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On the Nature and Rationale of Property Offences

A P Simster and G R Sullivan

There are a number of offences that we think of as being concerned primarily with the protection of proprietary interests. To be sure, many of the wrongs and setbacks that can accompany the invasion and loss of proprietary interests may also occur in circumstances not involving property. Harry may say, ‘It’s not that I mind Jane seeing Dennis, it’s the fact that she does not tell me that hurts.’ A similar damage to the security and depth of their personal relationship may occur when Diane truthfully reports: ‘I would have given Bob far more than that had he asked; I can afford it and wanted to help. But he just took the money without telling me and that I cannot accept.’ In these cases, the loss of trust, respect, and psychological security may follow similar emotional pathways and, for Harry and Diane, the salient outcome may be the same: Harry no longer trusts Jane and Diane no longer trusts Bob. Diane may feel no economic privation; in substance, her economic condition may be wholly unaffected by Bob’s conduct. But theft by Bob it was and it was only the deprivation of Diane’s property that made it so.

To the extent that proprietary interests are their marque, it is tempting to think that property offences are less serious than are crimes regulating injury to a person’s body. This may often, in practice, be the case, but it is not obvious they are systemically of a different order of seriousness. If a person were forced to choose between suffering a minor assault and losing his house, for instance, it is plausible that he would prefer the former. At least from a liberal perspective, and in common with any criminal offence, the protection of property rights must be justified ultimately in terms of the interests of persons. Suppose a company collapses following some massive corporate accounting fraud. The most important concern in such cases is not the fraud per se but its widespread and real implications for the lives of human beings: employees who lose their jobs, shareholders, pension fund

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holders, and the like. Whether or not the crime involves property, the same questions must always be asked about its legitimacy: how is enactment of this crime justified by reference to the interests of persons, either as individuals or as members of the community?¹ What rationale underpins the claim to state intervention on behalf of V and/or V’s community, to the detriment of D?

Moreover, the answers to those questions must satisfy the demands of the Harm Principle. In a liberal society, it is important that the state respect its citizens by fostering their opportunities to pursue goals and values which they have adopted for themselves. But criminal law constrains the choices available to us. It is an intrusive and expensive method of regulating the behaviour of a society’s citizens. Each new crime is inevitably framed in general terms, thereby inhibiting a wide variety of possible acts by individuals and restricting their opportunities to shape their own conduct, both short and long term. In so doing, it limits the range of prospects for autonomous and free choice, and has the potential to inhibit successful engagement with a person’s own, constitutive goals, regardless of whether those goals are themselves valuable.

Of course, this is only a prima facie reason against coercing someone to behave as the state would like. Battery, for example, is rightly prohibited, because there are reasons not to hurt others that defeat any autonomy-based reasons for permitting such activity. Yet this illustrates the very point of the Harm Principle: state coercion can be justified, but only when it is to prevent harm to other persons. The existence and enforcement of a crime harms D and others like D, both ex ante by restricting D’s freedom of action and ex post by penalising D when she transgresses. According to the Harm Principle, state intervention of this nature can be justified only by showing that acts of this type lead, directly or indirectly, to harm to other persons. As such, the principle mediates conflicting individual interests within a society. I should be left free to act, at least until my acts collide with yours. And even when such a collision occurs, regulation may not be a matter for the criminal law—it may suffice for the protection of those interests to rest with civil remedies.

Any defence of property crimes, therefore, requires us to identify some harm that is addressed by each crime, and to show that the harm is sufficiently important to outweigh countervailing considerations, including considerations of individual liberty, which militate against state intervention. Moreover, while it is, on this view, no part of the state’s role to enforce morality per se, the account must also show how it is that the victim of the crime has been wronged.² The Harm Principle provides for protection

¹ Where one’s interests, we take it, comprise the things that make one’s life go well. See J Feinberg, Harm to Others (New York: Oxford University Press, 1984) 34; A P Simester and A von Hirsch, ‘Rethinking the Offense Principle’ (2002) 8 Legal Theory 269, 280–1.
against only those losses and setbacks that D was not entitled to inflict on V. Suppose that D steals an old shirt from V. The shirt is worthless and of no use to V; in fact, V normally throws out his old clothing and has forgotten about the existence of the shirt. Its misappropriation affects him not at all. Further, D is destitute and in great need of clothing. Yet V is wronged by D; and V wrongs no-one if, later, he discovers the loss and selfishly recovers his garment from D. V’s act of reclamation falls outside the scope of the Harm Principle because, although D’s welfare is damaged when he is deprived of the shirt, he has lost nothing to which he had a right.

1. Protecting the Regime of Property

In our view, it does not suffice to point to the violation of the property right per se as the wrongful harm that warrants state intervention. That would lead to a circularity about the application of the Harm Principle to violations of such rights because, in most modern societies, property rights are not pre-legal. This is not to deny that the legal structure of property rights may, analytically and historically, be a development of pre-legal norms and rights: conduct aimed at achieving dominion over resources and territory may exist before (or outside) any legal recognition of proprietary interests. Rather, our claim is that the recognition and delineation of propriety interests is itself a matter of legal rules, and moreover of rules that have varied considerably across different periods of social and common-law development. As a formal category, property is quintessentially legal. I don’t need the law to know that this arm is mine; but I do need the law to know that this is my table, or that this house is yours. Indeed, in the case of non-corporeal assets such as patents and shares, the very identification of such things as susceptible of ownership is dependent on law. Within the terms of the Harm Principle, interference with another’s property rights constitutes a prima facie harm. But it constitutes a harm the existence of which depends on a determination by the state—and, without more, its legitimate protection by the criminal law would be weakened by circularity. To invoke the Harm Principle successfully, we must demonstrate that the protection of property by the criminal law rests on values other than protecting property rights for their own sake.

It might be thought that this is mistaken: that it is one question whether the state justifiably creates and maintains an institution of property, where

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3 Related examples are discussed by J Gardner and S C Shute, ‘The Wrongness of Rape’ in J Horder (ed.), Oxford Essays in Jurisprudence (4th series, Oxford: Oxford University Press, 2000), 193, 201 and A P Simister and A von Hirsch, n. 1 above, at 282. A practical illustration is the Scottish case of Dewar v H.M. Advocate 1945 SLT 114 (HJC), drawn to our attention by Victor Tadros, D, the manager of a crematorium, was convicted of theft for removing (and putting to ‘various lucrative uses’) the lids from coffins immediately before they, and their contents, were consigned to the furnace.
the answer to that question need not rely on the Harm Principle; and that it is a second, distinct, question whether that institution of property should be protected, in part, by the coercive power of the criminal law. For most liberals, the Harm Principle is obviously crucial to that second question. Yet some might doubt whether there is vicious circularity in appealing to a harm whose existence is determined, not by the criminal law (clearly that would be circular), but by the state’s pre-criminal institutions.4

Yet the circularity remains, and it is revealing to see why. Even on a two-tier analysis, the state’s claim to deploy criminal law remains self-justifying, so long as the occurrence of the harm depends on law. Separating the institution of a property regime from its enforcement cannot evade that difficulty. However, it does suggest a way forward. The circularity can be dissolved once it is seen that, notwithstanding Feinberg’s formulation, the Harm Principle constrains other forms of state intervention besides penal legislation. Mill’s parameter for state action, that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’,5 applies also to the coercive sanctions of the civil law.6 Hence the state ought not to give effect to a regime of property at all, even through the civil law, unless to do so is consonant with the Harm Principle.

The move away from circularity is therefore made by establishing that, in the circumstances of the particular jurisdiction under discussion, the law of property facilitates the creation of forms of welfare and human flourishing that would become unattainable should that institution be lost. Where this is so, the Harm Principle is brought into play by the property regime itself. The regime itself serves our well-being; it provides a reliable means by which we can pursue a good life, through the voluntary acquisition, use, and exchange of resources. Having such a system may promote our well-being even if the particular form of the regime is imperfect, provided the community as a whole benefits by having a predictable, reliable, set of rules with which to organise their lives.7 Assuming minimum standards of just distribution of property, the proprietary regime is a public good.

Absent state intervention, however, the regime would be ineffective, and its ineffectiveness would result in lost opportunities for personal and social advancement through reliable coordinated economic activity, and for other forms of welfare and personal realisation that only the peaceful ownership and possession of property can deliver. Preventing that community-wide harm justifies state intervention to enforce the institution of property. Thus

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4 Thanks to Antony Duff for pressing us to address this objection in greater detail.
misappropriating V’s old clothes harms not only the interest, if any, that V has in the clothes; it also undermines the regime by which V’s property right in the clothes is recognised. It does so even if the survival and functioning of that regime is ultimately, on this occasion, unaffected by D’s wrong. The undermining is both immediate—through D’s denying, or at least failing to recognise and respect, the demands of that regime—and indirect: absent some reason for treating D’s case as special (e.g. in circumstances of necessity or emergency) the widespread replication of such conduct by others would tend to damage the operation of the regime itself.

By prohibiting crimes such as theft, the criminal law both protects individuals from any particular loss they may suffer, and safeguards the regime of property law more generally. Those who steal attack the practices of creating and exchanging property rights. In doing so, they set back the dependability of proprietary entitlements; which, in turn, restricts the ability of property owners to plan their own lives, relying both on the property rights they have already and on the expectation of being able to improve their lives by formulating proprietary transactions in the future. Protecting against these outcomes is an appropriate use of the criminal law. Even though the civil law provides a regime for the enforcement and defence of property rights, those rights receive extra protection and security from the criminal law. No doubt V can sue D in the civil courts for the unlawful taking of, say, his car. Sometimes, however, leaving V to his own devices in terms of self-help and civil redress would inadequately protect his property and, by extrapolation, the system of property rights as a whole. This is partly a pragmatic point: mobilising public resources to protect private property augments deterrence and means that V can report his loss to the police who, at least in theory, will assume the task of seeking out D and the stolen property while V gets on with his own affairs. But it is also symbolic: the proprietary regime is reinforced by public denunciation of proprietary usurpations.

As we intimated earlier, our argument accepts that violation of a property right may harm the victim directly. However, the harm is parasitic. It provides a justification for intervention only once it is accepted that the institution of property should be defended by the state. Once the case for a regime of property rights is accepted, further more specific harms may be crystallised by the rights themselves. Those more specific harms do not justify state intervention unless and until the regime by which they are created is itself justified. They cannot stand by themselves. Suppose, for example, that D rejects her society’s convention that persons may be owned and sets out to usurp V’s ownership of some slaves by helping them to escape. Although, within the terms of that civil legal system, V’s interests are set back, any version of the Harm Principle rooted in liberal, inclusive values cannot justify the proscription of D’s conduct.

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8 Cf. Dewar, discussed above, n. 3.
On the other hand, once the case is made for establishing (and then reinforcing) a system of proprietary rights, the more specific harms crystallise and can be relied on to justify particular offences. If D steals V’s car, he wrongs V because the car is V’s—only in virtue of this legal fact does V have a right that D not take the car without V’s consent. Yet once that right is acknowledged, and the state has regime-based reasons for enforcing rights of that sort, V in particular can then claim to be harmed by D’s theft. The existence of this harm creates a further reason for coercive state intervention. V has lost a valuable resource, diminishing the means and opportunities with which he may enjoy a good life. As such, V’s proprietary rights need not be ends in themselves, they function not only to mark out what conduct by D counts as a wrong but also to allocate the instrumentally valuable resources that conduce (at least in standard cases) toward V’s well-being.

In what follows, we take preliminary steps on two projects. In § 2, we discuss the nature and rationale of what might be regarded as the paradigm proprietary offence, theft. In light of our arguments concerning the importance of property regimes, we will consider the legitimate boundaries of theft and its subordination to the civil law of property. The remainder of the paper then builds on the discussion of theft, by investigating what work there is to do for other property offences. In § 3, we consider criminal damage and the grounds for distinguishing other property offences from theft before closing, in § 4, with a brief survey of the justification, within the constraints of the Harm Principle, for enacting other familiar property offences.

2. Theft

Theft is one of the few ‘pure’ property offences, in that the wrong of theft is intimately bound up with the harm. It is the very misappropriation of property, without claim of right to it (or any other justification or excuse), that constitutes the gist of the offence. Of course, the statute books know many other offences that protect proprietary interests, and which are defined in terms of specific ways of acquiring or causing loss of property. One commits an offence, for example, if one dishonestly obtains property by deception.\(^9\) Robbery is perpetrated if force or the threat of force is used to take property from another.\(^10\) An offence of burglary occurs if a building is entered with intent to steal.\(^11\) D is guilty of blackmail if he makes a demand for money backed by threats.\(^12\) Although these offences are very much part

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\(^9\) See, e.g., Theft Act 1968 (UK), s. 15; Crimes Act 1961 (NZ), s. 246. Except where otherwise indicated, references to the Crimes Act 1961 (NZ) are to the Act prior to overhaul of the part containing the property offences in 2003.

\(^10\) See, e.g., Theft Act 1968 (UK), s. 8; Crimes Act 1961 (NZ), s. 234.

\(^11\) See, e.g., Theft Act 1968 (UK), s. 9; Crimes Act 1961 (NZ), s. 241.

\(^12\) See, e.g., Theft Act 1968 (UK), s. 21; Crimes Act 1961 (NZ), ss. 238–9.
of the law’s protection of proprietary interests, none of these offences is a ‘pure’ property offence in the manner of theft. The nature of wrongdoing implicit in these offences is exemplified by rather than limited to the gain or loss of property. D1 can deceive V either into giving her money or into a ceremony of marriage. D2 can threaten force in order to either take V’s money or make V have sex with him. D3 can trespass in V’s house with intent either to steal her record collection or to inflict bodily injury on her. D4 can threaten to expose V’s criminal past either to gain money from him or to induce him to fire D4’s rival for an upcoming post. 13 Unlike the taking of property in theft, these wrongs, and these offences, are not bound up purely with the violation of proprietary rights. It is with the intrinsically proprietary offence of theft that we begin.

The Gist of Theft

The essence of theft is to misappropriate, with intent to deprive,14 property to which one is not legally entitled, and to do so without justification or excuse. As such, theft is concerned directly and primarily with protecting the legal structure of proprietary entitlements. Imagine V, a misanthropic billionaire who has inherited and not created any of his wealth. He has withdrawn all his money from his investments, trusts, and bank accounts and stacked the cash away in cardboard boxes that litter the floors of his grim mansion. He is determined that no-one shall have any use or pleasure from his wealth and has resolved that when his time is nigh, he will immolate himself and his cash.15 D is V’s selfless home-carer. Although paid a pittance by V, out of the goodness of her heart she ministers to V’s needs beyond any call of duty. From time to time, she takes cash from one or other of the boxes, never for herself, but to ease the path of friends and acquaintances who are in dire economic straits. There is no profligacy in this: she takes enough, just enough, to stave off the worst consequences of the privations that afflict the people she helps. D is a thief; a thief despite the fact that V knows nothing of D’s takings and is unharmed psychologically by what D has done, and despite the fact that, for him, the financial loss is de minimis in every conceivable sense. She has misappropriated V’s property, usurped his property rights without his consent; no more is required. This conclusion follows, as we shall argue, even where D acts with a degree of selflessness and concern that

13 Prior to 2003, this alternative would have fallen outside the terms of ss. 238–9 of the Crimes Act 1961 (NZ); but it now lies within the scope of s. 237.
14 In most jurisdictions, with intent to deprive permanently. Contrast, in Scotland, Strathern v Seaforth 1926 JC 100. The exclusion from theft of dishonest borrowing is partly, we take it, designed to prevent liability for de minimis interferences with property. For discussion, see A P Simester and G R Sullivan, Criminal Law: Theory and Doctrine (2nd ed., Oxford: Hart Publishing, 2003), § 13.7(i)(a).
15 We disregard any complications that may arise from offences of destroying currency.
would be vindicated as ethically correct under many versions of community morality.

The example illustrates that the immediate victim of a theft may be harmed in a wholly conventional sense, without suffering any substantive disvalue or setback of human interests. Across a range of different cultures and circumstances, outcomes such as death, injury, physical and emotional pain, extreme discomfort, paralysing fear, bereavement, etc., are unequivocal—and pre-legal—harm. Although it does not follow that the infliction of such harms is always wrong, or that their categoric prohibition is justified, it may readily be agreed without reference to the law that a person who is badly physically or emotionally hurt is, while that condition endures, worse off than when her usual circumstances obtain. By contrast, and while D’s conviction for theft may be justified in terms of protecting the proprietary regime itself, V is a victim only formally.

Violations of the ownership, control, or possession of property need not always set back the interests of an agent whose rights have been contravened. Of course, sometimes a loss of property may have devastating consequences for the nature and quality of an agent’s life. Yet the accretion of property may have no beneficent effect on the quality of life or moral standing of an agent. Take the misanthropic billionaire: no doubt from Aristotelian and communitarian perspectives his life and moral standing would improve immeasurably if, after some ghostly visitation, he were to give away the bulk of his fortune in well-judged and effective acts of philanthropy. Moreover, it may be argued from these moral perspectives that, absent any re-enactment of The Christmas Carol, D, his housekeeper, should have taken even more of V’s money and redistributed it to the needy. It seems an inversion of sound moral judgment to castigate her as a thief. If she is to be criticised at all, it might be for her failure to take more of his money before he, his mansion, and the money went up in smoke.

Immorality, Redistribution, and Dishonesty

How might one bring a claim that the housekeeper has not acted wrongly within the ambit of a denial that she has committed the wrong of theft? Characteristically, conviction for theft requires proof that, in appropriating

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16 Provided ‘interests’ is given meaning beyond a circular definition that refers to the loss of property rights per se: above, n. 1. Contrast Feinberg’s discussion of bare trespass in Harm to Others (n. 1 above) 107, criticised in Simser and von Hirsch, n. 1 above, at 284. Even so, it may be that such wrongs standardly cause harm. Given that criminal prohibitions are unavoidably rough-grained, it may be necessary to frame prohibitions in terms of benchmark cases. (Similarly, prohibitions of dangerous activities, such as speeding, tend to be framed on the basis of typical risks, ignoring the context of every transgression.) As such, if theft normally harms its immediate victims, and provided the property regime is defensible generally, we have reason within the terms of the Harm Principle to enact a general prohibition.
V’s property with intent to deprive V of that property, D acts dishonestly.\footnote{At least historically: see, e.g., Theft Act 1968 (UK), s. 1; Crimes Act 1961 (NZ), s. 220 (‘fraudulently’). But contrast Model Penal Code, § 223.2; Crimes Act 1961 (NZ), s. 217 (as amended).} Prima facie, it is this mens rea requirement that introduces the element of moral obloquy into theft, making the wrong of theft something more than a mere usurpation of V’s property rights. Remediing mere usurpations, it might be thought, is the task of the civil law. Criminal law, by contrast, requires something more: a moral wrong, sufficient to mark out that usurpation as deserving condemnation and punishment.

Curiously, however, ‘dishonesty’ is an amorphous concept that lacks clear delineation. The English statute, for example, offers only a partial definition of non-dishonesty: a finding of dishonesty cannot be made if D takes property in the belief that it is lost property and the owner cannot reasonably be found; or that he has the right in law to take and keep the property; or that the owner would consent to his taking the property.\footnote{Theft Act 1968, s. 2(1).} It will be noted that none of these negations of a finding of dishonesty involves any challenge to the justice or conscionability of any particular ownership of property or, in general terms, to the overarching societal distribution of property rights. All these negations fit snugly with the legal proprietary framework: the property was lost, or thought by D to be his own, or taken with V’s assumed consent.

But these provisions determine only some cases where findings of dishonesty cannot be made. In other situations, the issue whether D was dishonest is left at large. To the extent that it admits of further definition at all, the general test for dishonesty is said to go beyond a mere examination whether D believes his conduct is legally innocent or justified. In England, the fact finder should ask whether what was done was dishonest according to ‘the ordinary standards of reasonable and honest people’; and if so, whether D realised that what he was doing was, by those standards, dishonest.\footnote{Ghosb [1982] QB 1053, 1064.} It will readily be understood that this test could be applied to exonerate the housekeeper, D.\footnote{Similarly, in New Zealand prior to 2003 it sufficed to exculpate the defendant that she genuinely believed she was justified in departing from her legal obligations, such that the jury might conclude that her legally wrong conduct was never the less honest: Firth [1998] 1 NZLR 513, 519 (CA); Williams [1985] 1 NZLR 294, 308 (CA); Coombridge [1976] 2 NZLR 381, 387 (CA). This possibility has now been excluded by a statutory definition of dishonesty: see s. 217 (as amended) of the Crimes Act 1961 (NZ).}

Yet, assuming that V is a competent adult, the finding that his property may be taken by others acting without his consent and without a claim of (legal) right, in anything other than tightly defined emergency situations, amounts to a rejection on broad moral grounds of the incorrigibility of V’s rights to his property.\footnote{This is, in effect, the view taken by the New Zealand legislature (ibid.), which now defines the theftuous requirements that D act ‘dishonestly and without claim of right’ as acting, respectively, without belief that consent has been given and without belief that the act is legally permitted.} D’s claim is subversive of the proprietary regime,
the regime it is a function of the law of theft to uphold; it is, in effect, a claim
to be a legitimate agent of distributive justice. The sheer cogency of her
claim (and a myriad of similar claims) that the persons she helped required
and deserved help demonstrates why such a plea cannot be allowed. It is
of interest that the test of dishonesty in English law, while giving rise to
musings about a ‘Robin Hood’ defence, has been circumspectly applied.
In practice, it is available only when D takes V’s property while still
acknowledging V’s ownership. So, a strapped-for-cash employee may be
able to contest her dishonesty if she takes an unauthorised advance payment
of wages, acknowledging her taking by an accurate I.O.U. and believing that
she will be able to make repayment. While leaving cases of that kind to the
jury has been criticised for undue laxity, at least outright claims to V’s
property on the grounds of moral entitlement are avoided.

The criminal law, as currently conceived, cannot readily accommodate
claims of moral entitlement or disentitlement to property. It takes as a
datum those property rights recognised and enforceable at civil law.
Acknowledging claims to have acted honestly, even in cases as extreme as
the billionaire and the housekeeper, imports a moral element into the
security of property ownership. It is exceedingly difficult to place limits on
this morally driven incursion into property rights. This is not to say that the
recognition of property rights is normatively insensitive: but issues of dis-
btributive justice are questions affecting the design of a property law system
and the recognition of rights within that system, not questions to be revisited
at the point of protection and enforcement of that system. They are matters
for property law, tax law, and the like; not for the criminal law. Within the
framework of theft, harm (both to V and to the proprietary regime) is
constituted by the unauthorised appropriation of V’s property; it becomes a
wrong simply in virtue of being deliberate and with intent to deprive. The
wrong is, thus, derived from the harm—it is because the property is V’s that
D wrongs V when she interferes with it. With the exception of defences
arising out of, for example, emergency and mistake, the criminal law must
accept the distribution of property recognised and enforceable at civil law
and protect that property through its blaming and coercive mechanisms.

This can show the criminal law in its most unattractive light. The saying,
‘possession is nine-tenths of the law’ is, suitably adapted for this context, an
understatement. Some extreme forms of libertarianism will defend all
measure of material inequality to the hilt. By contrast, one need not hold
with Proudhon that all property is theft to be discomfited by the posture of
Anglo-American criminal law as the unyielding custodian of the proprietary
rights of unequal, divided societies. Admittedly, one may point to the

23 An egregious exception is Police v Minihinack [1978] NZLR 199, discussed in A P Simmer
§ 19.4.2(1).
destabilising, even tumultuous, effect on civic order that any ‘help yourself’ message may bring if issued by an authoritative court, however guarded and circumspect the terms of the message might be: changes in the distribution and ownership of property should be determined by the political and legislative process and not by the courts. But if the existing, asymmetrical, distribution of material goods in a society is unjust, the criminal law can only compound that injustice. In all important respects, the law of theft is the protector of the status quo. That status quo is, in large part, defined by the civil law.

Theft and the Boundaries of Property Law

We have suggested that, in terms of the recognition and protection of property, the criminal law is dependent upon and posterior to the civil law. In so far as the actus reus of theft is defined in terms of ‘property’, the range of economic interests buttressed by the criminal law will expand or contract according to developments in the civil law. For example, the taking of a bribe might formerly have led only to liability for offences of corruption. But receiving a bribe may now also be theft, following a common law decision that the proceeds of a bribe given to the agent of a principal are the property of the principal; hence the retention of the property by the agent against his principal falls within the compass of theft.

The civil law of property is constantly evolving, leading inevitably to speculation whether particular forms of economic value constitute forms of property. Against that backdrop, it may on occasion be appropriate for the criminal law to resolve by stipulation whether, for the purposes of the law of theft, certain interests are to be regarded as proprietary in nature, especially where the question is contested at civil law. Such ‘deeming’ provisions are useful for the avoidance of doubt that may arise at the margins of property law. In the absence of stipulative provision, moreover, it is appropriate for criminal courts to resolve any doubts about the coverage of the civil law in favour of the accused. For instance, it may be that there are property rights in certain kinds of confidential information. None the less, a criminal court can legitimately decline to rule about so contested a civil law matter and assume a state of the civil law favouring acquittal; as when it is assumed that for a student illegitimately to borrow a confidential examination paper, and return it after photocopying the contents, does not comprise the theft of any property.  

24 See, e.g., Theft Act 1968 (UK), s. 4(1) (‘money and all other property, real or personal, including things in action and other intangible property’); Crimes Act 1961 (NZ), s. 217 (‘everything which is the property of any person’).
26 See, e.g., Theft Act 1968 (UK), s. 5(2)–(4); Crimes Act 1961 (NZ), ss. 218–19.
These interstitial clarifications do not alter the essential dependence and subjugation of the law of theft to the civil law of property. If, as we have argued, the harm of theft is the misappropriation of a person’s property and the wrong of theft is to take property without claim of right to it and intending to keep or dispose of it, the subservience of the criminal law to the civil law comports with this state of affairs.

It is logically possible, however, for the criminal law to be more profoundly at odds with the civil law in respect of the protection it may extend to certain sorts of proprietary interests. For instance, a legislator might appease certain pressure groups by, say, legislating that the taking of a person’s money earned by way of gambling, prostitution, or the performance of abortion, is not to be regarded as theft; so that the criminal law has different standards from the civil law and will not protect property rights obtained in certain ways. Yet while it may be possible logically to provide that certain property rights can only be enforced by way of self-help and civil redress, and that other public resources will not be mobilised in their defence, the overarching policy of the law as a whole would be undermined by this move. In a state where the law of theft had been amended in that way, D could enter the house of V, a prostitute, in order to take her money without perpetrating the crime of burglary: if he believed her money to be the proceeds of prostitution he would not intend to steal and would commit only a tort of trespass. V, presumably, could use reasonable force to protect her property, but could not call upon the police to help her prevent the commission of a crime if D intended to take the proceeds of prostitution and nothing else. While such a state of affairs is legally possible, there are cogent reasons for thinking it undesirable. The underlying rationale for protecting property rights via the criminal law applies to these cases too: arguments about the recognition of property rights belong in the civil law, and their resolution there should be authoritative.

An even more subversive possibility is the obverse scenario, contemplated recently in the English case of Hinks,28 where the House of Lords was prepared to put the criminal law directly at odds with the civil law concerning the rules of ownership. D was convicted of stealing cheques and money from V. It was accepted that the property passed from V to D by way of gifts valid at civil law; so that, in civil law, D owned the money she stole. How, then, had she stolen it? Because, apparently, within the domain of criminal law, title to the money remained with V at the point of the theft. One may concede that, in the circumstances, it was dishonest of D to solicit and accept the gifts. (V was said to be a gullible man of somewhat limited intelligence.) Yet even if we acknowledge D’s dishonesty, how, at one and the same time, could title to the money be vested in D under civil law yet remain with V for the purposes of the criminal law? One might defend this

possibility by arguing that the policies and protected interests of the civil and
criminal laws can diverge: the civil law may be concerned primarily with
certainty and the security of transactions, whereas the criminal law may be
more concerned with the protection of the vulnerable and the punishment of
dishonesty. Hence, in the civil law, property could be vested in D while still
belonging to V, for the purposes of the criminal law, in order to convict D of
theft. Hinks, in effect, invents a new category of property that can be owned
solely by one person at civil law and owned simultaneously by another
person at criminal law. The criminal law property right will trump the civil
law right, at least in criminal proceedings held to determine whether D stole
from V when acquiring a valid title to the property.

The disruptive potential of this possibility may be illustrated by an
example discussed in Hinks itself. Suppose D sells his roadside petrol station
to V, without disclosing that planning permission has been granted for the
building of a bypass road—which, when built, will divert most of the traffic.
The contract would be valid under English law; there was no special relation-
ship between the parties, no duress or undue influence, no mis-
representation. Yet a majority of the House of Lords was prepared to accept
that, if dishonest, D could have stolen the consideration he receives.

The argument has so far been made that it is in the nature and rationale of
the law of theft to protect the proprietary status quo, a status quo consisting
of the proprietary rights recognised by civil law. Hinks turns this on its head,
placing the criminal law in opposition to the civil law where acquisitions of
property through indefeasible civil law transactions contravene community
standards of honesty. While the academic response to Hinks has been pre-
dominantly hostile, the decision has its defenders. In the eyes of its
supporters, its major merit is the very lack of subjugation of the criminal law
to the civil law that has been argued for here. The decision has been per-
ceived as a wedge whereby communitarian and public values of the criminal
law (as assumed) can militate against the private and commercial concerns
of the civil law. Which, of course, they can, in specific targeted contexts such
as consumer protection legislation. But not by the law of theft. If the
behaviour in Hinks was wrong, it was a wrong of exploitation. It was not the
wrong of stealing.

For those who criticise the decision, one ground of complaint is the
deployment of the concept of dishonesty to segregate non-criminal from
criminal transactions. And it is, we think, undesirable for rule of law reasons
that this amorphous and vague concept should bear very significant weight.

29 See, e.g., the notes by J C Smith at [2001] Crim LR 162; A T H Smith, ‘Theft Or Sharp
one’s own Property’ (1999) 115 LQR 372.
30 S C Shute, ‘Appropriation and the Law of Theft’ [2002] Crim LR 445; A Bogg and
See also S Gardner, ‘Property and Theft’ [1998] Crim LR 35.
Yet the deeper concern about this possibility is the threat it poses to the coherence of the scheme of property protection provided by the legal system as a whole. A manageable law of theft can, in substance, concern itself only with corrective justice. That is to say, it must respond to situations where D has misappropriated V’s property lacking any belief in a claim of right or any other justification or excuse. It cannot, reverting to the housekeeper and the misanthropic billionaire, deflect allegations of theft by hearing arguments that those for whom D acted were more deserving of the property than V; it cannot, in other words, listen to arguments based on distributive justice, particularly in cases of self-help.

The ramifications of the approach in Hinks lead one rapidly into destabilising questions of distributive justice. Consider, in our earlier example of the sale of the petrol station, the position of T who is aware of all the circumstances of the sale. He knows D will use the proceeds to purchase T’s yacht. By accepting this money, does T commit the crime of handling stolen goods? If the answer is affirmative, this effectively lays down rules of just distribution rather than correcting any wrong done to V. We assume here that V cannot recover the money at civil law from D or from anyone who accepts the money with notice: if the transaction between D and V is valid at civil law that assumption should follow. Yet were we to hold that a civil law transaction involving theft by one of the parties is thereby vitiated, we would indeed be in a vicious circle. We would then be committed to holding that the dishonest acquisition of any property is theft because there is no entitlement to such property at civil law. The cart would be driving the horse.

Theft, Fraud, and Property

Historically, theft—larceny—required a physical interference with tangible goods.31 The paradigm case of larceny exhibited ‘manifest thievery’, an overt unauthorised taking of another’s property.32 Larcenous incidents had implications for safety and security; they were unsettling interruptions to the normal flow of events. By contrast, fraudulent conduct was something that required investigation to reveal its true nature.

In modern societies, however, a myriad of valuable assets take incorporeal form, and theft now includes the appropriation of intangible property. Consequently, there may be nothing ‘manifest’ about many acts of theft. Suppose that a bank official knowingly transfers funds electronically from a customer’s account to an account in another bank opened by a company in which he has a financial interest. His conduct may be indistinguishable externally from the conduct of normal business; yet it may be

31 Cf. Larceny Act 1916 (UK), s. 1(1) (‘takes and carries away’).
described either as a theftful taking or as a fraudulent abstraction with no significant loss of nuance. In modern economies, theft is an important offence to be used in combating commercial fraud.

This raises the question: is it intrinsic to theft that it requires an appropriation of property? The line between intangible assets constituting property and other, non-proprietary, forms of economic value can be very hard to draw. Furthermore, when drawing that line, the question of the appropriate parameters of theft is rarely at issue. Typically, the matter is determined by civil law considerations such as the intention of the parties, commercial expectations, priorities in liquidation, taxation implications, and like. That classification decision may have no bearing on D’s culpability, or on the measure of harm done to V. Suppose, for example, that D manages a series of investment schemes from which, over a number of years, he abstracts millions of pounds for his own use. D is charged with the theft of this money. Proof of this charge would require that investors retain an equitable proprietary interest in the money that they place in these funds. If, instead of proprietary rights, they merely have a contractual right to payment of dividends and lump sums when departing from the scheme, theft cannot be shown because D will not have appropriated property belonging to another. Depending on fine points of the deed of investment, D might leave court a free man despite massive deprivations of the funds and the ruin of many of his clients. Either way, moreover, the gist of his wrongdoing remains the same: dishonest abstraction of funds to the detriment of his investors.

Should, then, theft embrace the appropriation of all forms of intangible economic value and not just property—should a general fraud offence be spliced into the crime of theft? The boundary between proprietary and non-proprietary intangibles is frequently tentative and mutable, and may not track any principled divide between those appropriations that should be made criminal and those best left (if at all) to civil law redress. A conceptually coherent and morally defensible version of theft could admit non-proprietary abstractions within its ambit.

None the less, there are pragmatic reasons for confining theft to property. There may be considerable dispute whether certain forms of intangible economic value should be protected by the criminal law or, if so, protected by an offence more specific and fine-grained than theft. For example, a case can be made that existing copyright and patent regimes inadequately control the misuse of valuable information (such as confidential client lists). Yet misconduct such as exploiting confidential information can raise complex

34 Barlow Clowes (No. 2) [1994] 2 All ER 316 (HL).
35 Neither need he have committed any other offence; investors need not have been induced to invest by any deception, and there need be no collusion with others to support a charge of conspiracy to defraud; false accounting charges and other financial regulatory offences are often hindered, as they were in this case, by the offshore location of the funds.
issues of fair competition, access to markets, free movement of employees, and freedom of speech. To the extent that such questions are significantly more complex in the realm of non-proprietary economic value, they may be better mediated by more fine-grained and specific legislation, and not simply overpainted by the broad brush of theft.

A move of this sort would reflect the fact that, even in commercial transactions, the classification of criminal wrongs will not always track the definitions of ‘property’ that serve the aims of the civil law. Many wrongs that arise in property-related contexts, such as exploitation or unfair competition, are not themselves proprietary wrongs and should not be categorised as such. Insider trading, for example, is not theft. It is not really a property offence at all. Rather, it is a covert transactional wrongdoing of exploiting market conditions through unequal access to information. D does not violate V’s property rights in the shares. He buys them. But he cheated.

3. How Many Property Offences other than Theft do we Need?

One might question whether, if sufficiently widely defined, ‘theft’ is the only form of property offence required by legal systems in the Anglo-American tradition. To be sure, the protection of property would be incomplete without supporting inchoate and substantive-inchoate offences. Offences of conspiracy and attempt are supplemented by the offence of going equipped for stealing, for example. Additionally, we require offences proscribing conduct ancillary to theftuous activity, such as false accounting and suppression of documents. Necessary too is an offence of handling stolen goods, to discourage commerce in stolen goods. There are also offences that deal with non-proprietary forms of value. Yet, in terms of core property offences, one might think that a sufficiently widely drawn offence of theft, with its supporting offences, is arguably all that the law needs to cover wrongful violations of property rights.

Is that enough? It seems to us that there are ways of interfering with property which manifest wrongs distinct from the wrong of theft. Further, some varieties of proprietary wrongdoing lead to particular harms that differ from theft generally. As such, these wrongs should be reflected in the calendar of offences; particularly where they merit, on a systematic basis, more (or less) severe punishment than theft.

A Second Core Offence: Criminal Damage

One of the most important instances is criminal damage. Like theft, criminal damage may be regarded as a ‘pure’ property offence, in that it is intrinsically bound up with the violation of property rights. The intentional or
reckless damaging of another’s property suffices to establish the wrong. Moreover, like theft, criminal damage may be perpetrated whether or not there is any setback to the interests and well-being of the immediate victim. Assume, for instance, that the mansion of our misanthropic billionaire is situated on an enormous estate. V has instructed his housekeeper to keep to the paths. None the less, she regularly walks across a patch of grass to take a substantial shortcut to her work. Consequently, the grass on the route that she takes becomes flattened and bruised. V does not know this as he never ventures out; indeed, because he receives no visitors only D is aware of the despoliation. There is no impact on the economic value of the mansion and grounds. Yet D has committed the offence of criminal damage, a result that can be defended, mutatis mutandis, on the same grounds that defend her conviction of theft when she takes V’s money.

Even though theft and criminal damage are not coextensive (as our example in fact illustrates), their rationales are similar: like theft, criminal damage typically involves both a direct violation of V’s proprietary rights and an indirect undermining of the proprietary regime. Why not, then, proscribe them with just a single, unified, crime? To deprive the owner of a chattel by destroying it can be the actus reus of a theft; why not broaden this result to cover damage as well, by enacting (say) a generic offence of criminal interference with property?

One reason is that the manner of deprivation is characteristically different. While criminal damage can be committed in the pure form conjectured above, many typical instances of criminal damage involve forms of vandalism employing percussive force, fire, or explosions, conduct that may well cause alarm and concern even to bystanders lacking any proprietary interest in the property being damaged. To that extent, the offence becomes part of the family of offences concerned with restraining violence and disorder—concerns generally outside the ambit of theft, save for lootings in circumstances of civil tumult. And, to the extent that it is associated with these different forms of wrongful conduct, criminal damage is a less pure form of property offence than theft. Vandalism frequently has an expressive dimension, communicating a contempt for society, and for the victim, which goes beyond a mere trespass upon property rights; that further wrong is, in turn, more clearly captured by classifying offenders with a label distinct from theft.

Not all types of vandalism share this feature—think, for instance, of defacing a book. Yet it may well be a sufficiently familiar concomitant to give criminal damage a moral resonance going beyond its association with proprietary wrongs. This is, of course, a contingent matter. But all cases of vandalism share a second, more general, intrinsic feature: criminal damage

36 Gayford v Chouler [1898] 1 QB 316 (DC).
37 Cabbage (1815) Russ & Ry 292, 168 ER 809; Crimes Act 1961 (NZ), s. 219(1)(b) (as amended).
The Nature and Rationale of Property Offences

is concerned with the item of property per se, and not just with another’s rights over that item. When D steals V’s book, she does not attack the item itself but, rather, pre-empts V’s rights to use and exchange the book. The book itself remains usable and exchangeable; indeed, it is simply the subject of an involuntary exchange. By contrast, when E destroys V’s book he attacks the use- and exchange-value of the item in anyone’s hands and not merely V’s. Its value is lost tout court, not just to V; society’s store of wealth is diminished. In this respect, the harm of criminal damage differs from that of theft.

Given the overlap, there will be borderline cases; especially where the focus of D’s concern is ‘purely’ to destroy V’s property and D’s conduct has no public manifestation beyond that which affects the interests of the victim. In such cases, there may be shared territory with the law of theft and unclearness about which charge is the more appropriate. Imagine that, in the course of a furious row with V, D throws V’s book into the household fire. This case seems straightforwardly one of criminal damage: D’s conduct may violate V’s ownership and use of the book yet his conduct lacks the connotation of underhandedness and acquisitiveness normally associated with theft. But suppose instead that, in the course of this row, D takes V’s diamond brooch from her jewellery box and throws it into the river beneath the apartment? We may assume that the brooch is irrecoverably lost to V—yet, somewhere in the murky depths, it rests in pristine condition. What charge to bring? A charge of theft is somewhat artificial, for the reasons applicable to the book example. But as the brooch is neither damaged nor destroyed, a charge of criminal damage seems unfounded. If one considers (and we do) that such conduct should fall within the criminal law, it must be theft. The example illustrates the difficulty of framing laws to meet marginal cases, especially where offences and their rationales overlap. By placing the brooch irrevocably out of reach, D’s action seems to be a special case of criminal damage, falling more within the rationale of that crime than of theft. But it shares with theft the wrong of deprivation and, it being often undesirable to manipulate offence definitions for the sake of peripheral cases, is appropriately treated as such.

Distinguishing Proprietary Criminal Wrongs

We have seen that theft is a paradigmatic offence, in that the proprietary harm is connected directly to D’s wrong. The same is true, mutatis mutandis, of criminal damage; but we can identify differences, including a further expressive wrong, in typical ways in which the harm is inflicted. Other property offences may also affect V’s resources; but they involve either a different wrong, a different harm, or both. It is for this reason that they are rightly separate offences. Obtaining by deception may, for example, lead to much the same immediate harm as does theft—a straightforward
diminution of V’s resources—but the wrong is different. Moreover, it does not undermine the proprietary regime in the same way as does theft. On the other hand, burglary (as we shall see) involves a different harm. In looking to explain and justify the existence of each of these offences, it is necessary to identify what harm, and what wrong, is addressed by each crime. Structurally, in turn, each can only be defended as a distinct form of crim-inality if it captures a distinctive harm or wrong. Moreover, distinctions between different harms and wrongs will only acquire salience for a criminal justice system if to override the distinctions will send misleading or incomplete communication, either (ex ante) as guidance to potential offenders or (ex post) from the fact of conviction, and/or will suppress considerations that should inform the kind and range of sentence.

English criminal lawyers will recognise this claim, about the importance of drawing distinctions, as an extension of the principles of fair warning and fair labelling.38 Ex ante, citizens need to know where they stand. They need advance warning concerning their actions; in particular, about whether what they are going to do is a crime and, if so, what sort of crime it is. Ex post, offenders ought to be labelled with an adequate degree of precision, in order that the criminal record identifies the gist of D’s criminal wrongdoing. Both principles require that each offence is labelled and defined in such a way that it conveys to citizens an accurate moral picture of the prohibited conduct, one that is neither misleading nor unduly vague or over-generalised. Offences should, so far as is practical, reflect meaningful distinctions in the public mind between different types of culpable wrongdoing. This requires that they are drawn up in such a way that they capture, and differentiate, significant differences in the harmfulness, wrongfulness, and/or culpability of various types of action.

By way of illustration, the differences between murder, maiming, and criminal damage are significant because the harms (and indeed the wrongs) at stake are quite different. Their differences are clearly sufficient to warrant enacting separate offences, since the meaning and moral significance of each action is clearly distinguished in the public mind. Attempted murder, too, is rightly distinguished from murder on the grounds of harm. Likewise, although the harms of theft and of criminal damage are similar, the manners in which they are inflicted involve two different forms of wrongdoing; forms that, as we have argued, are sufficiently distinct in the public mind to warrant independent recognition by the criminal law. Occasionally, too, there may be a case for distinguishing between two harmful activities on the grounds of culpability. An assault being negligent with regard to any consequential risks to life would typically lack the same culpability as an assault being reckless about those same risks—and, if ever worthy of being criminalised as form of a homicide (which we doubt), ought surely

38 See, e.g., Simester and Sullivan, n. 14 above, §§ 2.3–2.4, and references there cited.
to be a separate offence and not lumped in with murder or reckless manslaughter.

Not every difference is worthy of capture. Even though many U.S. states follow the common law in drawing a rudimentary distinction between petty and grand larceny, nobody would suggest that there should be a much more refined series of theft offences, graded in minute detail (say, theft of less than £50 value; theft of less than £100 value; theft of less than £200 value; and so on). Excessively specific offences risk clogging the trial process with unmeritorious technical argument, and obfuscating the moral clarity of the law’s communications. At least in the context of non-specialist activities such as property offences, people (both ex ante and ex post) need to know the law’s requirements in gist and not precisely. As such, meaning is better conveyed through publicly-shared moral distinctions that are broadly rather than narrowly significant, provided those broader distinctions communicate an adequately nuanced statement of the prohibited wrongdoing.

The degree of specificity that the law should adopt when distinguishing various harms and wrongs is, therefore, a trade-off. The fragmentation of the particular must be balanced against the vagueness of the general. Moreover, while that balance is contextual, in that it is affected by the range of differentiation that informs the public imagination concerning each family of offences, that context can itself be affected by law. Whereas, some decades ago in England, driving after drinking was treated as minor matter (if a wrong at all), it is now widely perceived as very wrong indeed. The moral salience of the label has been informed and shaped by criminal prohibitions.

Identifying Non-Proprietary Rationales

People are, we think, right to treat drunk-driving more seriously than once they did. But sometimes public understandings can be misled by the law. Sometimes, on closer investigation, it turns out that an offence historically associated with the protection of property is in fact—like insider trading—not really a property offence at all; or at least should not be. One example of this is blackmail, which under English law is a (substantive-inchoate) property offence, in that the gain to D or the loss to V that D seeks, when he makes an unwarranted demand on V fortified by menaces, must be a gain of money or property. But a closer examination of the harm and wrong of blackmail shows that this scope is unconnected to its rationale.

In our view, the restriction to money or property is, normatively speaking, arbitrary. The wrong of blackmail has no connection to the sorts of wrongs addressed by an offence such as theft. Consider a case where D and V are employed by the same company. D threatens to expose V’s criminal past to the company’s management unless V makes regular payments to him from

39 Theft Act 1968 (UK), s. 21.
her salary. This might be described as the dishonest appropriation of property belonging to another and, therefore, under that description, a case of theft. But to describe the conduct in those terms is to miss the mark. From the perspective of the victim, this is something very different from finding a purse missing from her desk, however much money in the purse. The pressures inducing a surrender to these threats may well be, according to the circumstances, enormous, and succumbing may well entail a form of life that comes close to servitude. It is D’s preparedness to put his victim through that experience—to subjugate V to his will—which is the essence of his wrongdoing. Blackmail, therefore, is in truth a serious offence against the person even where the threat is one of exposure rather than violence. The wrong of blackmail is committed by making the (conditional) threat, whether or not any property ultimately is transferred. Moreover, the same wrong is perpetrated even if the condition has nothing to do with payment; if, say, D threatens exposure unless V fires a colleague or herself resigns. It is this wrong, together with the need to protect citizens from unjustified coercion by others, which brings blackmail within the scope of the Harm Principle independent of any proprietary character that, at least under English law, it may happen to possess. Perhaps the English limitation is designed to narrow the practical scope of the offence: but the concept of blackmail is free of property.

4. Other Property Offences

Limitations of space permit only a sample discussion of other property offences besides theft. In what follows, we offer some indicative remarks concerning their distinctive natures and rationales.

Deception

Is there need for an offence separate from theft of obtaining property by deception? Many jurisdictions maintain a clear distinction between the two offences. Apart from the obvious distinction that the offence requires that one make a false representation, and that one do so with mens rea, a deception offence may be committed even though property is obtained with the consent of the owner, whereas the paradigm wrong of theft involves an adverse interference with the owner’s property, a usurpation in violation of V’s rights. This distinction has been undermined in English law, such that virtually all cases of obtaining property by deception are now also cases of theft. Is, then, the better approach to follow the Model Penal Code and

40 Contrast the Crimes Act 1961 (NZ), s. 237 (as amended).
41 See, e.g., Theft Act 1968 (UK), ss. 1 and 15; Crimes Act 1961 (NZ), ss. 220 and 246.
collapse obtainings of property by deception into the offence of theft, and thereby to abolish any separate deception offence related to the obtaining of property?\footnote{Model Penal Code, § 223.}

We think not. First, however, it must be conceded that in certain circumstances acts of obtaining property by deception and simple acts of theft may be, in substance, much the same. Suppose that D1, an employee of a bank, sets up an automated payments system which skims off very small amounts from a great number of accounts, to be paid into accounts in which he has an interest. D2, on the other hand, is an employee of a company that purchases various forms of services; he arranges for companies in which he has an interest to invoice the employer for services never to be performed. If charges of theft were brought in response in each of these cases, nothing of substance would be lost even though the latter circumstances could also sustain a charge of obtaining property by deception. In substance, each case involves abstractions of money from an employer, wrongdoing adequately reflected in charges of theft.

Be that as it may, in other cases deception is at the heart of the wrongdoing and something would be lost if a charge of theft rather than deception were brought. Suppose, for instance, that V will happily provide funds for D to buy books for his studies but not to bet on dogs and horses. It may be that V is very well off and is in no sense perturbed by the loss of her money. What does make her angry is that she realises she has been lied to when she discovers the betting slips in D’s pockets. On occasions like this, only a deception offence will capture the gravamen of the wrong; here, obtaining property by deception is a property offence, in that property must have been obtained by D, but it is the means by which he obtained the money that constitutes the wrong, and not the obtaining \textit{per se}.\footnote{See S C Shute and J Horder, ‘Thieving and Deceiving—What is the Difference?’ (1993) 56 MLR 548; C M V Clarkson, ‘Theft and Fair Labelling’ (1993) 56 MLR 554; I Koffman, ‘The Nature of Appropriation’ [1982] Cres L R 331; L Leigh, ‘Some Remarks on Appropriation’ (1985) 48 MLR 167; S Gardner, ‘Is Theft a Rip-Off?’ (1990) 10 OJLS 441; A Halpin, ‘The Appropriate Appropriation’ [1991] Crim L R 426. Contrast P R Glazebrook, ‘Thief or Swindler: Who Cares?’ [1991] CLJ 389.}

Indeed, the obtaining need not be wrong at all. Just as the element of deception is lacking in theft, the element of misappropriation is, conversely, lacking in deception. The thief bypasses ordinary mechanisms for allocating and transferring property. The deceiver exploits them. By his deception, he induces V to initiate a transfer and wrongs her in doing so. The transfer, however, is V’s choice. Moreover, she is ordinarily free to refrain, thereby protecting herself from the predations of V. Unlike theft, obtaining by deception does not drive a coach and horses through the regime of property law. Yet even if it does not undermine the ownership, use, and enjoyment of one’s possessions, obtaining by deception characteristically affects the confidence one may have in property \textit{exchanges}. One who has sold goods in
return for a bad cheque may well hesitate to make such a transaction again. To the extent that it undermines the trust we can have in transactions, the wrong of obtaining by deception not merely harms V directly but harms the community more generally.

Handling (or Receiving) Stolen Goods

Typically, conduct that amounts to handling will also be misappropriation of the stolen goods by the handler. Accordingly, handlers also commit theft against the persons from whom the goods were originally stolen. None the less, the maximum penalty is frequently greater for the former than for the latter.\textsuperscript{45} This difference is defensible only if it can be maintained that handling stolen goods is distinct from and, systemically, a more serious crime than theft.

In our view, handling is distinct from theft, even if all cases of handling are also cases of theft. Very common forms of handling will be sales at a discount of stolen goods to friends and acquaintances of the thief. By buying goods that he knows T has no right to sell, D will be committing theft against the rightful owner. Yet there is something technical about this conclusion. D’s subsequent purchase of V’s goods does not, in any substantive moral sense, compound or duplicate the original theft from V. At the time of D’s purchase it is most unlikely that V will see her goods again. In many instances, D will know that if he does not buy, the person standing alongside him will do so instead. The essence of the wrong of handling seems to lie in the purchase of the goods themselves; in the idea that stolen goods are a form of contraband, like drugs or counterfeit currency, which law-abiding persons should not, knowingly, acquire.

Given that this wrong is distinctive, is it systemically worse than theft, justifying the higher penalty? Although moral judgements are not a matter of counting heads, one may be confident that, from a normally distributed sample of citizens, there will be significantly more persons prepared to buy stolen goods than initially to steal those same goods.\textsuperscript{46} To a degree this can be explained by perceptions of risk about arrest and punishment. But there is also a familiar ‘distancing’ phenomenon, a greater ease of conscience in benefiting from a wrong perpetrated by someone else compared with directly committing the wrong. Many persons may decline a career in, say, the arms industry, despite possessing relevant skills and aptitudes. They might happily, however, benefit from a large bequest in the will of a successful but now deceased arms-dealing relative (or, indeed, work for a university receiving such bequests).

\textsuperscript{45} Contrast Theft Act 1968 (UK), ss. 1 (theft—seven years’ imprisonment), 22 (handling—fourteen years), with Crimes Act 1961 (NZ), ss. 220 and 258 (both seven years).

\textsuperscript{46} Cf. Sainthouse [1980] Crim LR 506, where a lay (i.e. non-professional) receiver was prepared to plead guilty to handling but not to theft.
Perhaps the greater seriousness is instrumental—in virtue of the scale of the harm to which handling conduces. There is a symbiotic relationship between theft and handling: ‘there would not be so many thieves if there were no receivers.’ 47 No doubt, if there were no handlers, there would still be thieves. But if society were to eliminate handling, the incidence of theft surely would drop dramatically. One reason why the crime of handling deserves independent criminalisation is because of the important role that ‘fences’—and indeed end-purchasers—of stolen goods play in the business of theft. In modern society, the explosion of property offences is largely a matter of economics: in the market for stolen goods, supply is responsive to demand. Dealers in stolen goods are the brokers who make that market: handling is the channel through which commercial forces drive theft. 48 Moreover, those who deal in stolen goods also provide the means by which merchandise can be ‘laundered’, so that the tangible evidence of theft effectively disappears. 49 Mass-produced items, once sold on, cannot normally be traced. By providing an outlet for the efficient disposal of such items, handlers reduce the risk that theft will be detected. Thus one, largely unrecognised, role that professional fences perform is the obstruction of justice.

Does it follow that there should be a heavier maximum penalty for handling? Under English law, the maximum penalty of 14 years is double the maximum for theft. Where a particular handler of stolen goods is a large scale organiser of theftful activity by others, there may be strong instrumental reasons to punish the handler more severely than members of his team of thieves. There may even be intrinsic reasons, in that his culpability for the harm that these thefts inflict may be greater than anyone else’s. He alone may be complicit in the totality of the theftful conduct.

Heavier penalties may be apt to such cases. More typically, however, the handler acquires goods from the thief (or dealer) for her own consumption. In such cases there might be deterrence-based reasons for punishing purchasers of stolen goods more severely than the initial takers; but if this consideration were to underpin systematically heavier penalties for all forms of handling, we would be in the realm of instrumental penalties unmediated by individual culpability. Indeed, the culpability of a handler may be lesser than the initial thief’s. Suppose H buys a DVD player from T in the knowledge that the player was stolen by T from V. H buys opportunistically; the player was not stolen to order. He is aware that the player will never find its way back to V and that there are other persons who will readily buy the item though aware of its provenance. What, precisely, does H do wrong?

Arguably, H shares in the initial wrong done to V by T, in that he is prepared to benefit from T’s theft. (Indeed, handling was originally criminalised as a form of accessoryship to theft).\(^{50}\) However, he did not encourage or assist in the theft and his conduct, without more, does not amount under modern principles to being an accessory after the fact. Is it wrong \textit{per se}, over and above the wrong of the original theft, to buy something known to be stolen? An affirmative answer may be given if we are confident, as we surely can be, that without willing end-purchasers of stolen goods there would be less theft.\(^{51}\) To that extent handlers, even of the petty nature of H, are members of the class of persons whose activities undermine the security of ownership and possession, something that is wrong in itself apart from any further instrumental considerations. Yet there are no reasons of principle to punish H more severely than T.

\textbf{Burglary}

A typical burglary occurs when D breaks into V’s premises in order to commit a further crime, such as theft. Of course, breaking into V’s building is a significant physical step by which D commits herself to carrying out the theft, and it might warrant criminalisation as an attempt to commit a crime (say, theft) that itself standardly involves harm. Indeed, entry as a trespasser is not, by itself, an offence. It is D’s intent to commit (or commission of) the ulterior crime that radically changes the nature of her legal wrong. Given this, it might be thought odd to enact a crime of burglary when D could, on the same facts, be convicted of an attempt to commit the ulterior crime directly. Paul Robinson asks:\(^{52}\)

One may wonder, then, why burglary is retained as an offense in modern codes. Conviction for criminal intrusion and for attempt to commit the intended offense would seem adequately and properly to punish the conduct constituting burglary.

It is certainly true that the gist of burglary is not trespass. However, neither is it the ulterior crime at which D aims (or ultimately commits). Burglary is not merely an aggravated form of theft etc. It is a wrong in its own right. The trespassory entry by D not only exposes V to risk of the further crime; it also, in so doing, violates V’s private life.

The strongest case of this—often subject to distinctive labelling or sentencing provisions—is where the premises are a dwelling-house.\(^{53}\) Interaction with and exposure to other members of society is integral to public life;

\(^{50}\) 3 & 4 W. & M. c. 13 (1692).

\(^{51}\) A similar argument is often made concerning end-purchasers of child pornography: although they themselves do not wrong the child victims, they create incentives for those wrongs to be perpetrated by others.


\(^{53}\) Theft Act 1968 (UK), s. 9(3)(a); Sentencing Act 2002 (NZ), s. 9(1)(b). This was originally the only variety of burglary known to the common law. See 3 Coke Inst. 63.
conversely, our sense of identity and well-being as individuals depends upon our being able to reserve private space, from which other persons can be excluded. It is through controlling our private environment that we are able to have ‘breathing space’ from interactions with other people. Burglary compromises that space. It is hardly surprising that house burglary, in particular, causes victims great distress even if they were absent at the material time. The victim of such a burglary cannot be sure of the peaceable and secure enjoyment even of her own home. For most people, when the integrity of their private space cannot be taken for granted, one of the foundations of their well-being is destroyed.

An analogous if less powerful claim can be made for burglary of other buildings. One of the main functions of structures such as warehouses, offices, and the like is to help safeguard people and property by establishing a physical separation from the public environment. Within that secured space, people can relax at least some of the precautions they may take when in public, by putting down their handbags, remaining late to work, and the like. Conversely, if that space is not perceived to be fully secure, such practices become disrupted. Even in these non-domestic contexts, the existence and control of a realm of quasi-private space affects the manner in which we live.54

The existence of secured private space also influences how we organise our property. Just as at home, goods in warehouses and offices can be arrayed or stocked without securing each individually. Thus a related harm of burglary is that it gives D unparalleled access to take (or damage) a whole range of V’s goods, whether domestic or commercial, in a way that, say, pickpocketing does not.55 Here too, the case of a domestic burglary is an aggravated one: the goods to which D has access tend to include our highly personal things (underclothes, private letters, and the like) as well as things with high sentimental value—something that reinforces the sense of ‘violation’ experienced by burglary victims.

The arguments outlined here are supplemented by consequentialist considerations. Entry into a building is a significant physical step by which D commits herself to carrying out the ulterior crime. In effect, it ups the stakes, making it more likely that the ulterior offence will be committed. Moreover, because the activity occurs inside a building, it increases the probability that incidental violence will ensue should D be chanced upon by someone else.56

For all these reasons, burglary deserves its status independently as a serious crime. Notice, though, that the normative core of burglary we have identified is concerned with the protection of real property rather than with

54 The argument here suggests a proposition we embrace: that a space open to the public, such as a shop floor during trading hours, should not be susceptible of burglary (e.g. by a shoplifter who enters the shop with intent to steal). See n. 59 below.
55 We are grateful to Jeremy Horder for help with this point.
the particular offence that is intended or committed therein. For this reason, it seems to us anomalous that in English law the crime is confined to only a few specified ulterior crimes.\footnote{Theft Act 1968 (UK), s. 9(1)-(2).} The rationale of burglary extends to penalising persons who make trespassory entries into a building and intend or commit any serious (say, indictable) crime.\footnote{As in New Zealand: Crimes Act 1961, s. 231 (as amended).} The gravamen of the offence is both to be a trespasser and to intend or commit an indictable offence in the place wherein one has trespassed.\footnote{These are separate elements: \textit{contra} English law (\textit{Smith and Jones} [1976] 3 All ER 54), the status of trespasser should not be accorded merely on the basis of intending to commit a crime on the premises concerned. See the criticism by Glanville Williams, \textit{Textbook of Criminal Law} (2nd ed., London: Stevens, 1983), 847 ff.} In its aggravated domestic version, burglary is most truly a property offence in that such conduct radically undermines the enjoyment of a vital proprietary interest. In other contexts, burglary becomes more obviously associated with proscribing conduct likely to result in the commission of a serious offence; yet there too it undermines the use and purposes of the premises themselves.

\textbf{Robbery}

Simply put, robbery—where force is used or threatened in order to steal—is a species of theft that is aggravated by assault. Thus it is to some extent unusual, in that it combines a property offence with an offence of violence against the person, with penalties more severe than the punishments for those individual offences. Partly, this is because the introduction of force makes theft more likely to succeed and, conversely, the object of theft makes the assault more highly motivated, arguably exposing the victim to a greater risk of injury.\footnote{Note, ‘A Rationale of the Law of Aggravated Theft’ (1954) 54 \textit{Col LR} 84, 102.} More importantly, however, the use of force to complete a theft changes the moral character of D’s action, such that it is legitimate to criminalise D’s wrong specifically by the ‘combined’ offence of robbery. What is significant about robbery is not merely that D usurps V’s property rights, but how she does so. The victim of a theft suffers a loss of property: in robbery, V experiences the deprivation. The psychological harm V suffers in so doing may go far beyond any immediate injury and loss. Conversely, the use of force differs from an ordinary assault in that, whereas many assaults are perpetrated for their own sake—perhaps a violent upshot of interactions in which the victim may even have participated—the robber purposively targets or victimises V for the sake of an ulterior goal. V is not addressed as a human being; rather, his interest in personal integrity is subordinated for the sake of material gain. By her actions, D communicates to V that, in her eyes, V matters not as a person but only as a source of wealth. Moreover, their interaction is, for V, involuntary. The best that V can do is minimise the risk of its recurrence. Indeed, even the \textit{prospect} of a mugging undermines our
willingness to move freely through public spaces, such as parks, especially by night. Our expectations of personal and property security are pre-conditions of a stable, meaningful life, for both individuals and society. Robbery undermines both of these expectations. Thus it is misleading to suggest that robbery is a species of aggravated theft, or even a form of aggravated assault.\textsuperscript{61} Robbery is a distinct wrong. The difference is not one of degree.

\textsuperscript{61} Or to suggest with Robinson that, like burglary (above, n. 52, at 780), 'the situations to which the offense of robbery apply might as easily and logically be punished by conviction for both assault and theft'.