Reforming Theft: Taking Without Consent

Nathan Tamblyn*

Abstract: This article proposes a new offence of theft, based on intentionally or recklessly taking or keeping another's property, knowingly or recklessly without consent. It discusses how this new law is in practical terms an improvement over the current law, and how without legislative reform the current law might be improved through case law. It argues that the proposed law is also a better fit in theory, in terms of characterising the wrong of theft.

This article proposes a new offence of theft: intentionally or recklessly taking or keeping another's property, knowingly or recklessly without consent. In particular, this formulation does without the concepts of appropriation, dishonesty, and intention to deprive permanently which appear in the current law.

This article proceeds as follows. In the first section, to set the scene, I lay out my proposed new law alongside the headline definitions of theft in the old (pre-1968) law of larceny, and the current law found in the Theft Act 1968. The middle sections are concerned with a pragmatic analysis of detail, taking each element of my new proposed law and seeking to show how it is a practical improvement. For those readers pessimistic about the prospects for legislative reform, I will also seek to show how the case law might be developed to move closer to my proposed new law. Thus, we consider the following topics: taking, keeping, and borrowing; how this relates to intangibles, like bank balances; absence of consent; and why theft might include recklessness. The final sections address two theoretical issues: the need to distinguish theft from fraud; and how best to characterise the wrong of theft.

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* MA (Ox) LLM PhD (Cam) SFHEA Barrister, Associate Professor of the Common Law, University of Exeter Law School. With thanks for their helpful comments to Stephen Skinner, the anonymous reviewer, and the editor.

The conclusion draws everything together. But by way of preview, here are some examples of how my proposal will apply. It applies without difficulty to common cases of theft like shoplifting, or taking a wallet from a pocket, or a handbag in a cinema, or a mobile phone from a car. I shall argue that 'borrowing' money from an employer's cash register is theft, as it is under current law, although by a different pathway. In contrast to current law, I shall argue that changing labels on supermarket goods, or taking more money than is due from a proffered wallet, or buying with a forged cheque, or purporting to sell something without physical control of the goods, is not theft but fraud.

Laws of theft

Here is my proposed new law of theft:

> It is the crime of theft where a person intentionally or recklessly takes or keeps another's property, knowingly or recklessly without that other's consent. There is a defence if the person believes that: they have a right to take or keep the property; or the other would consent.

As for the old law of larceny, under s 1 of the Larceny Act 1916:

> A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent at the time of such taking permanently to deprive the owner thereof.

As for the current law, under s 1 of the Theft Act 1968:

> A person is guilty of theft if they dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it.

Taking and keeping

To repeat, my proposed crime of theft involves taking or keeping another's property. Let us consider keeping first, because this element involves only minor clarification and not major change of the current law.

The old law of larceny required D to 'take and carry away'. The Criminal Law Revision Committee considered one of its weaknesses that, where D had obtained the property lawfully or innocently, larceny did not include D subsequently and wrongfully keeping another's property.[1] So under the current law, keeping is explicitly an act of 'appropriation'.[2] Also, omitting to return could be keeping – at least, say authors, where done intentionally.[3] Thus my proposal is an improvement over the old law of larceny, but without radical change to the current law, except that it does articulate that keeping should be intentional (or reckless), and so makes explicit what in the current law is left unaddressed.

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[1] *Theft and Related Offences*, 8th Report, Cmnd 2977 (London: HMSO, 1966) [21], [36].

[2] Theft Act 1968, s 3(1).

[3] Melissaris, 'The Concept of Appropriation and the Offence of Theft' (2007) 70 MLR 581; Herring, *Criminal Law*, 8th edn (Oxford: Oxford University Press, 2018) 507; Simester et al, *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 543; Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 415. In *Broom v Crowther* (1984) 148 JP 592 (DC), it was not theft where D kept something he had only recently discovered was stolen while he decided whether or not to return it. We might say, he had not yet intended to keep rather than return.

Now let us consider the element of taking. Taking was part of the definition of theft in the old law of larceny. The current law requires instead an 'appropriation'. This is defined as any assumption by the defendant (D) of the rights of an owner.[4] Since ownership involves a bundle of rights then, according to current case law, appropriation occurs when D acts upon any one of those rights.[5]

Ormerod and Williams say that the reintroduction of taking would set the law back 200 years.[6] However, I disagree that the current law is worth protecting just because it is 'modern'. Rather, the current law of appropriation has the following problems, which my proposal improves upon.

First, appropriation covers trivial conduct: mere touching is an appropriation.[7] There is a consensus of opinion that, as a matter of principle, the law should only criminalise serious misconduct, and not trivial misconduct,[8] and yet the current law does criminalise the trivial, at

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[4] Theft Act 1968, s 3.

[5] *Morris* [1984] AC 320.

[6] Ormerod and Williams, *Smith's Law of Theft*, 9th edn (Oxford: Oxford University Press, 2007) [2.30].

[7] In *Morris* [1984] AC 320 (HL), mere touching was not enough. Appropriation was said to involve an adverse interference with or usurpation of the rights of the owner. The honest shopper does not appropriate when they take goods off the shelves, said the court, because they act with the implied authority or consent of the supermarket. But in *Gomez* [1993] AC 442 (HL) the court departed from *Morris* and held that removing an item from a shelf was indeed an appropriation. There did not need to be an adverse interference or usurpation, and consent or authorisation was irrelevant. (Lord Lowry dissented.) Following *Gomez*, mere touching can be an appropriation.

[8] The American Law Institute's Model Penal Code has a defence where the conduct is too trivial to warrant the condemnation of conviction (§2.12); Husak, 'The De Minimis Defence to Criminal Liability' in Duff and Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011). See too: Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 116 LQR 225; Husak, *Overcriminalisation* (Oxford: Oxford University Press, 2008). Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 75-77.

least to the extent that mere touching can suffice to ground criminal liability.[9] Further, as an element of the crime, because it is trivially satisfied, appropriation bears little weight. This puts undue burden on other elements of the crime. Under the current law, that weight is mainly borne by the element of dishonesty,[10] which is already a troubled element (discussed below).

In contrast, under my proposal, it is not every trivial interference with property which incurs liability, but only the major interferences of taking and keeping. These elements thereby also bear a meaningful weight in the definition of the crime.

I cannot prove that taking and keeping are the major forms of property interference as a matter of categorical logic, but I do appeal to the reader's own experience and sense of loss. It seems to me relatively unproblematic, and undeserving of the attention of criminal law, for example, the person who pets a dog, or moves a suitcase on the baggage carousel to access their own. Rather, the bother and sense of affront arises more keenly, for example, when someone takes my umbrella from the stand and out with them into the rain, or when someone who has borrowed my book decides to keep it for themselves. I suggest that taking and keeping, rather than touching, are the more egregious forms of interference.

Second, the current law produces results which are contrary to common sense. For example, if D purports to sell property belonging to the victim (V), that is an appropriation, and so D commits theft, even if V retains title, even if the property never leaves V's

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[9] Should it be theft to take, say, another's pencil (something of little value)? My point here is a separate one, that mere *touching* a pencil (without taking) is too trivial a misconduct to satisfy the *actus reus* of the crime of theft.

[10] The Law Commission say that dishonesty is the principal determinant of criminality in theft: *Fraud and Deception*, Consultation Paper No 155, [3.2]. See too: Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 402.

possession.[11] It seems extraordinary to convict D of *stealing* the Mona Lisa, without ever touching it, or even going to France, merely purporting to sell it to X, with the Louvre retaining the painting, and title to it, all along. This was not formerly larceny.[12] It is not a crime under my proposal, because D has not taken or kept the property. (The disappointed buyer may well cry fraud instead.)[13]

Here is another example of a result contrary to common sense. D intends to steal a car, so D walks down a street, trying the handle on each car. This is an appropriation. But since each car is locked, D is thwarted and goes home empty-handed. D's acts are probably merely preparatory, and so would likely not be sufficient for any attempt to commit another crime.[14] And yet D has *stolen* every car in the street. What then would constitute attempted theft? Merely reaching out a hand towards a car door?[15] Under my proposal, D has not committed theft because D has not taken any car. At best, D has committed attempted theft, but perhaps not even then, since trying the car door handle is probably no more than merely preparatory to stealing.[16] Under my proposal, the result matches common sense.

It would not solve matters were the current law to decide instead that appropriation meant assuming *all* the rights of an owner. While that would preclude non-trivial interferences from being theftuous, it creates other problems. For example, an owner of a car can drive it,

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[11] *Pitham* (1977) 64 Cr App R 45. See too: *Dobson v General Accident Fire and Life Insurance Corp plc* [190] 1 QB 274 (CA).

[12] *Bloxham* (1944) 29 Cr App R 37.

[13] See the discussion below of *Pitham* (1977) 64 Cr App R 45.

[14] See too: Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 416.

[15] Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 418, 421. Similarly, Horder says that the inchoate mode of definition is used for theft, which pushes back the crime of attempted theft even further: Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 426.

[16] Attempt requires an act that is *more* than merely preparatory: Criminal Attempts Act 1981, s 1.

sell it, repaint it, lend it, gift it, and so on. A would-be thief might truthfully say that they wanted to drive it, but not the rest, in which case they are declining to assume all rights of ownership. This leads to the unacceptable conclusion that it would not be theft to take and keep the car forever. If, to avoid that conclusion, the law deems the would-be thief to have assumed all the other rights, we are simply back to the point that the assumption of one right is enough (to bring the other rights with it).

If the assumption of any right is too trivial, and the assumption of all rights is also unsatisfactory, we have to grasp the nettle and identify which non-trivial rights are really of central concern. There are perhaps many rights in the bundle of ownership, from touching through moving to controlling, and so on, which might have a claim for protection. However, I suggest that taking and keeping are the two principal rights of central concern (and that sticking with just those two provides greater clarity and simplicity than a longer list of rights of diminishing importance). What is more, this approach produces results which, unlike the current law, accord with common sense.

To repeat, the statutory definition of appropriation is any assumption by D of the rights of an owner.[17] It is case law which has held this statutory provision to mean the assumption of any right of an owner.[18] It is therefore potentially open to the courts to revisit that interpretation, to suggest that theft is properly concerned with the assumption of any of the core rights of an owner, and not trivial interferences. It need not set the bar so high that D must assume all the rights of an owner. The core rights could be taking and keeping. The common law could potentially move the crime of theft closer to my proposal here without the need for legislative change.

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[17] Theft Act 1968, s 3.

[18] *Morris* [1984] AC 320.

Borrowing

The old law of larceny required an intention to deprive permanently. So too does the current law – although it is a crime to borrow a conveyance,[19] and, improbably, art on public display.[20] My proposal does not require an intention to deprive permanently, and so potentially covers borrowing, which is of course a form of taking and keeping. In this section, first I shall provide some historical context, second I shall argue why borrowing ought to be theftuous, then third I shall show how the current law in fact goes part of the way to recognising that, and could on the case law go further still.

Historical context

The Theft Act 1968 requires an intention to deprive permanently. So too did the Larceny Act 1916. The latter appears to be the first time that theft was given a statutory definition. At least, the statutes which the 1916 Act purported to consolidate and repeal did themselves not provide any definition. So before 1916, the definition of larceny was a matter for the common law. Shortly prior to 1916, the books tended to be forthright that the common law of larceny required an intention to deprive permanently.[21] However, that appears to be in part a necessary fix to problems elsewhere in the then definition of larceny.

[19] Theft Act 1968, s 12. This crime is defined as taking a conveyance without consent, knowingly. This has a similar structure to my proposed crime of theft.

[20] Theft Act 1968, s 11. This is defined as removing without authority, again similarly to my proposed crime.

[21] Stephen, *A Digest of the Criminal Law*, 6th edn (London: Macmillan & Co, 1904) [art 321]; Kenny, *A Selection of Cases Illustrative of English Criminal Law* (Cambridge: Cambridge University Press, 1903) 284.

Larceny required a taking and carrying away. The books suggest that 'taking' involved as little as touching, while 'carrying away' involved nothing more than moving or lifting an item a few inches.[22] These are such trivial interferences that it feels as though an intention to deprive *permanently* was needed to provide counterbalancing weight.

For example, Kenny cites one case were a would-be robber, finding nothing worth stealing, merely throws the victim's possessions about the highway.[23] This was held not to be robbery because, so Kenny intimates, there was no intention to deprive permanently. However, I doubt that it should even constitute taking, giving that word its ordinary meaning. It would make sense to ask the victim in that case, 'Did the robber take anything?', and to receive the answer, 'No, he just threw my things on the highway.' Yes, the ordinary meaning of the word taking does include the idea of laying hold of something, but it also gives the sense of depriving, which the robber did not do. If I were to re-arrange your jigsaw pieces, I have touched them and moved them a few inches, which would have been enough for a conviction of larceny, but it cannot sensibly be said that I have *taken* the jigsaw pieces.

So if taken is given a sensible meaning, perhaps that diminishes any historically felt need for counterbalance in the form of *permanent* taking.[24]

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[22] Russell, *Treatise on Crimes and Misdemeanours*, 7th edn (London: Stevens & Sons, 1910) 1179; Kenny, *A Selection of Cases Illustrative of English Criminal Law* (Cambridge: Cambridge University Press, 1903) 211, 218.

[23] *Anonymous* (1698) East's Pleas of the Crown 662, cited by Kenny, *A Selection of Cases Illustrative of English Criminal Law* (Cambridge: Cambridge University Press, 1903) 284.

[24] But see Fletcher, who argues that the introduction of an intention to deprive is in keeping with a philosophical commitment to develop larceny away from a crime of objective criminality based on its external appearance and towards a subjective criminality based primarily on mental states: 'The Metamorphosis of Larceny' (1976) 89 Harvard L Rev 469, 509.

Why borrowing should be theftuous

Simester et al say that the wrong of permanent taking is far more substantial than the wrong of temporarily interfering with use or enjoyment.[25] Now, permanently taking X might be worse than borrowing X. But borrowing Y might be much worse than permanently taking X. For example, some permanent takings can have little impact, like where they go unnoticed.[26] In contrast, the Criminal Law Revision Committee acknowledged that temporary taking could cause serious loss or hardship.[27] For example, borrowing another's property might harm through loss of use.[28] More than that, property might, from a Hegelian perspective, be thought necessary for our ethical development;[29] or in some cases as an extension of the self and so part of our identity.[30] In this way, temporary deprivation might negatively impact our sense of self and self-development. But we do not need to get into high philosophy here; the following suggestions are practical.

[25] Simester et al, *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 549.

[26] Simester and Sullivan themselves give the example of taking from a misanthropic billionaire who does not notice: 'The Nature and Rationale of Property Offences' in Duff and Green (eds), *Defining Crimes* (Oxford: Oxford University Press, 2005) 174-176. Readers might remember how an accountant stole £6m from Sting, the pop musician, who failed to notice until he was tipped off:
https://www.independent.co.uk/news/stings-adviser-jailed-for-pounds-6m-theft-from-star-1578141.html

[27] *Theft and Related Offences*, 8th Report, Cmnd 2977 (London: HMSO, 1966) [56]. However, the Committee thought that there was no pressing social need for a crime of temporary taking. But they were persuaded that temporarily taking art on public display should be a crime, despite only identifying three examples of its occurrence (at [57]).

[28] Gardner and Shute, 'The Wrongness of Rape' in Horder (ed), *Oxford Essyas in Jurisprudence* (Oxford: Oxford University Press, 2000).

[29] Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988).

[30] Dan-Cohen, *Harmful Thoughts* (Princeton: Princeton University Press, 2002) ch 9.

Bein gives the example of taking a performer's violin only for the day when the musician is due to give a reputation-defining performance.[31] Wilson gives the example of taking a golfer's preferred putter only for the duration of a big tournament.[32] We might give further examples of taking a student's lucky mascot, or asthma inhaler, for the day of their final exam; or borrowing another's car for a month when they have no other way of getting to work; or borrowing another's laptop for a week when it has all of someone's vital work saved there. Any of these might even be done maliciously, with intent to cause loss.[33]

There has long been a consensus of opinion that causing harm to another can be a good reason to criminalise,[34] so all this points towards the criminalisation of borrowing. Indeed, some other jurisdictions in their law of theft have no requirement of permanent deprivation.[35]

Another peculiarity of the current law is how, from V's perspective, it might be inscrutable. Taking the property temporarily would be an appropriation, but what currently prevents it from being theft is that D has no intention to deprive permanently. But often, V will

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[31] Bein, 'The Theft of Use and the Element of Intention to Deprive Permanently in Larceny' (1968) 3 Israel LR 368, 377

[32] Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 411.

[33] Williams, 'Temporary Appropriation Should Be Theft' [1981] Crim LR 129, 133.

[34] Feinberg, *Harm to Others* (New York: Oxford University Press, 1984); Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011); Edwards, 'Harm Principles' (2014) 20 Legal Theory 253. See too: Packer, The Limits of the Criminal Sanction (1968) 266-267, who says that harm to another is a threshold principle.

[35] Jurisdictions surveyed in the literature include South Africa, Canada, and France: Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 401; Bein, 'The Theft of Use and the Element of Intention to Deprive Permanently in Larceny' (1968) 3 Israel LR 368, 369; Williams, 'Temporary Appropriation Should Be Theft' [1981] Crim LR 129. For further comparison, see too: Weinrich, 'German Cures for English Ailments? Appropriation Versus Taking Away' (2005) 69 J Crim L 427.

not know D's intention. V will only know that the property has been taken. Whether it has been taken temporarily or permanently, and what D's intention might have been all along, might only transpire later. In the meantime, what is V meant to do: buy replacement property, or suffer loss of use while they wait to see if their property is eventually returned?[36]

Under my proposal, borrowing is criminal because it is a form of taking. This position is scrutable to V from the outset. There is no need for anomalous exceptions (like conveyances or public art). It acknowledges that taking or keeping, even temporarily, can cause serious harm.[37]

The current law

Although the current law requires an intention to deprive permanently in the headline definition of theft under s 1 of the Theft Act 1968, this position is modified significantly under s 6(1), which rather proves the need to acknowledge the harm caused by borrowing. That section provides as follows. (I have added the Roman numbers.)

> [I] A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; [II] and a borrowing or lending of it may

[36] Williams, 'Temporary Appropriation Should Be Theft' [1981] Crim LR 129, 135.

[37] Temporary taking can of course include very short periods of time where no harm is caused. Rather than distorting the definition of theft to accommodate this, instead this is precisely where prosecutorial discretion and fair sentencing have a sensible role to play.

> amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

The clarity of this clause has often been criticised.[38] [I] and [II] have tended to be treated as not cumulative. Thus [I] need not involve borrowing or lending,[39] and [II] has been described as a specific illustration of [I].[40]

As for [II], this seems a sensible extension. It prevents someone from gaming the system by taking and keeping something, as it were 'forever less one day', and then claiming, even truthfully, that they always intended to return it. This is surely as effective as any permanent deprivation. It also prevents someone from escaping liability when, although they return property, it is now substantially worthless. A familiar example is 'borrowing' a season ticket, intending to return it after the end of the season.[41] Note, however, that [II] does not capture any of the examples of harmful temporary borrowing raised earlier in this section (the violin or putter or mascot or inhaler or car or laptop). Upon their return, these latter items of property still have value, in that they can still be used and sold.

As for [I], this was inserted to capture ransom cases, which were previously an exception under the old law of larceny to the requirement of an intention to deprive

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[38] Spencer, 'The Metamorphosis of Section 6 of the Theft Act' [1977] Crim LR 653; Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 439; Simester et al, *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 553; *Lloyd* [1985] QB 829, 834 (CA).

[39] *Downes* (1983) 77 Cr App R 260.

[40] *Fernandes* [1996] 1 Cr App R 175.

[41] Ormerod and Laird, *Ormerod, Smith and Hogan's Criminal Law*, 15th edn (Oxford: Oxford University Press, 2018) 888; Herring, *Criminal Law*, 8th edn (Oxford: Oxford University Press, 2018) 511; Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 441.

permanently.[42] While at one point the court did suggest that [I] should not be extended beyond ransom cases,[43] more often the court has said that [I] should not be so restricted.[44]

Although the court has said that [I] is not intended to cut down the definition of theft in s 1 of the Theft Act 1968,[45] in practice that is exactly what it does:

For a start, with ransom cases, [I] creates a fiction. Where ransomer D intends to keep the property anyway, there is a real intention to deprive permanently, and no need for the statutory extension. It is in precisely those cases where, once paid, ransomer D intends to return the property, or perhaps to abandon it,[46] that the statutory extension applies, and deems an intention which does not exist.

Beyond ransom cases, the court has given a wide interpretation to [I]. In *Chan Min-sin v AG for Hong Kong*,[47] D used forged cheques to withdraw money from company V's account. Forged cheques are a nullity, meaning that the bank would have to refund V. The court said that even if D contemplated that his fraud would be discovered, and appreciated that V would

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[42] Spencer, 'The Metamorphosis of Section 6 of the Theft Act' [1977] Crim LR 653. A modern example of a ransom case is *Raphael* [2008] EWCA Crim 1014.

[43] *Lloyd* [1985] QB 829 (CA).

[44] *Downes* (1983) 77 Cr App R 260; *Bagshaw* [1988] Crim LR 321; *Fernandes* [1996] 1 Cr App R 175; *Marshall* [1998] 2 Cr App R 282; *Mitchell* [2008] EWCA Crim 850; *Raphael* [2008] EWCA Crim 1014.

[45] *Mitchell* [2008] EWCA Crim 850.

[46] Abandoning property, not caring whether or not V obtains its return, is *reckless*. Abandoning property does not necessarily evince an *intention* to deprive V permanently: *Mitchell* [2008] EWCA Crim 850. But see *Fernandes* [1996] 1 Cr App R 175, which suggests that it is enough that D knows they are risking the loss of the property. Also, if D appreciates that the loss of property is virtually certain, that can suffice for an intention, as per *Woollin* [1999] AC 82. It need not preclude an *initial* intention to deprive permanently that property is later abandoned when the robbery is frustrated and the usefulness of the property dissipated: *Raphael* [2008] EWCA Crim 1014.

[47] [1988] 1 All ER 1 (PC).

recover the withdrawals, still D intended to deprive V permanently, falling within the statutory extension because he was 'purporting to deal with the companies' property without regard to their rights'.

Similarly, in *Marshall*,[48] D re-sold used London Underground travel cards. The tickets were the property of London Underground, and it was assumed that London Underground would recover the tickets at the end of their use. Nevertheless, D was convicted of theft, because he intended to treat the tickets as his to dispose of regardless of the rights of London Underground.

In both *Chan Min-sin* and *Marshall*, D disposed of the property – although in *Chan Man-sin* the court used the language of dealing. In *DPP v Lavender*,[49] there was not so much a disposal as a keeping. D moved doors from one council property to another. Thus the council was not deprived of the doors themselves. Nevertheless, following *Chan Man-sin*, the court upheld D's conviction for theft. He fell within the statutory exception because he 'intended to treat the doors as his own, regardless of the council's rights'.

The effect of all this is that even where D appreciates that V will retain or recover the property, nevertheless an intention to deprive permanently will be deemed (thus, fictionally) if in the interim D *disposes* of the property or perhaps even *deals* with the property.

Now, it might be argued that the word 'dealing' goes further than 'disposing', but that is not necessarily true. Admittedly, dealing and disposing are not synonyms. Nevertheless, disposal has at least two elements: how, and when. A person might dispose of property by throwing it in the rubbish bin tomorrow, or by bequeathing it to an heir. Both of these are disposals. This reveals the corollary of disposal, which is dealing or keeping. If a person disposes of property next week, in the meantime they have kept it. In other words, choosing to

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[48] [1998] 2 Cr App R 282.

[49] [1994] Crim LR 297.

keep property for one week is also a determination to dispose of it thereafter. Every disposal decision imports a dealing in the meantime.

In summary, under current law, where D intends to keep stolen property for good, that is straightforwardly an intention to deprive V permanently. Where instead D intends to dispose of the property, and in the meantime to keep or deal with it, this is tantamount to treating it as D's own, and can be deemed an intention to deprive permanently under s 6(1) of the Theft Act 1968. Let me repeat that sentence: 'where instead D intends to dispose of the property, and in the meantime to keep or deal with it' – that describes borrowing! In short, s 6(1) is apt to cover most borrowings already.[50] My proposal makes explicit that borrowing can be theft, without resort to fictions, when the current law purports to deny this on the face of it, yet through statutory exception and case law subverts that denial to allow many instances of it.

Intangibles and bank balances

Can a crime of theft based on taking apply to intangibles? Horder suggests that taking is too narrow a concept for theft, because it is not apt to cover some types of property, like bank balances.[51] There are three responses to this.

[50] To constitute borrowing, must the property be returned to the owner? Some case law might be taken as saying that disposal by *abandonment* does not fall within s 6(1). See: *Mitchell* [2008] EWCA Crim 850. Yet s 6(1) contains no such reservation, and it seems arbitrary to distinguish between different types of disposal (whether to the owner or otherwise). Indeed, elsewhere in the case law, disposing to the owner is within s 6(1), as per *Raphael* [2008] EWCA Crim 1014, and so too disposing to a third party, as per *Marshall* [1998] 2 Cr App R 282. One final remark: if the taker does return the property, then we have an actual borrowing – but this is still theft under the current law if at the time of taking there was an intention to deprive permanently. So actual borrowings can already be theft!

[51] Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 385.

First, with a little imagination, perhaps taking and keeping might be applied to intangibles. (In which case, when it comes to 'borrowing', why not see loss of use as theft of an intangible?)[52] Intangibles exist conceptually, so perhaps taking might be a conceptual act as well as a physical one. Already we use the verb 'taking' in such contexts. For example, we talk already about taking someone's place in a sports team, or taking away someone's rights, or their dignity, or their privacy. Sarah Green suggests that criminal law has always been progressive in its attitude to intangibles (more so than civil law),[53] so here is perhaps an opportunity to push further.

Second, if taking and keeping cannot apply to intangibles, there is no reason to abandon hope. For a start, the old law of larceny did not cover intangibles either.[54] Nor does the current law cover all intangibles: for example, it does not cover confidential information,[55] or

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[52] Bein, 'The Theft of Use and the Element of Intention to Deprive Permanently in Larceny' (1968) 3 Israel LR 368, 370.

[53] Green, 'Theft and Conversion – Tangibly Different?' (2012) 128 LQR 564.

[54] Smith and Hogan, *Criminal Law* (London: Butterworths, 1965) 371; Hooper, *Harris's Criminal Law*, 21st edn (London: Sweet & Maxwell, 1968) 445; Turner, *Russell on Crime*, 11th edn (London: Stevens & Sons, 1958) 1004, 1006; Turner, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 1952) 230.

[55] Ormerod and Williams suggest that a separately legislated crime would be more appropriate to cover this anyway: *Smith's Law of Theft*, 9th edn (Oxford: Oxford University Press, 2007) [2.174]. See too: Christie, 'Should the Law of Theft Extend to Information?' (2005) 69 J Crim L 349. In *Oxford v Moss* (1979) 68 Cr App R 183, a student took an exam paper, read it and returned it. The court held that this was not theft of the contents. Under my proposal, the taking of the paper itself would be theft.

copyright,[56] or identity.[57] In short, the law of theft has never felt the need to cover all intangibles.

Now, it might be said that the previous examples of intangibles are not forms of property, and this might well be true according to current law. But why are they not property? All of these intangibles are protected by the law in various ways, and if the law deems them worthy of protection, why not upgrade them to the status of property? In the absence of a theory of property which enjoys universal support, the division between intangibles which do and do not count as property, and which should or not should not be additionally protected by the law of theft, can therefore seem arbitrary.

Third, more robustly, if bank balances are not covered by theft, so be it. (Similarly, only chattels can be the subject of a tortious claim of conversion.)[58] Stuart Green suggests that it would be more appropriate anyway to have a separate crime in respect of intangibles.[59] In the meantime, this does not mean that there is a gap in the law. For example, a rogue who goes on-line and accesses another's bank account to make a transfer: defrauds the bank (into believing that the rogue is the holder of the bank account); commits an offence under the Computer

[56] Herring, *Criminal Law*, 8th edn (Oxford: Oxford University Press, 2018) 491 n 3; Simester et al, *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 507; Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 425. In *Lloyd* [1985] 829 QB (CA), it was held not to be theft when a projectionist took a film reel to copy before returning it. The court said explicitly that it was discussing theft of the film, not theft of the copyright. Under my proposal, taking the film reel would be theft.

[57] *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 511. When D 'steals' V's identity, to transfer money from V's bank account, V is not the victim of theft, rather the bank is the victim of D's fraudulent impersonation.

[58] Torts (Interference with Goods) Act 1977, s 14(1); *OBG Ltd v Allan* [2007] UKHL 21.

[59] Green, *13 Ways to Steal a Bicycle* (Harvard University Press, 2012).

Misuse Act 1990.[60] Meanwhile the account holder is protected because the bank has effected a transfer without the authority of the account holder, and so must reverse that transaction.[61] There is no need to distort the law of theft to extend to situations already adequately addressed by other areas of law.

Without consent

My proposal is based on taking or keeping another's property, knowingly or recklessly without that other's consent. Let us compare this to the old law of larceny, and the current law.

The old law of larceny

Under the old law of larceny, a thief acted 'without the consent of the owner, fraudulently and without a claim of right made in good faith'. So theft was explicitly an act done without consent. That is consistent with my proposal.

As for the rest of the phrase, some authors suggest that the use of 'fraudulently' was a tautology, meaning simply without a claim of right.[62] Others suggest that it also allowed for a defence where D believed that V would consent.[63] If so, then it would have been tidier to excise

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[60] Under the Computer Misuse Act 1990, it is a crime if D causes a computer to perform any function with intent to secure access to any program or data held in any computer, when D knows this is unauthorised.

[61] As occurred when money was stolen from Sting (see n 21 above). Similarly, with forged cheques, see: *Chan Min-sin v AG for Hong Kong* [1988] 1 All ER 1 (PC).

[62] Turner, *Russell on Crime*, 11th edn (London: Stevens & Sons, 1958) 1129; Turner, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 1952) 280; Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395, 403-405.

[63] Lowe, 'The Fraudulent Intent in Larceny' [1956] Crim LR 78.

'fraudulently' and simply stipulate the defences of claim of right and belief in consent, which is what my proposal does.

The only case to discuss the meaning of 'fraudulently' under the old law of larceny said that it meant intentionally and deliberately, and without mistake.[64] Again, my proposal explicitly provides that D intentionally (or recklessly) takes another's property. Also, D must intend to take property, *and* D must intend that the property is another's, rather than, for example, mistakenly thinking that this property is their own. In this way, D must act without mistake. This is the same as the law of criminal damage: D intentionally or recklessly damages property belonging to another,[65] which is taken to mean that D must both intend to damage property and intend that the property belongs to another.[66]

In short, my approach makes explicit what in the old law of larceny was unclear or arrived at via a circuitous route.

The current law

As for the current law, the phrase 'without the consent of the owner' was dropped from the headline definition of theft. This is not even adverted to, let alone explained, in the report of the Criminal Law Revision Committee. Instead, the Theft Act 1968 did two things.

First, it replaced the phrase 'fraudulently and without claim of right' with 'dishonestly', not for any reason of principle, but simply because the Committee thought the word 'dishonestly' easier for a jury to understand than 'fraudulently'.[67] This suggests that

[64] *Williams* [1953] 1 QB 660 (CA).

[65] Criminal Damage Act 1971, s 1.

[66] *Smith* [1974] QB 354.

[67] *Theft and Related Offences*, 8th Report, Cmnd 2977 (London: HMSO, 1966) [39].

'dishonestly' was seen as a mere synonym for 'fraudulently'. That was not a promising start. As we have just seen, in the old law of larceny 'fraudulently' was either redundant or a place-holder for other defences, rather than used to mean 'dishonestly'. Also, the two words are not treated as synonyms elsewhere in criminal law. For example, under the Fraud Act 2006, dishonesty is one of several *ingredients* in fraud, and not a mere synonym for fraud.

Second, by s 2(1), the 1968 Act provides that it is not dishonest if: (a) D believed that they had in law the right to deprive the other; or (b) D believed that the other would consent.[68] Here the Committee thought it was simply keeping faith with defences in the old law of larceny,[69] as indeed it was, and these are both defences which my proposal keeps too. However, by omitting 'without consent' from the crime, we risk cases where D is guilty of stealing what V intends them to take, which cannot be right, and it can also blur the line between theft and fraud, as the following cases show. (We discuss below why blurring theft and fraud is undesirable.)

Thus, in *Gomez*,[70] D was convicted of theft when V consensually parted with goods in exchange for a worthless cheque. The true wrong here is not obtaining the goods; getting rid of the goods was precisely V's business model. The true wrong was not paying for them, and that is better seen as a fraud: D falsely represented that the cheque would be honoured.[71] So

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[68] Under s 2(2), it *may* be dishonest (but might not be) even if D is willing to pay for the property. Under my proposal, a willingness to pay is irrelevant. If D offers to pay, and V accepts payment, it may be that the matter goes no further. But if D offers to pay, and V rejects payment, why should D keep the property and even have the chance of denying theft, when they have otherwise intentionally taken another's property without consent? In contrast, under my proposal, the person who, finding a corner shop unattended, takes a chocolate bar and leaves the correct change on the counter, would have a defence where they believed that V would have consented.

[69] *Theft and Related Offences*, 8th Report, Cmnd 2977 (London: HMSO, 1966) [39].

[70] [1993] AC 442.

[71] Or it might be the separate crime of making off without payment: Theft Act 1978, s 3.

too in *Lawrence*,[72] D was convicted of theft when he took from V's wallet consensually an excessive fare for the taxi journey without V objecting. Again, this is a case of fraud: D falsely represented the cost of the journey as he continued to take money from the wallet.

By omitting 'without consent' from the definition of theft – combined with the fact that 'appropriation' can be trivially satisfied – all the weight of criminality is born by 'dishonestly', and it cannot bear that weight under the current approach.

The current test for dishonesty derives from *Ivey v Genting Casinos (UK) Ltd*:[73] given what D knew or believed, was their conduct dishonest by the standards of ordinary decent people? The criticisms of this test are well known and can be briefly summarised as follows. The definition of dishonesty, as conduct which does not meet standards of honesty, is circular, and provides no clear guidance. It assumes a moral consistency among jurors when in reality juries will likely reflect a diversity of moral outlooks and experience. Indeed, some jurors might engage in (objectively) 'dishonest' conduct,[74] like creative expense claims,[75] or false tax returns.[76] Are they to allow such transgressions by the accused or, hypocritically, should they

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[72] [1972] AC 626.

[73] [2017] UKSC 67. This is only the latest in a line of cases struggling to define dishonesty, which attests to the difficulty of that concept. See previously: *Gilks* [1972] 3 All ER 280 (CA), *Feely* [1973] QB 530 (CA), and *Ghosh* [1982] QB 1053 (CA).

[74] Griew, 'Dishonesty – The Objections to *Feely* and *Ghosh*' [1985] Crim LR 341, 346.

[75] Seemingly, this is less evil if done by a Member of Parliament than by anyone else. The maximum punishment for fraud is 10 years in prison: Fraud Act 2006 s 1(3). But an MP who knowingly makes a false expense claim is liable to a maximum punishment of only 1 year in prison: Parliamentary Standards Act 2009, s 10.

[76] Two polls 20 years apart suggest that perhaps 70% of people persistently think it morally acceptable to take payment in cash to avoid tax: Ormerod and Williams, *Smith's Law of Theft*, 9th edn (Oxford, Oxford University Press, 2007) [2.307]; Ormerod and Laird, *Ormerod, Smith and Hogan's Criminal Law*, 15th edn (Oxford: Oxford University Press, 2018) 882.

hold the accused to a higher standard? All this risks inconsistent and unpredictable outcomes. It also means that D risks being convicted of a crime for behaviour which they did not know in advance to be dishonest, which is unfair.[77] The Law Commission acknowledges that in some cases a person may not be able to foresee whether a proposed course of action would be criminal, and seeking legal advice is not likely to help.[78] This is unacceptable.

To solve these problems with the current law, Smith suggests that dishonesty could be defined as knowing that the appropriation may be detrimental to V's interests in a significant way.[79] However, this definition of dishonesty is no improvement.[80] For example, it would not be theft to steal a bag of apples from a supermarket, since the loss of one bag of apples would be trivial to a large supermarket chain. It would not be detrimental to its financial interests. Yet such a taking seems like a common sense example of theft.[81]

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[77] And potentially a breach of art 7 of the European Convention on Human Rights: Ormerod and Laird, *Ormerod, Smith and Hogan's Criminal Law*, 15th edn (Oxford: Oxford University Press, 2018) 881-882; Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 404-405, 425-427; Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 448; Simester et al, *Simeseter and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 560; Ormerod and Williams, *Smith's Law of Theft*, 9th edn (Oxford: Oxford University Press, 2007) [2.301].

[78] Consultation Paper No 155, [5.43].

[79] Reported in Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 448. Similarly, Elliott suggests that no appropriation shall amount to theft if it is not detrimental to V's interests in a significant practical way: 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395, 410.

[80] It also requires subjective consideration of V's position, when *Ivey* puts the test for dishonesty on an objective footing.

[81] Instead we might say that, if it were legal to steal a bag of apples, because it is trivial, nevertheless if everyone did it, the cumulative result would be a significant detriment. Which is true, but it means criminalising every trivial theft after all, subverting Smith's proposal, because all trivial thefts could potentially be cumulatively significant.

Glazebrook suggests an approach to theft which assumes dishonesty, with consent as a defence.[82] However, it is unfair to label someone as dishonest without evidence. Indeed, this approach might be thought to risk the presumption of innocence.

My proposal jettisons the problematic concept of dishonesty, a concept which was not used in the old law of larceny. I suggest that the core wrong of theft is taking another's property without their consent, so my proposal gives centre stage to the issue of consent instead.

Since the definition of dishonesty arises at common law, it is open for the courts to adopt a different definition. In the context of theft, dishonesty might be defined as 'knowingly without that other's consent, or being reckless as to the fact that it is without that other's consent'.[83] This would move the current law closer to my proposal without the need for reforming legislation. Similarly, in the criminal law of New Zealand, under the Crimes Act 1961, as amended,[84] theft is where D takes dishonestly,[85] and 'dishonestly' is defined as acting without a belief that there was express or implied consent or authority to the taking.[86] This does not appear to have given rise to academic disagreement, or difficulties in the case law.

Under my proposal, there is a defence if D believes that they would have consent. Again this aligns the law of theft with a pattern found elsewhere in criminal law. For example, the act of criminal damage is damaging another's property without lawful excuse,[87] it being a defence that D believes that they had or would have consent.[88]

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[82] Glazebrook, 'Revising the Theft Acts' (1993) 52 Cambridge LJ 191

[83] See too: Halpin, 'The test for dishonesty' [1996] Crim LR 283; Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395.

[84] By the Crimes Amendment Act 2003 (NZ).

[85] Crimes Act 1961 (NZ), s 219.

[86] Crimes Act 1961 (NZ), s 217.

[87] Criminal Damage Act 1971, s 1.

[88] Criminal Damage Act 197, s 5(2)(a).

I have not suggested that D has a defence if they 'honestly' believe that V consented. The word 'honestly' seems retrograde when I have otherwise sought to axe the problematic concept of dishonesty.[89] Anyway, it adds nothing: a dishonest belief is surely not a belief. Rather, it signifies that D is pretending to believe, when in fact they do not believe. It is a form of fraud, a false representation of belief. Further, I do not suggest that D's belief need be reasonable. It is not a requirement, for example, of the current law of theft,[90] nor of criminal damage.[91]

Finally, if D 'borrows' money from their employer's cash till on Friday night, returning the same value on Monday morning, the current law treats this as theft, because D has permanently deprived V of the specific notes or coins taken on Friday.[92] Some authors suggest that it should not be theft when taking something fungible, intending to replace it, at least where D believes that the substitution does not matter.[93] Under my proposal, this is still a theftuous taking where D takes the money knowingly or recklessly without consent. (If they believed that V would have consented, they would have a defence.) I do not see why D's 'good intentions' to return the value of the fungible property outweigh their 'bad' knowledge that they are taking another's property without consent.

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[89] A similar point is made by the Supreme Court of New Zealand: *Hayes* [2008] UKSC 3, [34].

[90] *Small* [1987] Crim LR 777 (CA); *Terry* [2001] EWCA Crim 2979.

[91] Criminal Damage Act 1971, s 5(3).

[92] *Velumyl* [1989] Crim LR 299.

[93] Glazebrook, 'Revising the Theft Acts' (1993) 52 Cambridge LJ 191; Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395, 406-407; Elliott, 'Dishonesty under the Theft Act' [1972] Crim LR 625. Smith thought that this might have been the position under the old law of larceny: 'The Fraudulent Intent in Larceny: Another View' [1956] Crim LR 238.

Recklessness

Under my proposal, it is theft where D intentionally or recklessly takes another's property, knowingly or recklessly without consent. The inclusion of liability for recklessness is novel, but appropriate.

For a start, the inclusion of reckless acts aligns theft with other crimes. For example, it is a crime to damage another's property intentionally or recklessly.[94] It is a crime to commit violence intentionally or recklessly. So too it might sensibly be criminal to take another's property intentionally or recklessly.

As for recklessness with regards to consent, it is helpful to consider again *Ivey v Genting Casinos (UK) Ltd*.[95] In that case, the court gave the example of a tourist who knows that public transport is free in their own country, and so does not pay on an English bus. This behaviour is supposedly not 'dishonest'. But that is a very strange example. First, ignorance of the law has never been a defence. Second, just because the tourist knows it is free at home, that is no good reason to assume that public transport is also free in England. Third, the court is not consistent here in applying localised standards. For example, in *Hayes*,[96] when D was prosecuted for distorting LIBOR rates, it was no defence when he claimed that it was common practice in his business. So why is the common practice of the tourist's home country a defence? Really what it comes down to is a particular moral judgment, that the court is prepared to think well of the tourist but badly of the trader. That is not a principled stance as much as an evaluation of individual character.

[94] Criminal Damage Act 1971, s 1.

[95] [2017] UKSC 67, [60].

[96] [2015] EWCA Crim 1944. Yet previously, in *Gilks* [1972] 3 All ER 280 (CA), the common practice among bookmakers *was* said to be relevant.

At any rate, the point to take away from the discussion of *Ivey* is this. I suggest that if the tourist was reckless in their assumption that public transport is free in England, that should be no excuse.[97] Similarly, if D is reckless as to consent when taking another's property, there is no good reason to tolerate that.[98]

Distinguishing crimes

In this section I seek to show why it matters to distinguish theft from other crimes, principally fraud, and how cases decided under the current law might be treated differently if this distinction were upheld.

As for the difference between theft and fraud, in everyday terms, fraud is about tricking people, whereas theft is about taking other people's property. They might both be objectionable, but nevertheless they are different types of wrongs. Shute and Horder say that a deceiver works

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[97] Perhaps we can find some support for this proposition in the civil test for fraud. This is where D makes a false statement, knowingly or recklessly or without belief in its truth: *Derry v Peek* (1889) 14 App Cas 337 (HL). In other words, a reckless belief is no defence.

[98] Recklessness is where D foresaw a risk, but took it anyway when to do so was unreasonable in the circumstances known to them: *G* [2004] 1 AC 1034 (HL). By this definition, there might be times when it is reasonable to run the risk that D is taking another's property without their consent. One scenario might be circumstances akin to necessity, for example where D takes an unused lifebelt on a sinking ferry. Another scenario might be where D finds lost property without any sensible prospect of finding the owner, and when turning it in to the police seems excessive. Under s 2(1)(c) of the Theft Act 1968, it is not dishonest to appropriate property where D believes that the owner cannot be discovered by reasonable steps. This formulation seems to miss the point that handing property in can be appropriate, because owners not discoverable sometimes nevertheless turn up of their own accord asking if anything has been found.

within the social practice of consensual transactions, albeit by wrongfully procuring that consent, whereas a thief attacks the social practice from the outside, taking without consent.[99]

It is important to keep fraud and theft separate, for two main reasons.

First, there is the concern for fair labelling: the name of offences should reflect the form of wrongdoing and harm involved.[100] For example, we do not sweep all offences of violence into one crime. Instead, we differentiate assault, battery, actual bodily harm, grievous bodily harm, involuntary manslaughter, voluntary manslaughter, and murder. So too being a thief is not the same as being a fraudster. The Criminal Law Revision Committee acknowledged this, saying it would be a 'mistake' to label the rogue a thief.[101] If we are to censure someone with the stigma of criminal conviction, it ought to be an accurate reflection of what they did wrong

Second, by allowing situations better addressed by fraud to sustain a conviction for theft, the current law of theft has become distorted, as the following examples show.

In *Morris*,[102] D was convicted of theft when he switched price labels on food at a supermarket. This case extended appropriation to include the assumption of any right of an owner, leading to the position that appropriation could a trivial event.[103] However, *Morris* should not have been a case of theft. Rather, this was a case of fraud: D falsely represented the price of the food when he presented it to the cashier for purchase.

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[99] Shute and Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 MLR 548

[100] Clarkson, 'Theft and Fair Labelling' (1993) 56 MLR 554; Chalmers and Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217.

[101] *Theft and Related Offences*, 8th Report, Cmnd 2977 (London: HMSO, 1966) [38]

[102] [1984] AC 320.

[103] At least, when *Morris* was finally reconciled with *Lawrence* in *Gomez* [1993] AC 442 (HL).

In *Pitham*,[104] without taking V's property, which remained in V's flat, D sold the property to X. D was convicted of theft. The counter-intuitive consequence is that a person steals – not attempts to steal, but succeeds in stealing – property even when the owner is never parted from it. Again, *Pitham* is better viewed as fraud: D falsely represented to X that D had title to the property.

In summary, by allowing the law of theft to cover situations of fraud, the current law has found itself criminalising trivial interferences and producing counter-intuitive results. My proposal seeks to reverse those undesirable consequences, and in so doing assists in maintaining the appropriate distinction between theft and fraud which is necessary to ensure we give fair labelling when convicting people of stigmatic crimes.

Characterising the wrong of theft

As we have seen, the current law says that appropriation of property belonging to another occurs whether or not V consents and no matter how trivial D's interference with that property. As a result, the current law is apt to cover *conduct* which is ordinary and acceptable. For example, picking up a can of beans from a supermarket shelf to put in a shopping basket would constitute appropriation of property belonging to another (and often with an intention ultimately to deprive the supermarket of those beans permanently). This means that most of us every day *act* like thieves, which is not a fair or accurate characterisation, even if we are not *thinking* like thieves (ie dishonestly).

Now, I appreciate that what I have just said might be seen as controversial, because within *actus reus* theory there are some authors who suggest that the *actus reus* is a concept

[104] (1977) 64 Cr App R 45

without stigma.[105] Then again, this is a bold claim for something that means literally 'guilty' act. Some say that the notion of an *actus reus* is used primarily for ease of exposition.[106] Some say that the *actus reus* must be taken to include any justifications or excuses,[107] or any permissions whether expressly written into the definition of the crime or instead taken for granted.[108] Some say that it includes only justifications not excuses,[109] or that defences are a separate consideration.[110] Some question whether there is any merit in maintaining a distinction between *actus reus* and *mens rea*.[111] Given this diversity of reasonable views, we are unlikely to get a conclusive resolution of how to characterise the wrong of theft by considering *actus reus* theory.

There is another diversity of views on how the institution of criminal law or criminal justice might be justified,[112] and what might be its proper purposes. For example, the American Law Institute's Model Penal Code sets out five purposes to criminal law,[113] which Wilson

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[105] Cooper and Allen, 'Appropriation after *Gomez*' (1993) 57 J Crim L 186, 189.

[106] Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edn (Oxford, Oxford University Press, 2018) (32 n 47).

[107] Williams, *Criminal Law: The General Part*, 2nd edn (London: Stevens, 1961) 19.

[108] Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) 102.

[109] Moore, *Act and Crime* (Oxford: Oxford University Press, 1993) 177-183.

[110] Simester et al, *Simester and Sullivan's Criminal Law*, 7th edn (Oxford: Hart, 2019) 19; Lanham, 'Larsonneur Revisited' [1976] Crim LR 276.

[111] Tort law manages perfectly well without it. See too: Robinson, 'Should the Criminal Law Abandon the *Actus Reus – Mens Rea* Distinction?' in Shute et al (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993).

[112] Duff and Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011); Duff et al (eds), *Criminalization – The Political Morality of Criminal Law* (Oxford: Oxford University Press, 2014); Chiao, 'What Is the Criminal Law For?' (2016) 35 Law and Philosophy 137.

[113] §1.02.

describes as the closest thing we have to an uncontroversial statement of the proper purposes of criminal law.[114] Yet it is controversial. For example, what if some of those five purposes conflict? Does one purpose trump another?[115] Other authors have proffered their own list of purposes instead.[116] If this too seems unpromising, nevertheless there is within this discussion a common theme, an accepted background fact which we can distil: criminal law prohibits, and then censures transgressions.[117] This is its mode of operation. If that claim seems simple, perhaps even obviously correct, nevertheless it has important implications.

For a start, if criminal law prohibits, there is a strong body of opinion that the criminal law should not prohibit thoughts.[118] Certainly the criminal law could not prohibit mental states. For example, it could not prohibit *intention* without absurdly excessive consequences, since most of us act intentionally when it comes to most of our basic functions (like eating, or going to bed, or going to work, or abiding by the law). Similarly, there could be no blanket prohibition on *deception* without risking absurdity. For example, such a ban would prohibit magic shows, or feints in a fencing match, or playing with a dog by pretending to throw a ball, or teasing a toddler with 'got your nose'.

So too there are problems with the idea of prohibiting *dishonesty*. We start from the impossible position of having no legal definition of dishonesty beyond the claim, in effect, that

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[114] Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 5.

[115] Robinson, 'The Modern General Part – Three Illusions' in Shute and Simester (eds), *Criminal Law Theory* (Oxford: Oxford University Press, 2002).

[116] For example: Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford: Oxford University Press, 2016) ch 3.

[117] See too: Wilson, *Criminal Law*, 6th edn (Harlow: Pearson, 2017) 4; Simester et al, *Simester and Sullivan's Criminal Law*, 6th edn (Oxford: Hart, 2016) 5-6.

[118] Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law*, 15th edn (Oxford, Oxford University Press, 2018) 26; Duff, *Answering for Crime* (Oxford: Hart, 2007) 95.

honest people will know it when they see it. Trying to move beyond that, surely many people would consider *lying* to be a form of dishonesty, but really this just takes us back to deception. For example, lying to obtain state benefits would be a type of fraud.[119] Then again, 'little white lies' are socially acceptable. Some might consider cheating in an exam to be dishonest. But this too is really just a specialised form of breach of contract: a student who enters an exam at the very least implicitly by their action agrees to be bound by the rules,[120] and if they break those rules then there are prescribed repercussions (which do not ordinarily include criminal sanctions). It seems that the only archetypal form of dishonesty that does not merge into other wrongs like deception or breach of contract is stealing. In other words, dishonesty is not so much an element within the crime of stealing, as the moral judgment attached to the decision that there has been a theft. It expresses a conclusion, rather than a step in the reasoning. We struggle to find a notion of dishonesty separate from stealing.

And yet the current crime of theft points to dishonesty as something separate from theft, and then seeks to prohibit that mental state. Under current law, because appropriation is trivially satisfied, and the weight of criminality is borne by dishonesty, theft tends towards the prohibition of dishonesty, trivially manifested in dealings with property. More than that, the dealings with property can be otherwise unimpeachable. The difference between the shopper at the supermarket loading their basket, and the thief doing likewise, is simply their mental state, their thoughts.[121]

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[119] For example, see: *Mashta* [2010] EWCA Crim 2595, where D failed to disclose that he was now in gainful employment and so not entitled to benefits.

[120] Analogously, where participants enter a yacht race, they are taken to bind themselves contractually to the rules: *Clarke v Dunraven* [1897] AC 59 (HL).

[121] See too: Melissaris, 'The Concept of Appropriation and the Offence of Theft' (2007) 70 MLR 581, 592; Smith, 'Theft or Sharp Practice: Who Cares Now?' (2001) 60 Cambridge LJ 21, 22.

I suggest that it is less natural to think of theft as a crime of dishonesty, with property merely providing the context for dishonesty's physical manifestation, and more natural to think of theft as a property crime. Taking without consent reflects that. It does not trivialise the property context, but responds to major interferences with property. Because interferences with property must be major, that element of the crime has weight; the work is not all left to the *mens rea*. And there is a further reason why my proposal does not tend towards a thought crime, because it requires an additional fact: the actual absence of consent. Thus the difference between the shopper and the thief does not turn on their mental state: the shopper has consent for what they do, whereas the thief has no consent to take without paying. The everyday *acts* of the shopper are lawful.

In summary, criminal law prohibits, and then censures transgressions, but there is a limit to what it can sensibly prohibit. I suggest that what theft prohibits ought not to be dishonesty, manifested in a property context by behaviour which might otherwise be lawful. Rather, theft should prohibit non-consensual interferences with property. This latter is the more persuasive characterisation of the wrong of theft. Thereafter, the crime of theft should be drafted to align with that characterisation. My proposed law more naturally reflects the wrong of theft.

Conclusion

My proposal is this. It would be the crime of theft where a person intentionally or recklessly takes or keeps another's property, knowingly or recklessly without that other's consent. There is a defence if the person believes that they have a right to take or keep the property, or that the other would consent.

Unlike the current law, my proposal does not capture trivial (or merely preparatory) interferences, like mere touching, nor everyday conduct which is otherwise acceptable, like putting goods in a shopping basket. It avoids the counter-intuitive consequences which afflict the current law, like thefts where the victim never loses the property. It is apt to cover borrowings – some of which can be every bit as harmful or serious as a permanent taking – without resort to anomalous exceptions. Its structure tends to align the law of theft with other crimes, notably criminal damage, while at the same time preserving the distinction from fraud. It uses straightforward terms, rather than the concept of dishonesty, with the latter's circular definition and lack of predictive clarity. Its language is a better characterisation of what is wrong with theft. Contrary to the current law, theft is not best characterised as the prohibition of dishonesty (whatever that means), trivially manifested in dealings with property. Rather, theft is best understood as a property crime, that is, a serious interference with another's property without consent.

If the reader is pessimistic about the prospects of legislative reform, nevertheless there is scope for the case law to bring about improvements to the current law by moving the current law more towards my proposed law. 'Dishonestly' could be defined as 'knowingly without that other's consent, or being reckless as to the fact that it is without that other's consent'. 'Appropriates' could be defined as an assumption of the non-trivial or core rights of an owner, those being taking and keeping. And as for an intention to deprive permanently, if that is deemed whenever a person disposes or deals with property without regard to the rights of the owner, as the current law has a tendency to do anyway, then giving that full effect means it will cover most instances of non-consensual borrowing after all.