

## Approaches to the Reform of the Law of Theft

L. H. Leigh

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[See table of contents](#)

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Article abstract

Cet article compare les propositions législatives que fait la Commission de réforme du droit du Canada (CRD) au sujet du vol, dans son Rapport n° 30, avec les dispositions du *English Theft Act 1968 et du Model Penal Code*.

Dans son examen critique des suggestions de la CRD, l'auteur considère d'abord l'élément moral du crime de vol. Il souligne les problèmes qu'a soulevés le mot « *dishonesty* » devant les tribunaux anglais. La simplification que la CRD propose, à l'effet de remplacer les expressions anciennes par des formulations plus abstraites, lui semble peu satisfaisante en ce qu'elle pourrait avoir pour effet d'élargir le crime de vol. Ce danger serait d'autant plus grand que l'élément moral du vol comprend l'intention de priver temporairement la victime de sa propriété.

Parmi les autres problèmes traités se trouve la notion d'apparence de droit reconduite par la CRD. La définition de la propriété semble insatisfaisante à l'auteur en ce qu'elle réfère aux biens immobiliers. L'occupation illicite d'une propriété doit-elle être considérée comme du vol ? Quels seraient alors les effets en droit criminel des règles de droit civil relatives au transfert de la propriété ? Peut-on envisager que des règles de droit criminel autonomes pourraient solutionner le problème ?

En conclusion, l'auteur exprime l'opinion que les suggestions de la CRD doivent être réexaminées à la lumière de l'expérience des juridictions sur lesquelles elles sont basées.

## Approaches to the Reform of the Law of Theft

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L.H. LEIGH \*

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*Dans son examen critique des suggestions de la CRD, l'auteur considère d'abord l'élément moral du crime de vol. Il souligne les problèmes qu'a soulevés le mot « dishonesty » devant les tribunaux anglais. La simplification que la CRD propose, à l'effet de remplacer les expressions anciennes par des formulations plus abstraites, lui semble peu satisfaisante en ce qu'elle pourrait avoir pour effet d'élargir le crime de vol. Ce danger serait d'autant plus grand que l'élément moral du vol comprend l'intention de priver temporairement la victime de sa propriété.*

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*En conclusion, l'auteur exprime l'opinion que les suggestions de la CRD doivent être réexaminées à la lumière de l'expérience des juridictions sur lesquelles elles sont basées.*

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\* Professor of Criminal Law in the University of London. (The London School of Economics and Political Science).

	<i>Pages</i>
Introductory .....	470
1. The Canadian Proposals .....	471
2. Theft .....	473
3. The Mental Element .....	474
4. Claim of Right .....	479
5. Temporary Deprivation .....	483
6. The External Elements .....	484
7. Obtaining Services .....	489
8. Fraud .....	490
Conclusions .....	490

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## Introductory

There appear to be at least five crucial issues in reforming the law of theft. The first is the definition to be adopted; what matters should be brought within theft? The second concerns the mental element and in particular how and to what extent such terms as “dishonestly” and “fraudulently” can be defined. The third concerns the organising principle to be adopted; that, for example of appropriation, or that, allegedly easier to use, of trespass<sup>1</sup>. A fourth concerns its relationship with the civil law; whether theft legislation should, as far as possible be self-contained, or whether it should depend upon and thus be intimately linked to a body of civil law principles<sup>2</sup>. A fifth, in practice related to the fourth, though perhaps not necessarily so, is whether to strive for a limited number of all inclusive sections, or whether to opt for more particular and therefore more numerous, but perhaps more readily comprehensible provisions.

In what follows, I address these issues through the medium of the theft proposals contained in the new draft Canadian *Criminal Code*<sup>3</sup>. In doing so,

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1. So contended by G. FLETCHER, *Rethinking Criminal Law*, Boston, Little, Brown, (1978), p. 10 “[...] the murky concept of appropriation [...]”. As, however, R.R. STUART, “Law Reform and the Reform of the Law of Theft”, (1967) 30 *M.L.R.* 609 noted, the old trespass-possession structure had, by 1968, been much modified.

2. These concerns have most recently been enunciated by Lord Roskill in *Reg v. Morris*, [1984] A.C. 320.

3. Law Reform Commission of Canada, *Recodifying Criminal Law*, Report n° 30, 1986.

I shall compare the Canadian proposals with those of the *Model Penal Code*, and with English law under the *Theft Acts of 1968 and 1978*. Many problems will be found to be the same or similar, but the solutions differ. Canada of course legislates against a distinctive background of case law which allows only persuasive value to English judgments though some are influential, and within the context of a federal system which entrusts the enactment of criminal law to the Centre, but which leaves matters of property and civil rights to the provinces<sup>4</sup>. It follows that what is property will differ from province to province, and although this probably causes no difficulty with the common law provinces, any formulation must be such as to apply readily to the civil law jurisdiction of Quebec as well. Surprisingly, perhaps, this does not seem historically to have caused problems.

### 1. The Canadian Proposals

The Canadian proposals deal with theft and fraud in three briefly stated propositions, somewhat expanded and, perhaps in the case of fraud with the meaning somewhat altered, reproduced in Appendix A as statutory drafts. For the sake of completeness I propose to deal with theft as defined in variant clauses 13(a) and (b) and with fraud as defined by clause 72 of the draft *Criminal Code* bill. The formulation in proposition 13(c) relating to fraud is obviously much wider and deserves discussion in its own right<sup>5</sup>.

Proposition 13(1), alternative 1, defines theft as the dishonest appropriation of another's property without the other's consent. Proposition 13(2), Obtaining services, again reproduced almost verbatim in clause 71 of the draft Code, provides that everyone commits a crime who dishonestly obtains for himself or another person services from a third party without full payment for them. The difference here, from the draft clause, is the absence of the word "full". Proposition 13(3) concerning fraud, provides simply that everyone commits a crime who, dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof. This reproduces the *ratio* of *Olan*<sup>6</sup>. Draft clause 72, is, however, couched in terms reminiscent of false pretences, and appears apt to catch only representations made *inter partes*. It is thus narrower than proposition 13(3) dealing with fraud. I am informed that the explanation is that the fraud section of the current *Criminal Code*, s. 338, is thought to be too wide and that a replacement provision cast in narrower terms is now under consideration.

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4. *Constitution Act, 1867*, s. 92(13).

5. For the sake of convenience, I have reproduced both the propositions in both versions of clause 13 and clauses 70–72 of the *Criminal Code* bill as an appendix to this paper.

6. *The Queen v. Olan*, [1978] 2 S.C.R. 1175.

Alternative 2 of proposition 13 is not illustrated in statutory form. It is intended to avoid problems which have arisen in England with the word "dishonestly"<sup>7</sup> and also to avoid the use of a fault term which is neither mentioned nor defined in the general part<sup>8</sup>. Proposition 13(1) in this variant speaks of appropriation without the other's consent and without any right to do so. Proposition 13(2) speaks of obtaining services without a right to do so. Proposition 13(3) speaks of inducing another person to suffer economic loss or risk thereof without any right to do so.

These rather laconic formulae must be read in conjunction with the specifications of fault and the definitions of "property" and "property belonging to another" contained in the general part. The basic level of culpability, whichever alternative is chosen, is "purpose"<sup>9</sup>. "Property" includes electricity, gas and water and telephone, telecommunication and computer services. The latter phrase is not defined, which could prove troublesome. Otherwise, the term is evidently wide and comprehends anything which the legal system of any of the provinces or of Canada itself are prepared to recognise as property. "Another's property" means property that another owns or in which he has a legally protected interest<sup>10</sup>. Again, the draft Code does not seek to specify when a person has a legally protected interest in property. Ownership, possession and control would be comprehended, but otherwise matters are left to be determined by provincial law.

The theft propositions are drafted in wide and general terms, and much is left to be inferred from them. The commentary is rather brief as indeed is that in the Working paper which preceded the report<sup>11</sup>. No doubt much may be inferred; the report mentions, for example, the defense of claim of right, the exclusion of liability for mere puffing, and possible liability for non-disclosure. I shall, however, seek to show that the result is to leave the reader in doubt concerning the possible extension of liability to situations which the *Model Penal Code* and the Criminal Law Revision Committee sought to bring within theft. That is not to say that the Law Reform Commission of Canada is obliged to accept the policy of another body concerning the proper

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7. For a Canadian discussion of this problem, see J.D. EWART, *Criminal Fraud*, Toronto, Carswell, 1986, p. 166-173; for a critical English discussion, see E. GRIEW, *The Theft Acts 1968 and 1978*, London, Sweet & Maxwell, 1986, paras. 2-110, 2-112.

8. *Supra*, note 3, p. 74.

9. *Supra*, note 3, proposition 4(d), and see explanatory notes at p. 75. The defendant must mean to misappropriate. The draft Code, cl. 10 and 11 specify that a person must mean to engage in the conduct in question.

10. Draft Code, cl. 2(1).

11. L.R.C. of Canada, Working Paper n° 19.

ambit of theft. It does, however, leave the reader in doubt respecting important issues. Furthermore, it may be doubted whether, from an operational point of view, it is wise to leave so much to inference. A Code must be worked by police officers as well as prosecutors, and the former may require explicit guidance concerning what falls within it.

## 2. Theft

We may now turn to consider the two alternative drafts of the crime of theft of property. The first variation requires a purpose dishonestly to appropriate another's property without his consent. The second specifies no mental element, but purpose is understood. In full, therefore, everyone commits theft who, purposely, appropriates another's property without his consent and without any right to do. Common to both is the point that appropriation, consistent with existing Canadian law, may be temporary or permanent. The general structure of the theft provisions is intended to simplify radically the existing law of theft which now consists of a general provision and a plethora of particular provisions as well. It merges "takes" and "converts" into "appropriates", and it merges "fraudulently and without colour of right" into "dishonestly", although the proposed Code does retain a separate claim of right formulation in proposition 3(7)<sup>12</sup>. This structure differs from the English *Theft Act 1968* in not specifying even partially, save for those cases falling under claim of right, cases which are not to be taken as dishonest. It differs from the English Act also in not providing extended attributions of property interest so as to bring embezzlement and fraudulent conversion within theft. This may reflect the belief either that such cases, or certain examples of them should not fall within theft, or a belief that the wording is apt to cover all those cases which are presently dealt with in Canadian criminal law<sup>13</sup>. By contrast, the English legislation does at least specify certain cases as coming within theft and related offences, though not always clearly, while the *Model Penal Code* and the *Draft United States Federal Criminal Code* state explicitly which of the old crimes they seek to bring within theft<sup>14</sup>. The Canadian proposals are thus very general in their

12. See for explanation, *supra*, note 3, p. 75.

13. On matter can confidently be asserted; the problems dealt with by the extended property attribution provisions of s.5(3) and (4) of the *Theft Act 1968* (U.K.) were drawn to the L.R.C.'s attention; see A. HOOPER, *Theft and Related Offences: Draft Sections and Explanatory Notes*, Ottawa, Law Reform Commission, 1975, 181p., a study prepared for the L.R.C. of Canada.

14. American Law Institute, *Model Penal Code and Commentaries*, 1980 ed., Greenawalt, art. 223.0 and commentary at Pt.II, p. 127-8; *Draft United States Federal Criminal Code*, 1971, art. 1731.

terms, the meaning of which is apt to require a good deal of elucidation. Some part of their ambit may of course be gauged from the context afforded by other property crimes, but even this is a partial guide only. The relevance of all this will become clearer as this paper progresses.

### 3. The Mental Element

We rely upon the mental element to specify fault, and thus require a formula which will enable us to discriminate between those whom we believe to be truly at fault and so properly the object of a prosecution, and those who are not. Of course the positive specification or purpose does not conclude the inquiry; given a purpose to take, convert, appropriate, or whatever the fault term may be, we have then to inquire whether a defeating condition applies, such as claim of right, the owner's consent, necessity, or another general defence.

It is of course possible to define terms strictly and to convict persons who cannot invoke a general defence and who take deliberately and without mistake property which they know to be that of another. Lord Goddard C.J. adopted that position under the *Larceny Act 1916*<sup>15</sup>, and so do certain decisions of Canadian courts including that of the Supreme Court of Canada in *Lafrance*<sup>16</sup>. Courts are, however, disinclined to convict persons who apparently act without moral fault. For that reason, Lawton L.J. in *Feely*<sup>17</sup> departed from Lord Goddard's strict formula, and certain Canadian cases seem disposed to follow this lead<sup>18</sup>. That tendency could become more marked if "dishonestly" is adopted as the fault term<sup>19</sup>. There is a natural tendency to search for a formula which will avoid the conviction of those persons who appear to be morally blameless<sup>20</sup>. The need is, perhaps, the more compelling in Canada where theft can be accomplished by temporary deprivation, without qualification.

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15. *Regina v. Williams*, [1953] 1 Q.B. 660.

16. *La France v. The Queen*, [1975] 2 S.C.R. 201; see also *Regina v. Brais*, [1972] 5 W.W.R. 671, p. 677 per Robertson J.A.

17. *Regina v. Feely*, [1973] 1 Q.B. 530.

18. E.g. per Martin J.A. in *Regina v. De Marco*, 22 C.R.N.S. 258.

19. J.D. EWART, *supra*, note 7, argues that Canadian courts have construed dishonestly as meaning acting deliberately and without mistake. The fraud cases from which this derives do not, however, define "dishonestly"; see *Olan*, *supra*, note 6; *Côté v. The Queen*, [1986] 1 S.C.R. 2. See further P. RAINVILLE, "Les aléas de la fraude en droit criminel", (1986) 27 C. de D. 813.

20. See further, D.W. ELLIOTT, "Dishonesty in Theft: A Dispensable Concept", [1982] *Crim. L. R.* 395.

The problem can be seen in the so-called “prank” cases where persons who took objects temporarily, apparently without moral fault, were convicted of theft in strict obedience to the *Lafrance* formula<sup>21</sup>. In others, an implied exception to *Lafrance* was apparently asserted<sup>22</sup>. The problem can be seen also in *Pace*<sup>23</sup> where a cook took home a cake which, he alleged, would be otherwise disposed of in the rubbish. His story, even if believed the court held, revealed no defence to a charge of theft; the cake had not been abandoned, the accused knew that it was the property of his employer, and took it without mistake<sup>24</sup>. By contrast, in *Dalzell*<sup>25</sup> where the accused, allegedly in the interests of research, took articles from a shop, intending she said to return them after testing the shop’s security arrangements, a majority of the Nova Scotia court held that her absence of moral fault ought to afford her a defence<sup>26</sup>. In this instance, the court sought to formulate an exception to the strict *Lafrance* rule.

The question must be whether the Canadian draft adequately caters for those cases where the actor’s state of mind indicated an absence of moral fault. Prosecutorial discretion can, at best, be but a partial solvent of these problems, partly because on some of these moral issues a general consensus is hard to find, but perhaps more commonly, because the facts do not necessarily appear to the prosecutor and the police in the same light as they may ultimately appear to the jury. The accused’s story may not be obviously true; there may be a substantial triable issue for the jury concerning just what his mental element was<sup>27</sup>.

The Canadian formula undoubtedly caters for the classic cases at common law where the actor would not have been held to have acted dishonestly. The cases of finders where the actor believed that the owner could not readily be discovered<sup>28</sup>, of persons believing goods to be abandoned<sup>29</sup>, of cases where the actor believes that the owner would consent if he knew of

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21. *E.g. Bogner v. The Queen*, 33 C.R.N.S. 348.

22. The situation as the court in *R. v. Rotinsky*, (1984) 28 Man. R.(2d) 306 noted, remains obscure.

23. *Regina v. Pace*, [1965] 3 C.C.C. 55.

24. This was, no doubt, a harsh result, as A. MEWETT and M. MANNING, *Criminal Law*, Toronto, Butterworths, 1978, 577 p. contend, and in England, under section 2(1)(b) the accused would have an arguable defence.

25. *Regina v. Dalzell*, 6 C.C.C. (3d) 112.

26. The court followed *Feeley*, *supra*, note 17; quare the present status in English law of *Regina v. Smith*, [1960] 2 Q.B. 423.

27. *Pace*, *supra*, note 23, is an obvious example of this.

28. *The Queen v. Slavin*, [1900] 7 C.C.C. 175; *Regina v. Dubitsky*, 135 D.L.R. (3d) 710.

29. *Legge*, (1985) 160 A.P.R. 314.



the circumstances, and classic cases of claim of right can all be inferred from the general concept of dishonesty as the fault element. The issue in these instances is simply whether there is instrumental value in specifying them<sup>30</sup>. This proposition needs to be qualified in respect of claim of right, a topic dealt with separately below. The issue remains, however, how best we are to deal with those residual cases which present a problem of the absence of moral fault.

The English *Theft Act 1968* recognises by implication that such cases will arise but, like the Canadian draft, does not define “dishonesty”, preferring to leave the issue to the jury. The tortuous case law which has resulted clearly discloses that while the word may appear simple, the concept is not. English courts, in an endeavour to preserve a subjective formula while controlling it by reference to generally accepted moral standards so that the actor cannot simply excuse himself by urging that what he did corresponded to his own conception of morality, adopt a mixed subjective — objective formula: first, was what was done dishonest according to the standards of ordinary reasonable people; secondly, if so, did the actor realise that what he was doing was dishonest by those standards. If the accused realised this, his own subjective standards are irrelevant; if he did not, but rather thought that his standards were the same as those of reasonable people, he is entitled to be acquitted. This is the famous formula in *Ghosh*<sup>31</sup>. The problems with it have been identified by others; it is complicated, allows the accused’s standards to govern provided that he believes that his standards and those of humanity in general coincide, may lead to arbitrary results given that juries may disagree on matters of common morality, and becomes harder to apply the further the facts are from very common situations<sup>32</sup>. It is not, however, a formula which is linked uniquely to the word “dishonestly”; it could equally apply to “fraudulently” were courts minded so to construe that term as to cater for residual cases of non-dishonesty as some Canadian courts have done. Alternative 2 if read literally may avoid the problems of interpretation noted above, but it does so by reverting to the strict *Lafrance* formula which leaves prosecutorial and sentencing discretion as the available solvents of injustice.

If it is desired to provide for those residual cases where it is assumed that there is an absence of moral fault, and which do not fall within the pattern of defences offered by the draft Code, the task then is to elaborate a form of

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30. See *Model Penal Code*, *supra*, note 14, notes to art. 223; *Theft Act 1968* (U.K.), s. 2.

31. *Regina v. Ghosh*, [1982] 1 Q.B. 1053.

32. D.W. ELLIOTT, *supra*, note 20; E. GRIEW, *supra*, note 7, at paras. 2–110, 2–114. Consider *Green, Greenstein*, 61 Cr. App. R. 296 (staggering) which my seminar groups over the years find difficult.

words which enables the necessary discriminations to be made without the formlessness which the undefined adverb presents. The structure adopted both by the *Model Penal Code* and by the United States draft Federal Code is to specify knowledge as the culpable mental state, and then to elaborate defences. These are reasonably inclusive, for example claim of right, unawareness by the actor that he is infringing the property interests of another, taking property exposed for sale, and to a limited extent, property in which another spouse has an interest. They do not, however, go beyond the cases provided for under section 2 of the English *Theft Act 1968* and, as the rapporteurs note, would not give a defence in a case where the actor takes his employer's money in the belief that the owner is indebted to him. Nor would an agent, given money by this principal to buy an article have a defence if he buys it for less money than the Principal has given him and keeps the difference<sup>33</sup>. One's view of the desirability of this technique, which can be employed whether or not the word "dishonestly" is used to signify fault, must depend on whether it is thought that the problem cases have been adequately identified and properly resolved. In the Canadian proposals it is used without elaboration; under the English *Theft Act 1968* it is used in terms which make it clear that apart from the examples of lack of fault in section 2, the term "dishonesty" has an undefined residual meaning.

Section 120(1) of the Ghana *Criminal Code 1960* does indeed endeavour to state inclusively and exhaustively when an appropriation is dishonest. It provides:

An appropriation of a thing is dishonest if it is made by a person without claim of right, and with a knowledge or belief that the appropriation is without the consent of some person for whom he is trustee or who is owner of the thing, as the case may be, or that the appropriation would, if known to any such person, be without his consent.

To this provision, the general defences contained in the Code, such as necessity, apply. Special provision is made for finders. This appears to be reasonably inclusive, at any rate in a Code which requires that the actor intend permanently to deprive the victim, and which defines general defences in reasonably broad terms. Indeed, it is a blemish in English law that the issue of dishonesty under the *Theft Act 1968* is determined without reference to the ambit of exculpation provided by a developed system of general defences<sup>34</sup>.

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33. *Model Penal Code*, *supra*, note 14 at p. 154-157.

34. If, for example, *Feeley*, *supra*, note 17, had been denied exculpation under an acknowledged defence of necessity, it might more readily have been seen that virtually nothing remained pointing to an absence of dishonesty. On this case and dishonesty, see G.L. WILLIAMS, *Textbook of Criminal Law*, 2<sup>e</sup> ed., London, Stevens, 1983, p. 726; in my submission, Prof. Williams analysis is cast in misleading terms.

Yet another solution is propounded by Professor D.W. Elliott, this time founding upon Australian case law<sup>35</sup>. Put briefly, his solution is treat cases of insignificance as not involving dishonesty. He cites as cases which should fall outside theft those where the actor takes small sums belonging to another, intending or expecting to be able to repay them. The vice here is thought to be misuse of an asset rather than an intent permanently to deprive. This consideration, whatever force it might otherwise have, is not persuasive in a system which treats temporary deprivation generally as theft. But, then, the problem is unlikely to arise unless the case is one in which the victim has previously made it clear that such takings are forbidden. In such cases we ought to beware of assuming that the victim asserts no value which the criminal law ought to protect. He may consider that moneys ought never to be taken from the till lest a bad example be set and temptation made manifest to others. He may, as in *Pace*, wish to dispose of unwanted articles in a particular way. One's doubts are reinforced by Professor Elliott's draft clauses: how does a jury determine whether a taking is detrimental to the victim's interests in a significant way? What interests are relevant? Does significance vary according to the victim's financial position? Would a cashier who purloined \$ 50.00 from Dominion Stores intending to return it be entitled to a defence which a cashier who took the like amount from Patel's corner grocery could not raise? No doubt Professor Elliott is correct to say that his solution does not present a question of moral estimation without guidelines, but it presents practical problems of significance<sup>36</sup>.

Should we then abandon the attempt to formulate a residual formula and leave hard cases to discretion? In a sense that would merely substitute the moral judgment of the prosecutor or the judge for that of the jury or more commonly in Canada to a magistrate who will in most cases have to decide on both guilt and punishment. It is, nonetheless, the conclusion which I would adopt, at least if temporary deprivation is to continue as theft. If the authorities exercise discretion, it may at least be structured for the future by rule and example; if the issue is exclusively for the jury, principles will not be elaborated. The issue will be left to their innate and variable common sense. If, of course, permanent deprivation alone were to constitute theft, the hard cases would be fewer. Most of the meritorious cases already fall within well-defined common law and statutory defences, and I cannot see that those cases which the American Law Institute or Professor Elliott identifies ought to benefit from an unstructured residual formula. Employees should not be

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35. *Supra*, note 20.

36. A. HOOPER, *supra*, note 13, advanced a similar suggestion, but would not have premised triviality on value alone. The L.R.C. of Canada for which the study was prepared appears implicitly to have rejected the suggestion.

encouraged to abstract money on a plea of set off; an agent should not be entitled to pocket the saving which he has made on the purchase of an article; employers should not be put at risk of an employee's belief in his ability to repay<sup>37</sup>.

#### 4. Claim of Right

Claim of right is treated in the draft Code as a specific example of mistake of law. The wording, which is meant to reflect existing Canadian law, is broad and undefined:

3(7) Mistake of Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law: (a) concerning private rights relevant to that crime [...]

It is, I submit, quite unclear what this wording seeks to do, first because it purports to reflect existing law which is in fact in an unsettled state despite overconfident claims to the contrary<sup>38</sup>, and secondly because the phrase "private rights" is potentially wider than the notion adopted in the *Model Penal Code* or under the American Draft Federal Criminal Code of honest belief in a claim to property<sup>39</sup>. It is of course not necessarily wider than the phrase used in s. 2(1)(a) of the *Theft Act 1968*, but that provision has not been tested in the courts. It may fit uneasily with the rest of the mistake of law defence which the draft provides. It is of course easy to see that claim of right as formulated under the American proposals makes manifest what is already necessarily included in the requirement that one intend to appropriate another's property<sup>40</sup>.

37. Of course hard cases can be put. For example, if I tell my employee never to take money from the till, and he being broke, does so in order to buy a Metro ticket which he needs in order to deliver items from my business, the case might technically be theft unless the trier of fact were to conclude that whatever my words, I would not have minded had I known the full facts, but in any event, would proceedings ever be brought? In some of the prank cases, *Bogner, supra*, note 21, for example, the case was much less clear cut. The accused were drunk, they threw the article away when approached, and had previous convictions. Casey J. alone thought that the prosecution came close to an abuse of process. A. HOOPER, *supra*, note 13, p. 169, would have exempted "borrowing" of money from the employer's till from theft, but this is obviously dangerous.

38. E.g. D. STUART, *Canadian Criminal Law*, Agincourt, Carswell, 1982, p. 276-279.

39. *Draft United States Federal Criminal Code*, s. 1739; *Model Penal Code, supra*, note 14, s. 223.1(3)(a).

40. *Model Penal Code, supra*, note 14, p. 153.

It is clear in Canadian law that claim of right involves, in its classic sense, a claim that the property is legally that of the actor<sup>41</sup>, and extends also to a claim that the actor is entitled to deal with property in a certain way. Thus, a Bank which unlawfully covered a customer's overdraft with a social security cheque, believing that it had a right to do so was held not guilty of theft<sup>42</sup>. In *Lilly*<sup>43</sup> a real estate broker's defence to a theft charge, that he believed that he was entitled to transfer deposit moneys from trust to general account once an offer to purchase property had been accepted, was held to be valid.

Claim or colour of right is also used in a wider sense to convey the idea that an actor who believes that the owner would not object to the taking cannot be convicted of theft<sup>44</sup>. As Martin J.A. noted in *DeMarco*<sup>45</sup>, the term when used in the sense of an honest belief in a state of facts which if it existed would justify or excuse the act done is merely a particular application of the doctrine of mistake of fact. Indeed, both classes of case can readily be brought within the general wording of the theft propositions without explicit reference to colour of right, the former because the actor asserts that the property is his, or in the dealing cases asserts also that he acts honestly in respect of the property, the latter because the actor's claim bears upon honesty<sup>46</sup>.

The puzzle is to know how much farther proposition 3(7)(a) is meant to take us. The meaning of the phrase "private rights", even in this context, is unclear<sup>47</sup>. It is submitted, however, that the essence of the actor's claim is that he acted without *mens rea* which must, of course mean without the fault element required for the offence<sup>48</sup>. Historically, this has involved "fraudulently and without colour of right"; under the draft proposals it may involve an open-ended concept of dishonesty, and there is a sense in which the whole discussion must be circular unless the concept of fault is given some objective definition. Certain Canadian commentators and courts seem to suggest a wider meaning which is not limited by the notional of purposive action in respect to the external elements of the offence and which is, indeed, apt to

41. *Regina v. Hemmerly*, 30 C.C.C. (2d) 141; *Polchies*, (1985) 165 A.P.R. 386; *R. v. Wright and Wright*, 41 Alta. L.R. (2d) 361.

42. *Chapdelaine c. Bérubé*, [1985] C.S. 980.

43. *Lilly v. the Queen*, [1983] 1 S.C.R. 794.

44. *Pace, supra*, note 23; *Legge*, (1985) 160 A.P.R. 314.

45. *Supra*, note 18.

46. *Kastratovic*, (1986) 19 A. Crim. R. 28. Indeed, MEWETT and MANNING, *supra*, note 24, p. 289, very sensibly suggest that one ought to look at whether the mistake relates to an essential element of the crime.

47. G. WILLIAMS, *Criminal Law, the General Part*, 2 ed., London, Stevens, 1961 p. 305.

48. *Id.*, p. 322.

break down the distinction between errors of fact and of law in this context. Nonetheless, there is common law authority for the wider view<sup>49</sup>.

The debate centres around the decision of Rand and Fauteux JJ. in *Shymkovich*, a decision more often abused than analysed<sup>50</sup>. The accused removed logs from a booming ground. The logs were not at large in the river. The accused alleged no property interest in them. He knew that they were not lost. He knew that they were owned by a company which could establish title to them, and that he had no right to them deriving from the company. His defence was based on an inaccurate recollection that a provincial government pamphlet concerning beachcombing gave him a legal right to take logs. Rand and Taschereau JJ. characterised this as a belief in a general legal right to collect logs. Accordingly, they rejected it as a defence. Mistake of law alone will not, they hold, suffice. Rand J. sums up claim of right thus<sup>51</sup>:

A claim to ownership of a chattel, although it may depend on matter of law, is, in most cases, a question of fact, or its legal basis may, in the ordinary sense of the word, be subsumed in "fact". This enhances the difficulty of separating legal from factual elements in any relation to property and in any case it may resolve itself into a refined conceptual distinction. But a distinction between justifying an act as authorized by law and as a bona fide belief in a property interest does seem to correspond with an instinctive discrimination between the two concepts.

Estey and Fauteux JJ. disposed of the case on the facts; the accused lacked an honest and reasonable belief in the existence of facts which would have made his belief reasonable. What those facts might be remained unexpressed and their Lordships may indeed have assumed the law to be as their colleagues formulated it. Locke J. dissented, holding that the issue ought to be whether the accused really believed, on whatever grounds, that he had a right to the logs; that he really believed them to be his own. His Lordship's judgment may thus be internally contradictory.

There is much to be said for the position adopted by Rand and Taschereau JJ. It corresponds to the value which underlies the *Model Penal Code* formulation, that a person who believes that he owns or perhaps has a right of disposition over a thing poses no threat to the proprietary interests of others<sup>52</sup>. Furthermore, its limits are reasonably discernible. Professor Glanville

49. The English authorities are discussed by King C. J. in *Langham*, (1984) 12 A. Crim. R. 391. The wider doctrine does not seem to correspond to the justification for colour of right in 2 East P.C. 659, that a man's life should not be put in jeopardy because of a property dispute.

50. *The Queen v. Shymkovich* [1954] S.C.R. 606; for comment see D. STUART, *supra*, note 38, p. 276; G.L. WILLIAMS, *supra*, note 47, p. 324-325; see A. MANGANAS and G. CÔTÉ-HARPER, *Droit Pénal Canadien*, Cowansville, Éd. Yvon Blais inc., 1984, p. 463-464.

51. *Supra*, note 50, p. 608-609.

52. *Model Penal Code, supra*, note 14, p. 153.

Williams argues that the proper course is to acquit with a warning those who are genuinely ignorant of the civil law<sup>53</sup>. This, if taken far enough, could produce bizarre consequences in other contexts<sup>54</sup>. Could a father argue that he has a property in his daughter which would entitle him to imprison her unless and until she agrees to marry a chosen suitor? Would he, if charged with false imprisonment, be entitled to an acquittal coupled with a warning? What should the general rules of mistake of law contain?

My principal concern in this context is, however, to point out that Canadian law is in an uncertain state. The judgment of Rand and Taschereau JJ. was not accepted in *Howson*<sup>55</sup>. The accused removed the victim's car which was unlawfully parked in a private parking lot at the instance of the lot's proprietor and declined to give it up to the victim until the latter paid parking and towing charges. He was charged with theft and convicted. On appeal, the conviction was quashed. Porter C.J.O. (Evans J. concurring) held that the accused was entitled to be acquitted if he honestly but mistakenly believed that he had a right in law or in fact to take the vehicle. Their Lordships thus rejected the test in *Shymkovich*; an accused may found upon mistake of law, fact, or mixed law and fact. Laskin J. treated colour of right by virtue of the word "fraudulently" as referring to belief in matters either of law or fact justifying the challenged taking or detention. Here, the accused could rely on a mistaken belief that he had a right from the owner of the parking lot to detain the car. In *Pace*<sup>56</sup>, not truly a claim or right case, the Nova Scotia court preferred the judgment of Rand and Taschereau JJ. in *Shymkovich*, to that of Locke J. A later court concludes that it is not clear whether *Howson* has settled the law against *Shymkovich*, given the existence of contradictory provincial decisions<sup>57</sup>. In addition, it may be urged that *Howson* is less clear than it seems. The right urged can be seen as derived from that assumed by the proprietor of the parking lot, to detain vehicles left by trespass, until payment of compensation. Thus viewed, the right asserted is at least asserted in virtue of possession. But whether or not *Howson* can be thus interpreted, there is an ambiguity in the Canadian case law which the draft does not resolve. If it be urged that mistake of law as to private rights is used simply in order to extend the defence beyond that which would be assumed to exist where the person does not intend to take property belonging to another, one must ask why this extension is desired? What are the values in issue?

53. G.L. WILLIAMS, *supra*, note 47, p. 325.

54. Note that proposition 3(7) is limited only by the unsatisfactory expression "private rights relevant to that crime".

55. *Regina v. Howson*, [1966] 2 O.R. 63.

56. *Supra*, note 23.

57. *R. v. Gruber*, [1982] 1 W.W.R. 197, p. 256 per Stuart T.C.J.

What are the boundaries of the defence to be? Certainly they go far beyond the proposed rules for mistake of law generally. If, as a result of an erroneous reading of the *Morgentaler* case<sup>58</sup>, I believe that I have a right to perform an abortion without obeying the statutory requirements, I may expect to be convicted. Why should my case be different if, relying on a garbled memory of a government pamphlet, I appropriate logs which are not mine, are in another's booming area, bear the other's mark, and are, to my knowledge, not abandoned?

## 5. Temporary Deprivation

The mental element, as noted, consists of a purpose to deprive the owner either permanently or temporarily of his interest in property. The breadth of this should perhaps be reconsidered. Both section 6 of the English *Theft Act 1968* (not a desirable drafting model) and the American proposals allow such an intent only in special circumstances, as for example where the actor means to appropriate a major portion of the economic value of a thing, or to dispose of it under a condition as to its return which the actor may not be able to fulfill<sup>59</sup>.

I suggest reconsideration for three reasons.

First, most of these cases do not seem serious enough to justify being treated as theft, still after all, regarded as a serious offence. Second, the requirement of only temporary deprivation makes the problem of encapsulating the notion of dishonesty in the Code even harder than it would otherwise be. Third, it produces major problems when dealing with joy-riding, the essence of which is also temporary deprivation. In *Lafrance*<sup>60</sup> the Supreme Court accepted that there was substantial overlap between the two offences, but still thought that they might be distinguished. Fauteux C.J. concurring, thought that the difference between the two offences is that in joy-riding unlike theft, the actor means to return or cause the vehicle to be returned to its owner. This hardly seems realistic; in many cases the actor will simply be indifferent to the matter. Laskin J. (Hall and Spence J. concurring) dissenting, thought that in joy-riding the actor does not act fraudulently towards the owner, but it is unclear what they thought fraudulently should mean, and there is a danger of latent circularity in the argument. The result is, however, either to narrow joy-riding to the unrealistic case where the actor intends to return the vehicle, or

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58. *Morgentaler v. the Queen*, [1976] 1 S.C.R. 616.

59. *Model Penal Code*, *supra*, note 14, s. 223.0(1), p. 164-165. See also A. HOOPER, *supra*, note 13, p. 47.

60. *Supra*, note 16.



to admit a wide and undesirable measure of police and prosecutorial discretion in the choice of charges. The difference between a conviction for theft of the lesser offence may turn on the way in which the actor responded to the police.

## 6. The External Elements

The external elements, of appropriation of another's property without his consent, also present difficulties. The existing *Criminal Code* uses the phrase fraudulently takes or fraudulently converts<sup>61</sup>. This does not seem to have caused problems in practice. The *Model Penal Code* and the United States Federal Draft Code are cast in terms of knowingly taking or exercising unauthorised control over property, or making an unauthorised transfer of it<sup>62</sup>. The rapporteurs note to the *Model Penal Code* (1980 edition) does not suggest any difficulty with the term. By contrast, "appropriation" has caused considerable difficulties in England. The House of Lords in *Morris*<sup>63</sup> defines the term to mean interference with or usurpation of the rights of an owner<sup>64</sup>. That does not seem to correspond with the Law Reform Commission's view, for the explanatory notes say this<sup>65</sup>:

The gist of theft is not the taking or the converting itself. These are only modes of doing what theft seeks to prohibit, that is, usurping the owner's rights — appropriating another's property. Hence clause 13(1) singles out appropriation as the kernel of the crime.

The essence of appropriation on this view is thus usurpation of the owner's rights. Does right include any right? The *Theft Act 1968* uses such a formula in order to ensure that the non-theftuous possessor who converts property which he holds commits theft. That situation is caught by the present *Criminal Code*, and would be caught directly by the *Model Penal Code* as well. Why alter the basic structure? Especially as the House of Lords formula both causes operational difficulties (when does a label switcher commit theft?) and makes it virtually impossible to reconcile the cases on when

61. *Criminal Code*, s. 289.

62. *Model Penal Code*, *supra*, note 14, s. 223.2(1) (2); *Draft United States Federal Criminal Code*, s. 1732.

63. *Supra*, note 2, p. 340.

64. E. GRIEW, *supra*, note 7, para. 2-58 n. 90 suggests that the phrase "adverse interference [...] or usurpation cannot properly be read disjunctively, but should be taken as referring to usurpation though. This, however would not fit the label switcher who fundamentally acknowledges the owner's title, but who hopes to obtain the property by perpetrating a fraud upon him.

65. *Supra*, note 3, p. 75.

appropriation occurs<sup>66</sup>. The label switching cases have, for example, been perfectly satisfactorily resolved in Canada; such conduct is regarded as an act preparatory to the crime of obtaining by false pretences, and the accused is accordingly arrested as he passes through the cashier<sup>67</sup>. Furthermore, it is at least odd that one of the concerns in *Morris*, that of whether appropriation can be a purely mental operation vis-à-vis the property concerned, a very old problem in the law of theft by a bailee, was not met by the Law Reform Commission to whose attention the point had earlier been directed<sup>68</sup>.

Conversely, there are obvious problems with the present law of theft which the proposed draft will not touch. Consistently with the old law of larceny, the existing theft sections are so construed as to reflect the historic distinction between false pretences and larceny by a trick<sup>69</sup>. Consequently, where the transaction serves to pass possession but not property, the crime is theft only<sup>70</sup>. Recourse to difficult doctrines of civil law is and will be inevitable. The undesirability of this has often been emphasized by English courts, whose well-meaning attempts to do so have produced notable distortions of doctrine<sup>71</sup>. The proposed draft, by using the phrase "another's property"<sup>72</sup> makes it inevitable that this will cause difficulty for, obeying the rule that the mental element and the external elements must coincide, a court will be obliged to inquire into the state of property right at the moment of appropriation<sup>73</sup>.

The Law Reform Commission's documents neither indicate that this problem was ever considered, nor that suggestions have been made to overcome it. It has, for example, been suggested that the problem might be resolved by providing that in all cases where a trick is used, ownership would not pass or the contract would be void, so that the result would be theft only<sup>74</sup>. Conversely, section 136(1) of the Ghana *Criminal Code* simply provides that if the owner or person having authority to part with a thing

66. See L.H. LEIGH, "Some Remarks on Appropriation in the Law of Theft After *Morris*", (1985) 48 *M.L.R.* 167.

67. *Regina v. Dawood*, 27 C.C.C. (2d) 300; *Regina v. Klopping*, 57 C.C.C. (2d) 574.

68. A. HOOPER, *supra*, note 13, p. 40; see further, L.H. LEIGH, *supra*, note 66, p. 172-174.

69. This distinction is presently recognised in Canadian law; *Regina v. Hemingway*, (1955) 112 C.C.C. 321; *Riga c. R.*, [1977] C.A. 408.

70. *Dawood*, *supra*, note 67.

71. *Morris*, *supra*, note 2.

72. Defined in proposition 1(2) to mean property that another owns or has any legally protected interest in.

73. For a short discussion of the problems encountered in England, see J.C. SMITH, *The Law of Theft*, 5th ed., London, Butterworths, 1984, paras. 35 s.

74. R.R. STUART, *supra*, note 1, p. 620.

gives consent to the appropriation of it by the accused, then, although such consent has been obtained by deceit, the accused person shall not be deemed guilty of theft, but may be convicted of having defrauded by false pretences. Consent, by s. 136(2) is an unconditional consent to the immediate and final appropriation of the thing by the accused person, by way of gift or barter, or of sale on credit to the accused person.

This sort of provision or the converse suggestion that property be deemed not to pass, has the merit of directing the police officer's or prosecutor's mind to the appropriate crime to charge. Admittedly, under English law, obtaining by criminal deception may be charged whatever the nature of the property interest obtained, but that has not prevented operational problems<sup>75</sup>. Under draft clause 72 of the Canadian proposal, the situation is, perhaps, even less clear, for it speaks of inducing a person to part with his property. This probably refers to possession, but is ambiguous enough to be interpreted as meaning the victim's property interest.

Further problems concern the case where the owner acts under a mistake of which the actor was aware, but which he did nothing to induce. It is well-known that in English law, the courts have not used the extended property attribution provisions of section 5, but have simply held, thus reforming the law in a rather unexpected way, that no property passes to an actor who takes with knowledge of the owner's mistake<sup>76</sup>. Taking under the owner's mistake has also proved to be a problem in Canadian law. In two cases an accused, who was erroneously credited by his bank with large sums, drew out the money and spent it. In one case, *Johnson*<sup>77</sup>, the accused was convicted of theft. It seems clear that Freedman, Matas, and Monnin J.J.A. considered that no property passed in the money, but without specifying their reasons. Their Lordships found it unnecessary to decide whether the theftuous act was the taking or the conversion. Hall J.A. relied upon *Middleton*<sup>78</sup> holding that the cashier's consent to pass the money was mistaken, and that the accused's dishonest taking advantage of her nullified her consent. Sullivan J.A. dissented. On the other hand, in *Lavery*<sup>79</sup>, admittedly a decision of a lower court, and on the same facts, the court held that the cashier had full authority to pass over the money and that any conversion took place after property passed. The crime could not, therefore, be theft. This decision founds, not unreasonably,

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75. *Lawrence v. Metropolitan Police Commissioner*, [1972] A.C. 626.

76. *Gilks*, 56 Cr. App. R. 734.

77. *Regina v. Johnson*, 88 D.L.R. (3d) 692, (C.A.).

78. (1873) L.R. 2 C.C.R. 38.

79. *R. v. Lavery*, 45 C.R. (3d) 93 (D.C. Ont.).

on the label switching cases which are premised on property having passed. Further to complicate matters, *Brochu*<sup>80</sup> seems to suggest that a person who receives property by another's error does not obtain title to it so that a later dishonest dealing with it can be theft. This, of course, runs counter to the English authorities, and seems at variance with common law doctrines concerning the passing of property<sup>81</sup>.

A further set of problems concern one who obtains goods for which payment is customarily required on the spot, and who drives off without paying. This is of course specially dealt with in English law<sup>82</sup>. The difficulty arises at self-service stations where the actor obtains gasoline or a similar commodity, without dishonest intent at that moment and therefore without employing a deception. If he then leaves without payment, there may be neither theft, for property passed before he formed a dishonest attempt, nor deception. The problem in essence is one of civil law; when did property pass? Canadian authority is robust. First, there is a disinclination to find that the accused may have acted honestly when putting gasoline into the tank. Secondly, and more questionably, it has been held that a service station retains a special property or interest in the gasoline until payment is made. But if property passed under the local Sale of Goods Act before the dishonest intent was formed, what property interest can the owner have? He has, surely, only a right to require payment<sup>83</sup>.

None of this is to suggest that the solutions embodied in the English *Theft Act 1968* should be adopted in Canada. I draw attention to them only because it is not obvious whether the Law Reform Commission has seen the problems. The matter is not simply technical. In a case where no deception is used, the question whether dishonest retention should be punished at all, and if so on what conditions, is of fundamental importance. In some cases, the answer is easy; no-one would have qualms about convicting the person who drives away from the gasoline pump without payment or excuse. In other cases, perhaps of an undefined restitutionary nature, where a person keeps property or proceeds which by virtue of the civil law he should return to another, the answer is more doubtful<sup>84</sup>.

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80. *Brochu v. The King*, (1950) 10 C.R. 183.

81. *Moynes v. Cooper*, [1956] 1 Q.B. 439; *Attorney-General's Reference (nº 1 of 1983)*, [1984] Crim. L. R. 570; see *Theft Act 1968* (U.K.), s. 5(4). *Brochu* does not appear to turn on any doctrine peculiar to the civil law of Québec.

82. *Theft Act 1978*, s. 3.

83. *R. v. Pratt*, (1983), 26 Sask. R. 268; see *R. v. Badger*, (1983), 19 Sask. R. 316.

84. See further, R.R. STUART, *supra*, note 1.

The Canadian proposals are also unique in not differentiating between movable and immovable property, or what can and what cannot be the subject matter of theft. The *Model Penal Code* and later American reform propose movable property as capable of theft by taking or by the exercise of control, but treat immovable property as capable of theft only by transfer<sup>85</sup>. The English *Theft Act 1968* is even more restrictive<sup>86</sup>. The Canadian proposals have the great advantage that any dishonest transfer can be brought within theft. One would not, for example, have to worry about the status of the transferor or the precise nature of any authorisation upon which he might rely.

On the other hand, there is no recognition of the reason which led the American Law Institute to reject a general assimilation of movable and immovable property, that is, the undesirability of including unlawful use or occupancy of land, perhaps by an overholding tenant, within theft. The rapporteur states<sup>87</sup>:

The immobility and virtual indestructibility of real estate makes unlawful occupancy of land a relatively minor harm for which civil remedies supplemented by mild criminal sanctions for trespass should be adequate.

The problem is surely potentially more difficult in Canada where, as the proposals now stand, intent to deprive temporarily will suffice for theft. Any temporary dispossession of my neighbour from any part of his property would, seemingly, fall within the theoretical ambit of theft, squatters would become thieves, and the police could be called upon to intervene in situations of social unrest to which the civil law seems better adapted.

A final point on property involves the status of confidential information. In both Canada and England it is held not to be property of the purposes of theft, and the reform proposals will not alter this<sup>88</sup>. Canadian law with its concept of temporary deprivation will at least protect against unauthorised removal for copying<sup>89</sup>. There is, no doubt, a need for an offence serious enough to reflect the gravity of much industrial espionage. Fraud, as defined in proposition 13(3) would not do. In such a case the victim would not necessarily be *induced* to suffer an economic loss or the risk thereof. In any event, the proposal does not seek to define or describe economic loss. It seems

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85. *Model Penal Code*, *supra*, note 14, s. 223.2; *Draft United States Federal Criminal Code*, s. 1741(f).

86. *Theft Act 1968* (U.K.), s. 4; J.C. SMITH, *supra*, note 73, paras. 87-112.

87. *Model Penal Code*, *supra*, note 14, p. 172.

88. *Regina v. Stewart*, 138 D.L.R. (3d) 73; *Oxford v. Moss*, 68 Cr. App. R. 183.

89. This clearly falls outside the ambit of section 6 of the *Theft Act 1968* (U.K.); *R. v. Lloyd*, [1985] 2 All ER 661.

doubtful whether all infringements of trademarks, patents and designs should be treated as crimes. Infringements of copyright are commonly treated as summary conviction offences both in common law and civil law systems<sup>90</sup>. But the infringements involved in these matters do not respond to traditional concepts of theft and fraud and, furthermore, need to be discussed in terms of policy, not resolved by artificial adaptation of concepts from seemingly cognate areas of criminal law.

## 7. Obtaining Services

Here, the Canadian proposal is in part loosely drafted. Clearly, the draft encompasses only services rendered for consideration. In that, it follows proposals elsewhere. The offence is, helpfully, so drafted as not to require a deception. It thus avoids the complications involved in specifying the mode of dishonesty and is clearly broad enough to encompass cheating a machine<sup>91</sup>. It is, furthermore, apt to cover the case where a person having control over the services of another, diverts them to his own use or that of his nominee.

The proposal is unsatisfactory in the following respects. First, "services" is left undefined. In this, it differs from the *Model Penal Code* which, admittedly, employs a wide residual definition of services as anything that can be classified as a service, but which specifically instances labour, professional services, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, the use of vehicles and other movable property<sup>92</sup>. No doubt most or all of these would be understood as comprehended within services, but it might nonetheless be better, from an operational point of view, to spell them out. Secondly, there may be virtue in the presumption of dishonesty contained in the American proposals which applies against an absconder where payment is normally made immediately after the services are rendered<sup>93</sup>. This is not, however, of critical importance; in most such cases, dishonesty will readily be inferred.

A third criticism concerns casting the offence in terms of not making payment, rather than in terms of obtaining services intending not to pay, or by means to employed to avoid payment. The draft presents two problems in

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90. A. MATTFELD, "Protection of Software Against Third Parties in the Federal Republic of Germany", 1 *Software Law Journal* 341 (1986).

91. A problem in England; see E. GRIEW, *supra*, note 7, para. 6-15; on the other hand, where theft of property is concerned the Australian High Court has held, in *Kennison v. Daire* 60 A.L.J.R. 249 that a cash dispensation by a machine which is dishonestly used by a person without an account does not pass property. Griew's statement may, therefore, be too wide.

92. *Model Penal Code*, *supra*, note 14, s. 223.7; note that neither the Draft Federal Code nor the English *Theft Act 1978* define the term.

93. *Model Penal Code*, *id.*; *Draft United States Federal Criminal Code* (1971) s. 1733.

this respect. The first concerns the use of "full" payment in both drafts of proposition 13. Draft clause 71 simply specifies that the person obtain a service "and does not pay for it." Is any different meaning intended? The first variant would exempt from the offence someone, however dishonest, made partial payment only. The second variant would enable the conviction of someone who dishonestly seeks to avoid partial payment for services rendered, perhaps because he has repented of his bargain. This needs explanation. Secondly, save in the case where compensation is usually made immediately, at what time does one conclude that services have not been paid for? Here, surely, is fertile ground for evasion on the one hand, bullying on the other, and operational confusion as police officers seek to determine whether a matter is or is not essentially civil<sup>94</sup>.

## 8. Fraud

Space precludes any extended discussion of either proposition 13(3) or draft clause 72 relating to fraud, but the following points may be noted. First, the crime is essentially a deception offence in the latter but not the former variant. If it is to be a deception offence it will be much narrower than the existing provision, section 338<sup>95</sup>. Secondly, it seems odd that both theft and obtaining services are cast in terms of "dishonesty" *simpliciter*, while fraud is cast in terms of false representations and omissions<sup>96</sup>. Third, as argued above, "to part with his property" is ambiguous. Fourth, the present *Criminal Code* provision concerning false pretences has a presumption against one who gives an n.s.f. cheque. Is the omission of this presumption intentional, or has it been overlooked? Finally, a point arising under draft clause 84, ought it not to be an offence to possess articles which could be used to forge cheques and credit cards?

## Conclusions

I am conscious that this is both long and incomplete. I have tried to locate those points of difficulty which Canadian experience and comparative research suggest may arise under the draft proposals. Inevitably, there is much that I have not foreseen and doubtless more that I have not appreciated. I have, I hope, said enough to assist the debate which the draft *Criminal Code* seems certain to provoke.

94. I would not contend that these difficulties are absent under s. 223 of the *Model Penal Code* or under s. 1 of the *Theft Act 1978*, but they are limited by the necessity of showing that the actor employed one of the means referred to in the provisions.

95. See in general J.D. EWART, *supra*, note 19.

96. In this respect it appears to owe parentage to s. 223.3 of the *Model Penal Code*. Indeed, the detailed drafting is such as to reproduce most of that measure's points.