MARKING THE LINE BETWEEN CRIMINAL FRAUD AND COMMERCIAL MISFORTUNE: THE AMENDMENT OF VERMONT'S LAW OF FALSE PRETENSE

Introduction

The criminal law of Vermont presently includes by statute the offense of obtaining property by false pretense or token.[1] This offense is grouped within the Vermont law of frauds.[2] Vermont follows the majority of American jurisdictions which hold that for a misrepresentation to be an indictable offense, the misrepresentation must be of some fact which existed at the time the representation was made. Promises relate to future actions and are not indictable as false pretenses in the majority of American jurisdictions.[3] An insincere promise or an expression of intention made without any intention of performance will not support a conviction of obtaining property by false pretense pursuant to Vermont's false pretense statute.[4]

The significance of the distinction made by the majority of jurisdictions, between misrepresentations of existing fact and insincere promises, is illustrated by the following example. An individual approaches a merchant and expresses a desire to purchase furniture. He is given the furniture upon his representations that he will obtain a loan and return in several days with the money.[5] Under the majority view, when the individual does not return with the money, this would not be treated as an indictable offense. The individual's representation that he would be getting a loan in the *future* and would return in the *future* with that money did not relate to an existing fact; it was merely an insincere *promise* and thus, not criminally indictable.

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1. Vt. Stat. Ann. tit. 13, § 2002 (1974).

2. Vt. Stat. Ann. tit. 13, §§ 2001-2022 (1974).

3. *See* Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 524 (1976); Note, 43 Calif. L. Rev. 719 (1955); People v. Ashley, 42 Cal.2d 246, 274, 267 P.2d 271, 289 (1954).

4. Vermont law is unclear on this point. Vermont seems to follow the majority rule (that false promises are not indictable as false pretense) by default. Conversations conducted with Phillip C. Linton, Former Chief, Consumer Protection Division of the Vermont Attorney General's office, Montpelier, Vt., confirm the proposition that fraud perpetrated by false promise is not presently punishable pursuant to the criminal law of Vermont. (January 29, 1981).

5. These facts are drawn from Elliot v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Numerous incidents have been documented in Vermont where home improvement and general contractors have perpetrated frauds upon Vermont residents by the use of false promises (expressions of intention made without any intention of performance).[6] Such frauds have occurred as follows: A contractor will approach a homeowner for the purpose of soliciting business. Often an oral agreement is made whereby the contractor agrees to return at some later date to commence the agreed work. The homeowner will then advance the contractor money, with the expectation that the money will be used to purchase building materials. The contractor may return to leave a ladder or an insignificant amount of materials, or possibly collect more money, but work is never begun.[7]

When a complaint is made to the Attorney General's office or to a law enforcement agency, and action is taken, the offending contractor faces civil action pursuant to Vermont's Consumer Fraud law.[8] Action instituted pursuant to this provision is often ineffective, however, because a contractor is often difficult to locate and, if located, enforcement of the judgment may prove to be difficult.[9]

A contractor's *promise* to return and commence work is only an expression of *future* intention. As such, it will not fall within the scope of Vermont's statute which criminalizes obtaining property by false pretense. For a contractor's actions to fall within the false pretense statute, the contractor would for example, have to falsely represent that he had completed the agreed upon work and then collect his fee. Such an action would be a misrepresentation of an existing fact, that the work was *presently* completed, and as such would be an indictable offense.

Proposals have been submitted to the Vermont Legislature to amend the Vermont law of frauds to criminalize fraud by false promise.[10] This note will examine the current law of false pretense

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6. *See, e.g.,* State v. McTaggart (d/b/a/ W. McTaggart and Son), S177-76 WMC (Windham Super. Ct. 1978); *see also* Brattleboro Reformer, Nov. 11, 1978 at 5, col. 3, Rutland Daily Herald, Oct. 7, 1978 at 14, col. 1.

7. *Id.*

8. VT. STAT. ANN. tit. 9, § 2453 (1974).

9. Interview with Philip C. Linton, Former Chief, Consumer Protection Division, Vermont Attorney General's Office, in Montpelier, Vermont (January 29, 1981); *see also* Brattleboro Reformer, Nov. 11, 1978 at 5, col. 3.

10. H. 298, 55th Bien. Sess. (1979), H. 331, 56th Bien. Sess. (1981).

and provide historical background to the development of the law. It will examine the methods that various jurisdictions have employed to criminalize false pretense, and will further examine the merits of criminalization in relation to the proposed amendments of Vermont law.

I. The Majority Rule

A. *Historical Perspective*

The crime of obtaining property by false pretense is traceable to an early English statute.[11] This statute provided

> [t]hat . . . all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same . . . [s]hall be deemed offenders against law and the public peace . . . .

Most jurisdictions in the United States have statutes similar to this statute.[12] Vermont's false pretense statute is typical of most. It provides that "[a] person who designedly by false pretenses or by privy or false token and with intent to defraud, obtains from another person money or other propety . . . shall be imprisoned . . . or fined . . . ."[13]

The first widely cited case, decided under the English statute, making acquisitions of property by false pretenses a crime was *Young v. The King*.[14] In *Young*, the court stated, "[i]t is no objection that the pretence consists in a representation as of some transaction to take place at a future time." The court's holding in *Young* made it clear that they would regard false promises as false pretense.

In a later English case, *Rex v. Goodhall*,[15] the defendant obtained meat from a merchant, promising to pay at some future time; payment was never made. The jury found that the defendant

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11. 30 Geo. ch. 24 § 1, cited in People v. Ashley, 42 Cal.2d 246, 259, 267 P.2d 271, 279-80 (1954).

12. *See* 3 Wharton's Criminal Law 455-57 (C. Torcia 14th ed. 1980); *see, e.g.*, People v. Ashley, 42 Cal. 2d 246, 259, 267 P.2d 271, 279 (1954).

13. Vt. Stat. Ann. tit. 13, § 2002 (1974).

14. 3 T.R. 98, 100 Eng. Rep. 475 (K.B. 1789). The facts of this case are not available.

15. Russ. & Ry. 461 Eng. Rep. 898 (crown 1821), cited in Note, *supra* note 3, at 722 n.24.

had no intention of paying for the meat, and convicted him pursuant to the false pretense statute. The court overturned the conviction, reasoning that the defendant's false promise to pay was not a false pretense within the meaning of the false pretense statute. Common prudence and caution on the part of the merchant, the court stated, would have prevented any harm from the breach of the defendant's promise.[16] The court was apparently of the opinion that the buyer's failure to exercise caution justified his bearing the loss.[17]

Wharton, an American legal commentator, took the position that false promises could not be regarded as false pretense.[18] Wharton stated that "[a] pretense that a party would do an act that he did not mean to do . . . was holden by all the judges not to be a false pretense, within the meaning of the statute of George II [citing *Rex v. Goodhall*]; and the same rule is distinctly recognized in Massachusetts[19] [citing *Commonwealth v. Drew*]."[20] In *Commonwealth v. Drew*,[21] the court held that the false pretense statute at issue in the case could not, "regard naked lies as false pretences."[22] The court stated, "[t]he pretence must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence."[23] The court reasoned that it would be inexpedient and unwise to regard every private fraud as a crime.[24] The court was not prepared to punish criminally mere lies, but instead was concerned with "deceptive contrivance"[25] and behavior likely to mislead people or throw them off their guard.[26] By setting forth this demarcation between mere lies and deceptive

16. *Id.*

17. However, following *Rex v. Goodhall*, the state of false pretense law was discussed by two noted British commentators, John Frederick Archbold and Henry Roscoe. Archbold and Roscoe accepted the reasoning of the *Young* case, that false promises or false representations about future acts could be prosecuted pursuant to the false pretense statute. J.F. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 183 (3rd ed., 1828), H. ROSCOE, DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES, 418 (2d. Amer. ed., 1840). *See* Note, *supra* note 3 at 722-23, at 23-24.

18. F. WHARTON, AMERICAN CRIMINAL LAW 543 (1st. ed., 1846).

19. *Id.*

20. 36 Mass. (1 Pick.) 179 (1937).

21. *Id.*

22. *Id.* at 185.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

contrivance,[27] the court was in effect saying that some lies or untruthful behavior were not within the province of the criminal law. Other more calculated and blatantly deceptive behavior, would, however, be the subject of criminal sanctions. The court was allocating the resources of the criminal law to combat what it perceived as unacceptable behavior, while ignoring more innocuous forms of deception which were better suited to civil remedies.

B. *Rationale*

Wharton's doctrine that false promises were not covered by false pretense statutes became, "[i]ngrained in Anglo American law."[28] Although several jurisdictions have statutes which include false promises,[29] the majority view holds that false pretense statutes do not embrace the concept of theft by false promise.[30]

The reluctance of some courts to construe the existing false pretense statutes to include false promises reflects some deeply-rooted concerns.[31] The major concern is that defaulting debtors will be prosecuted for obtaining property by false promise.[32] This result could be achieved by reasoning that such defaulting debtors never intended to satisfy their debts, and that their "false promises" to satisfy debts are criminally actionable pursuant to existing false pretense statutes.[33]

The application of criminal sanctions to business transactions was addressed by the United States Court of Appeals for the Dis-

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27. *Id.*

28. PEARCE, *Theft By False Promises*, 101 U. PA. L. REV. 967, 968 n. 6 (1953); Note, *supra* note 3, at 723. *See also* People v. Ashley, 42 Cal.2d 260, 267 P.2d 271, 280 (1954).

29. See, e.g., CONN. GEN. STAT. ANN. § 53a-119(3) (West Supp. 1981), LA. REV. STAT. ANN. § 14:67 (West 1979), MINN. STAT. ANN. § 602.52(2)(3)(b) (1954), N.Y. PENAL LAW § 155.05(2)(d) McKinney 1975), and N.C. GEN. STAT. § 14-100 (Supp. 1979).

30. *See supra* note 3.

31. The minority view is characterized by judicial inclusion of false promises within the statutory crime of false pretense. State courts which have adopted this approach include People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954); State v. West, 252 N.W.2d 457 (Iowa 1977); Balsamo v. Sheriff, Clark County, 565 P.2d 650 (1977); State v. Singleton 85 Ohio App. 245, 87 N.E.2d 358 (1949); State v. McMahon, 49 R.I. 107, 140 Atl. 359 (1928); and Fisher v. State, 487 S.W.2d 335 (Tex. 1972).

32. In Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946), the court was concerned that treating false promises as criminal behavior could wrongfully be applied to those whose only crime was inability to pay debts and would "place a devastating weapon in the hands of the disgruntled or disappointed creditor." *Id.* at 699. Other courts have expressed the same concern. *See, e.g.*, People v. Ashley, 42 Cal.2d 246, 276-77, 267 P.2d 271, 290 (1954); People v. Churchill, 417 N.Y.S.2d 221, 225, 390 N.E.2d 1146, 1150 (1979).

33. *See* People v. Ashley, 42 Cal.2d 246, 276-77, 267 P.2d 271, 290 (1954).

trict of Columbia in *Chaplin v. United States*.[34] In Chaplin, a liquor dealer was appealing his conviction pursuant to the District of Columbia false pretense statute which provided that "whoever, by any false pretense with intent to defraud, obtains from any person any service or anything of value, . . . shall be imprisoned . . . or . . . shall be fined . . . or both."[35] Chaplin had borrowed money on representations that he would use the borrowed funds to purchase liquor tax stamps, and failed to repay the money he had been advanced. The prosecution asserted that Chaplin had misrepresented a material fact: his intent to repay the money (his state of mind).[36] On the basis of this argument Chaplin was convicted at trial.[37]

The court of appeals rejected this reasoning, and held that Chaplin's state of mind could not be a misrepresentation of an existing material fact, pursuant to the false pretense statute at issue. The court said, "business affairs would be materially incumbered by the ever present threat that a debtor might be subjected to criminal penalties if the prosecutor and the jury were of the view at the time of borrowing he was mentally a cheat."[38] The court was not at all comfortable with the prospect of inferring the defendant's intent after the alleged offense had occurred, and then basing a prosecution upon it. The court reasoned that the possible prosecution of those who were guilty of nothing more than inability to satisfy debts would be an unacceptable consequence if Chaplin were found guilty. "It is not enough to say that if innocent the accused would be found not guilty . . . . The burdens incident to the defense would, irrespective of the outcome, place a devastating weapon in the hands of a disgruntled or disappointed creditor."[39]

Judge Edgerton, dissenting in the *Chaplin* opinion, reasoned, however, that intent could be proved in most cases; therefore, the defendant's intention or state of mind at the time he made a false promise could be characterized as a misrepresentation of existing fact.[40] Judge Edgerton stated that the defendant had borrowed money from different people, each time requesting it for the same

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34. 157 F.2d 697 (D.C. Cir. 1946).
35. D.C. CODE § 22-1301 (1940).
36. 157 F.2d at 697-98.
37. *Id.* at 697.
38. *Id.*
39. *Id.* at 699.
40. *Id.* at 700 (Edgerton, J., dissenting).

purpose.[41] This indicated that Chaplin had fraudulent intentions when he borrowed the money from the complainant. The majority of the court, however, was firm in the belief that the defendant's actions were concerned with future acts, and were therefore not punishable as false pretense pursuant to the statute at issue.[42] The court was aware that the defendant's actions were less than admirable, explaining that "[n]o doubt . . . the zeal with which the innocent are protected has provided a measure of shelter for the guilty."[43]

The United States Court of Appeals for the District of Columbia again dealt with the question of whether false representations as to future actions could constitute false pretenses in *United States v. Fulcher*.[44] Fulcher was charged with violating the District of Columbia false pretense statute.[45] Fulcher was convicted for obtaining sums of money by false representations that he intended to perform home-improvement work.[46] The government's case was that Fulcher, through one or more of his home-improvement companies, defrauded customers who had paid for anticipated home-improvements.[47] Fulcher, citing *Chaplin*, stated that the false representations that he intended to perform home-improvement were not sufficient to support a conviction of obtaining money by false pretense.[48] Fulcher said that his representation of present intention to perform work in the future would not support a conviction because it did not relate to a present or past fact.

The Court of Appeals did not explain or analyze the rationale of Fulcher's contentions. The court was constrained to accept the precedential value of the *Chaplin*, case and stated, "Although the government attacks the rationale of *Chaplin*, that case states the law of this circuit and we are bound by it."[49]

41. *Id.* at 701.

42. *Id.*

43. *Id.* at 699.

44. 626 F.2d 985, 987 (D.C. Cir. 1980).

45 D.C. CODE ANN. § 22-1301 (1973).

46. 626 F.2d at 987.

47. *Id.*

48. *Id.*

49. *Id.*

II. FALSE PROMISES AS CRIMINAL BEHAVIOR: TWO APPROACHES

A. *The California Approach — Judicial Interpretation*

Although false promises have not traditionally been indictable as criminal behavior in the majority of American jurisdictions, it would be incorrect to assume that false promises have remained untouched by the criminal law. The actions of the California Supreme Court in *People v. Ashley*[50] provide a unique model of how jurisdictions can incorporate false promises within their existing false pretense statutes. In *Ashley,* the defendant induced the complainants to lend him money, promising to give them security for the loans. The security was never given, and the jury found that the defendant never intended to perform.[51] The California Supreme Court affirmed the conviction of theft pursuant to § 484 of the California Penal Code. This section provided in relevant part that

> [e]very person who shall feloniously steal . . . or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft . . .[52]

In applying the statute the court stated, "If false promises were not false pretenses, the legally sophisticated, without fear of punishment, could perpetrate on the unwary fraudulent schemes like that divulged by the record in this case . . . ."[53] The court believed that defendant's intent not to perform could be sufficiently proved in most cases to support a conviction.

The *Ashley* court reiterated the reasoning of the court in *Chaplin* that, "[b]usiness affairs would be materially encumbered by the . . . threat that a debtor might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat."[54] The court acknowledged the fact that the *Chaplin* court believed it unwise to attach much significance to the mental attitude of the accused, but did

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50. 42 Cal.2d 246, 267 P.2d 271 (1954).

51. *Id.* at 251-58, 267 P.2d at 275-79.

52. CAL. PENAL CODE § 484 (West 1935).

53. 42 Cal.2d 246, 265, 267 P.2d at 283.

54. *Id.* at 262-63, 267 P.2d at 282 (quoting Chaplin v. United States, 157 F.2d 697, 699 (1946)).

not find this reasoning persuasive.[55] The *Ashley* court pointed out that false promises could provide the basis for a civil action of deceit in the majority of American states and England.[56] The court reasoned that the instigation of criminal proceedings by disgruntled creditors against commercial defaulters could only be predicated upon the actions of incompetent juries "incapable of weighing the evidence"[57] or understanding jury instructions, and that such actions would only be tolerated by appellate courts derelict in discharging their duty.[58] The court was convinced that intent not to perform could be proved and such intent could provide a sound basis for conviction pursuant to false pretense statutes. The court was willing to let the judges and juries decide whether or not the accused intended to perform his representation.

The court's reasoning does not definitively indicate the basis of its decision. The court's holding fails to indicate whether it was including false promises within the false pretense statute by resorting to a "state of mind"[59] approach or whether it was doing away with the requirement that a false statement of a past or present fact was an essential element of theft by false pretense. The "state of mind" approach refers to the situation where defendant represents he will do something at a future time, but in fact does not intend to do it. Under this approach, his representation as to his future action is in fact a misrepresentation of the existing fact (i.e., his state of mind), and thus is a false pretense according to majority common law interpretations. This "state of mind" approach has not been adopted by the majority of jurisdictions.[60] The *Ashley* opinion evidenced that the California Supreme Court had abandoned the common-law rule, and would now treat false promises as

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55. 42 Cal.2d 246, 263-64, 267 P.2d at 282.

56. *Id.* at 263, 267 P.2d at 282.

57. *Id.*

58. *Id.*

59. *Id.* at 262, 267 P.2d at 281.

60. *See* 3 WHARTON'S CRIMINAL LAW 472-77 (C. Torcia 14th ed. 1980); WHARTON'S lists six jurisdictions which have adopted the state of mind approach. These jurisdictions are: *California*, People v. Kiperman, 69 Cal. App. 3d Supp. 25, 138 Cal. Rptr. 271 (1978); *Delaware*, State v. Nichols, Houst. Crim. 114 (1862); *Massachusetts*, Commonwealth v. Morrison, 252 Mass. 116, 147 N.E. 588 (1925); *New Jersey*, State v. Trypuc, 53 N.J. Super. 6, 146 A.2d 503 (1958); *Rhode Island*, State v. McMahon, 49 R.I. 107, 140 A. 354 (1928); and *Washington*, State v. Peterson, 109 Wash. 25, 186 P. 264 (1919). *Id.* at 474-75 n.64. The case of Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946), illustrates the reasoning that the majority of courts have adopted in rejecting the "state of mind" approach. For a good discussion of Chaplin and the rejection of the "state of mind" approach see Annot., A.L.R. 828 (1946).

criminally actionable behavior.[61]

In a dissenting opinion in *Ashley*, Judge Schauer agreed with the majority as to their result, but found fault with their reasoning.[62] Judge Schauer found, unlike the majority, that Ashley had misrepresented existing facts, and had committed theft by false pretense according to the common-law interpretation of false pretense, "pursuant to long-accepted theories of law."[63] According to Judge Schauer, Ashley induced a complainant to deliver property to him upon his representations that he owned certain property, which he did not in fact own. This was false representation of existing fact, prosecutable according to common-law notions of criminal false pretense.[64] Judge Schauer accused the majority of possessing a "fervor to declare new law"[65] instead of applying the existing law as it should have been applied. According to the dissenting judge, the court did not have to strike down well-settled rules of law to find that Ashley could be prosecuted for theft by false pretense.[66]

Judge Schauer viewed the majority's approach as dangerous and said that the purpose of criminal law is "not to make easier the conviction of alleged miscreants"[67] but to protect the innocent from false conviction. The court's move was, according to Judge Schauer, an "encroachment on the rights of individuals"[68] and a whittling away of the rules that protect them. Judge Schauer disagreed with the majority's holding that juries were competent to make a finding of the defendant's intent. He was concerned with the far-reaching implications of the court's ruling, and recognized the possibility that those guilty of nothing more than inability to satisfy debts could now become subject to harsh and inappropriate criminal sanctions.

B. *The New York Approach—Statutory Amendment*

New York has approached the application of criminal sanc-

61. 42 Cal.2d at 262, 267 P.2d at 281. *See* Note, *supra* note 3 at 720 n.9.
62. 42 Cal.2d 246, 274-75, 267 P.2d 271, 288-89 (dissenting opinion).
63. *Id.* at 274, 267 P.2d at 289.
64. *Id.* at 277-78, 267 P.2d at 290-91.
65. *Id.* at 277, 267 P.2d at 290.
66. *Id.* at 276, 267 P.2d at 289.
67. *Id.*
68. *Id.* at 276, 267 P.2d at 290.

tions for false promises by legislative enactment.[69] New York amended its larceny statute to include larceny by false promise in 1975.[70] Prior to New York's amendment of its larceny statute, New York followed the majority common-law rule, and did not treat false promises as a prosecutable offense.[71] The amended New York statute provides in relevant part:

> A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or . . . does not believe that the third person intends to engage in such conduct.
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> In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts . . . of the case are wholly consistent *with guilty intent* . . . and excluding to a *moral certainty* every defendant's intention or belief that the promise would not be performed.[72]

The addition of larceny by false promise to the criminal law of New York "represents a significant enlargement of the crime . . ."[73] It appears that New York's amendment of the crime of larceny is aimed at intentional wrongdoers rather than debtors who simply fail to satisfy debts. In the Practice Commentaries appended to New York's larceny statute, Arnold D. Hechtman analyzes the addition of false promises to the criminal law of New York. Hechtman states that "[s]ince many flagrant swindles are perpetrated by patently fraudulent promises — and with careful avoidance of any misrepresentation of fact — many an expert confidence man has gone scot free for want of a provision such as the one at hand."[74]

The inclusion of the language "pursuant to a scheme to de-

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69. N.Y. Penal Law § 155.05(2)(d) (McKinney 1975).

70. *Id.*

71. *See* People v. Karp, 298 N.Y. 213, 81 N.E.2d 817 (1948).

72. N.Y. Penal Law § 155.05(2)(d) (McKinney 1975) (emphasis added).

73. Hechtman, Practice Commentaries, N.Y. Penal Law, Book 39, 114-15, § 155.05 (McKinney 1975).

74. *Id.*

fraud"[75] within the statute excludes instances that are not by their nature criminal. Because the defendant's intention or belief that the promise would not be performed cannot be established by non-performance alone, prosecutions pursuant to New York's statute will not include situations where trickery or culpable conduct is absent. The statute's requirement that the promise be part of a "scheme to defraud," and the requirement that every hypothesis be excluded to a "moral certainty" except defendant's belief that the promise would go unperformed, tends to discourage prosecutions against debtors unable to satisfy debts, and those unable to tender commercial performance. The New York case of *People v. Churchill*[76] illustrates how the strict requirements of proof within the New York statute operate to discourage prosecutions based solely upon non-performance.

Churchill, who had a background in performing construction work but no experience in managing a business, decided to secure construction jobs on his own. He placed advertisements declaring himself to be a home improvement contractor. Churchill then entered into various contracts to perform services ranging from enclosing back porches to constructing concrete walkways. Some of his contracts were satisfactorily completed while others led to complaints, civil suits, and ultimately an indictment charging him with grand larceny in the third degree, in connection with his performance on the contracts.[77] The prosecution proceeded upon the theory that Churchill was engaged in a scheme to defraud by entering into business transactions which he had no intention of performing. The jury found Churchill guilty of larceny by false promise.[78]

The court of appeals held that to convict Churchill of larceny by false promise the record would have to "establish to a moral certainty" that at the time Churchill entered into the contracts he did not intend to perform.[79] The court held that the prosecution failed to establish that "moral certainty."[80] The court stated that a conviction of larceny by false promise

> may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with

75. *See supra* note 69.
76. 417 N.Y.S.2d 221, 390 N.E.2d 1146 (1979).
77. 417 N.Y.S.2d 221, 224, 390 N.E.2d at 1148.
78. *Id.*
79. *Id.* at 225, 390 N.E.2d at 1150.
80. *Id.*

> guilty intent . . . and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed . . . .[81]

The court realized that in amending their larceny statute the legislature did not want the criminal law to be a tool in the hands of those disappointed by commercial defaults. The court noted further "[b]y setting forth a high standard of proof for the establishment of the defendant's intent, the Legislature had recognized that the criminal justice system is not an alternative to every person who seeks retribution from a defaulting, judgment-proof adversary."[82] According to the court, the prosecutor's evidence showed only that Churchill was a "bumbling novice" not that he was engaged in a scheme to defraud those with whom he contracted.

According to the prosecution, factors which tended to show Churchill's intent not to abide by his contracts included both Churchill's deposit of the downpayments he received into his personal checking account, and use of the downpayments for personal expenses.[83] The court rejected this argument, observing that it is not unusual for someone with no money to use such downpayments to provide for daily expenses of family and self.[84] The court said that despite Churchill's disordered finances, the record was devoid of proof that he did not intend to perform his contracts. "Stripped of all its unseemly innuendos, the People have shown only that [Churchill] had entered into . . . contracts and that he had failed to complete performance."[85] The inferences to be drawn from the record "do not exclude to a moral certainty"[86] every hypothesis but that when Churchill entered into his contracts he had no intention of meeting his obligations. The court reasoned that the inference was equally strong that Churchill was simply inexperienced, uneducated, and that his talents as a salesman exceeded his ability to manage a business.[87] The Court stated that "[i]t is because of the danger of confusing larceny by false promise with purely civil wrongs that the Legislature has insisted that the People prove to a moral certainty that at the time of the promise the

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81. *Id.* at 225, 1150; (quoting N.Y. Penal Law § 115.05(2)(d) (McKinney 1975)).
82. *Id.* (quoting People v. Ryan, 394 N.Y.S.2d 609, 612, 363 N.E.2d 334, 337 (1977)).
83. *Id.* at 226, 390 N.E.2d at 1150-51.
84. *Id.*
85. *Id.*
86. *Id.* at 225, 390 N.E.2d at 1149.
87. *Id.* at 225, 390 N.E.2d at 1151.

defendant had no intention that it would be performed."[88]

C. *New York Approach vs. California Approach*

The evidentiary safeguards built into the New York Statute provide a necessary degree of protection from criminal prosecution for commercial defaulters and debtors. The New York statute's inclusion of the "moral certainty" standard[89] tends to insure that the New York larceny statute will not be employed as a club in the hands of disgruntled creditors.[90] The safeguards built into the New York statute, along with the court of appeals' interpretation of it, seem sufficiently to address the concerns raised in the *Chaplin*[91] case and in the dissenting opinion of the *Ashley*[92] case. By following the New York approach, the courts are free to apply the criminal law to inhibit and punish the actions of swindlers and thieves, while situations involving commercial defaults will not expose such defaulters to criminal sanctions.

The New York and California approaches typify two trends that (can be seen nationally) with respect to treating false promises as criminal behavior. The California approach is characterized by the inclusion of false promises within existing false pretense statutes through judicial interpretation.[93] The New York approach is characterized by the inclusion of false promises within the criminal law by legislative enactment.[94] Of these two approaches, New York's approach is more concerned with the entire problem of what can be called the "disgruntled creditor."[95] The New York approach handles this potential problem by incorporating strict evidentiary hurdles into its statute. California, on the other hand, leaves much discretion to the prosecutor and jury in deciding whether the accused was "mentally a cheat"[96] when he manifested his intention to either pay or perform at some time in the future.

States which have taken the approach the California Supreme

88. *Id.* at 225, 390 N.E.2d at 1150.
89. N.Y. PENAL LAW § 155.05(2)(d) (McKinney 1975).
90. *See supra* note 32.
91. Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946). *See supra* note 32.
92. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954); *See supra* text accompanying notes 65-67.
93. *See supra* text accompanying notes 51-61.
94. *See supra* text accompanying note 69-88.
95. *See supra* note 32.
96. See Chaplin v. United States, 157 F.2d 697, 699 (1946).

Court took in *People v. Ashley*[97] by judicial inclusion of false promises within existing statutes include: Rhode Island,[98] Massachusetts,[99] Iowa,[100] Nevada,[101] and Texas.[102] States which have amended their existing law to include the crime of false promises (or an analogous offense) in addition to New York include: Louisiana,[103] North Carolina,[104] Connecticut,[105] and Minnesota.[106]

III. Proposed Amendments to Vermont's False Pretense Statute

Bills have been introduced by Vermont legislators to prohibit fraud by false promise. Two bills introduced by different legislators, one introduced in 1979[107] and the other in 1981,[108] have identical language and statements of purpose. The statement of purpose of each is as follows: "It is the purpose of this bill to prohibit fraud by false representations and by false promises."[109] For purposes of convenience, further references will be to the bill introduced in 1981. The proposed bill provides in relevant part:

> A person who designedly and with intent to defraud obtains property from another person by using:
> (1) false pretenses,

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97. 42 Cal.2d 246, 267 P.2d 271 (1954).

98. State v. McMahon, 49 R.I. 107, 140 A. 359 (1928), where the court held that a misrepresentation of a present state of mind as to future intention was misrepresentation of existing fact. *Id.* at 108, 140 A. at 360.

99. Commonwealth v. Green, 326 Mass. 344, 94 N.E.2d 260, 264 (1951). The court held that representations that money was to be invested were misrepresentations of existing fact, thus false pretense. *Id.* at 348, 94 N.E.2d at 263.

100. State v. West, 252 N.W.2d 457 (Iowa 1977). The court held that a promise to perform a future act, made without intent to perform, was sufficient to support a charge of cheating by false pretenses; overruling prior contrary cases. *Id.* at 461.

101. Balsamo v. Sheriff, 93 Nev. 315, 565 P.2d 650 (1977). The court held that defendant who agreed to perform construction work and failed to do so was chargeable with obtaining money under false pretenses. The court rejected the contention that false pretense did not include false promises. *Id.* at 316, 565 P.2d at 651.

102. Fisher v. State, 487 S.W.2d 335 (Tex. 1972). The court held that false promises which cause a person to part with his property could be the basis of theft by false pretext, if the promises were false at the time they were made.

103. La. Rev. Stat. Ann. § 1467 (1979).

104. N.C. Gen. Stat. § 14-100 (Supp. 1979).

105. Conn. Gen. Stat. Ann. § 539-119(3) (West Supp. 1981).

106. Minn. Stat. Ann. § 602.52(2)(3)(b) (West Supp. 1981).

107. H.298 1979 Sess. (Introduced by Mr. Koch of Barre Town and Mrs. Kroger of Essex).

108. H.331 1981 Sess. (Introduced by Mr. Hamilton of Wilmington, Mr. Sassi of Barre City and Mr. Valsangiacomo of Barre City).

109. H. 298, 55th Bien. Sess. (1979); H. 331, 56th Bien. Sess. (1981).

> (2) false representations,
> (3) false promises,
> (4) a position of confidence, or
> (5) false token
> Shall be guilty of larceny by fraud . . . . If the property obtained, whether by a single act or by a scheme or course of conduct victimizing one or more than one person, exceeds $100.00 in value, a person convicted of larceny by fraud shall be imprisoned not more than ten years or fined not more than $1000.00, or both. If the property obtained does not exceed $100.00 in value, the person shall be imprisoned not more than six months or fined not more than $300.00 or both.[110]

A recurring theme in the criminalization of false promises has been the need to protect mere commercial defaulters from disgruntled and disappointed creditors.[111] In viewing the cases which have arisen in this area, there has been a reluctance to let triers of fact infer the defendant's intent.[112] Attempts to protect those who have been accused of criminal behavior by false promise have been in the form of strict requirements of proof.[113] The New York statute's requirements of proof reflect the need for society to protect itself from swindlers and thieves, while protecting essentially non-criminal defaulters from the over-anxious triers of fact who might mistakenly infer criminal intent where none existed.[114]

The major benefit of criminalizing false promises legislatively, as opposed to judicially, is the ability to protect those whose actions are essentially non-criminal. Such non-criminal actions can be protected by the inclusion of requirements of proof. If the Vermont legislature is prepared to take the initiative to criminalize false promises it should take advantage of its ability to incorporate such requirements of proof. It is not difficult to visualize the proposed Vermont statute being enforced against mere commercial defaulters. The language of the proposed statute could be applied

110. H. 331, 56th Bien. Sess. (1981).

111. *See* Chaplin v. United States, 157 F.2d 697, 698-99 (D.C. Cir. 1946); People v. Ashley, 42 Cal.2d 246, 276, 267 P.2d 271, 289-90 (1954) (Shauer, J., concurring); Hechtman, Practice Commentaries, N.Y. PENAL LAW, Book 39, 114-15, § 155.05 (McKinney 1975).

112. Chaplin v. United States, 157 F.2d 697, 698-99 (D.C. Cir. 1946); People v. Ashley, 42 Cal.2d 246, 276, 267 P.2d 271, 290 (Schauer J., concurring).

113. New York's larceny statute incorporates strict requirements of proof by the inclusion of language that tends to discourage prosecutions against debtors unable to satisfy debts and commercial defaulters; N.Y. PENAL LAW § 155.05(2)(d) (McKinney 1975). *See supra* text accompanying notes 69-75.

114. *See supra* text accompanying notes 73-76.

by a prosecutor to charge a commercial defaulter or debtor with a crime for actions which are wholly non-criminal. Similarly a jury could convict such a defendant if of the opinion that the defendant never meant to tender the agreed performance. This possibility has been of paramount concern in the area of false promises.[115] In the interests of protecting the rights of the accused from unjustified prosecution and conviction, the proposed Vermont statute should, at a minimum, include stricter standards of proof such as those contained in the New York statute:

> [D]efendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts . . . are wholly consistent with guilty intent . . . .[116]

Such an inclusion would help to insure that individuals would not be subject to criminal prosecution and criminal sanctions based on non-performance alone.[117] It would be sloppy legislating for the state of Vermont to criminalize false promises while failing to clarify the application of such criminalization, thereby excluding needless prosecutions.

Conclusion

The inclusion of false promises within the criminal law is useful in curbing the activities of those who perpetrate promissory swindles, and is highly beneficial in the area of consumer protection. However, if applied indiscriminately, such a statute could become a weapon against one who merely fails to satisfy a debt. With this in mind, The California approach of including false promises within the criminal law by judicial fiat[118] does not go far enough to prevent the coercive powers of the criminal law from harassing those whose only crime is inability to satisfy a debt, or failure to tender agreed performance.

Thus Judge Schauer's concern for those who may become the subject of criminal prosecutions due to disgruntled or disappointed creditors is reflected in his characterization of the California Su-

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115. *See supra* note 111.

116. N.Y. Penal Law § 155.05(2)(d) (McKinney 1975).

117. The operation of such standards of proof is illustrated by *People v. Churchill*, 417 N.Y.S.2d 221, 390 N.E.2d 1146 (1979).

118. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954).

preme Court's actions as dangerous.[119] New York's legislative approach to criminalization of false promises is superior because it allows society to protect itself against swindlers and thieves while providing an essential degree of protection for those involved in business and its unavoidable commercial defaults.

False promises can be the subject of civil actions in most jurisdictions,[120] as is the case in Vermont.[121] However, civil remedies may not be sufficient to deter frauds committed by false promise. The criminal law is able to invoke tremendous powers of coercion; when this power is exercised it should be done in a well reasoned manner. As civil remedies prove to be insufficent, legislative amendment of Vermont law to include larceny by false promise can effectively be used to discourage and combat the sort of home-improvement fraud described earlier.[122] Any such enactment should be skillfully drafted to exclude commercial dealings which are not clearly criminal in nature.

Bruce N. Proctor

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119. *Id.* at 276-77, 267 P.2d at 289.

120. People v. Ashley, 42 Cal.2d 246, 263, 267 P.2d 271, 282 (1954).

121. VT. STAT. ANN. tit. 9, § 2453 (1974).

122. *See supra* text accompanying notes 6-9.