Appropriation and the law of theft

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Crim. L.R. 445 **Summary:** *The decision of the House of Lords in* Hinks *has provoked extreme hostility from academic criminal lawyers. This article explains why much of that criticism is mistaken.*

There can be no doubt that some criminal lawyers had high hopes for the Theft Act 1968. They believed that its new structure would overcome most of the complexities and doctrinal difficulties found in the old law of larceny and eliminate an increasing tendency to resort to legal fictions. [1] But soon cracks in the new legislation started to appear. In particular, many of the concepts that had been relied upon to bring clarity to the new law turned out to be much more troublesome than supporters of the legislation had expected. One such concept was "appropriation", which had been introduced into the law of theft to replace the need to establish both a "taking" and a "carrying away". A partial definition of appropriation was provided by section 3(1) of the 1968 Act [2] but, in the absence of any further legislative explanation of the term, problems of definition soon arose. Two matters were especially difficult to resolve: the relationship between consent and appropriation and the question of whether it was possible to appropriate property that had been acquired as part of a transaction which was otherwise unimpeachable at

civil law. For more than a quarter of a century, courts and commentators [3] wrestled with these issues and although the House of Lords has now put much of the confusion **Crim. L.R. 446* to rest with its recent decisions in *DPP v. Gomez* [4] and *Hinks,* [5] clarity has been achieved at a cost. The purpose of this article is to examine the legacy of these two cases. It will concentrate on the decision in *Hinks* and explain why much of the academic criticism that has been directed at that case has been wide of the mark. It is necessary to begin, however, with a brief review of the effect (by now somewhat familiar) on the law of theft of the decision in *DPP v. Gomez.*

1. Consent and Appropriation

The defendant in *Gomez,* it will be recalled, argued that there had been no appropriation of property contrary to section 1 of the Theft Act 1968 because nothing had been done that was inconsistent with the owner's rights since the owner had consented to the defendant and his acquaintance taking the goods away. The House of Lords (Lord Lowry dissenting) rejected that argument. While it agreed with Lord Roskill's conclusion in *Morris* [6] that the assumption of any of the rights of an owner could amount to an appropriation, the House held that Lord Roskill had been wrong to claim that there could be no appropriation where the act was expressly or impliedly authorised by the owner. This ruling brought much needed clarity to the law of theft but it also extended the reach of the law beyond what had been intended by the framers of the 1968 legislation. [7] Following *Gomez* it was possible for the prosecution to bring a charge of theft where prior to *Gomez* the charge ought properly to have been one of obtaining property by deception under section 15 of the Theft Act 1968. [8] The advantage to the prosecution of the former charge, of course, is that a conviction for obtaining property by deception requires the prosecution to prove both that someone was deceived and that the deception led to the obtaining of the property, and in many cases this will be far from easy. But if theft is charged neither of these elements is necessary. [9]

**Crim. L.R. 447* The impact of *Gomez* can be seen vividly if we consider two different situations in which goods belonging to *B* might pass to *A* following a "consensual" transaction. [10] In the first of these situations possession of the goods passes to *A* once the transaction has been completed but ownership remains with *B*. This may happen if *B* consents to the passing of property in the goods to *A* but does so only because of a fundamental mistake as to the identity of *A* or because of a fundamental mistake as to the identity of the goods: such a mistake will vitiate any intention on the part of *B* to transfer property in the goods to *A* and the transaction will therefore be a nullity. In these circumstances, even before *Gomez, A* 's acquisition of the property would have straightforwardly amounted to an appropriation within the terms of section 1(1) of the Theft Act 1968. *Gomez* made a difference, however, in the second situation, where ownership and possession of the goods pass from *B* to *A* as a result of a consensual transaction but that transaction is voidable at common law or in equity. An otherwise valid transaction can be impugned at common law or in equity on a number of different grounds: the transaction may have been the product of duress; it may have been tainted by fraud, deception, misrepresentation or undue influence; or it may have been vitiated on the grounds of unconscionability. [11] Should any of these vitiating factors be present, the transaction will remain valid (and ownership of the transferred property will lie with the transferee) unless and until it is successfully repudiated by the transferor. [12]

According to the orthodox view when ownership passes under a voidable transfer there can be either criminal liability for obtaining the property by deception under section 15 of the Theft Act 1968 or no criminal liability at all. [13] That was said to be implicit in the Criminal Law Revision Committee's Eighth Report on *Theft and Related Offences,* which distinguished between theft and obtaining property by deception in the following terms:

Obtaining by false pretences is ordinarily thought of as different from theft, because in the former the owner in fact consents to part with his ownership; a bogus beggar is regarded as a rogue but not as a thief, and so are his less petty counterparts. To create a new offence of theft to include conduct which ordinary people would find difficult to regard as theft would be a mistake. [14]

**Crim. L.R. 448* Yet, despite this, it was held in *Gomez* that such a transfer would amount to an appropriation for the purposes of section 1(1) of the Theft Act 1968. Hence in this area the concept of appropriation was expanded.

2. 不可彈劾的轉讓和撥款

2. Unimpeachable Transfers and Appropriation

But what of a third situation where ownership of property passes from *B* to *A* as a result of a transfer that is unimpeachable both at common law and equity? Can a transfer of this kind also amount to an appropriation for the purposes of the law of

theft? An appellate court was finally required to confront this question in the mid-1990s in *Mazo.* [15] The case concerned a maid who had been employed part-time by Lady Marjorie Stirling, aged 89. The allegation against the maid was that she had taken dishonest advantage of her employer's mental incapacity by receiving and cashing a large number of cheques which had been made payable to her by her employer. The maid, for her part, argued that the cheques and their proceeds were valid gifts. At Southwark Crown Court she was convicted on five counts of theft and one count of attempted theft and sentenced to six months' imprisonment. On her appeal, however, it was held that it was implicit in the speech of Viscount Dilhorne in *Lawrence v. Metropolitan Police Commissioner,* [16] which had been approved by the House of Lords in *Gomez,* that where a valid gift was made there could be no theft. [17] Therefore, the Court of Appeal said, it had been incumbent on the trial judge to ensure that the jury took the state of mind of the transferor and the circumstances of the transfer into account, since these factors might be determinative of the issue of the passing of title. More particularly, it had been incumbent on the trial judge to direct the jury to consider whether Lady Stirling's mental state was such that she was capable of making the gifts. The fact that the trial judge had failed to do this meant that Mazo's conviction could not stand.

The decision in *Mazo* bristled with difficulty. [18] It was far from clear that it was legitimate to infer from Viscount Dilhorne's speech in *Lawrence* that the receiver of a valid *inter vivos* gift could not be convicted of theft and, in any case, the court's approach to appropriation sat very uncomfortably alongside the apparently contradictory conclusion reached by the House of Lords in *Gomez.* It was predictable, therefore, that the matter would not rest there. The first sign of judicial unease came in *Kendrick and Hopkins* [19] where a differently constituted Court of Appeal described the *Mazo* approach as "bold and perhaps surprising". In the end the facts of *Kendrick and Hopkins* were such that it was not necessary for the court to ask whether the "apparent gloss" in *Mazo* on *Gomez* was "well-founded". [20] But within two years a third case, *Hinks,* required the point to be addressed directly.

Crim. L.R. 449 The defendant in *Hinks* had befriended a 53-year-old man of limited intelligence. According to the prosecution Hinks then "influenced, coerced or encouraged" [21] her friend to part with a television set and a considerable sum of money (amounting to some £60,000) that he had inherited from his father. Hinks argued that because the sums were loans or gifts they could not be appropriated for the purposes of section 1(1) of the Theft Act 1968. At Wolverhampton Crown Court the trial judge (His Honour Judge Warner) rejected that submission and the jury subsequently convicted Hinks on five counts of theft. [22] She appealed, unsuccessfully, first to the Court of Appeal, [23] and then to the House of Lords.

The House of Lords, by a majority, [24] agreed with the unanimous opinion of the Court of Appeal that the law as stated in *Gomez* and *Lawrence* was incompatible with a claim that an indefeasible gift of property could not amount to an appropriation. The leading speech, with which Lord Slynn of Hadley and Lord Jauncey of Tullichettle agreed, was delivered by Lord Steyn. [25] He noted that the House of Lords in *Gomez* had been expressly invited to hold that there was no appropriation where the entire proprietary interest in the goods had passed, yet had declined to do so. [26] Lord Steyn concluded, therefore, that the suggestion that a transferee does not appropriate property unless the transferor retains some proprietary interest in the ***Crim. L.R. 450*** property (or the right to resume or recover some proprietary interest) should also be rejected. It was "directly contrary to the holdings in *Lawrence* and *Gomez.*" [27]

☆ Following *Hinks* it is now safe to conclude that there is nothing in the concept of appropriation that requires a jury to consider whether a gift has been validly made. It is thus perfectly possible for the prosecution to bring a charge of theft where someone receives property from a donor in the knowledge that the donor only agreed to the transfer because she assumed, wrongly, that the donee had done something to deserve it. Equally, it is possible for the prosecution to bring a charge of theft where someone purchases goods at an undervalue after falsely claiming to be entitled to a discount, even though the seller does not believe the purchaser's story and only gives the discount to ensure a quick sale. It is also possible for the prosecution to bring a charge of theft where a seller, without making a false representation, sells goods knowing that they are unsuitable for the buyer's purposes. In each case the fact that title to the goods or money passes under a valid or a voidable transfer will not affect the question of whether there was an appropriation of the property. In short, the decision in *Hinks* reaffirms *Gomez* 's ascendancy. [28]

3. Arguments Against Hinks

For many this enlargement of the scope of the criminal law to include cases where title passes as a result of an unimpeachable transaction is unjustified. [29] One argument against such an expansion is that it rides roughshod over the intentions of the framers

of the Theft Act 1968. Evidence of these intentions can, it is said, be gleaned from the Eighth Report of the Criminal Law Revision Committee and from **Crim. L.R. 451* correspondence between the draftsman of the 1968 Act, Mr (later Sir) J.S. Fiennes, and members of the Larceny Sub-Committee of the Criminal Law Revision Committee. [30] Neither source, however, has carried much weight with the House of Lords. Thus in *Gomez* Lord Keith of Kinkel said that it would serve "no useful purpose" to construe the Theft Act 1968 in the light of the Committee's Report; and in *Hinks* Lord Steyn dismissed Mr Fiennes's letters as "an interesting bit of legal history", adding that it would be wrong "to delve into the intention of individual members of the Committee, and their communications". If statutory interpretation is to be a rational and coherent process, Lord Steyn said, "a line had to be drawn somewhere". [31]

A second objection to the decision in *Hinks* is that it opens the door to inappropriate prosecutions. Counsel for the appellant in *Hinks* offered four examples which, in his view, illustrated the "absurd and grotesque results" that would follow if the appeal were to be dismissed. [32] Once again Lord Steyn was not convinced. He pointed out that the House of Lords in *Gomez* could not have overlooked the consequences of its decision and he said that, in any event, a prosecution was hardly likely to be brought in such cases and, if it were brought, would be "likely to founder" because the jury would not be persuaded that there was dishonesty in the required (*Ghosh*) sense of that term or would conclude that under section 2(1)(a) of the Theft Act 1968 the transferee believed that he had a legal right to deprive the transferor of the property. [33]

A third objection to *Hinks* is that it pares down excessively the *actus reus* of theft: indeed, some have argued that the combined effect of *Hinks* and *Gomez* is to reduce **Crim. L.R. 452* the *actus reus* of theft to "vanishing point". [34] Of course, as the *actus reus* of the crime shrinks, so the role played by the *mens rea* concept of dishonesty will necessarily increase: it will have to take much more of the strain of filtering out cases that ought not to be regarded as theft from those that are clearly theftuous. [35] This, in turn, generates two interconnecting objections to the *Gomez* /*Hinks* position: one based on the rule of law; the other on the harm principle.

It is a foundational (although not an unqualified) principle of our criminal law that citizens ought to be able to predict in advance whether or not their actions or omissions will fall foul of criminal prohibitions. Honouring this principle enhances a number of significant rule of law values: it imposes constraints on the use of arbitrary power; it goes some way towards ensuring that state authorities show proper respect for human dignity and autonomy; it assists citizens who wish to plan for the future; and it increases human freedom by allowing citizens to choose effectively between various life options. Relying on dishonesty to take most of the definitional strain in the crime of theft is said to work against these values because it is far from easy to predict in advance whether one's actions will or will not be adjudged dishonest. This difficulty is compounded in English law by the fact that the Court of Appeal has held that dishonesty is a matter for the jury. [36] Unless a trial judge can conclude that there is no evidence upon which the jury could properly regard the defendant as dishonest he must put the issue to them: he cannot direct the jury to convict, nor can he withdraw the issue of dishonesty from them on the basis that the defendant was patently dishonest. Where the jury does require some assistance they should be advised on the basis of the test laid out in *R v. Ghosh* [37] which, if given at all, should be given *ipsissima verba* [38]:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be **Crim. L.R. 453* dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. [39]

Because different juries may take different views about what the ordinary standards of reasonable and honest people require, the *Ghosh* test is said to be too unpredictable in its outcome to do the work now required of it by *Gomez* and *Hinks*. [40] There are, however, arguments that can be made in its support. Richard Tur, for example, has defended the legal role of "standard-bearing concepts" like dishonesty on the basis that they help to "guard against an academic tendency to convert questions of practical moral philosophy into technical questions exclusively determined by the law." [41] When assessing the strength of this argument much will turn on the empirical question of whether there is in fact an identifiable and vivid community norm of

"dishonesty". [42] If there is, then the benefits of relying on it to take much of the definitional strain in the crime of theft may be sufficient to outweigh the disadvantages of vagueness and unpredictability that may be inherent in a *Ghosh* direction. If there is not, then the rule of law argument against *Hinks* (and for that matter *Gomez*) may be conclusive, although it should also be remembered that incorporating a thicker concept of appropriation into the law of theft in an attempt to counter excessive reliance on dishonesty may not achieve the desired result of an overall reduction in vagueness and unpredictability: for it could be that a thicker concept of appropriation will throw up as many problems of interpretation for judges or juries as the ruling in *Hinks*. [43]

Crim. L.R. 454 A connected argument against *Hinks* derives from the role of the liberal "harm principle". This states that in a liberal society criminalisation is justified only if it serves to prevent harm. The principle operates as a principle of exclusion: it identifies activities that ought not to be criminalised because their criminalisation cannot be shown to serve the goal of preventing harm. [44] The objection to *Hinks* is that it breaches the harm principle because it expands the scope of the offence of theft to include cases where no civil wrong has been committed. [45] Consider, for example, the case of a shopper who, with theftuous intent, takes an incorrectly priced pair of shoes from a sale rack in the hope that when she reaches the checkout she will be charged the lower amount. What the shopper does, it is argued, is nothing more than a "harmless preparatory activity". [46] Yet, following *Gomez* and *Hinks*, she will have committed the crime of theft.

Two points can be made in response to this argument; both are controversial. The first is that there are good grounds for thinking that the conditions of the harm principle are met not only where an activity is itself harmful but also where it is a member of a class of acts that *tend* to cause harm. Hence it is false to conclude that the actions of the dishonest shopper described in the preceding paragraph will not satisfy the requirements of the harm principle: for even if they were not directly harmful they were clearly members of a class of acts which have a propensity to cause harm. The second point is that, in any case, the harm principle does not say that only harmful wrongs may be criminalised. Rather, it states that even harmless wrongs may be criminalised if criminalisation diminishes their occurrence and if their wider occurrence would detract from other people's prospects--for example, by diminishing some public good, such as people's sense of ease with their living environment, or their ability to enjoy public spaces, or their use of commercial facilities, such as shops, or the degree of mutual respect that prevails in public culture at large. [47] Once the harm principle is understood in this way it becomes possible to see why, even if the main reason for criminalising theft is to protect property rights, it may nonetheless be justifiable to extend the crime of theft to cases where no property right has been infringed. This is because a State's failure to criminalise wrongs that do not infringe property rights may itself undermine those rights or indeed some other public good. [48]

Crim. L.R. 455 A fourth objection to *Hinks* is that it brings the criminal law into conflict with the civil law. [49] Lord Steyn gave this argument the same short shrift that he had given to arguments based on the possibility of inappropriate prosecutions and the intentions of the framers of the 1968 Act. He agreed that "in theory the two systems should be in perfect harmony" but said that in "a practical world" there will sometimes be some disharmony between them, especially as their purposes are "somewhat different". He added, moreover, (and in this he was influenced by a closely-argued article written by Simon Gardner [50]) that "it would be wrong to assume on *a priori* grounds" that if there was a disharmony it was the criminal law rather than the civil law that was defective. He concluded therefore that the tension between the civil and the criminal law was not a factor which justified a departure from the law as stated in *Lawrence* and *Gomez*. [51]

But is this conclusion too quick? Professors Beatson and Simester certainly think that it is. In their view any extension of the law of theft to include unimpeachable transfers "risks seriously distorting the law of property". [52] At the heart of their position is the claim that *Hinks* leaves the law on the horns of an uncomfortable dilemma. On the one hand the conflict between civil and criminal law could be resolved by requiring the civil law to yield: the existence of the criminal law wrong could, as it were, "trump" the normal civil law rules, thus rendering an otherwise valid transaction voidable. But such a solution, Beatson and Simester assert, "cannot be taken seriously". Property offences are designed to protect property rights and if we were to allow the law governing property offences to trump civil law rules, that dependence would be broken and property crimes would be left with "no rationale". On the other hand if we attempt to avoid this apparently unpleasant consequence by leaving the civil law unchanged we will be impaled on the second horn of the dilemma, for we will have to accept that "the principle that no-one may benefit by his wrong would [in these circumstances] have immediately to be abandoned". [53]

Beatson and Simester argue, in other words, that *Hinks* forces us to choose between abandoning a well-founded principle of civil law and divorcing property offences from their underlying rationale. Since each alternative is highly unattractive *Hinks* must, they conclude, have been wrongly decided. But, despite its ingenuity, this argument is mistaken. It is, as we have already seen,

false to assume that, if the law allows a property offence to be committed without a property right having been infringed, then the link between property offences and property rights will necessarily have been broken. Beatson and Simester's error arises because they fail to see that even without breaching a recognised proprietary right the criminalised act may nonetheless have had a *tendency* to undermine property rights, either directly by attacking the interests that they protect, or indirectly by weakening an established system of property rights and so threatening the public good that that ***Crim. L.R. 456*** system represents. In either case the justification for criminalising the act may still be the protection of property rights, even though in this instance no property right has been violated.

For this reason there is no necessary threat to the underlying rationale of property offences if the law of theft is extended to cover otherwise unimpeachable transfers. Nor is there a threat to that rationale if a crime committed in these circumstances is able to "trump" the normal civil law rules thus rendering an otherwise valid transfer voidable. In fact, the law of property has long since acknowledged such a possibility. It does so by giving legal effect to the principle that "no-one may benefit from his own wrong". [54] The principle is both limited in its application and relatively weak: first, it applies only where there has been a "wrong"; second, even where there has been a wrong, the principle is often redundant because the wrong itself will generate a cause of action that is, on its own, sufficient to strip the wrongdoer of his benefit [55]; third, the principle is of limited weight and hence may easily be overridden or excluded by other considerations [56]; fourth, even where operative, the principle usually works by estopping a wrongdoer from relying on the wrongful transaction rather than by creating a new cause of action in some other party [57]; and, fifth, even when not outweighed, the principle need not require that the wrongdoer be stripped of all the benefits he obtained from his wrongdoing: a partial restitution may be all that is required to meet its demands. That said, however, the "no benefit principle" comes into its own when a criminal wrong has been committed which is not based on a civil law wrong. [58] In these circumstances, driven by a criminal law wrong but not by a civil law wrong, the principle can result in a thief such as Hinks being stripped of (at least some of) the benefits obtained through her wrongdoing. When this happens the civil law is, in a sense, required to "yield" to the criminal law: if it had not been for the criminal wrong no restitution would have been possible. But this is not an indication of an unacceptable conflict between the civil and the criminal law. Nor is it an indication that there has been a "serious distortion" of the law of property. Rather, it is an indication that both the criminal law and the law of ***Crim. L.R. 457*** property have (wisely) chosen to give legal effect to an important moral proposition. [59]

4. Conclusion: Hinks Assessed

A range of arguments can be pitted against the decision in *Hinks* but when examined in detail none seems particularly strong. Arguments based on the intentions of the framers of the Theft Act 1968 may have had some force prior to *Gomez* but their legal sting was effectively drawn by the House of Lords' decision in that case. And the same is true of the arguments based on an over-reliance on dishonesty and on the possibility of inappropriate prosecutions. Since these arguments failed to convince the majority of their Lordships in *Gomez*, it was very unlikely that House of Lords in *Hinks* would give them any greater credence. Indeed, it is noteworthy that counsel for the appellant in *Hinks* did not expressly ask the House to depart from any of its previous decisions, perhaps because he knew that such a request would fall on stony ground. [60]

The arguments of substance are thus those that focus solely on the drawbacks of extending *Gomez* to cover unimpeachable transfers. These arguments rely, for the most part, on the claim that the harm principle is breached if theft is extended to cases where no property right is infringed; on the supposed conflict between civil and criminal law; and on the related claim that *Hinks* forces us to choose between either abandoning a well-founded principle of civil law or divorcing property offences from their underlying rationale. As has been demonstrated, none of these objections is decisive. So far as the first claim is concerned, because the harm principle may in certain circumstances allow for the criminalisation of harmless wrongs, there is no reason to think that its precepts will necessarily be breached once theft is extended to cases where no property right is violated. The second claim--that the decision in *Hinks* creates an unacceptable conflict between civil and criminal law--was thoroughly examined by Simon Gardner and found to be wanting. Lord Steyn also dismissed it in *Hinks* as insufficient to warrant a departure from the decision in *Gomez*. Finally, the related claim made by Beatson and Simester, that *Hinks* either forces the abandonment of the "no benefit principle" or ***Crim. L.R. 458*** removes property offences from their underlying rationale, has been shown in this article to be equally lacking in substance.

My conclusion, therefore, is that despite the torrent of academic criticism that *Hinks* has received, [61] the position taken by the majority of the House of Lords can be justified. With *Gomez* as their starting point, their Lordships had no choice but to accept

that the concept of "appropriation" must include unimpeachable transfers as well as transfers that are void or voidable. The fault with this approach, if fault there be, lies with *Gomez* not *Hinks*. [62]

An early draft of this article was presented as a paper at a conference, organized jointly by the School of Law, University of Birmingham and the International Association of Penal Law, on *Fraud, Theft and Deception.* The conference was held at the University of Birmingham on 27 April 2001. The author would like to thank the University of Birmingham for granting him a period of sabbatical leave that made work on the paper possible. The article is dedicated to Catherine Shute, whose birth coincided with its completion.

Footnotes

1 But compare R. Stuart, "Reform of the Law of Theft" (1967) 30 M.L.R. 609.

2 Section 3(1) states: "Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner." According to section 1(1): "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it."

3 See, for instance, G. Williams, "Theft and Voidable Title" [1981] Crim.L.R. 666 and J.C. Smith, "Theft and Voidable Title: A Reply" [1981] Crim.L.R. 677.

4 [1993] AC 442.

5 [2000] 3 W.L.R. 1590.

6 [1984] AC 320.

7 See S. Shute and J. Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 M.L.R. 548, at pp.549-550.

8 A notable exception to this, however, would appear to be land. Section 4(2) of the Theft Act 1968 states that there can be no theft of certain categories of land but this section is not extended by the general interpretation section, section 34(1), to obtaining property by deception under section 15. For some other situations where there might be an "obtaining" but not an "appropriation", see S. Shute and J. Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 M.L.R. 548, at p.549, fn. 7. See also R. Heaton, "Deceiving without Thieving?" [2001] Crim.L.R. 712.

9 The maximum penalty for theft is now seven years' imprisonment (having been reduced from 10 years' by section 26(1) of the Criminal Justice Act 1991); the maximum penalty for a section 15 offence is 10 years' imprisonment.

10 See also S. Gardner's thoughtful article, "Property and Theft" [1998] Crim.L.R. 35, at p.37. "Consensual" is in quotation marks to indicate that the term equivocates between at least two different conceptions of the concept: on the one hand, there are transfers which are "fully" consensual because uncoerced and fully understood even if undesired; on the other hand, there are transfers which are not "fully" consensual because they have been induced by serious coercion or because some key underpinning assumption is mistaken as in many cases of obtaining by deception. See S. Shute and J. Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 M.L.R. 548, at p.551. This equivocation should be borne in mind wherever the concept is referred to in the text below.

11 A transfer is not voidable merely because of a mistake made by one or both of the parties, although if the mistake is sufficiently fundamental it may render the transfer void.

12 In some circumstances the vitiating factor may be so substantial that the transfer is void not voidable. Such transfers will fall into the first category of situations.

13 See A.T.H. Smith, *Property Offences* (London, 1994), at p.135.

14 Cmnd 2977 (1966), para. 38. As the report of the Criminal Law Revision Committee had provided the basis for the Theft Act 1968, its views were thought to carry particular weight.

15 [1997] 2 Cr.App.R. 518.

16 [1972] AC 626.

17 [1997] 2 Cr.App.R. 518, at p.521, *per* Pill L.J.

18 Nonetheless, it received support from J.C. Smith in his *The Law of Theft* (8th ed., London, 1997), para. 2-22. For a more critical view, see S. Gardner, "Property and Theft" [1998] Crim.L.R. 35.

19 [1997] 2 Cr.App.R. 524.

20 *ibid.* at p.531, *per* Ebsworth J.

21 [2000] 1 Cr.App.R..1, at p.1, *per* Rose L.J. But compare Lord Steyn in the House of Lords [2000] 3 W.L.R. 1590, at p.1593 ("It was the prosecution's case that the appellant had *influenced or coerced* [the victim] to withdraw monies from his building society account, which were then deposited in her account", emphasis added). See also Lord Hobhouse, at p.1609 (The prosecution's case "was based upon the allegation that she had *coerced or unduly influenced* [the victim] into parting with his money and the television set", emphasis added), and Lord Hutton, at p.1604 (who referred to the statement of facts before the House which alleged that "the appellant somehow *influenced or coerced* [the victim] to withdraw moneys totaling about £60,000 from his Building Society accounts, the moneys subsequently being deposited into the appellant's own account. She was also alleged to have taken a colour television … belonging to [the victim], using similar means", emphasis added).

22 She was sentenced to 18 months' imprisonment concurrently on each of the five counts, and to a further concurrent term of six months' imprisonment on one count of false accounting to which she had pleaded guilty.

23 After observing that *Mazo* had been predicated on concessions made by prosecuting counsel, the Court of Appeal unanimously concluded ([2000] 1 Cr.App.R.1, at p.9, *per* Rose L.J.): "A gift may be clear evidence of appropriation. But a jury should not, in our view, be asked to consider whether a gift has been validly made because, first, that is not what section 1 of the Theft Act requires; secondly, such an approach is inconsistent with *Lawrence* and *Gomez*; and thirdly, the state of mind of a donor is irrelevant to appropriation."

24 Lord Hutton and Lord Hobhouse of Woodborough dissenting. Lord Hutton dissented on the narrow ground that the trial judge's direction on "dishonesty" failed "to make clear to the jury that if there was a valid gift there cannot be dishonesty" (p.1607). Lord Hobhouse dissented on the wider ground that the phrase "dishonestly appropriate" should be "construed as a composite phrase" (see esp. pp.1616 and 1623) and "does not include acts done in relation to the relevant property which are done in accordance with the actual wishes or actual authority of the person to whom the property belongs. This is because such acts do not involve any assumption of the rights of that person within section 3(1) or because, by necessary implication from section 2(1), they are not to be regarded as dishonest appropriations of property belonging to another" (p.1623).

25 Lord Slynn and Lord Jauncey agreed both with Lord Steyn's conclusions and with his reasoning. Lord Slynn indicated, however, that the fact that he did not think it appropriate to review the trial judge's summing up on dishonesty was not to be read as an approval of it.

26 See [2000] 3 W.L.R. 1590, at pp.1598-1599.

27 *ibid.* at p.1601. See also p.1599: "*Gomez* therefore gives effect to section 3(1) of the Act by treating "appropriation' as a neutral word comprehending "any assumption by a person of the rights of an owner'. If the law is as held in *Gomez*, it destroys the argument advanced on the present appeal, namely that an indefeasible gift of property cannot amount to an appropriation"; and *R.(on the application of A) v. Snaresbrook Crown Court*, QBD, 12 July 2001, *The Times*, where Lord Woolf C.J. held that section 3(1) of the Theft Act 1968 "did not require misappropriation, merely appropriation."

28 On some interpretations of the facts what the defendant did in *Hinks* amounted to undue influence; indeed Lord Hobhouse mentioned this as a possibility in his dissenting judgment in the case (see fn. 21 above). Nonetheless, the decision of the majority of the House of Lords is predicated on the view that there had been no such undue influence and that the transaction was not voidable in civil law on this or any other ground.

29 See J.C. Smith, who condemns the decision as, with all respect, "contrary to common sense" ([2001] Crim.L.R. 163, at p.164); A.P. Simester and G.R. Sullivan, *Criminal Law*, *Theory and Doctrine* (Oxford, 2000), who argue that the decision "must be undone" (at p.455); and M. Allen, *Textbook on Criminal Law* (6th ed., London, 2001), who describes the decision as incredible (at p.404), "almost surreal" (at p.405), and "ridiculous" and "bizarre" (at p.415). See also G. Williams, "Theft, Consent and Illegality" [1997] Crim.L.R. 127-138 and 205-213. Williams, who had been a member of the Criminal Law Revision Committee, argued in this article for two propositions (see p.127): "First, theft cannot be committed by a person who has an indefeasible title to the property when he commits the act charged as an appropriation, notwithstanding that he may be morally dishonest … Secondly, theft cannot be committed by an act that is not wrongful (under the general law) against the person to whom the property belongs."

30 See J.C. Smith, "The Sad Fate of the Theft Act 1968", in W. Swadling and G. Jones (eds.), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999), pp.97-113, esp. pp.98-99. See also his case note on the Court of Appeal's decision in *Hinks*: [1998] Crim.L.R. 904.

31 See [2000] 3 W.L.R. 1590, at p.1596. He did, however, say that the Eighth Report of the Criminal Law Revision Committee on *Theft and Related Offences* (especially para. 35) might "arguably be relevant as part of the background against which Parliament enacted the Bill which became the Act of 1968." Compare Lord Keith in *DPP v. Gomez* [1993] AC 442, who said at p.464: "In my opinion it serves no useful purpose at the present time to seek to construe the relevant provisions of the Theft Act by reference to the report which preceded it, namely the Eighth Report of the Criminal Law Revision Committee."

32 [2000] 3 W.L.R. 1590, at pp.1599-1600.

33 [2000] 3 W.L.R. 1590, at p.1600. Lord Steyn concluded this part of his speech with the following trenchant remarks: "… one must retain a sense of perspective. At the extremity of the application of legal rules there are sometimes results which may seem strange. A matter of judgment is then involved. The rule may have to be recast. Sir John Smith has eloquently argued that the rule in question ought to be recast. I am unpersuaded. If the law is restated by adopting a narrower definition of appropriation, the outcome is likely to place beyond the reach of the criminal law dishonest persons who should be found guilty of theft. The suggested revisions [i. qualifying the law in *Lawrence* and *Gomez* by holding that there can be no appropriation unless the other party to the transaction (the owner) retains some proprietary interest, or the right to resume or recover some proprietary interest, in the property; or ii. interpreting the word "appropriates' as if the word "unlawful' preceded it] would unwarrantably restrict the scope of the law of theft and complicate the fair and effective prosecution of theft. In my view, the law as settled in *Lawrence and Gomez* does not demand the suggested revision. Those decisions can be applied by judges and juries in a way which, absent human error, does not result in injustice."

34 See J.C. Smith and B. Hogan, *Criminal Law* (9th ed., London, 1999), at p.505. The concept may still, however, have sufficient substance left in it to allow a distinction to be drawn between an "appropriation" under section 1 of the Theft Act 1968 and an "obtaining" under section 15 (see fn. 8 above).

35 For an account of "The Role of Dishonesty in the Present Law", see Law Commission Consultation Paper No. 155, *Legislating the Criminal Code: Fraud and Deception* (1999), Part III.

36 *Feely* [1973] QB 530, at pp.537-538, *per* Lawton L.J.: "Jurors, when deciding whether an appropriation was dishonest, can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty."

37 [1982] QB 1053, CA.

38 See *Ravenshad* [1990] Crim.L.R. 398, CA.

39 [1982] QB 1053, at p.1064, *per* Lord Lane C.J. *Ghosh*, unlike *Feely*, where a charge had been brought under section 1(1) of the Theft Act 1968, concerned charges of obtaining or attempting to obtain property by deception, contrary to section 15(1) of the Theft Act, and a charge of attempting to procure the execution of a valuable security, contrary to section 20(2) of the Theft Act 1968. Section 1(3) of the Theft Act 1968 indicates that the partial negative definition of dishonesty offered in section 2 applies only to section 1(1) and not to other sections of the Theft Act. But see *Woolven* (1983) 77 Cr.App.R. 231, at p.236, where Leonard J., giving the judgment of the Court of Appeal, said that: "… a direction based on *Ghosh* seems likely to us to cover all occasions when a section 2(1)(a) type direction might otherwise have been desirable."

40 The test was, however, subject to criticism even before the decisions in *Gomez* and *Hinks*: see Kenneth Campbell, "The Test of Dishonesty in *R. v. Ghosh*" [1984] C.L.J. 349, D.W. Elliott, "Dishonesty in Theft: A Dispensable Concept?" [1982] Crim.L.R. 395, and E. Griew, "Dishonesty: The Objections to *Feely* and *Ghosh*" [1985] Crim.L.R. 341.

41 See R. Tur, "Dishonesty and the Jury: A Case Study in the Moral Content of Law" in A. Phillips Griffiths (ed.), *Philosophy and Practice* (Cambridge, 1985), pp.75-96, at p.95. Certainly Lord Steyn was convinced in *Hinks* that dishonesty was up to the task. In response to the allegation that the decisions in *Lawrence* and *Gomez* "were calculated to produce injustice", he robustly declared (see [2000] W.L.R. 1590, at p.1601) that "the mental requirements of theft are an adequate protection against injustice."

42 See A. Halpin, "The Test for Dishonesty" [1996] Crim.L.R. 283, at p.286: "Once we accept that the common term dishonesty can be used to convey quite different standards then the *Ghosh* test collapses on its own foundation."

43 These issues would need to be taken into account when considering a possible challenge under Article 7 of the European Convention on Human Rights and Fundamental Freedom to offences which rely heavily on the *Ghosh* "definition" of dishonesty. Decisions of the European Court of Human Rights in cases such as

Kokkinakis v. Greece ((1993) 17 E.H.R.R. 397), where a law prohibiting "proselytism" was upheld, suggest that in any event such a challenge might not succeed. For a discussion of whether a "general dishonesty offence" would be so uncertain as to fall foul of Article 7, see Law Commission Consultation Paper No. 155, *Legislating the Criminal Code: Fraud and Deception* (1999), Part V, paras 5.33-5.53.

44 Without the prevention of harm, the harm principle holds that criminalisation is an unwarranted invasion of individual liberty.

45 In fact, in so far as there are circumstances where a transfer is voidable at common law or equity but the vitiating factor is not a civil law wrong, this expansion had already occurred as a result of the decision in *Gomez*.

46 A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine*, at p.454. See also C.M.V. Clarkson, *Understanding Criminal Law* (3rd ed., London, 2001), at p.235: "… the absurdly broad judicial interpretation of "appropriation' allows the criminalisation of conduct that hardly constitutes a threat to another's property interests: for example, offering to sell another's property when the defendant is in no real position ever to do so. Again, the real focus is on the defendant's wrongdoing irrespective of any threat of loss. This approach is unfortunate."

47 See J. Gardner and S. Shute, "The Wrongness of Rape" in *Oxford Essays in Jurisprudence* (Oxford, 2000), at pp.215-217. For examples of other acts whose wrongfulness does not lie in their harmfulness, see pp.195-199.

48 It may also be true that the harm principle operates as a rule of thumb which tolerates some departures from its standards: see J. Gardner and S. Shute, "The Wrongness of Rape" in *Oxford Essays in Jurisprudence* (Oxford, 2000), at p.215.

49 J.C. Smith describes this in his case note on *Hinks* as "the most serious aspect of the decision": see [2001] Crim.L.R. 163, at p.165.

50 S. Gardner "Property and Theft" [1998] Crim.L.R. 35, at pp.40-42.

51 [2000] 3 W.L.R. 1590, at p.1601.

52 "Stealing One's Own Property" (1999) 115 L.Q.R. 372, at p.374.

53 *ibid.* at p.375. See also A.P. Simester and G.R. Sullivan, *Criminal Law, Theory and Doctrine*, at p.453.

54 See, for instance, the following remarks of Sir Samuel Evans P.: "It is clear that the law is, that no person can obtain, or enforce any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." *In the Estate of Cunigundu (Otherwise Cora) Crippen, Deceased* [1911] P 108, at p.112.

55 This would be true, for example, in most cases of fraud or misrepresentation.

56 See, for instance, Peter Gibson J. in *Halifax Building Society v. Thomas* [1996] Ch. 217, at p.227: "… the policy of law is to view with disfavour a wrongdoer benefiting from his wrong, but it cannot be suggested that there is a universally applicable principle that in every case there will be restitution of benefit from a wrong."

57 Thus, in *Halifax Building Society v. Thomas* [1996] Ch. 217, at p.229, Peter Gibson J. said: "The proposition that a wrongdoer should not be allowed to profit from his wrongs has an obvious attraction. The further proposition, that the victim or intended victim of the wrongdoing, who has in the event suffered no loss, is entitled to retain or recover the amount of the profit is less obviously persuasive."

58 Beatson and Simester claim that these cases include those where "murderers are named as beneficiaries by the will of the deceased" (see (1999) 115 L.Q.R. 372, at p.375). Yet, in such circumstances, *pace* Beatson and Simester, a civil wrong is committed: *viz.* the civil wrong of murder.

59 It is interesting that the trial judge in *Hinks* ordered the appellant to pay £19,000 "compensation" to the victim (see [2000] 1 Cr.App.R. 1, at p.1, *per* Rose L.J.). This sum plainly amounted to only partial restitution for the loss suffered by the victim, who had given Hinks some £60,000. Nonetheless, as indicated above, it is perfectly proper to give effect to the "no benefit" principle by ordering a wrongdoer to be stripped of just part of the benefits she obtained from her wrongdoing. The compensation order would have been made under the power in section 35 of the Powers of Criminal Courts Act 1973 (now to be found in section 130 of the Powers of Criminal Courts (Sentencing) Act 2000). This provides that a criminal court may require an offender to pay compensation for any "personal injury, loss or damage" resulting from an offence. The Court of Appeal has held that such orders can be made even though the offender would not be liable in civil law for the loss: see *Chappell* (1984) 80 Cr.App.R. 31, where Lord Lane C.J. said, at p.35, "For our part we see nothing anomalous in the idea that the statute may operate to give a remedy to the victim where none existed before". (But compare P.S. Atiyah, "Compensation Orders and Civil Liability" [1979] Crim.L.R. 504.) There is also a power in section 28 of the Theft Act 1968 (now to be found in section 148 of the Powers of Criminal Courts (Sentencing) Act 2000) for the criminal courts to order the "restitution" of stolen property. Unlike a compensation order,

however, a "restitution" order can only be made in favour of a person with a pre-existing entitlement to recover the stolen goods. It is not therefore available in cases such as *Hinks*.

60 See [2000] 3 W.L.R. 1590, at p.1595, *per* Lord Steyn.

61 See n.29 above.

62 For an argument that *Gomez* not only flies in the face of the Committee Report that preceded that Theft Act 1968 but fails to pay proper attention to the moral arguments in favour of keeping theft and obtaining property by deception as separate offences, see S. Shute and J. Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 M.L.R. 548.

