Uniform Law Conference of Canada

Report of the Criminal Section Working Group on Criminal Interest Rate: A Discussion Paper
Section 347 of the Criminal Code
In Need of Reform

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Introduction

In 1940, Parliament passed a law designed to regulate the business of small loans in Canada. The *Small Loans Act* provided protection for individual consumers, imposing limits on rates of interest and requiring the licensing of non-bank lenders. These limits were enforced through penal sanction making it an offence to charge interest in excess of the maximum rate, punishable by up to one year imprisonment and/or a fine not exceeding $1000. A number of factors, however, undermined the objectives of the legislation. The restrictions on lenders discouraged the issuance of small loans and limited the opportunities for competition between existing lending agents. The Act failed to keep pace with a maturing Canadian economy, as a reduced reliance on cash loans, coupled with the advent of credit cards, resulted in an overall decline in the number of loans falling under its ambit. In addition to these factors, many provinces also introduced consumer protection legislation that often usurped and surpassed the protective measures originally introduced by the *Small Loans Act*. Consequently, by 1980, the protections offered under the *Small Loans Act* were largely insignificant.

In 1980 the *Small Loans Act* was repealed.[1] With its repeal came the introduction of section 305.1 of the *Criminal Code* (now s.347), which created the offence of entering into an agreement or arrangement to receive interest at a criminal rate, or receiving interest at a criminal rate.

The challenges that s.347 have presented in other areas – for example, the area of commercial transactions – are well-documented. The purpose of this paper will be to briefly revisit those concerns and to recommend that the Federal Department of Justice, in consultation with the provinces and territories, explore options for reform.

This paper is divided into seven parts. The first part provides an overview of the history of s.347 and the motivation behind the creation of a criminal interest rate. The second part canvasses the elements of s.347 and examines the method by which interest rates are calculated under the section. The third part highlights the problems created by the criminal interest rate provisions, including the obstacles faced by some short-term lenders and venture capitalists. The fourth part examines the respective responses of both the civil courts and Parliament to the application of s. 347 to certain otherwise legitimate lending arrangements. The fifth part evaluates s.347 in light of accepted principles of criminal law. The sixth part surveys the approaches taken to address both loan sharking and unfair lending practices in non-Canadian common law jurisdictions. Finally, the conclusion offers a recommendation and resolution for the reform of s.347.

[1] Bill C-44, *An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code* R.S.C. 1980-1981-1982, c. 43.

Part I
From Small Loans to Criminal Interest Rates: A Legislative Overview

Section 347 was enacted with the repeal of the *Small Loans Act*. The impetus for the enactment appears principally to be focused on addressing loan sharking – unlicensed street-lenders offering credit at exorbitant interest rates and employing intimidation and violence to enforce their contracts. [2]

Prior to 1980, loan sharks had been prosecuted under a variety of criminal offences, as well as under the *Small Loans Act*, the latter of which required all moneylenders to be licensed by the Federal Government. However, the impending repeal of the statute, coupled with the absence of any other legislative mechanisms that directly targeted loan sharks or that was perceived to be acceptable, left some concerned that the illicit lenders would be left unchecked in the wake of the Act's repeal. Thus the criminal interest rate provisions were created in part to address this statutory void.

The decision to tackle the problem of loan sharking by way of a criminal interest rate was questioned by some, including members of the Senate Standing Committee on Banking, Trade and Commerce. Some Senators questioned whether sixty percent was too high; other Senators were concerned that setting a fixed rate at 60 percent would send a message that loans with interest rates of 60 percent or less would be given legitimacy.

One of the primary reasons given for the decision to use a fixed rate was certainty. In his testimony to the Committee Mr. E. G. Ewaschuck, Director of the Criminal Law Amendments Section of the Department of Justice noted the importance of having the elements of a criminal offence clearly defined.[3] Another reason given for the use of a fixed rate seemed to be more practical. It was felt that it would be easier to prove the offence of loan sharking through evidence of an agreement in violation of an objectively determined criminal interest rate rather than being required to prove the violence or intimidation often associated with loan sharking activity. Again, Mr. E. G. Ewaschuck noted:

> The provincial AGs…tell us that basically you cannot get [victims of loan sharking] to come to court to say, "someone intimidated me, someone extorted from me."…These people won't come. But we find pieces of paper and we can get information from people entering

[2] See Howard Abadinsky, *Organized Crime 8th Ed.* (Thomas-Wadsworth Learning, Belmont, CA, 2007) at p.259 and Patrick J. Ryan, *Organized Crime: A Reference Handbook* (ABC-CLIO, Santa Barbara CA, 1995 page 15). See also: Senate of Canada, *Proceeding of the Standing Senate Committee on Banking, Trade and* Commerce, No. 22 at 13 (4 November 1980) where E. Ewaschuck, the Director of the Criminal Law Amendments Section of the federal Department of Justice stated: "A loan shark… enforces not through going to the courts. He knows that if he went to the courts to sue for this [loan enforcement] on a civil contract, the courts would void the situation. So he does not do that. *He has ex-professional fighters, all kinds of tough guys, going around and they collect.*"

[3] See, for example Parliament of Canada *Proceedings of the Senate Committee on Banking, Trade and Commerce,* Issue 22, November 4, 1980 at 20.

> into contracts at 100 percent, 150 percent, sometimes 200 percent or 300 percent. Those people will come and testify on those situations…especially if their name is on a piece of paper.[4]

This point was echoed by the testimony given to the Committee by the Department of Consumer and Corporate Affairs:

> The great difficulty in controlling loan sharking is that (a) it is quite difficult to prove the use of extortion or violence, and (b) it is quite difficult to get victims who are prepared to testify…a specified criminal interest rate is an objective standard that can be applied by the courts.[5]

This testimony demonstrates the criminal law objectives behind the enactment of s. 347. This is not to say, however, that the Senate was unmindful of the economic implications associated with establishment of a criminal interest rate.

The Economic Rationale for Sixty Percent Interest Rates

While the issue of loan sharking spurred the creation of s.347, the concerns of bankers and investors influenced what threshold would be set for determining when an interest rate became criminal. Indeed at the time of the section's conception, the Department of Justice initially considered setting the criminal interest rate lower than the 60 percent mark – suggesting, instead, a 45 percent benchmark for determining criminality. The rationale given for the former was informed by the concerns of stakeholders who indicated that the lower rate would interfere with legitimate financial transactions such as short-term lending and the funding of high-risk ventures. This justification was described during the Senate Committee hearings:

> There were a number of reasons why the figure of 60 percent was selected. The first was the problem that arises in the case of small transactions where there is a fixed service charge which is simply sufficient to recoup the extra cost of handling a transaction and which can have the effect of increasing the interest rate dramatically.
>
> Secondly, we had received a representation from the Canadian Banker's Association pointing to… [problems that arise] when venture or risk capital is involved. Under those circumstances 60 percent, while it would be exorbitant as a stipulated interest rate, would be not out of the ball park when you are dealing with both interest and a share of the profits for a venture that initially seemed to be quite speculative or hazardous.[6]

[4] *Id* at p 12.
[5] *Id* at p. 22.
[6] *Id* at p. 17.

Part II
The Elements of Section 347 and the Criminal Rate of Interest

Section 347(1) of the *Criminal Code* states that,

> Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
>
> a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
> b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

where interest is defined to mean:

> [T]he aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.[7]

The Supreme Court of Canada has confirmed the comprehensive nature of the term "interest" in section 347 and has noted that a determination of whether a charge or expense is considered interest will depend on the substance of the transaction and not necessarily its form. Jurisprudence has held that processing, brokerage or late fees, can fall within the definition of interest.[8]

In 1992, the Canadian Institutes of Actuaries published a paper setting out a standard formula for determining the criminality of interest rates.[9] In particular, the Institute defined the calculation of interest as

$$A\,(1 + I)^{t} = B$$

where

[7] *Criminal Code*, s.347(2)
[8] *See Garland v. Consumers' Gas Co*, [2004] 1 S.C.R. 629*; Degelder Construction co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90.
[9] Canadian Institute of Actuaries, "A Public Statement on Effective Rates of Interest," (Ottawa: 1992).

A = Initial sum advanced by lender
B = Final sum repaid by borrower
I = Interest rate
t = Time, in years, between loan and repayment[10]

The following example illustrates the application of this formula.

Example 1: *Bob asks Alan to loan him $100. Alan agrees but demands that Bob give him an extra $10 for the trouble. Bob takes the loan and eventually repays Alan $110 at a later date. How long does Bob have to repay Alan before the loan becomes criminal?*

Applying the formula $A\ (1 + I)^t = B$ *given above, we have:*

$A = 100$
$B = 110$

In order to determine when the interest on the loan, I, will be come criminal, we set I = .6 – the greatest possible legal rate of interest – and solve the equation for t, the time between the loan and the repayment:

$$100\ (1 + .6)^t = 110$$
$$100\ (1.6)^t = 110$$
$$1.6^t = 110/100$$
$$1.6^t = 1.10$$
$$t = \log_{1.6} 1.10$$
$$t = 0.20279$$

Since t *represents time in years, we multiply* t *by 365 in order to convert it to time in days:*

$$t_{days} = 0.20279 * 365$$
$$t_{days} = 72.19324$$

So, $t_{days} = 72.19$. *This means that if Bob pays Alan his $110 in 73 days or more, the total annual interest accrued will not exceed the criminal rate of sixty percent. However, if Bob repays Alan in 72 days or less, the interest rate will exceed sixty percent and thus make the loan criminal.*

Thus, we see that duration of the loan is critical to the determination of whether it violates s.347. Assuming that the amount due remains constant, loans that are repaid within relatively brief periods of time are more likely to offend s. 347 than those with a longer duration.

[10] Christopher C. Nicholls provides an excellent summary of this formula in his paper, "Protecting Goliath from David: Criminal Rate of Interest and Finance Transactions after *Garland* and *Degelder*," (2000) 15 B.F.L.R. 249.

Part III
"Neither a Borrower Nor a Lender:" The Problems and Challenge Created by s.347

In its current form, s.347 poses two distinct challenges to the business of both loaning and borrowing money in Canada:

1) The formula used to calculate the rate of interest operates such that short-term loans, which would otherwise be within commercially acceptable standards, may offend s.347.

2) The fixed sixty percent interest rate offers no flexibility to accommodate high-risk ventures that relying on enticing investors with an expectation of large returns.

Short Term Loans

Short term financing – that is, loans issued with the expectation that they will be repaid in short-order – is used in a variety of circumstances. For example, bridge financing is frequently used in real estate transactions where the funds necessary for the purchase of a property are not available at the time of closing, but are anticipated within a short period of time. Transactions such as these fall afoul of s.347 when the short duration of the loan, coupled with the broad interpretation that is given to "interest," results in an amount that exceeds 60 percent. Consider the following example:

Example 2: *Assume an employee requests a loan of $10.00 from another employee and promises to repay $11.00 a week later. The one dollar charged if interpreted as interest, corresponds to an annual interest rate of approximately 520 per cent.*[11]

In this example, we see that the "flat fee" of one dollar associated with the loan is sufficient to create an interest rate that is criminal. Indeed, since s.347 includes virtually all types of fees associated with the advancement of a loan (the credit assessment, legal paperwork, due diligence, etc.) in the interest calculation but does not adjust for the duration of the loan itself, the existence of any additional costs is often enough to turn a legitimate transaction into a criminal one.[12]

A similar problem occurs in the case of loans that are structured as long-term but include provisions that either allow the lender to demand earlier payment, or allow the borrower to repay the loan in advance. Consider the following example:

Example 3: *A $100 000 loan with a one-year term requiring a $1,000 commitment fee and no other interest charges would bear a one percent effective annual rate of interest if*

[11] *Nelson v. C.T.C. Mortgage Corp* [1984] B.C.J. No. 3161 at para 8. B.C.C.A. affirmed at [1986] 1 S.C.R. 749, citing J.S. Ziegel (1981) 59 Canadian Bar Review, March 1981, 59 (No. 1).
[12] Mary Anne Waldron, "Section 347 of the Criminal Code: 'A Deeply Problematic Law,'" (Uniform Law Conference, 2002) [unpublished] at p. 5.

paid at the end of the year, but a rate of three thousand six hundred and seventy-eight per cent if the loan was repaid the day after the advance. [13]

In determining whether the above example runs afoul of the criminal interest rate provision, consideration must be had to the interpretation of sections 347(1)(a) and 347(1)(b). The Supreme Court of Canada has articulated the following principles governing the interpretation of s. 347 in such cases:

1) Section 347(1)(*a*) should be narrowly construed. Whether an agreement or arrangement for credit violates s. 347(1)(*a*) is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(*a*), although s. 347(1)(*b*) might be engaged.

2) Section 347(1)(*b*) should be broadly construed. Whether an interest payment violates s. 347(1)(*b*) is determined as of the time the payment is received. For the purposes of s. 347(1)(*b*), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding.

3) There is no violation of s. 347(1)(*b*) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.[14]

Notwithstanding the Court's apparent flexibility in interpreting s.347, there still remains a great deal of uncertainty for legitimate creditors whose loans may be captured under the criminal interest rate provisions. The possibility that a loan may violate s.347 represents a significant obstacle for investors and other lenders; even if the Court does not find a given loan to be illegal, the time and money spent engaging in litigation, coupled with the uncertainty of the outcome, is undeniably problematic.

The Investors Dream: The high risk venture becomes a pot of gold

Section 347 fails to accommodate ventures that carry levels of risk not properly reflected by the fixed rate of 60 percent.[15] As Professor Waldron observed in her 2003 paper prepared for the Uniform Law Conference of Canada entitled "Section 347 of the Criminal Code: 'A Deeply Problematic Law,'

> New commercial ventures are inherently risky and it takes a good deal of work in some cases to come up with a financing opportunity that will be attractive in the market. The alternative is to simply let

[13] *Supra Nelson* at para. 6.
[14] *Degelder Construction Co.* v. *Dancorp Developments Ltd* , [1998] 3 S.C.R. 90 at ¶ 34.
[15] Stephen Antle, "A Practical Guide to Section 347 of the Criminal Code – Criminal Rates of Interest" (1994) 23 Can. Bus. L.J. 323.

> the venture go un-financed, thereby limiting economic development and market expansion.[16]

A strategy frequently employed by investors in the case of risky ventures with the potential for a significant pay-off is that of profit sharing.[17] In such situations, loan agreements do not simply require the repayment of principal and interest at a set rate, but also offer financers equity in the venture. This type of loan offers the lender the chance to make a considerable profit; if the venture is successful, the value of the equities increases. Unfortunately, such agreements also have the potential for offending s.347.[18] While an investment of equity alone does not engage s.347, an investment consisting of both debt and equity where the "dominant feature" of the transaction is to lend money, is subject to the restrictions of the criminal interest rate provisions.

Part IV
Responding To An Illegal Contract: Two Solutions

Section 347 and the Civil Courts

While s.347 of the *Criminal Code* was enacted to address the problems associated with loan sharking, it has been observed that the section has rarely been used for that effect. [19] To wit, Berryman in his 2003 commentary on the decision in *Garland v. Consumers' Gas Co*., [2004] 1 S.C.R. 629:

> The majority of case where the section has been involved concerns otherwise legitimate commercial transactions where a borrower seeks to escape the enforcement of contracts provisions alleging illegality.[20]

As a general rule, an illegal contract is unenforceable.[21] To enforce such an agreement would be tantamount to its legitimization and would violate the principle that one should not profit from their own wrongdoing. [22] It is no surprise, then, that when initially confronted with the reality that "perfectly legitimate commercial agreements in which no inequality of bargaining power nor use of unsavory collection procedures" were being impacted by s.347, courts were (in the words of Professor Waldron) "shocked."[23] Indeed, in early cases concerning contracts in violation of s.347, it was common for courts to wholly nullify the agreement, even refusing to require the repayment of

[16] *Supra* Waldron at p. 2.
[17] *Id* at p. 7.
[18] *Id* at p. 8.
[19] Jeff Berryman, "Mr. Garland Goes to Ottawa: Comments on Restitution in Canada – Through the Lens of *Garland v. Consumers' Gas*" (2003) 36 Loy. L.A. Law. Rev 779 at pp. 787.
[20] *Ibid.*
[21] John Swan et al. *Contracts: Cases, Notes & Materials*, 6th ed. (Toronto: Butterworths, 2002) at 954.
[22] *Supra* Antle.
[23] *Supra* Waldron at p. 16.

principal.[24] However, the courts were ultimately persuaded of the inappropriateness of this response, recognizing instead a lack of criminal intent among the parties, and noting that depriving the lender of the principal of the loan represented unjust windfall for the borrower. [25]

In recent years, the courts have moved towards an approach in which contracts in violation of s.347 are resolved by severing the illegal portion of the agreement.[26] The decision to sever a contract requires an analysis of four factors:

1) The court must consider whether the policy of the *Criminal Code* provision will be subverted by severance.[27]
2) The court must determine whether the parties entered the arrangement with an illegal purpose from the inception.
3) The court must determine the relative bargaining power of the parties. For example, has the borrower been forced to submit to a usurious lender without independent advice?
4) The court must consider whether the borrower will be unjustly enriched as a result of not severing the interest term. [28]

In most cases, the courts have concluded that the parties "did not intend to break the law" and that they were "sophisticated and legally advised." Furthermore, the courts have held that not requiring the repayment of principal would result in the unjust enrichment of the borrower. In these circumstances courts have severed the criminal interest provision from the remainder of the contract.[29]

While in the majority of s.347 cases the courts have found that they can and should sever the criminal interest provisions and enforce the remainder of the agreement, there are circumstances where the courts have been sufficiently concerned about the offensive nature of the contract that it is not enforced. [30] For example in the case of *C.A.P.S. International Inc. v. Kotello*, the court held that the plaintiff was not entitled to enforce a loan agreement where the effective annual interest rate was 80.05%. The court found that the borrower was unsophisticated, did not have legal counsel, did not know the rate of interest was criminal, had no opportunity to negotiate the terms of the loan and was in a difficult financial situation:

> The public policy objective of s. 347 is to protect the public from loans such as this. While I will refrain from describing this loan as "loan-sharking", it is usurious. This is a case where public policy demands that I make a strong statement against a loan transaction with such a usurious interest rate. I concluded that this

[24] *Id.*
[25] *Id.*
[26] *Supra* Waldron at p. 15, *supra* Berryman at 787.
[27] *Supra* Berryman at p. 788.
[28] *Ibid.*
[29] *Supra* Antle.
[30] *Ibid.*

> statement could not be achieved by simply severing the interest component of the loan transaction and requiring repayment of the outstanding principal. This is not a case where I even contemplated considering the approach of "notional severance" used in *Transport North American* to effectively rewrite the loan.[31]

Payday Lenders: An Exception to s. 347

Payday loans are typically small, short-term loans that have an annualized cost of borrowing well in excess of sixty percent per annum. While most lenders calculate interest at an annual rate, payday lenders frequently utilize a fortnightly calendar – for example, issuing a loan of $100 for 14 days. In 2007, Parliament passed Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, S.C. 2007, c. 9 which amended the *Criminal Code* to provide a legislative scheme that exempts certain payday loan agreements from the application of s.347 of the *Criminal Code* and s.2 of the *Interest Act*.

Under this scheme, payday lenders may lawfully issue loans for short periods of time at rates that exceed 60 percent if certain conditions are met. First, the loans may not exceed $1500 total and may not be longer than 62 days in duration. Second, the loans may only be made by provincially licensed lenders. Finally, the province licensing the lender must be designated to allow payday lending itself. In order to receive such designation, a province must have legislative measures that protect recipients of payday loans and provide limits on the total cost of borrowing. [32]

Part V
Section 347 and the Criminal Law:
An Overview of Purposes and Principles

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.[33]

At its core, the criminal law is a limitation on freedom. It limits the freedom of all citizens by prohibiting certain prescribed conduct punishable through a variety of means including incarceration. The criminal law has also been described as a “blunt and costly

[31] *C.A.P.S. International Inc. v. Kotello* [2002] M.J. No. 205.
[32] s.347.1(2)(3).
[33] Department of Justice Canada. *The Criminal Law in Canadian Society: Highlights* (Ottawa: 1982) at 5.

instrument." [34] In creating new offences, therefore, Parliamentarians must be particularly mindful of the purpose of the criminal law and the principles that underpin it. Key principles include: restraint, the prevention of harm, retribution, proportionality, deterrence, denunciation and an insistence that new laws are crafted with clarity and apply equally to all.

Restraint

The criminal law is concerned with the pursuit of justice and the protection of society.[35] To this end, the law engages a broad spectrum of mechanisms both punitive and non-punitive to censor individuals who run afoul of these goals: treatment, rehabilitation, denunciation, deterrence, and incapacitation.[36] However, irrespective of the form of sanction the criminal law chooses to impose, the prohibition should always be guided by the principle of restraint. To wit, the Federal Department of Justice in their 1982 review of *The Criminal Law in Canadian Society:*

> Criminal law should be used only when the harm caused or threatened is serious, and when other less coercive or less intrusive means do not work or are inappropriate.[37]

Punishment under the criminal law is an instrument that must be used only where necessary. In particular, our notions of justice require that the state only infringe our individual liberty in cases where it is clearly necessary to protect in the interests of society as a whole. Furthermore, when liberty *is* limited in the interest of collective security, the restriction must be no greater than necessary to provide the requisite protection.[38] It thus follows that conduct should only be declared criminal and associated with punitive consequences if there exists *no other* less restrictive means of social control to engage such behaviour.[39]

The effect of s. 347, as documented above, has been far broader than was initially contemplated. While the use of an objectively identifiable rate as a basis for determining criminal liability was motivated by legitimate policy objectives, it has also resulted in significant unintended consequences in other areas. As such, it is worth questioning whether s. 347 can be amended to more effectively target genuinely criminal behaviour.

The objective underpinning the enactment of this section was to target loan sharking. In light of this objective and the principle of restraint, possible models for reform should focus on the enforcement of debts through coercive means such as violence, threats, intimidation, or abuse of power.

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[34] *Supra* Law Reform Commission at p. 27.
[35] *Ibid* at.18.
[36] *Id.*
[37] *Id* at p. 20.
[38] *Id* at p. 21.
[39] *Id* at p. 24.

Prevention of harm

Just as the criminal law recognizes the necessity of restraint in determining what behaviour should be censored, so too does it recognize the existence of harm as a necessary condition for the creation of a criminal offence. This so-called "harm principle" has been canvassed in depth by the Supreme Court of Canada – most recently in the 2003 case of *Malmo-Levine* (*R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571; 179 C.C.C. (3d) 417) and the subsequent 2005 case of *Labaye* (*R. v. Labaye*, [2005] 3 S.C.R. 728; 203 C.C.C. (3d) 170). In the latter, the Supreme Court held that that the bulk of criminal offences are predicated on the notion of harm. Chief Justice McLachlin, writing for the majority held:

> Grounding criminal indecency in harm represents an important advance in this difficult area of the law. Harm or significant risk of harm is easier to prove than a community standard. Moreover, the requirement of a risk of harm incompatible with the proper functioning of society brings this area of the law into step with the vast majority of criminal offences, which are based on the need to protect society from harm.[40]

Further the harm to be prevented should be "both serious in nature and degree"[41], and also constitute the sort of harm best dealt with by the criminal law. [42]

Addressing the harm inherent in or caused by loan sharking properly falls within the rubric of the criminal law. It is important, however, that the criminal law properly targets the specific harms at issue (in addition to not including conduct that should not be captured). It is questionable whether s. 347 properly addresses the harms at issue. For example, s. 347 would not currently capture the loan shark who, employing a variety of coercive means to collect his debt, charged interest at 59%. It would, however, capture the same loan shark who charged 61%. It is questionable that the harm caused in the second example is more serious than the first such that only the second example deserves criminal sanction. Indeed it is this type of example that caused some members of the Senate Banking Committee concern and it is this type of example that calls into question the effectiveness of s. 347 in properly addressing the harms associated with loans sharking.

Some, however, will argue that the charging of interest at a rate of interest in excess of 60 percent on an annual basis, without any coercive collection practices, is in fact harmful and worthy of sanction, be it criminal or otherwise. Some of the jurisprudence hints at this.[43]

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[40] *R. v. Labaye*, [2005] 3 S.C.R. 721 at para. 24.
[41] Report of the Law Reform Commission, *Our Criminal Law* (Ottawa: 1976) at p. 28.
[42] *Id.*
[43] See for example: *R* v. *Dimmerman*, [1992] MJ No. 558; *R.* v. *Marsy*, [2006] AJ No. 1685.

Given the above, possible models for reform should more effectively target the harms associated with loan sharking. Consideration should also be given to whether in fact charging interest at a defined limit is deserving of criminal sanction in the absence of coercive methods for enforcement.

Equality

A crime must be a crime no matter who commits it.[44] To the extent that exceptions are created, they must be justifiable.

Section 347.1 creates a limited exception to the general rule that agreements to receive interest in excess of 60% are criminal. As described above, certain payday loans can be exempt for section 347 of the *Criminal Code* if the following conditions are met:

(a) the payday loan is for an amount not exceeding $1500 and the term of the agreement does not exceed sixty-two days;
(b) the payday lender is licensed or otherwise authorized by the province or territory to provide payday loans; and
(c) the province or territory has been designated by the Governor in Council.

In order for a province or territory to be designated by the Governor in Council, the province or territory must:

(a) request, through their Lieutenant Governor in Council, the federal designation; and
(b) enact legislative measures that protect recipients of payday loans and which must provide for a limit on the total cost of borrowing under payday loan agreements.

Given this recent legislative change, it is reasonable that commentators may suggest other exceptions should be permitted. For example, some may suggest that more complex lending transactions should be exempt from s. 347 on the basis that such arrangements are generally entered into by persons with equal bargaining power and the benefit of independent legal advice and, as such, are less likely to be taken advantage of by unscrupulous lenders.

Possible reforms to section 347 should be mindful of the myriad instances to which the section applies and accordingly treat such instances in a similar fashion unless there are clear and justifiable reasons for not doing so.

Misplaced Focus

Once an assessment has been made that certain conduct is worthy of criminal prohibition, it is critical that the laws crafted to respond to that conduct are done so in a way that is

[44] *Supra* Law Reform Commission at p. 9.

clear, simple and attacks the harm in question. Both on its face and in effect, s. 347 does not directly address the harms associated with loan sharking.

There are two identifiable and related rationales which served as the basis for the enactment of s. 347: 1) having a clearly defined prohibition that was easily determined through objective evidence; and 2) the inability to have victims of loan sharks testify in court for fear of violent reprisal.

Although clear and generally easy to understand, these rationales failed to directly target the harm at issue and in so doing encompassed conduct that need not have been prohibited. Amendments to s. 347, therefore, should more effectively target the harms in question such as coercion, violence, threats and intimidation rather than simply relying on an objectively defined rate of interest as a proxy for certain types of harmful behaviour.

Part VI
Observations from Around the Globe

Appendix A to this paper contains legislation from the United Kingdom, Australia and the United States. This legislation serves as examples of the approaches other jurisdictions have taken to the problem of loan sharking and unfair lending practices. Most instructive from this legislative review is how these other jurisdictions control unfair lending practices. The tendency is to afford the court the authority to look at factors relevant to the lending agreement beyond the interest rate alone. The following are summaries of these different approaches:

United Kingdom

While the United Kingdom does not currently possess any statute criminalizing specific rates of interest, the enforcement of debts through harassment, deception or threats is explicitly prohibited.[45] In addition, the civil law provides for courts to reopen a credit bargain if it is found to be extortionate – that is, if it the debtor to make exorbitant payments, or it is otherwise grossly contrary to the ordinary principles of fair dealing.[46] In determining whether a credit bargain is extortionate, courts may consider such factors as prevailing interest rates; the circumstances of the debtor such as age, experience, business capacity, health, financial pressures faced; and, relative to the creditor, the court may consider the degree of risk, security provided, and his relationship to the debtor. [47]

[45] *United Kingdom Administration of Justice Act 1970*, c.31, Part V, s. 40.
[46] *Consumer Credit Act 1974*,s. 137.
[47] *Consumer Credit Act 1974* s.138(4).

Australia

The criminal law is principally a matter for the states and territories in Australia. However, the federal *Consumer Credit Code* does provide civil relief for credit transactions that may be deemed unjust or unconscionable.[48] In such cases, the court must consider "all the circumstances" surrounding the issuance of credit, including "whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor".[49]

Several Australia states, including Queensland, Victoria and Western Australia, have criminal laws prohibiting extortion, the most likely provision used to address loan sharking activity. There are no provisions that explicitly criminalize usurious loans.

United States

In the United States, criminal law is principally created at the state level. There are, however, statutes addressing loan sharking at both the federal and state levels.

At the federal level, there are laws specifically criminalizing the use of violence to collect debts [50] and there are civil laws regulating debt collection and prohibiting "the use or threat of use of violence or other criminal means to harm the physical person, reputation or property of any person."[51]

At the state level, however, loan-sharking is captured by usury laws that criminalize loans made at high rates of interest. The interest rates set by these laws vary by jurisdiction and many provide exemptions for legitimate lenders issuing loans at rates higher than those established by the usury provisions. Furthermore, many states qualify their criminal usury provisions with a condition making them subject to other interest rate laws.[52] Five distinct examples are provided, below:

- The **Florida** criminal statutes provide an explicit definition of loan-sharking, defining it as the extortionate extension of credit where the interest rate is greater than 25 percent but less than 45 percent.[53] The issuance of credit is deemed to be extortionate when both the debtor and the creditor understand that a delay or failure to make repayment could be met with the use of violence or other criminal means of causing harm to the person, reputation or property.

[48] *Consumer Credit Code, Australia*, s.70-72.
[49] *Id* at s.70(j).
[50] *U.S. Code, Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 42 Extortionate Credit Transactions*.
[51] *Fair Debt Collection Practices Act.*
[52] See, for example, *Ohio Revised Code*, Title 29, s.2905.21(H)(1).
[53] *Florida Statutes*, Title XXXIX, s.687.071.

- **New York** penal law provides for two offences: criminal usury in the first degree and criminal usury in the second degree.[54] Both offences establish loans in excess of 25 percent interest as being usurious, however a charge of first degree criminal usury additionally requires either a) a prior conviction for criminal usury, or b) participation in a larger scheme to collect usurious loans.

- **Massachusetts** law criminalizes loans in excess of 20 percent interest, where interest is defined to include all brokerage fees, commissions, and similar extraneous charges.[55] The criminal usury provisions provide an exemption for lenders who notify the Attorney General of their intent to issue loans at higher rates of interest. Such lenders are required to maintain records of their transactions and must provide the Attorney General with accurate identifying information.

- **Ohio** law defines criminal usury as the issuance of credit at interest rates exceeding 25 percent.[56] In addition, the law provides an offence for the extortionate extension of credit. In particular, the Ohio *Revised Code* indicates that there is probable cause that a loan is extortionate if, a) it is made in excess of 25 percent interest, or b) the debtor reasonably believed that the creditor employed extortionate means of repayment or had a reputation for employing such means.

Part VII
Conclusion

From its inception, s.347 was designed to criminalize loan sharking. The objective of preventing and punishing loan sharks, who rely upon coercive practices to enforce their debts, is a legitimate aim. The criminal interest rate provision may not be the most appropriate means of achieving this goal. Indeed, the paucity of criminal convictions for loan sharking under this provision suggests that the offence is not being used as intended.

It is questionable whether a fixed maximum rate of interest is the most effective approach as a basis for combating loan sharking. Some may argue that it is an appropriate approach. However, in light of the numerous unintended consequences of the law, as well as the basic principles that underpin the criminal law, reconsideration is necessary. Possible options for reform should be mindful of the specific harms that are being targeted, and whether the criminal law is the most appropriate vehicle to address usurious transactions in the absence of evidence of coercive debt collection practices.

[54] *New York Penal Code*, s.190.42 and s.190.40, respectively.
[55] *General Laws of Massachusetts*, Part IV, Chapter 271, s.49.
[56] *Ohio Revised Code*, Title 29, s.2905.21-24.

Recommendation/Resolution

In light of the issues and discussion contained in this paper, the Criminal Section of the Uniform Law Conference of Canada recommends that the Department of Justice, in consultation with the provinces and territories, immediately conduct an examination of s.347 with a view to reform and present the results of its examination on an expeditious basis.

Appendix A

Canada

Criminal Code, R.S., 1985, c. C-46

347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

"credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

"insurance charge" means the cost of insuring the risk assumed by the person who advances or is to advance credit under an agreement or arrangement, where the face amount of the insurance does not exceed the credit advanced;

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

"official fee" means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

"overdraft charge" means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by

the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board;

"required deposit balance" means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

(8) This section does not apply to any transaction to which the *Tax Rebate Discounting Act* applies.

347.1 (1) The following definitions apply in subsection (2).

"interest" has the same meaning as in subsection 347(2).

"payday loan" means an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card.

(2) Section 347 and section 2 of the *Interest Act* do not apply to a person, other than a financial institution within the meaning of paragraphs (*a*) to (*d*) of the definition "financial institution" in section 2 of the *Bank Act*, in respect of a payday loan agreement entered into by the person to receive interest, or in respect of interest received by that person under the agreement, if

a) the amount of money advanced under the agreement is $1,500 or less and the term of the agreement is 62 days or less;
b) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and
c) the province is designated under subsection (3).

(3) The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.

(4) The Governor in Council shall, by order, revoke the designation made under subsection (3) if requested to do so by the lieutenant governor in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

United Kingdom

Administration of Justice Act, 1970 c.31

40. Punishment for unlawful harassment of debtors

(1) A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he—

a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;

b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;

c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or

d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.

(2) A person may be guilty of an offence by virtue of subsection (1)(a) above if he concerts with others in the taking of such action as is described in that paragraph, notwithstanding that his own course of conduct does not by itself amount to harassment.

(3) Subsection (1)(a) above does not apply to anything done by a person which is reasonable (and otherwise permissible in law) for the purpose—

a) of securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss; or

b) of the enforcement of any liability by legal process.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine of not more than £100, and on a second or subsequent conviction to a fine of not more than £400.

Consumer Credit Act 1974, s. 137

137. Extortionate credit bargains.
(1) If the court finds a credit bargain extortionate it may reopen the credit agreement so as to do justice between the parties.

(2) In this section and sections 138 to 140,

a) "credit agreement" means any agreement other than an agreement which is an exempt agreement as a result of section 16(6C) between an individual (the "debtor") and any other person (the "creditor") by which the creditor provides the debtor with credit of any amount, and

b) "credit bargain" –

i. where no transaction other than the credit agreement is to be taken into account in computing the total charge for credit, means the credit agreement, or

ii. where one or more other transactions are to be so taken into account, means the credit agreement and those other transactions, taken together.

138. When bargains are extortionate.

(1) A credit bargain is extortionate if it

a) requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or

b) otherwise grossly contravenes ordinary principles of fair dealing.

(2) In determining whether a credit bargain is extortionate, regard shall be had to such evidence as is adduced concerning

a) interest rates prevailing at the time it was made,

b) the factors mentioned in subsection (3) to (5), and

c) any other relevant considerations.

(3) Factors applicable under subsection (2) in relation to the debtor include—

a) his age, experience, business capacity and state of health; and

b) the degree to which, at the time of making the credit bargain, he was under financial pressure, and the nature of that pressure.

(4) Factors applicable under subsection (2) in relation to the creditor include—

a) the degree of risk accepted by him, having regard to the value of any security provided;

b) his relationship to the debtor; and

c) whether or not a colourable cash price was quoted for any goods or services included in the credit bargain.

(5) Factors applicable under subsection (2) in relation to a linked transaction include the question how far the transaction was reason-ably required for the protection of debtor or creditor, or was in the interest of the debtor.

139. Reopening of extortionate agreements.

(1) A credit agreement may, if the court thinks just, be reopened on the ground that the credit bargain is extortionate

a) on an application for the purpose made by the debtor or any surety to the High Court, county court or sheriff court; or

b) at the instance of the debtor or a surety in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the credit agreement, any security relating to it, or any linked transaction; or
c) at the instance of the debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant.

(2) In reopening the agreement, the court may, for the purpose of relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable, by order
a) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons,
b) set aside the whole or part of any obligation imposed on the debtor or a surety by the credit bargain or any related agreement,
c) require the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement by the debtor or a surety, whether paid to the creditor or any other person,
d) direct the return to the surety of any property provided for the purposes of the security, or
e) alter the terms of the credit agreement or any security instrument.

(3) An order may be made under subsection (2) notwithstanding that its effect is to place a burden on the creditor in respect of an advantage unfairly enjoyed by another person who is a party to a linked transaction.

(4) An order under subsection (2) shall not alter the effect of any judgment.

(5) In England and Wales an application under subsection (1)(a) shall be brought only in the county court in the case of
a) a regulated agreement, or
b) an agreement (not being a regulated agreement) under which the creditor provides the debtor with fixed-sum credit or running-account credit.

(6) In Scotland an application under subsection (1)(a) may be brought in the sheriff court for the district in which the debtor or surety resides or carries on business.

(7) In Northern Ireland an application under subsection (1)(a) may be brought in the county court in the case of
a) a regulated agreement, or
b) an agreement (not being a regulated agreement) under which the creditor provides the debtor with fixed-sum credit not exceeding £15,000 or running-account credit on which the credit limit does not exceed £15,000.

Australia (federal)

Consumer Credit Code, Appendix to the Consumer Credit (Queensland) Act, 1994

70. Court may reopen unjust transactions

(1) **Power to reopen unjust transactions.** The Court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, reopen the transaction that gave rise to the contract, mortgage or guarantee or change.

(2) **Matters to be considered by Court.** In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the Court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following –

a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;
b) the relative bargaining power of the parties;
c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;
e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;
f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;
g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;
j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;
k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;

l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;
m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;
o) any other relevant factor.

(3) **Representing debtor, mortgagor or guarantor.** For the purposes of subsection (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

(4) **Unforeseen circumstances.** In determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

(5) **Conduct.** In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

(6) **Application.** This section does not apply to a change in the annual percentage rate or rates payable under a contract, or to an establishment fee or charge or other fee or charge, in respect of which an application may be made under section 72 (Court may review unconscionable interest and other charges). This section does not apply to a change to a contract under this Division.

(7) **Meaning of unjust.** In this section, ***unjust*** includes unconscionable, harsh or oppressive.

72. Court may review unconscionable interest and other charges
(1) The Court may, if satisfied on the application of a debtor or guarantor that –

a) a change in the annual percentage rate or rates under a credit contract to which section 59(1) or (4) applies; or
b) an establishment fee or charge; or
c) a fee or charge payable on early termination of a credit contract; or
d) a fee or charge for a prepayment of an amount under a credit contract;
e) is unconscionable, annul or reduce the change or fee or charge and may make ancillary or consequential orders.

(2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the Court that—

a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the Court thinks relevant; or
b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.

(3) In determining whether an establishment fee or charge is unconscionable, the Court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract.

(4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

United States (federal)

U.S. Code, Title 18, Part I, c.42

§ 891. Definitions and rules of construction
For the purposes of this chapter:

(1)-(5) [omitted]

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

§ 892. Making extortionate extensions of credit
(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

    A. in the jurisdiction within which the debtor, if a natural person, resided or
    B. in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

3) At the time the extension of credit was made, the debtor reasonably believed that either

A. one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or
B. the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

§ 893. Financing extortionate extensions of credit

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined under this title or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

1) to collect or attempt to collect any extension of credit, or
2) to punish any person for the nonrepayment thereof,

shall be fined under this title or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the

circumstances described in section 892 (b)(1) or the circumstances described in section 892 (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Fair Debt Collection Practices Act

§ 806 / § 1692d (U.S.C.) Harassment or abuse.
A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act.
4) The advertisement for sale of any debt to coerce payment of the debt.
5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 813 / §1692k (U.S.C.) Civil liability
(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of

1) any actual damage sustained by such person as a result of such failure;

2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

3) (B) in the case of a class action,
    i. such amount for each named plaintiff as could be recovered under subparagraph (A), and
    ii. such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the

lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

4) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors

1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

United States (state)

Florida Statutes, Title XXXIX, s.687.071

687.071 Criminal usury, loan sharking; shylocking.

(1) DEFINITIONS.--The following words and phrases, as used in this section, shall have the following meanings:

a) "Person" shall be construed to be defined as provided in s. 1.01.

b) "Creditor" means any person who makes an extension of credit or any person claiming by, under, or through such person.

c) "Debtor" means any person who receives an extension of credit or any person who guarantees the repayment of a loan of money for another person.

d) "Extension of credit" means to make or renew a loan of money or any agreement for forbearance to enforce the collection of such loan.

e) "Extortionate extension of credit" means any extension of credit whereby it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

f) "Loan shark" or "shylock" means any person as defined herein who lends money unlawfully under subsection (2), subsection (3), or subsection (4).

g) "Loan sharking" or "shylocking" means the act of any person as defined herein lending money unlawfully under subsection (2), subsection (3), or subsection (4).

(2) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per annum, or the equivalent rate for a longer or shorter period of time, whether directly or indirectly, or conspires so to do, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding 45 percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who shall knowingly and willfully make an extortionate extension of credit to any person or conspire so to do shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In any prosecution under this subsection, evidence that the creditor then had a reputation in the debtor's community for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof shall be admissible.

(5) Books of account or other documents recording extensions of credit in violation of subsections (3) or (4) are declared to be contraband, and any person, other than a public officer in the performance of his or her duty, and other than the person charged such usurious interest and person acting on his or her behalf, who shall knowingly and willfully possess or maintain such books of account or other documents, or conspire so to do, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6) No person shall be excused from attending and testifying or producing any books, paper, or other document before any court upon any investigation, proceeding, or trial, for any violation of this section upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of the person may tend to convict him or her of a crime or subject the person to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against the person upon any criminal investigation or proceeding.

(7) No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.

New York Penal Code, Part 3, Title K, Article 190

§ 190.40 Criminal usury in the second degree.
A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.

Criminal usury in the second degree is a class E felony.

§ 190.42 Criminal usury in the first degree.
A person is guilty of criminal usury in the first degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or

shorter period and either the actor had previously been convicted of the crime of criminal usury or of the attempt to commit such crime, or the actor's conduct was part of a scheme or business of making or collecting usurious loans.

Criminal usury in the first degree is a class C felony.

General Laws of Massachusetts, Part IV, Chapter 271

Section 49. Criminal Usury
(a) Whoever in exchange for either a loan of money or other property knowingly contracts for, charges, takes or receives, directly or indirectly, interest and expenses the aggregate of which exceeds an amount greater than twenty per centum per annum upon the sum loaned or the equivalent rate for a longer or shorter period, shall be guilty of criminal usury and shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. For the purposes of this section the amount to be paid upon any loan for interest or expenses shall include all sums paid or to be paid by or on behalf of the borrower for interest, brokerage, recording fees, commissions, services, extension of loan, forbearance to enforce payment, and all other sums charged against or paid or to be paid by the borrower for making or securing directly or indirectly the loan, and shall include all such sums when paid by or on behalf of or charged against the borrower for or on account of making or securing the loan, directly or indirectly, to or by any person, other than the lender, if such payment or charge was known to the lender at the time of making the loan, or might have been ascertained by reasonable inquiry.

(b) Whoever, with knowledge of the contents thereof, possesses any writing, paper, instrument or article used to record a transaction proscribed under the provisions of paragraph (a) shall be punished by imprisonment in a jail or house of correction for not more than two and one half years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

(c) Any loan at a rate of interest proscribed under the provisions of paragraph (a) may be declared void by the supreme judicial or superior court in equity upon petition by the person to whom the loan was made.

(d) The provisions of paragraph (a) to (c), inclusive, shall not apply to any person who notifies the attorney general of his intent to engage in a transaction or transactions which, but for the provisions of this paragraph, would be proscribed under the provisions of paragraph (a) providing any such person maintains records of any such transaction. Such notification shall be valid for a two year period and shall contain the person’s name and accurate address. No lender shall publicly advertise the fact of such notification nor use the fact of such notification to solicit business, except that such notification may be revealed to an individual upon his inquiry. Illegal use of such notification shall be punished by a fine of one thousand dollars. Such records shall contain the name and address of the borrower, the amount borrowed, the interest and expenses to be paid by the

borrower, the date the loan is made and the date or dates on which any payment is due. Any such records shall be made available to the attorney general for the purposes of inspection upon his request. Such records and their contents shall be confidential but may be used by the attorney general, or any district attorney with the approval of the attorney general, for the purposes of conducting any criminal proceeding to which such records or their contents are relevant.

(e) The provisions of this section shall not apply to any loan the rate of interest for which is regulated under any other provision of general or special law or regulations promulgated thereunder or to any lender subject to control, regulation or examination by any state or federal regulatory agency.

Ohio Revised Code, Title 29

2905.21 Extortionate extension of credit - criminal usury definitions.
As used in sections 2905.21 to 2905.24 of the Revised Code:

(A) “To extend credit” means to make or renew any loan, or to enter into any agreement, express or implied, for the repayment or satisfaction of any debt or claim, regardless of whether the extension of credit is acknowledged or disputed, valid or invalid, and however arising.

(B) “Creditor” means any person who extends credit, or any person claiming by, under, or through such a person.

(C) “Debtor” means any person who receives an extension of credit, any person who guarantees the repayment of an extension of credit, or any person who in any manner undertakes to indemnify the creditor against loss resulting from the failure of any recipient to repay an extension of credit.

(D) “Repayment” of an extension of credit means the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(E) “Collect an extension of credit” means an attempt to collect from a debtor all or part of an amount due from the extension of credit.

(F) “Extortionate extension of credit” means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment will result in the use of an extortionate means or if the debtor at a later time learns that failure to make repayment will result in the use of extortionate means.

(G) “Extortionate means” is any means that involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person or property of the debtor or any member of his family.

(H) “Criminal usury” means illegally charging, taking, or receiving any money or other property as interest on an extension of credit at a rate exceeding twenty-five per cent per annum or the equivalent rate for a longer or shorter period, unless either:

1) The rate of interest is otherwise authorized by law;

2) The creditor and the debtor, or all the creditors and all the debtors are members of the same immediate family.

(I) “Immediate family” means a person’s spouse residing in the person’s household, brothers and sisters of the whole or of the half blood, and children, including adopted children.

2905.22 Extortionate extension of credit - criminal usury.
(A) No person shall:

1) Knowingly make or participate in an extortionate extension of credit;

2) Knowingly engage in criminal usury;

3) Possess any writing, paper, instrument, or article used to record criminally usurious transactions, knowing that the contents record a criminally usurious transaction.

(B) Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the fourth degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree.

2905.23 Probable cause to believe that extension of credit was extortionate.
In any prosecution under sections 2905.21 to 2905.24 of the Revised Code, if it is shown that any of the following factors were present in connection with the extension of credit, there is probable cause to believe that the extension of credit was extortionate:

(A) The extension of credit was made at a rate of interest in excess of that established for criminal usury;

(B) At the time credit was extended, the debtor reasonably believed that:

1) One or more extensions of credit by the creditor were collected or attempted to be collected by extortionate means, or the nonrepayment thereof was punished by extortionate means;

2) The creditor had a reputation for the use of extortionate means to collect extensions of credit or punish the nonrepayment thereof.

2905.24 Evidence showing an implicit threat as means of collection.
In any prosecution under sections 2905.21 to 2905.24 of the Revised Code, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat is alleged to have been made, collected, or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.