district, subpena issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

PARAGRAPH "M"

All other process in any civil or criminal action or proceeding under this section may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

PARAGRAPH "N"

The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under this section if in his

opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if he had instituted the action or proceeding.

PARAGRAPH "O"

A final judgment or decree rendered in favor of the United States in any subsequent civil proceeding as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

PARAGRAPH "P"

Except as hereinafter provided, any civil action or proceeding under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding, other than an action under subsection (h) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of this section, the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsection (g) or (i) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

PARAGRAPH "Q"

This paragraph takes the place of paragraph 6 of section 659.

A violation of this section shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, chattels, or other property "other property" is new under this amendment.

PARAGRAPH "R"

This takes the place of paragraph 7 of section 659.

The carrying or transporting of any such money, baggage, goods, chattels, or other property in interstate or foreign commerce, knowing, or having reason to know, it had been embezzled, stolen, or otherwise, unlawfully taken, carried away, concealed or obtained, shall constitute a separate violation and subject the violator to criminal penalties and a civil cause of action under this section and the violation shall be deemed to have been committed in any district into which such money, baggage, goods, chattels, or other property, shall have been removed or into which it shall have been brought by such violator.

The words "freight" and "express" now in the law are omitted. New words and phrases are "on other property" "on having reason to know" on otherwise unlawfully taken, carried away, concealed or obtained," "and a civil cause of action under this section."

PARAGRAPH "S"

This paragraph takes the place of paragraph 8 of section 659.

Beginning with the third sentence new material is added, i e., "Proof that a person was found . . ." also, in the first sentence the phase "in any criminal or civil action or proceeding."

To establish the interstate of foreign commerce character of any shipment in any criminal or civil action or proceeding under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property. Proof that a person was found in unexplained possession of any money, baggage, goods, chattels, or other property, recently embezzled, stolen or otherwise unlawfully taken, carried away, concealed or obtained by fraud or deception in violation of this section, shall be prima facie evidence that such person knew that such property was or that such person had embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception such money baggage, goods, chattels, or other property in violation of this section. Proof that a person bought or received for a consideration substantially below its fair market value money, baggage, goods, chattels, or other property embezzled, stolen, or otherwise unlawfully taken, carried away, concealed, or obtained by fraud or deception in violation of this section shall be prima facie evidence that such person probably knew that such property was embezzled, stolen, or otherwise unlawfully taken, carried away, concealed or obtained by fraud or deception in violation of this section.

PARAGRAPH "T"

This paragraph is the same as paragraph 9 of section 659 except for one word. In the first sentence the word "criminal" has been added. A judgment of conviction or a acquittal on the merits under the laws of any State shall be a bar to any criminal prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

III

Section (b) of section 403 of the proposed amendment would change the analysis at the beginning of chapter 31 of title 18 of the United States Code, for section 659, to read:

659. Interstate or foreign baggage, express or freight; State prosecutions; civil remedies for victims of theft.

Statement by Senator Alan Bible on an Amendment to S. 2994, To Provide a Civil Action for Damages Resulting From Violations of Theft in Interstate Shipments, Before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, March 27, 1972

Mr. Chairman and members of this distinguished subcommittee, I am pleased to testify today in support of an amendment to S. 2994, the "Victims of Crime Act of 1972." I introduced this amendment on March 3, 1972, with the avowed purpose of taking the profit out of cargo thievery and making those individuals who steal, receive or market stolen property civilly liable in damages for their acts. I believe it will provide a major step to curb the biggest billion dollar national racket today—the theft, pilferage and hijacking of truck, air, rail and maritime shipments.

This amendment would strike at the middleman "fences" where it would hurt them most, their pocketbooks.

This amendment would enable persons in legal possession of goods to sue for treble damages persons responsible for stealing, buying or reselling goods moving in interstate commerce.

This amendment would provide that if goods are sold at less than fair market value, it is *prima facie* evidence that a person is trafficking in stolen goods.

This amendment would permit the Attorney General of the United States to enter a private civil damage suit on a class action basis for all citizens of the United States.

This amendment would grant the Federal district courts the power to issue injunctive orders to force persons engaged in the sale of stolen goods to divest themselves of business fronts or efforts used in the marketing of these stolen goods.

This amendment has as its basis S. 2426, which I introduced on August 14, 1971, a bill to provide civil damages for cargo theft losses.

Mr. Chairman, since the introduction of S. 2426, the Subcommittee on Criminal Laws and Procedures, under the able leadership of the distinguished senior Senator from Arkansas (Mr. McClellan) has held hearings on the bill and a series of related items. I am pleased to note that these hearings have produced impressive support for the basic concept of S. 2426. It has been endorsed by the Department of Justice, the Transportation Cargo Security Council, the American Trucking Associations, the Association of American Railroads, and the American Institute of Marine Underwriters.

Technically, my amendment to S. 2994 would integrate the basic concepts of S. 2426 into Title IV of S. 2994. As formulated in the amendment, the provision adopts the various venue and other procedural aspects of treble damage suits in the antitrust area to civil suits for cartage theft.

The fact that hearings are being held on this proposal so soon after its introduction is a tribute to the Subcommittee's appreciation of the importance and urgency of the bill.

Mr. Chairman, I would like to give you a brief background on the importance of reaching the criminal receiver of stolen goods, or as he is more commonly known, the fence.

Law enforcement officials plus shipper, carrier, and insurance executives believe most of this massive cargo theft finds its way back into legitimate commerce as a result of the operations of criminal, middlemen fences. Today, legitimate merchants, salvage companies, discount stores, as well as the more shady dealers operating behind the scenes are believed to be the link supporting widespread fence operations. It is believed that many of these merchants are engaged in selling goods which were originally stolen from interstate and foreign commerce shipments. It is charged that these merchants buy goods from middlemen fences who in turn buy directly or control the operations of thieves preying on cargo shipments from all modes of transportation.

Most legislative efforts have been geared toward combatting the crime of theft itself, but very little is being done to stop the equally important aspect of the illegal distribution of illegal goods. My amendment to S. 2994 is a vehicle which would go a long way in rectifying the inequitable legislative approach to the prevention of theft. It is aimed at not the thief, but the criminal profiteer who is not recognized by society as a thief, but more as a shady businessman. It is directed at the quasi-legal business functions of crime, without which there would be no theft. It will help the unaware buyers who become unwitting cogs in the criminal marketing chain.

This amendment is but the first phase in our efforts to halt the fencing of stolen goods. For the first time, the Select Committee on Small Business, of which I have the honor of being Chairman, will investigate this long-neglected, but vital element of crime. Never before has Congress conducted a searching examination of the operations of the silent hidden middlemen who are directly responsible for supporting all facets of property crime.

The staff of the Committee has been preparing a report on fence operations and I am appalled at the lack of information available from all sources. Preliminary investigations by the Committee staff have indicated that there is very little research and published material on: who receives stolen goods, how stolen goods get into the market place and where the key geographic purchasing, storage, transportation and selling areas are. I feel very strongly that in addition to my amendment to S. 2994, we will be able to develop new legislative solutions aimed at this form of criminal racketeering which is the main support of virtually all property crime.

How significant is the fencing operation? Does it warrant special legislation to destroy it?

Solderman and O'Connell in *Modern Criminal Investigation*, say:

> It has been truthfully said time and again that if there were no receivers of stolen goods there would be very little crime against property and against persons who are attacked and robbed of property. Criminal receivers are responsible for most of the dishonest and unethical practices in business, for youths committing crime, and for professional criminals continuing in crime.

Frederick J. Ludwig, chief assistant district attorney in Queens, New York City, put it this way:

The fence has always been at the center of thievish behavior.

And Morton R. Sarett, President of the Jewelry Industry Council, observed:

A jewel thief has to have a fence—unless he has an enormous number of girl friends to give things to.

In spite of the relative lack of information on fencing operations, I think we can make some safe assumptions:

First, fences play a vital role in the successful completion of a crime involving a major theft. Without the fence the theft is a meaningless act.

Second, stolen goods eventually reach a legitimate market place. The magnitude of theft is so great that the only reasonable outlet must be to legitimate consumers.

Third, the illegal distribution system from the thief to the market place must adversely affect legitimate business enterprises such as storage companies, transporters, wholesalers, lending institutions and others who are normally involved in a legal distribution system.

My amendment attacks more than just a follow-on crime to a theft; it attacks a criminal process that harms our whole marketing system and economic structure.

Eugene T. Rossides, Assistant Secretary for Enforcement and Operations, U.S. Department of the Treasury, in discussing theft and pilferage of international cargo at a Joint Conference on Cargo Security Crises, said:

The gravity of the problem is well known to all of you. The actual dollar loss is huge. In addition to the dollar loss, however, the economy is affected in other ways by such cargo losses—manufacturing schedules may be delayed; employees of manufacturers may be laid off due to lack of raw materials; seasonal markets may be lost; insurance premiums may be increased; stolen merchandise may be put into the stream of commerce by the underworld in competition with legitimate business, oftentimes in direct competition with the importers of the property which has been stolen; duty and internal revenue taxes are not collected on merchandise which is not received by the consignees; and lower income taxes are paid by importers who (1) fail to receive stolen merchandise which they would otherwise sell at a profit, and (2) claim a loss on their income tax returns for such theft or pilferage.

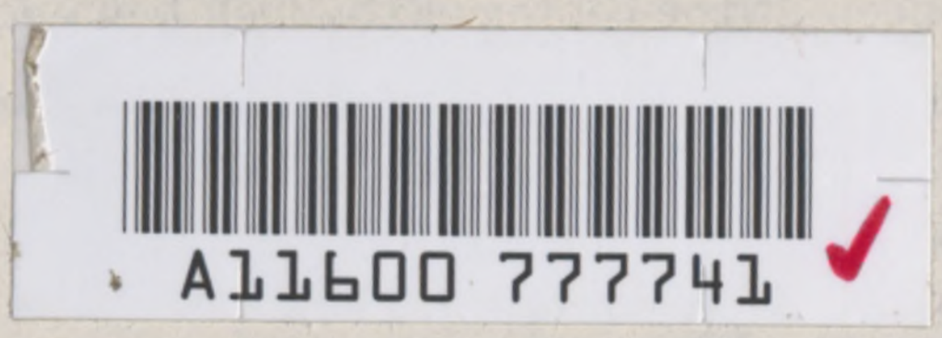
This malignant growth on our economy, which I believe could be arrested by the provisions of my amendment to S. 2994, is ironically the most publicly "accepted" of all crimes, when it may be actually more damaging to the general public welfare than the more infamous and better known felonies. It is necewsary that we expose the whole fencing operation, that we use our powers of legislation to wipe out this dangerous threat, that we stop this multiple plundering of the American public.

Mr. Chairman, let me quote some statistics from a recent series of articles on theft printed in *The Washington Star*.

Each year there are $3-billion employee thefts.
Each year there are $250-million auto thefts.
Each year there are $1.5 billion cargo thefts.
Each day there are $8-million shoplifting thefts.

This is primarily stolen property, as opposed to cash. This property must go somewhere . . . it must be moved . . . it must be sold . . . it must go through an illegal marketing distribution system—in other words it must be fenced. Let's get the fence.

Mr. Chairman, I respectfully urge that my amendment to S. 2994 be favorably reported as a part of your bill.


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