THEFT AND FRAUD

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BY

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THEFT AND FRAUD

FOREWORD

This paper constitutes a limited exercise. It does not attempt a major re-assessment of the place of property offences in our law. Nor does it try to correct deficiencies or injustices in this area of law. It merely aims to simplify the law of theft and fraud.

The reason why this paper does not try to re-assess the place of property offences in our criminal law emerges from recommendation (c) on p. 35 of the Commission's Parliamentary Report, Our Criminal Law. It reads: -

"(c). The law on property offences should be simplified and also re-assessed in the light of a fundamental re-appraisal of the role of property in society. Such simplification this Commission has undertaken as part of its ongoing programme of criminal law reform. Re-assessment is a more long-term matter the study of which is presently being considered." This paper then aims to implement the first stage of that two-fold recommendation.

The paper consists of three parts. Part I is an introduction explaining both the need to simplify this area of law and the essence of the proposed simplification. Part II is a proposed draft chapter of four sections with a total of twelve subsections containing all the law on theft and fraud. Part III is the draft chapter annotated by detailed explanations. It is intended that there will be a further part, Part IV, which will show how the present offences in the Criminal Code are all covered by the four draft sections and twelve draft subsections.

Part I demonstrates the present law's complexity - roughly fifty different sections and a mass of detail - and suggests reasons for this complexity. Next it examines disadvantages of such complexity - the burden on those concerned with administering the law, the possible divergence between law and common sense morality and the danger of rendering theft and fraud law artificially rigid. Finally it explains the paper's own approach, which is to underline the basic social value of honesty, to concentrate on principle and to leave marginal cases to be decided on facts rather than law.

Part II contains the draft. The arrangement, as explained in Part I, is simple. The offences are divided into four: (1) theft, (2) robbery, (3) blackmail and (4) fraud.

The style too is simple - simpler than the common law drafting style that lawyers are used to. For this there are three reasons. First, the paper advances not a definitive draft but rather suggests the lines a draft might follow. Second, the draft aims to get away from the detailed common law style that strives to foresee every possibility and close every loophole, instead it concentrates, as noted above, on principle. Third, it refrains from "over-definition": basic terms like "dishonestly" are left undefined on the ground that such terms are better understood than any less basic words that could be used to define them.

Part III is self-explanatory.

Part IV is still in course of preparation. It was not, however, considered so essential at this stage as to necessitate delaying these consultations.

N.B. Three points by way of caution

(1) This exercise is also limited in that it relates solely to concepts. Its aim is to simplify and clarify the conceptual principles of theft and fraud. For that reason the paper does not deal with procedure, evidence or sentencing.

(2) The draft also omits the many specific details including specific offences to be found in the present Code. The reason is that since these, as can be shown, are in fact covered by the general provisions of the draft, further specificity is unnecessary.

(3) The present draft is not intended to replace Parts VII and VIII in the Present Code as it now stands. Rather it is to be considered as an exercise aiming to produce an ideal chapter on theft and fraud. Such a chapter, appropriately fleshed out later (in terms of procedure etc.), could then take its place in the context of a quite new Code.

The aim of these consultations is to focus on such questions as the following: -

(1) is it accepted that the law on theft and fraud needs simplification?

(2) if so, does a simplification on the lines followed in the paper seem an improvement?

(3) if so, would such a simplified arrangement be workable?

(4) if so, would a simplification in the sort of drafting style used in the paper be workable?

P. J. Fitzgerald
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SIMPLIFYING THE LAW OF THEFT AND FRAUD

The Present Law: Reasons for Complexity

"Our life", said Thoreau, "is frittered away with detail: simplify, simplify" - words specially appropriate to law, where all too often common sense loses its way in an undergrowth of detail and complexity. A prime example is the law of theft and fraud.

Simplicity obscured by detail - the hallmark of our present law on theft and fraud. The crimes themselves are clear and simple notions. Basically the law says: "Do not be dishonest". Out of this basic principle, however, has grown a jungle of provisions dealing with such offences as theft by a bailee, theft by a person required to account, theft by a person holding a power of attorney, misappropriation of money held under direction, criminal breach of trust, false pretences, fraudulently obtaining food and lodging and so on -- as many as fifty sections in our Criminal Code. In theft and fraud, to steal Marx's terms, base and superstructure are at odds.

This largely stems from history. Our criminal law, like other common law, was made by judges. They fashioned it bit by bit to solve different problems coming before the courts. Originally by theft they meant taking without the owner's consent. Later they extended it to deal with dishonest borrowers, carriers, agents, trustees and finders of lost articles. Theft law had in it more ad hoc pragmatism than logic and simplicity.

If judges made ad hoc law, so too did legislators. As theft of different articles posed special problems, Parliament created special new offences. In consequence the Criminal Code now deals specially with theft of telecommunication services, taking ore for scientific purposes, fraudulently taking cattle, taking possession of drift timber, destroying documents of title, and theft from mail. Statute law too tends towards a "wilderness of single instances".

Not that the legislator bears all the blame. Some lies on judges who saw statutes as islands intruding in a sea of common law and needing to be submerged as far as

possible. They worked restrictively: anything not spelt out in black and white they judged not covered by the statute. So draftsmen learned to spell things out in full. That way they aimed at certainty and comprehensiveness. The cost was clarity.

But history explains, it never justifies. Common law pragmatism, legislative "ad hocery", drafting for certainty and comprehensiveness - these explain the present law's complexity; they do not justify it. Why should this complexity remain? Why can't we simplify? Of the three C's - clarity, certainty and comprehensiveness - the first is always last in law. Why can't we put it first? Could we, for instance, draft a law of theft and fraud that everyone could easily understand?

Bentham thought not. 'Thou shalt not steal', he says, 'could never sufficiently answer the purpose of a law'. As he points out in his Introduction to the Principles of Morals and Legislation,* stealing means

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* (ed. Burns and Hart pp. 303/304)

roughly the taking of a thing which is another's, by one who has no title so to do and is conscious of his having none. To be complete, however, the law must explain the meaning of having a title to take a thing. It must catalogue the events that confer 'title' and the events that qualify as a 'taking away'. Put simply, theft is a kind of trespass to property, 'trespass' and 'property' are complex terms of civil law, and so the law of theft must be complex and technical. The truth, they say, is rarely pure and never simple. Bentham would say the same of the law of theft and fraud. To him simplicity here is unattainable.

Dangers of Complexity

All the same, complexity brings dangers. The more complex the law, the harder to see the forest for the trees. This puts a greater burden on policemen, lawyers, judges and all who must administer the criminal justice system. Worse still, it drives a wedge between law and morality. When lawyers make distinctions unrecognized by ordinary common sense, law and morality part company. An act may be honest or dishonest legally without being necessarily so according to our current morality.

There is an even greater danger. Over-refinement of the law may make us look on "honest" and "dishonest" as fixed categories. In truth they are neither categories nor fixed.

First, they are not categories. Although we term acts honest and dishonest, the acts themselves don't come neatly labelled so. We put the labels on, we sort the acts into these categories. The categories, though, have no real existence. Reality is a continuum, and black and white merge in a no man's land of grey.

Honesty, then, is not a category but a standard. As such it can't be used mechanically. Like any other measuring-rod it must be used with understanding, tolerance and common sense.

Nor is it a fixed standard. Standards change in time, and acts once through honest come to be thought dishonest and vice versa. Over-define our standard and we imprison in a straightjacket that which must stay free and flexible. Standards made artifically rigid pull law and morals apart - the very worst thing for our criminal law.

A New Approach

A decent criminal law must support morality, not contradict it. As we said in Our Criminal Law, the prime function of the "real"* criminal law is to bolster basic values. But law must underline, not caricature, those values.

The value here is honesty. This, however, is such a basic value that everyone understands its import: everyone knows roughly what is meant by theft and fraud. To underline, not caricature, this value the law must be so devised as to highlight the basic principles involved, to concentrate on the vast majority of "run of the mill" dishonest actions and to avoid devoting all its efforts to the marginal case. In short, the law should make the value and

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*Our Criminal Law, following The Meaning of Guilt and The Limits of Criminal Law recommends that the distinction between "real" crimes and mere regulatory offences should be recognized by law, that the Criminal Code be pruned so as to contain only those acts generally considered seriously wrongful and that all other offences be excluded from the Code. What is said in this Working Paper is based on the premise that only "real" crime is being here discussed and that theft, fraud and related offences form a species of real crime.

the principles perspicuous enough to underwrite the citizen's general understanding of dishonesty while also providing guidelines for judicial interpretation in border-line cases. The law, therefore, should clearly prohibit all acts commonly reckoned dishonest and avoid prohibiting any act commonly reckoned legitimate.

This leaves the marginal cases. Cases, for instance, where property law rules make it doubtful whether property has been stolen. Or cases where the law on representations makes it dubious whether there has been a false pretence. How should a clear and single law of theft provide for these?

Our answer is as follows. The more our criminal law serves to bolster values, the less significant is the marginal case. For bolstering values means condemning all those acts and only those acts that are clearly considered wrongful and leaving untouched all acts thought legitimate. Marginal cases, therefore, - acts considered neither clearly wrong nor clearly right - will then require to be dealt with pragmatically.

Here pragmatism means three things. First, it means recognizing the invevitability of marginal cases. Second, it means being concrete. And third, it means operating by the light of principle.

First then, we have to recognize the inevitability of marginal cases. However we define our terms, there will be a hazy border-line. For one thing, language has an open-texture and descriptions necessarily have blurred edges. For another, life is uncertain and we can't provide for everything in advance.

Second, pragmatism means being concrete. We can't judge marginal cases in the abstract. The wrongfulness of any border-line behaviour can only be determined in the light of all the actual circumstances. This of course is the rationale of the common law.

Third, pragmatism here involves using not rules but principles. Whereas rules simply lay down the law, principles do more than this: a principle articulates the reason for that law - in other words by being based on

common sense and common morality it elucidates, explains and justifies that law. In this way principles point the way to the solution of border-line problems. So here the principles stemming from the value of honesty can guide our approach to marginal cases in the law of theft, fraud and similar offences.

On marginal cases, then, our view is this: the legislator has to leave them to the trial court or jury. Only these know all the facts. Only these can properly measure such cases against the moral standard.

This doesn't mean, however, that each decision must be regarded as authoritative. That way the law would soon become complex as it is today. Instead, each borderline decision should be regarded as decided on its own particular facts.

This does, however, mean that in such cases there will be considerable uncertainty. If all such cases are to be decided on the facts as they arise, we cannot know until the trial court tells us, whether the act is criminal or not. But that is surely right. In moral terms the act is

doubtful, on the border-line. The law can't be more precise without being artificial and out of touch with ordinary morality. Where there is moral uncertainty, that surely has to be reflected in the criminal law.

This is our strategy for marginal cases of dishonesty. Don't seek to solve them all by legislation in advance. Leave it rather to the trial court to decide each border-line case in the light of its particular circumstances. Applying the measuring-rod of honesty, the court must ask: "Given all these factors, would an honest man have acted as defendant did?" If not, convict. If there's a doubt, acquit; for given a doubt, defendant's act hasn't clearly violated the principle of honesty.

But what if the uncertainty - the marginality of the case - arises, not from the law, but from the defendant's ignorance of the law? What if the defendant didn't realize that theft law prohibited his act? In such a case his act will obviously have been dishonest, otherwise it wouldn't be prohibited by law. That being so, he must have known he shouldn't do it; he can't therefore complain that he didn't

know the law. Accordingly, with "real" crimes, including theft and fraud, ignorance of law is no excuse. Everyone is required to live up to the common teachings of ordinary morality. Disregard them and he acts at his peril.

This strategy will achieve sufficient clarity, certainty and comprehensiveness. Clarity, because the law will now clearly underline the value of honesty. Certainty, because it will prohibit and condemn those acts and those acts only that contravene this value. And comprehensiveness, because all acts that are obviously dishonest will fall within its scope. Meanwhile the marginal cases won't become the tail that wags the dog.

This, then, is our reply to Bentham. Theft law can and should be clear and simple. Though 'property' and 'taking' may be terms of art, the ordinary person knows well enough when another's property is being taken. This is sufficient for the criminal law. After all, criminal law is not like property law or contract, where the law must be certain enough to ensure that transactions completed according to the rules are valid and effective. In criminal

law, by contrast, we need to be certain that if we do what is ordinarily thought legitimate, we won't be liable to prosecution and punishment. What we need to be sure of, then, is that we will only be penalized for doing acts which ordinary people would consider wrong. Where ordinary people, given all the circumstances, would still be doubtful, the criminal law must hold its hand. This is the essence of our new approach.

The Basic Scheme

Applying this approach, then, we propose a simpler law of theft and fraud. It is simpler than the present law in three respects. First, marginal cases are left to be decided on the facts, and this avoids a mass of detail. Second, this leaves us free to concentrate on the bare bones of theft and fraud and make the underlying principles perspicuous in our arrangement. Third, it enables us to use a simpler, more straightforward drafting style. The first point has been dealt with earlier. Here we underline the other two.

(1) Arrangement

Theft and fraud are offences against property rights. Now a person may be "done out of" his property in four different ways:

(i) without consent;

(ii) unwillingly with consent obtained by force;

(iii) unwillingly with consent obtained by threats; and

(iv) willingly but with consent obtained by deceit.

Equally there are four different crimes:

(i) theft;

(ii) robbery;

(iii) blackmail; and

(iv) fraud.

(i) Theft

Theft is dishonest appropriation without consent. We divide it into three separate species: (a) taking with

intent to treat as one's own (b) converting and (c) using utilities without paying. Of these (a) covers the basic offence of stealing. (b) covers the offence of dishonest conversion where the offender comes by property innocently and subsequently misappropriates, and (c) is self-explanatory.

This definition of theft clearly excludes cases of intent to deprive temporarily. To cover this, we add the new offence of dishonest borrowing.

(ii) Robbery

Robbery, being an aggravated form of theft, follows immediately. It consists of using violence or threats of immediate violence for the purposes of theft.

(iii) Blackmail

Blackmail differs from robbery although the dividing-line is sometimes difficult to draw. This is specially so with robbery by threats. The difference, however, is that in robbery the threats are of immediate

violence while in blackmail they are not. Also in blackmail the threats needn't be of violence only; they may be threats of injury to reputation.

(iv) Fraud

Fraud is dishonest appropriation by deceit. It covers all cases where the owner is deceived into willingly parting with his property. It therefore covers (a) larceny by a trick, (b) false pretences and (c) obtaining credit by fraud.

In fraud there has to be deceit. Deceit, however, may sometimes be hard to prove - especially implied deceit. To cover this we add the offence of swindling. This covers dishonestly obtaining food, lodging, transport or other services without paying.

(2) Drafting Style

Our law of theft and fraud is put forward as an illustration. We don't try to advance a definitive draft. Rather we suggest the lines a draft might follow.

The main feature of our draft is simplicity. Because we avoid trying to take care of all marginal cases, we can paint with a comparatively broad brush. This is shown in the way we forbear from defining our most basic terms.

Basic terms are ex hypothesi terms known to all. As such they can only be defined by other words less well known. But why define the known by the unknown? After all, all definition must stop somewhere. Our draft, therefore, deliberately leaves undefined such words as 'taking', 'using' and 'dishonestly'.

Particularly important is the case of 'dishonestly'. Indeed it is crucial to our whole approach. 'Disohonestly' is the fundamental mens rea term. We don't define it in terms of 'fraudulently', 'claim of right' or 'colour of right' because 'dishonestly' is better understood than any of these. We all know what it is to take another's things dishonestly. It means taking them when we know we oughtn't. We don't define it further.

Conclusion

This, then, is the arrangement, style and substance of our approach. It concentrates on central cases, classifies offences according to the part played by the victim's consent, avoids defining basic terms, and states the law in short and simple sentences. The following draft and annotation shows how we eschew life-frittering detail and attempt to simplify.

THEFT AND FRAUD

DRAFT STATUTE

Section 1.00 General

Dishonest acquisition of property consists of

(1) Theft

(2) Robbery

(3) Blackmail

(4) Fraud

Section 1.10 Theft

A person commits theft who dishonestly appropriates another's property without his consent.

Section 1.11 Without Consent

For the purposes of section 1.10, appropriation by violence or threat of immediate violence is appropriation without consent.

Section 1.12 Appropriating Property

Appropriating property means

(1) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(2) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or

(3) using electricity, gas, water, telephone, tele-communication or computer services, or other utilities.

Section 1.13 Another's Property

For the purposes of section 1.10 property is another's if he owns it, has any legally protected interest in it or has possession, control or custody of it.

Section 1.14 Dishonest Borrowing

A person commits dishonest borrowing who dishonestly and without consent takes another's property with intent to return it to him later.

Section 1.20 Robbery

A person commits robbery who for the purposes of theft uses violence or threats of immediate violence to person or property.

Section 1.30 Blackmail

A person commits blackmail who threatens another with injury to person, property or reputation in order to extort money, property or other economic advantage.

Section 1.40 Definition of Fraud

A person commits fraud who by deceit dishonestly

(a) induces any person (including the public) to part with any property; or

(b) causes him to suffer a financial loss.

Section 1.41 Deceit

(1) Deceit means any false representation as to the past, present or future.

(2) Deceit includes exploitation

(a) of another person's mental incapacity;

(b) of another person's mistake intentionally or recklessly induced by the offender;

(c) of another person's mistake induced by the unlawful conduct of a third party acting with the offender.

(3) Deceit includes non-disclosure where a duty to disclose arises from the circumstances.

(4) Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

Section 1.42 Parting with Property

"Parting with Property" means relinquishing ownership, possession, control or other interest in it.

Section 1.43 Swindling

A person commits swindling if he obtains food, lodging, transport or other services dishonestly without paying.

DRAFT STATUTE AND NOTES

THEFT AND FRAUD

Section 1.00 General

Dishonest acquisition of property consists of

(1) Theft

(2) Roberry

(3) Blackmail

(4) Fraud

This is the organizing section. It classifies dishonest acquisition offences into four:

(1) Theft - dishonestly appropriating without consent;

(2) Robbery - theft with violence;

(3) Blackmail - threatening in order to extort; and

(4) Fraud - dishonestly appropriating by deceit.

The classification follows common sense as well as legal tradition. It rests on the common sense distinctions (a) between theft and robbery, (b) between robbery and blackmail, and (c) between theft and fraud.

(a) Theft and Robbery

The difference between theft and robbery is actually one merely of degree. Theft is simple stealing; robbery is aggravated stealing - theft aggravated by the use of force (the paradigm is the bank-robber). But common sense and common law have always throught robbery so special as to deserve a special name. The draft, therefore, retains robbery as a special offence.

(b) Robbery and Blackmail

Blackmail differs from robbery in two ways. First, regarding the threat involved. Second, regarding the victim's consent.

First, threats. In robbery the offender either uses violence or threatens immediate violence. A takes B's wallet by actual force. C forces D at gunpoint to hand over his wallet. In blackmail the harm threatened is less immediate. E threatens to kill F next week, to burn down F's house or to expose F's sexual deviations unless F pays "hush-money". In robbery there is a "clear and present danger". In blackmail there isn't.

Second, consent. Robbery by force clearly excludes consent and qualifies as theft. But why is robbery by threats theft while blackmail isn't? It is arguable that both are in the same category: in both the victim doesn't really consent, so both are theft; alternatively in both the victim has a choice and does consent, so that neither is theft. Why draw the line between blackmail and robbery?

To this there are three answers. First, that is where common sense and legal tradition draw it. Second, there is a continuum running from non-consent (X takes Y's wallet by force) to consent (Y makes X a present of his wallet), and the law sensibly distinguishes between cases where "clear and present danger" prevents a settled choice and cases where, despite mistake, fraud or threat of distant harm, time allows opportunity to choose. Third, the distinction is obvious if the offender's bluff is called: the robber then actually uses violence to take the property, the blackmailer carries out his threats but doesn't now get the property demanded.

Accordingly the draft maintains the present position. Robbery is aggravated theft. Blackmail is quite a separate crime.

(c) Theft and Fraud

Here again the difference relates to consent. Theft is misappropriation without consent - the paradigm is the pickpocket. Fraud is misappropriation with consent induced by deceit - the paradigm is the con-man. This distinction, though blurred by present law, is fundamental. It is central to the draft.

In sum, the draft classifies by reference to consent. In theft the victim doesn't consent to the misappropriation. In robbery he doesn't consent - his will is overborne by violence or threat of violence. In blackmail he consents - he chooses the lesser of two evils. In fraud he consents - he is tricked into consenting.

Section 1.10 Theft

A person commits theft who dishonestly appropriates another's property without his consent.

This definition covers every kind of theft. Theft of whatever property by whatever means is now covered by one section. This accords with popular ideas of theft, simplifies the law, and reduces complexity due to multiplicity of sections.

Dishonesty

The key word in the definition is "dishonesty". This, the mens rea term, is universally understood and only definable in less comprehensible terms. Accordingly the draft leaves it undefined.

This draft term, "dishonesty", replaces the three Criminal Code terms:

(1) fraudulently,

(2) without colour of right, and

(3) with intent to deprive.

For this replacement there are several reasons. First, clarity. The Code terms proved quicksands for

judicial interpretation. "Fraudulently" - "the mystery element of theft" - is sometimes interpreted as summing up the other two terms and sometimes as adding a third ingredient of moral turpitude. "Colour of right" is sometimes interpreted as including honest mistakes of law and sometimes as being confined to honest mistakes regarding private rights. And "intent to deprive" is far from clear: if a prankster is acquitted of theft, is this because he lacks intent or because he doesn't act fraudulently? Such problems are largely avoidable, and clarity more obtainable, by substituting the single term, "dishonestly".

Secondly, simplicity. Substituting "dishonestly" for the Code terms brings theft law closer to the ordinary idea of stealing. Since dishonesty is the central element of theft, splitting it into three sub-elements is artifical and confusing. Artificial, because the three sub-elements can't be treated separately without reference to the over-riding principle of honesty. Confusing, because terms (2) and (3), unlike "dishonestly", don't manifest the wrongfulness of theft or the reason for its criminality.

Thirdly, the question of values. As we argued above, "real" criminal law exists to bolster fundamental values. The value here at stake is honesty: honesty is what law

affirms, dishonesty what it denounces. The term "dishonestly" makes this crystal clear. The three Code terms do not.

One final reason. In theft dishonesty is not only the wrong denounced, but also the state of mind justifying denunciation. In theft we ask: did the accused's conduct fall short of the recognized standard of honesty? This is no mere objective question, for conduct isn't just an external act but an act accompanied by a state of mind. The question is subjective. We have to ask: did the accused mean to act dishonestly? This, however, is answered not by looking at the offender's mind - as Bryan C. J. remarked in the 15th century, "the intention of a man cannot be tried; the devil himself knows not the intention of a man". It is answered by reference to objective tests of evidence.

Applying such objective tests, a court should act as follows. It should acquit the accused if there is any reasonable doubt, i.e. any factor suggesting he was not dishonest. Such factors are: mistake of fact and sometimes mistake of law.

(a) Mistake of Fact

A takes B's car mistaking it for his. Here A is clearly not dishonest: he doesn't knowingly intend to take another person's property, he means to take his own but is mistaken. No one would morally hold him guilty of dishonesty. Nor does criminal law: the value of honesty hasn't been infringed so A's act isn't theft. The draft maintains this position.

(b) Mistake of Law

X takes Y's floating logs mistakenly believing that he has a right to take them. Does X here commit theft? The answer is more complex. Common law and the Code say ignorance of law is no excuse. Does this exclude X's excuse?

First consider the general rule itself. The rationale of the rule that ignorance of law is no excuse isn't that convictions would be impossible if prosecutors had to prove that each and every accused knew the law he broke. It is rather that society requires each individual to live up to basic social values like truth, honesty and non-violence. It matters little whether the defendant to a murder charge knows the precise legal rules about intention,

recklessness or "year and a day". He knows that murdering is wrong, he knows the values "real" criminal law underlines, and so he must live up to them.

Apply the general principle to the particular problem. X takes Y's floating logs mistakenly believing that he has a right to take them. Has he committed theft? It depends on the precise nature of X's mistake.

Does X erroneously believe that Y has abandoned the logs and therefore anyone is free to take them? If so, at common law, he makes a mistake of fact. This will excuse him both at common law and under the Code. Common sense puts the same thing differently: X doesn't steal because he isn't dishonest. The draft puts it the same way: no dishonesty, no theft.

Alternatively, does X erroneously think the law of property allows anyone to take possession of floating logs? If so, he misunderstands property law. But property law is far too complicated for the ordinary citizen to understand it all. For this reason and for the reason that he is not acting dishonestly and also for the reason that no one would blame him, X should be acquitted. Whether he would be under present law is far from clear - a criticism less of X than our present law! The draft, however, would allow acquittal.

Finally, does X wrongly believe that taking over people's property is no crime? Here two possibilities arise. Suppose X comes from a different culture where things are free to take and the concept of theft non-existent. Here X isn't dishonest and shouldn't be convicted. On the other hand, suppose X has lived for many years in one of our large cities but doesn't know (he claims) that taking other people's property is wrong and criminal. Even if he is telling the truth, maybe the law should take its course - it is time he learned the meaning of honesty. These unusual cases, however, can best be dealt with by common sense. If in the circumstances the accused may possibly have acted honestly, he should be acquitted. The draft's use of "dishonestly" allows this approach.

Honesty as a Standard

Honesty, then, is a standard? Whether the accused attained the standard is ultimately a question of fact. This is illustrated by reference to (a) consent, (b) finding and (c) mistake.

(a) Consent

A takes B's car without consent. He thinks B would have consented if asked. Is A dishonest? It depends. (i) If A has good reason to think what he does, he isn't dishonest. Under the draft he doesn't commit theft. (ii) If A has no reason to believe B would consent, vaguely hopes he might, doesn't really care, but takes a chance, preferring not to ask and risk refusal, he isn't honest. Under the draft here A commits theft.

(b) Finding

(i) X finds a dollar bill on the sidewalk, doesn't know who it belongs to, has no hope of finding out, and keeps it. This isn't dishonest. Under the draft X doesn't commit theft. (ii) Y finds a diamond ring on the sidewalk, doesn't know who the owner is, takes no steps to find out, and keeps it. Here Y acts dishonestly, because by taking reasonable steps he probably could have identified the owner but he preferred to avoid the risk. Under the draft Y commits theft.

(c) Mistake

(i) A takes B's umbrella in mistake for his own. Here A isn't dishonest. Under the draft he commits no theft. (ii) A takes B' umbrella not knowing if it is his or someone else's and not caring. This is dishonest disregard for other's property. Under the draft A commits theft. (iii) A takes B's umbrella genuinely thinking it is his, although a quick careful check would have shown it was B's. Here A has been careless - he hasn't taken as much care as a reasonable man would take. But he asn't deliberately infringed B's rights. Nor has he trampled on them with wanton disregard. Ordinarily we wouldn't say A had been dishonest. Under the draft, as under present law, A commits no theft.

Dishonesty and Negligence

This last example underlines the fact that theft can be committed intentionally and recklessly but not carelessly (or negligently). Dishonesty means deliberately or wantonly disregarding others' property rights. It means more than failing to take reasonable care to respect them. Like common law and like the Code, the draft has no concept of "theft by carelessness".

Definitions

Certain terms are now defined in sections 1.11-1.13. Terms like "appropriation of property", though seemingly clear, must be shown not to have the same technical meaning as in certain other areas of law (e.g. contracts, wills, conveyancing). Certainty and comprehensiveness requires theft law to "control" its fundamental concepts.

To maximise simplicity, however, basic words like "takes", are not defined. Their meaning is already well understood. Besides, they are only explainable in terms of words less well understood.

Finally, the draft follows Bentham's advice on definition. Phrases like "appropriates property" are not defined in terms of each separate constituent word. They are defined as complete expressions.

Section 1.11 Without Consent

For the purposes of section 1.10, appropriation by violence or threat of immediate violence is appropriation without consent.

At common law consent to misappropriation ruled out theft. The Code, however, fails to make this clear. Its definition of theft, therefore, is incomplete and only fully comprehensible by reference to the common law. To remedy this defect the draft provides explicitly in section 1.11 that theft is appropriation without consent.

As outlined above, consent obtained by force, threats, fraud or mistakes caused special problems.

(1) Consent Obtained by Force

Consent obtained by force was never true consent in law. A forcibly takes B's wallet. Here B doesn't consent. Theft is not, therefore, ruled out, but aggravated - A commits robbery. On this the draft maintains the present law.

(2) Consent Obtained by Threats

Consent obtained by threats may or may not be true consent.

(i) The threat is of immediate violence. X pulls a gun on Y saying "your money or your life". Y acquiesces. Here Y gives the money but not voluntarily - there isn't time to think. Therefore there is no true consent. X commits theft and robbery.

(ii) The threat is of non-immediate harm. P writes to Q "Pay up or I'll tell all". Q acquiesces. Here Q pays by choice - he does have time to think. Therefore there is consent. P commits, not theft, but blackmail.

In both cases the draft follows present law.

(3) Consent Obtained by Fraud

Consent obtained by fraud is more complex. A deceives B into parting with his property. Here at common law B's consent is nullified by A's deceit, so long as B consents to transfer possession only. (i) A tricks B into

lending him his watch and A misappropriates it. Here B consents only to transfer possession, his consent is negatived by A's deceit and A commits theft. (ii) A tricks B into lending him five dollars, which A never intends to repay. Here B consents to transfer ownership: he doesn't expect the return of those very bills - he will be satisfied with their equivalent. Here, at common law, B's consent isn't nullified by A's deceit, B transfers ownership and A commits, not theft, but fraud. This too is the position under the Code.

The draft operates differently. Going back to the more fundamental difference between theft and fraud, it distinguishes between parting with property voluntarily and parting with it involuntarily. In theft and robbery the victim parts with his property unwillingly - under compulsion. In blackmail and fraud he parts with it voluntarily although he is threatened or tricked. This distinction is more basic than that between transferring possession and transferring ownership. It is maintained by section 1.11, which provides that consent obtained by violence or threat of immediate violence is not consent. By implication consent induced by deceit remains true consent. Accordingly, in both the above examples consent isn't nullified, theft is ruled out and both offenders commit fraud.

(4) Consent Resulting from Mistake

Consent may also result from the victim's own spontaneous mistake. A hands B a twenty-dollar bill by mistake for a two-dollar bill, and B, not responsible for A's mistake but nevertheless aware of it, decides to misappropriate. Here though A parts voluntarily with the twenty-dollar bill, at common law his consent to do so is negatived by his mistake. If, therefore, B dishonestly takes advantage of that mistake, in present law he commits theft.

Again, the draft works differently. It doesn't specify that consent is nullified in such a case since this would be fictitious - A does consent. Instead, it covers this case as theft by converting under section 1.12. Where A mistakenly gives property to B, as soon as B realizes A's mistake a legal duty arises to return it - an implied resulting trust. For B to take advantage of the mistake and keep the property would be to act inconsistently with the implied terms on which he holds it. And this is theft by converting.

Section 1.12 Appropriating Property

Appropriating property means

(1) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(2) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or

(3) using electricity, gas, water, telephone, telecommunication or computer services, or other utilities.

Appropriation involves both a physical and a mental aspect. The physical aspect varies according to the nature of the property. Tangible movables can be taken hold of. Intangible things, like stocks and shares, can't be taken hold of but only converted. Utilities, like electricity, can't be taken hold of or converted but only used. Accordingly the draft defines three methods of appropriating.

(1) taking,

(2) converting, and

(3) using.

(1) Taking

This word is basic and so not defined. Its ordinary meaning is "taking hold of". Though ordinarily applied to tangible movable things that can be grabbed and taken away, the word also applies to immovables made movable, e.g. a shrub uprooted and taken away.

Mere taking, however, isn't appropriation. The taker must also assume some kind of right over the object taken. Section 1.12(1), therefore, adds: "with intent to treat as one's own". Merely moving a thing or laying hands on a thing isn't appropriation. A moves B's car a few feet from A's driveway. Here A takes it physically but because he has no intent to treat it as his own, he doesn't appropriate under section 1.12(1).

In this the draft differs from the Code. Code section 283(2) provides that "a person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved or begins to cause it to become movable". This aims to distinguish attempted and completed theft. Such distinctions, however, should rely on general

rules about attempt rather than on special rules about theft. Given the intent to misappropriate, courts can, as with any other crime, differentiate between completion and attempt. The draft doesn't try to do it for them.

The kind of property that can be taken is limited. "Taking" only applies to things that can be touched. One cannot take a debt or share, though one can take the paper representing it, i.e. the I.O.U. or share certificate. "Taking" also applies only to movables including immovables made movable. Other immovables can't be taken. A person doesn't take a house by squatting in it (though he may commit another offence e.g. forcible entry or detainer). A tenant doesn't take by holding over when his lease expires.

(2) Converting

"Converting" means acting inconsistently with the terms on which something is held. "Held" is the widest word to cover possession, custody, part-ownership or ownership on trust. Examples are having another's property for repair, cleaning, storage, management, carriage, or sale; having it on loan or hire; being given property by one's employer or by a third party for a specific purpose.

Often the terms will be expressly laid down, but may also arise by implication. A sells his car to B, delivery is postponed and A then sells the car. Here A holds the car on implied terms to keep it for B so that the sale is converting under section 1.12(2).

What counts as acting inconsistently depends on the terms. Generally there must be a positive act: the offender must do something inconsistent with the terms on which he holds the property - e.g. sell, pledge or give it away. An omission usually isn't enough: mere failure to return an object hired or lent is not conversion. Sometimes, however, omission is conversion, e.g. failure to account when the terms on which you hold the property oblige you to account. Unlike Code section 290, draft section 4(2) doesn't lay this down specifically because failure to account is clearly inconsistent with the terms on which the property is held.

The kinds of property that can be converted are unlimited. They include real or personal, movable or immovable, tangible or intangible property.

(3) Using

Section 1.12(3) replaces Code section 287. A special provision is necessary because utilities, being services rather than property, can't be taken or converted but only used. Use without consent, is theft under section 1.12(3).

"Using" is a basic term and therefore undefined. It ordinarily covers "abusing" or "wasting".

Section 1.13 Another's Property

For the purposes of section 1.10 property is another's if he owns it, has any legally protected interest in it or has possession, control or custody of it.

Theft is appropriating another's property. That other needn't be the full owner. First, theft shouldn't be restricted to dishonest takings from full owners. Second, prosecutors shouldn't have to identify the full owner in each case and establish his lack of consent. Third, the law has long since extended the term "theft" to cover stealing from people with interests less than complete ownership and section 1.13 merely maintains this extension.

Under section 1.13, then, property is another's if he owns it, has a legally protected interest in it or has custody of it. A steals an article from a store by snatching it from B, a clerk: here A steals from B (who has mere custody of the article), from the manager (who has possession and control), and from the owner of the store (who has ownership, possession and control).

"Possession" needn't be lawful. A thief possesses what he has stolen. A takes from B an article B stole from C. Here B had possession and A is guilty of theft from him.

A "legally protected interest" is a legally recognized right falling short of ownership. A gives his car to B, a garage owner, to repair. Here, as against C or any other third party, B has possession. But what if A dishonestly takes away the car to avoid paying the repair bill? Can A defend himself against a charge of theft by saying he has taken, not another's property, but his own? No, because section 1.13 provides that property is another's if that other has some legally protected interest in it. B has such an interest in the car - a lien over it till the repairs are paid for. So A commits theft from B.

In one respect the draft here differs from the Code. Code section 289 provides that spouses cannot steal each other's property except in special circumstances. Such cases, though, can adequately be dealt with by reference to the general principle of honesty. Special distinctions between marital and other close relationships are unnecessary and therefore omitted.

Section 1.14 Dishonest Borrowing

A person commits dishonest borrowing who dishonestly and without consent takes another's property with intent to return it to him later.

This offence complements the offence of theft by taking. While theft by taking requires an intent to treat the property taken as one's own, dishonest borrowing requires no such intent. Under the present law such borrowings are theft. Code section 283 provides that an intent to temporarily deprive suffices. In common law and common sense, however, dishonest borrowing isn't stealing. The draft here keeps the law in line with common sense by distinguishing the two offences.

Whether an appropriator intends to treat the thing taken as his own depends on the circumstances. Taking another person's money normally implies intent to misappropriate. Taking a car, however, does not - the taker may be only borrowing.

The offence of dishonest borrowing created by section 1.14 replaces the present offence of taking without permission of motor vehicles or vessels. In fact it encompasses dishonest borrowing of any property capable of being taken.

Section 1.20 Robbery

A person commits robbery who for the purposes of theft uses violence or threats of immediate violence to person or property.

Robbery is aggravated theft. Actual theft, however, needn't be committed. Violence or threat of violence for the purpose of theft is enough.

Section 1.20 simplifies the present law. Code section 304 defines robbery as:

1) stealing, and for the purposes of extorting the thing stolen or to overcome resistance to the stealing, the use of violence or threats of violence to a person or property;
2) stealing from a person, and using any personal violence to that person at the time of the stealing, or immediately before or immediately after;
3) assaulting a person with intent to steal from him; and
4) stealing from a person while armed with an offensive weapon or imitation thereof.

Reduced to their basic elements, all the above merely combine two elements: (1) theft or attempted theft and (2) violence or threats of violence. Section 1.20 combines these elements into one general offence.

Violence or Threats of Violence

In robbery violence is immediate. There is either actual harm, or else immediate harm is threatened. Where the harm threatened is not immediate, the offence is not robbery but blackmail.

Section 1.20 includes violence, or threat of violence, to property. A threatens here and now to bash in B's car unless B hands over his wallet. This is robbery.

Violence includes any interference with the person amounting to an assault. It therefore includes pulling a gun on someone. It doesn't, however, necessarily include "being armed with an offensive weapon". X picks Y's pocket, and at the time X happens to be carrying a gun. Here there is no threat of violence. X commits not robbery but simple theft.

Whether there is a threat of violence depends partly on the reaction of the offender. (i) A goes into a store displaying a large gun in his belt and demands the contents of the till. B, the clerk, is put in fear by A's gun. Here A impliedly threatens violence. (ii) A, armed as above, makes off with the contents of the till while B isn't looking. B never sees A and is never put in fear. Here A

doesn't threaten violence. (iii) A, a huge, aggressive individual, swaggers up to the clerk, B, a young individual of slight build, and loudly demands the money in the till. Here a jury may well decide that A put B in fear. (iv) A shoplifts an article from a store. B, the clerk, is put in fear by seeing this. Here, though B is frightened, there is no threat expressed or implied of violence.

For the Purposes of Theft

These words describe the mens rea. Theft needn't actually be committed. Violence used for the purposes of theft is enough.

Violence used "for the purposes of theft" is not restricted to violence used prior to the theft. It includes violence used during the theft and violence used after the theft in order to facilitate escape.

Section 1.30 Blackmail

A person commits blackmail who threatens another with injury to person, property or reputation in order to extort money, property or other economic advantage.

Section 1.30 replaces Code section 305. In so doing, it substitutes for the Code term "extortion" the more popular term "blackmail".

Section 1.30 is narrower than Code section 305. The Code doesn't restrict extortion to economic interest, but extends it to cover an intent to extort consent to sexual intercourse. That sort of conduct, however, is best dealt with by the law on intimidation (Code section 381) or sex offences. It has no place in the area of dishonest acquisition of property. The draft restricts blackmail accordingly.

Blackmail, like theft, fraud and robbery, is primarily an invasion of economic interests. It differs from these three offences, though, as regards the method used to obtain the property. In theft and fraud, dishonesty is the key element. In robbery and blackmail, the key

element is violence. In the former, violence is immediate; in the latter it is not. But all four offences are concerned with modes of acquiring property.

Ordinarily "blackmail" means extortion by threats. Following this ordinary meaning, section 1.30 defines the physical element of blackmail as threats and the mental element as an intent to extort.

The physical element is threatening injury to person, property or reputation. Here section 1.30 is more explicit than Code section 305. But it maintains the present law that the victim of the blackmail needn't be the person to whom the harm is threatened. A threatens to blow up B's son's house unless B buys A off. Here A commits blackmail.

Section 1.30 is narrower than the Code as regards threats of legal proceedings. Threats of civil proceedings aren't threats for the purposes of extortion under present law, nor are they under section 1.30. But threats of prosecution are threats for the purposes of extortion under present law but not necessarily under section 1.30. They are only threats under section 1.30 if they also constitute threats of injury to reputation.

The reason for this restriction lies in policy. Code section 129 makes compounding an indictable offence a crime. Accordingly an agreement for valuable consideration to conceal an indictable offence is a crime. A agrees not to prosecute B for theft if B pays him a sum of money. A is guilty of compounding. Such situations, however, have primarily to do with abuse of criminal process and the integrity of the criminal justice system. As such, they should be dealt with under the law relating to such matters and not under dishonest acquisition of property.

Section 1.30 makes no explicit reference to justification or excuse. Such matters can be raised regarding any offence and come within the general part of criminal law.

Section 1.40 Fraud

A person commits fraud who by deceit dishonestly

(a) induces any person (including the public) to part with any property; or

(b) causes him to suffer a financial loss.

The draft simplifies the law by defining fraud as one single offence replacing the three Code offences of fraud, obtaining property by false pretence, and obtaining credit by false pretence or fraud. This is done for several reasons. First, all three are variants of the same fundamental wrong-doing: defrauding. Second, all three violate the same basic value: truthfulness. Third, merging the three offences highlights the basic value and rids the law of technicalities.

"Fraud" is wider than any of the separate Code offences. It consists of dishonestly inducing anyone (including the public) by deceit to part with his property or causing him by deceit to suffer a financial loss.

Here, as with theft, "dishonesty" is undefined. The earlier remarks, therefore, are applicable here. Fraud,

like theft, can be committed intentionally or recklessly but not negligently. A knowingly makes a false representation to B and so induces B to part with property. Here A commits the offence of fraud. C makes a false representation to D, not caring whether it is true or false, and so induces D to part with property. Here C commits the offence of fraud. X makes a false representation to Y, thinking it true but failing to take reasonable care to make sure, and so induces Y to part with property. Here X is not deceitful - careless perhaps, but clearly not dishonest. So he commits no fraud. This is common sense, common law and also the law of the Code. The draft retains this principle.

The definition of fraud, then, neither extends nor narrows the Code offences. It merely merges them. It does this in two ways. First, by defining "deceit" to include false pretence as to present, past and future, including non-disclosure. Second, by extending the offence to cover not only (1) inducing a person to part with property but also (2) causing him to suffer a loss.

Here section 1.40 differs from the Code. Code sections 320 and 338, by using terms like "obtaining" and "defraud", suggest that fraud is not complete unless the

offender gets something. Case law is different. Case law says it is enough if the victim is deprived, e.g. parts with property or has something to which he is entitled withheld from him. In accordance with the case law section 1.40 creates two types of fraud.

Both types clearly overlap. Type (1) is a sub-species of type (2) and applies to any kind of property. Here fraud is wider than theft by taking. Type (2) provides for the case where a person suffers a loss without parting with property. For example, A obtains services from B by falsely pretending that he has already paid for them. Here A causes B a loss - B works for A but gets no pay for doing so. Here A commits fraud.

The loss must be financial. This excludes losses not assessable in terms of money. X, a golf player, by deceit gains access to a private club to which he has no right to be admitted; he pays his fee. Here there has been deception but still no financial loss to the club. Accordingly no fraud has been committed. But if X had falsely represented that he was a member, and had then been charged 10 dollars instead of the 15 dollars normally charged non-members, he would have caused the club 5 dollars' loss. This would be fraud.

Section 1.41 Deceit

(1) Deceit means any false representation as to the past, present or future.

(2) Deceit includes exploitation

(a) of another person's mental incapacity;

(b) of another person's mistake intentionally or recklessly induced by the offender;

(c) of another person's mistake induced by the unlawful conduct of a third party acting with the offender.

(3) Deceit includes non-disclosure where a duty to disclose arises from the circumstances.

(4) Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

The essence of fraud is deceit. Common law restricted deceit to false representation as to past or present fact. Code section 338, however, extends it by implication to false representations as to the future. Section 1.41(1) lays this down explicitly.

Section 1.41(2) extends deceit to cover three cases of exploitation. First, the dishonest exploitation of

another person's mental incapacity. A dishonestly takes advantage of B's feeble-mindedness to get him to part with property. Here A commits the offence of fraud. Second, exploitation of another person's mistake induced deliberately or recklessly by the offender. X deliberately behaves in such a way as to make Y, a customer in a store, mistake X for a clerk; Y hands X money for a purchase; X realizing Y's mistake retains the money. Here again X commits the offence of fraud. Third, exploitation of a mistake induced by the unlawful conduct of a third party acting with the offender. This covers cases of conspiratorial fraud. A,B,C and others, as part of a scheme, sell shares to depress their market value. X thinks the shares are falling because of some intrinsic weakness. Y, in league with A etc. buys X's shares at a reduced price. Here Y commits fraud because the actions of A etc. are unlawful. If, however, A etc. had merely sold their shares because they thought them overvalued, they would have acted lawfully and Y would not have committed fraud.

Non-disclosure isn't normally deceit but section 1.41(3) provides that it is deceit if the circumstances give rise to a duty to disclose. Examples of such circumstances are (1) situations where there is a special relationship

such that the victim is entitled to rely on the offender, (2) where the offender has created a false impression in the victim's mind, and (3) where persons in the victim's shoes are entitled to rely on some general practice unless the contrary is disclosed.

(1) A acts as B's lawyer in the matter of purchase of a lot from C. A discovers a defect in title but, to help C, conceals this from B. B buys the land for more than its value. Here A has a duty to disclose the defect to B. Not doing so is deceit.

(2) X offers to sell Y a boat. By describing recent cruises X gives Y the impression that the boat is seaworthy. He fails to correct this impression by disclosing that the boat recently ran aground and needs substantial repairs. Such failure to disclose is dishonest. Honesty would require X to correct the false impression he created. Failure to do so is deceit.

(3) C sells D a new car. In that part of the country new cars are so universally rust-proofed that buyers rely on this being the case unless the contrary is explicitly

stated. C knows the car is not rust-proofed but conceals this from D. Here general practice and D's justified reliance on it makes C's non-disclosure a form of deceit.

Puffing isn't by itself deceit. Section 1.41(4) merely reproduces Code section 319(2). Traditionally vendors have a certain license to commend their wares provided they avoid dishonesty. X, a car dealer, tells Y, a prospective purchaser, that the car is the best one on the market at that price. The fact that many people might think another car a better bargain doesn't make X guilty of fraud. It would be different, however, if the car was obviously a rotten buy - riddled with defects and hopelessly designed. Here X abuses his license and commits fraud.

Section 1.42 Parting with Property

"Parting with Property" means relinquishing ownership, possession, control or other interest in it.

Fraud is complete once the victim transfers possession. A fortiori it is complete if he transfers some interest greater than possession. It is also complete if he transfers some lesser interest such as custody.

Section 1.43 Swindling

A person commits swindling if he obtains food, lodging, transport or other services dishonestly without paying.

Swindling complements the offence of fraud. It also overlaps with fraud. There are two differences, though. In fraud but not in swindling there must be deceit. And in swindling but not in fraud there has to be an obtaining.

In general swindling will cover minor acts of dishonesty. As such it will mainly serve to facilitate prosecutions where fraud would be difficult to establish. In certain cases, however, swindling could be more than trivial. A, a stowaway, rides the trans-continental from Montreal to Vancouver and thereby pays no fare. The railroad's loss is more than trivial.