The Concept of Appropriation and The Offence of Theft

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The English law of theft is confusing and problematic in principle. Since the introduction of the Theft Act 1968 there has been inconsistency in the interpretation of appropriation as court and commentators have grappled with the intuition that appropriation must entail some subjective element and cannot be purely objective. Although subjectivity is traditionally associated with culpability rather than with conduct, it is argued that some acts can be subjective and yet factual and stand as causes to effects. Appropriation is such an act, its necessary and sufficient condition being a mindset, here termed proprietary subjectivity, on the part of the actor. It is argued that clarification of the concept of appropriation can help to resolve misperceived problems. Such clarification will also reveal other problems in the law of theft. Some tentative comments *de lege ferenda* are made suggesting how these problems can be addressed.

INTRODUCTION

With the aim of moving from the protection of possession to the protection of property, the Theft Act 1968 (hereafter TA 1968) replaced the Larceny Act 1916 *actus reus* requirement of 'taking and carrying away' in the offence of theft with the requirement of 'appropriation' defined as 'the assumption of the rights of the owner'. This change, however, has caused more problems than it solved, as courts have failed to interpret the concept of appropriation with any consistency. As I shall argue in the first part of this article, the controversy is due to the intuition that appropriation cannot be purely factual but must entail *some* mental element. Both courts and commentators have located the problem in that the subjective element of appropriation seems to belong in the realm of intentions rather than the act requirement and yet appropriation is firmly placed in the *actus reus* of theft. I then argue that this problem will be solved, if it can be shown that subjective states of mind can be factual and that appropriation can accordingly be reinterpreted as an act, the only necessary and sufficient condition of which is the development of proprietary mindset on part of the actor. In order to show this, I shall have to make two steps: First, I must argue that thoughts can amount to acts and that appropriation is an instance of a thought-act, which is *factual yet subjective*. Secondly, I must show that thought-acts in general and appropriation in particular can indeed have a real effect in the world. In the light of this argument, I will hint at how the conceptual clarification of appropriation can help us reconstruct the judicial interpretation of the law of theft as coherent and consistent by explaining

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away misperceived problems. At the same time, though, it will become apparent that the TA 1968 is *bad* law for other reasons pertaining to the concept of appropriation. I shall therefore make some tentative comments *de lege ferenda*.

This article is informed both by an interest in questions of philosophy of action and their relevance within the criminal law as well the pragmatic concern of rationalising the law of theft in England and Wales. Therefore, I start with a brief exposition of doctrinal development in the area since the enactment of the TA 1968 and a reconstructive overview of the debate that it has generated. I then move on to the philosophical question of action and relate it to appropriation. Finally, I turn back to some of the doctrinal questions. In this way it is hoped the article will speak to theorists and lawyers alike.

THE CURRENT DEBATE

According to section 1 of the TA 1968: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Appropriation is defined in section 3(1) of the TA 1968 as 'any assumption by a person of the rights of an owner . . . 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'. Straightforward as this may seem *prima facie*, the inclusion of appropriation in the description of theft instead of the simpler requirement of removal of the thing has caused great confusion and controversy in the courts and in criminal law theory. Many questions arose very quickly. What counts as an assumption? For example, does any handling of a thing amount to an assumption of the owner's rights, even if it is trivial or, indeed, lawful? And, and this proved to be one of the most controversial issues, what if the owner has consented? In such cases, does appropriation take place at all or should we be asking whether the appropriation is dishonest or not? Which of the owner's rights must be assumed for that assumption to constitute appropriation?[1]

The debate seems always to revolve around one central question, namely whether appropriation should be regarded as a purely objective requirement and, therefore, ascertained without any reference to the subjectivity of either the defendant or the owner of the thing, or whether *some* mental element is entailed in the concept of appropriation. But both courts and theory have found it very difficult to associate subjectivity with anything other than responsibility. The following extract aptly reveals this: 'Let us explore the ambit of appropriation by returning to the main defining words, "any assumption of the rights of the owner". Does this mean that one can *appropriate* property even if one obtains it with the consent of the owner? On the face of it, this might seem absurd: surely one cannot be said to *steal* property if the owner consents to part with it.'[2] What is telling in this excerpt is how *appropriating* and *stealing* are used interchangeably implying that there is an

1 The answer to this seems to be fairly uncontroversial, as the courts have (correctly, I think) accepted that the assumption of *any* of the rights of the owner suffices. See *R* v *Morris* [1984] AC 320.

2 A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford UP, 2006) 365 (emphasis added).

overlap between mental states required for both. So, the argument goes, if it were accepted that appropriation entails some subjective element, then the requirements of the offence would be merged thus creating all sorts of practical and ethical problems. A look at some central criminal law cases dealing with appropriation will show how courts have tried to make sense of appropriation and grappled with the intuition that it entails a certain degree of subjectivity.

At the earlier stages of the debate the question was whether the defendant appropriates the owner's rights, when the owner seems to have consented to that appropriation. In *R* v *Lawrence*[3] the victim, an Italian student coming to the UK for the first time and speaking very little English, asked the appellant, a taxi driver, to drive him to an address in London, which he produced written on a piece of paper. The appellant said that the destination was very far away and the fare would be very expensive. The victim got into the taxi, took £1 out of his wallet and gave it to the appellant who then, the wallet being still open, took a further £6 out of it, which was more than six times in excess of the lawful fare. He then drove the victim to his destination. He was charged and convicted of theft and appealed on the grounds that the victim had consented to being parted from his money, albeit he did so after having been deceived by the defendant. Therefore, he ought to be charged with obtaining property by deception rather than with theft. The appeal was dismissed and the House of Lords held that the TA 1968 cannot be reconstructed as if to include the Larceny Act 1916 requirement of absence of consent. Consent was deemed not to be salient to the question of appropriation.

Soon after *Lawrence*, it was felt that accepting that appropriation takes place despite the owner's consent amounted to dissociating appropriation from some adverse interference with the owner's property. This, however, seemed rather counterintuitive. *R* v *Skipp* and *Eddy* v *Niman* were two early blips in the radar. In *Skipp*[4] the defendant collected loads of goods from different places posing as a genuine haulage contractor and made off with them. On appeal, the court held that appropriation takes place when the defendant does something inconsistent with the rights of the owner. In the instant case, this probably happened only 'when the goods were diverted from their true destination'. In *Eddy* v *Niman*[5] the defendant entered a supermarket drunk, intending to steal goods. He filled up a trolley with things but before reaching the checkout, he changed his mind and abandoned the trolley. The trial court dismissed the charge and its decision was approved by the appellate court, which held that the question was 'whether the person charged had done some overt act inconsistent with the true owner's rights, and since the defendant had merely taken goods and put them into receptacles provided by the store he had not done any overt act inconsistent with the rights of the owner'.

It was *Morris* and *Anderton* v *Burnside*[6] (hereafter *Morris*) that dealt specifically with the question and diverged, if not altogether departed, from *Lawrence*. In *Morris* the defendants were switching price labels on products with the intention of

3 [1972] AC 626.
4 [1975] Crim LR 114.
5 [1981] 73 Cr App R 237.
6 [1984] AC 320.

buying the more expensive ones for the lower price. One of them was arrested after having bought the things and the other before so doing. Although the convictions were upheld, because the combination of the defendants' acts amounted to appropriation, Lord Roskill referred *obiter* to the concept of appropriation. He said that, contrary to *Lawrence*, appropriation entailed *some adverse interference with or usurpation of the owner's rights.* What is striking about *Morris* is that the court felt it was not departing from *Lawrence*, which nevertheless seemed to be directly contradicted by the new interpretation of appropriation rendering the latter even more ambiguous.

In *R* v *Gomez*[7] the House of Lords was required to choose between *Lawrence* and *Morris*. The defendant, the assistant manager of a shop, was approached by a customer who wanted to acquire goods in exchange for two stolen cheques. Knowing that the cheques were stolen, the defendant deceived the shop manager into authorising the sale of the goods to the customer in exchange for the cheques. The court decided that, although *Morris* was correctly decided, Lord Roskill's *dicta* were rather unnecessary and unfortunate, for an adverse interference with or usurpation of the rights of the owner were not necessary for appropriation to take place. *R* v *Hinks*[8] was decided along similar lines and has caused even more controversy. The defendant in *Hinks* had received a number of valid and indefeasible gifts from the victim, a man with severe learning difficulties. The court held that, despite the fact that there was nothing wrong with the gifts in civil law terms, receiving them still constituted appropriation and, as the defendant was dishonest, she was convicted of theft.

R v *Gallasso*,[9] a case decided after *Gomez* and before *Hinks*, succinctly summarises the debate and can therefore give us a valuable insight into what the concept of appropriation may entail. The appellant in *Gallasso* had been convicted of theft for receiving cheques belonging to a severely disabled patient, whom she cared for as a nurse, and depositing the money in accounts that she had opened for him. The Court of Appeal held that the concept of appropriation is *objective* and that the appellant had *objectively* not appropriated the owner's rights but had instead affirmed them. In the following extract, which is worth quoting at length, Lloyd LJ tries to back this position:

> In Gomez, Lord Keith said that there was much to be said in favour of the view that the mere taking of an article from a shelf in a supermarket and putting it in a trolley or other receptacle amounted to an appropriation in so far as it gave the shopper control over the article and the capacity to exclude any other shopper from taking it. But Lord Keith did not mean to say that every handling is an appropriation. Suppose, for example, the shopper carelessly knocks an article off the shelf; if he bends down and replaces it on the shelf nobody could regard that as an act of appropriation. Or suppose a lady drops her purse in the street. If a passer-by picks it up and hands it back there is no appropriation even though the passer-by is in temporary control. It would be otherwise, of course, if he were to make off with the purse.

7 [1993] AC 442.
8 [2000] 4 All ER 833.
9 [1994] 98 Cr App R 284.

> These examples show that in deciding whether, objectively, an action amounts to an appropriation, you must not stop the camera too soon; you are not confined to a single point of time; you may look to the consequences. In one sense, the applicant may be said to have taken control over the cheque, the piece of paper, when she removed it from the envelope and took it to the building society. But when she got to the building society she credited the proceeds to his account. Looking at the complete picture, there was no appropriation, no assumption of the owner's rights.[10]

To most criminal law theorists, it is not clear at all why the examples in the above excerpt would not constitute appropriation post *Gomez*.[11] The truth is that the court itself in *Gallasso* incoherently conceptualised appropriation as a *purely objective* element while not convincingly demonstrating what objective element may differentiate the examples in the above excerpt from the case at hand. The cinematographic analogy simply does not work. The whole picture that Lloyd LJ urges us to try to see is completed only if we include a subjective dimension. What if the defendant in *Gallasso* deposited the cheques in the victim's account always intending to withdraw money from it for her personal use? Or what if she received the cheques intending to cash them and then deposit them in her account? These hypothetical examples make it clear that there is nothing in the sensibly observable world *alone* that can tip the scales and determine whether a handling of a thing is an instance of appropriation or not. What the 'complete picture' offers is merely an indication of the mental state of the defendant. If the criterion is *purely objective*, then the threshold is much lower than the Court of Appeal set it in *Gallasso.* Any handling of a thing belonging to another will amount to appropriation. And it is for this reason that the Court of Appeal contradicts itself in *Gallasso,* making Smith go so far as to find that the latter was decided *per incuriam.*[12]

So, appropriation post *Gomez* is seen to be construed as fully objective and nothing more or nothing less than that. But this, according to the critics, is problematic in itself. Lord Hobhouse in his dissenting opinion in *Hinks* calls the objective conception of appropriation 'wholly colourless' while Clarkson and Keating insist that 'assumption' is not *value-free* and that there must be an 'assertion of dominion' over the property.[13] The problems identified both by judges and criminal law theorists with the post-*Gomez* conception of appropriation can be classified under two general headings.

First, there is the *systemic* problem of the internal logic and coherence of the law, which has at least three manifestations. It is suggested that, by removing the relevance of the mental state from appropriation, the latter becomes so broad as to be rendered meaningless and trivial. The argument is that *any* act, even the most trivial one like touching a can of baked beans sitting on a supermarket shelf, will count as appropriation.[14] More seriously, there will be appropriation and possibly

10 *ibid* 288–289.
11 C. M. V. Clarkson and H. M. Keating, *Criminal Law Texts and Materials* (London: Sweet and Maxwell, 2003) 761.
12 J. C. Smith, *The Law Of Theft* (London: Butterworths, 8th ed, 1997) 17.
13 Clarkson and Keating, note 11 above, 762; M. Allen, *Textbook on Criminal Law* (Oxford: Oxford UP, 2003) 401; N. Lacey, C. Wells and O. Quick, *Reconstructing Criminal Law* (London: Lexis-Nexis UK, 2003) 377.
14 Ashworth, note 2 above, 366.

theft, even when the transfer of the property is consensual and lawful.[15] Thus, the focus is now inevitably shifted to the element of dishonesty. The problem with that, the argument goes, is that the *Ghosh*[16] tests of dishonesty are so vague and indeterminate, especially in view of them being considered questions of fact since *R* v *Feely*,[17] that the floodgates are wide open for convictions of defendants, who have done virtually nothing or, in any case, nothing harmful.[18] Moreover, *Hinks* draws a sharp distinction between civil and criminal law in a way that detracts from the coherence of the legal system as a whole. Finally, the broad conception of appropriation collapsed the boundaries between obtaining property by deception[19] and theft as well as attempted theft and the completed offence. With very few exceptions, instances of deception will be instances of theft, although not necessarily the other way around. Furthermore, cases of impossibility aside, it will be impossible to *attempt* to steal, as even the slightest hint of acting will already constitute the complete offence.

Secondly, there is the *ethical* dimension to the problem. It is argued that post-*Gomez* appropriation is a direct breach of the rule of law and, in particular, the principle of fair warning in at least three ways. First, in that it differentiates civil from criminal law. The recipient of a valid and indefeasible gift will not be certain whether her receiving the gift will be a criminal act. Secondly, in effectively removing the requirement of a harmful act or, indeed, the act requirement altogether, it constrains the ability of agents to reason practically, as they can never know the legal meaning of their actions. Thirdly, the conflation of theft with offences of deception violates the principle of fair labelling.[20] One ought to be held responsible for exactly what one has done and nothing more than that.[21]

15 Simon Gardner deals with the moral relevance of consent in this context in S. Gardner, 'Appropriation in Theft: The Last Word' (1993) 109 LQR 194.

16 *R* v *Ghosh* [1982] QB 1053, 1064. The tests per Lord Lane: '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.'

17 [1973] QB 530.

18 For counterarguments to this see S. Shute, 'Appropriation and the Law of Theft' [2002] Crim LR 445.

19 TA 1968, s 15(1): 'A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.' The TA 1968 and 1978 offences of deception have been repealed by the Fraud Act 2006 and replaced by the single offence of fraud, which is committed by dishonestly making a false representation with the intention of making a gain for oneself or another, or causing loss to another or to expose another to a risk of loss. The offence is inchoate to the extent that no one need be deceived and no actual gain or loss need be made and, to that extent, it is rather problematic. However, this does seem like a good opportunity to draw with greater clarity the boundaries between theft and fraud.

20 For arguments for and against this, see S. 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; S. Gardner, 'Is Theft a Rip-Off?' (1990) 10 OJLS 441.

21 Alan Bogg and John Stanton-Ife argue that the law of theft post *Gomez* and *Hinks* is ethically sound, as it provides protection to more vulnerable members of the community. See A. L. Bogg and J. Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies* 402.

At the same time, though, it is not clear what the critics of *Gomez* and *Hinks* look for. An 'assertion of dominion', Clarkson and Keating tell us but what exactly may this refer to? Is it visibility, *pace Skipp*? An 'overt' or 'adverse interference' pace *Eddy* v *Niman* and *Morris* respectively? Or is it something more closely resembling dishonesty or the intention permanently to deprive? If this is the case, if that is the kind of 'value' that we look for in appropriation then we clearly end up collapsing the *actus* into the *mens* and there is nothing left for the latter to do. Unless we are to completely reject the TA 1968 conceptualisation of theft as an utter failure precisely because it confuses acts and intentions.

So the debate has been framed as one relating to the boundaries between objectivity and subjectivity, and, subsequently, those between the *actus reus* and the *mens rea* of theft. What is implied by this way of asking the question is that the conduct element is necessarily objective, that is independent of the mind of the defendant, whereas culpability is mind-dependent. However, this is not necessarily the case. The objectivity of acts is not the same as their factuality. The latter can very well be subjective, in the sense that it refers to mental states rather than occurrences in the physical world. In what follows I argue that appropriation provides an excellent example of an act being capable of being committed by thinking without this meaning that the subjective content of the act belongs in the realm of intentions. I will have to prove this in two steps: First, I must show that some thoughts can indeed amount to acts and that appropriation is one of those thought-acts. Secondly, I must show that at least some mental acts, of which again appropriation must be one, have an effect in the outside environment, in other words that they are somehow harmful. Once these two points have been established, I will try to revisit the debate in the law of theft and shed new light on it.

CAN THINKING EVER BE ACTING?

A powerful argument that acts are always manifestations in the physical world has been put forward by Michael Moore, who has advanced a robust metaphysical realist theory of law.[22] Moore's aim is twofold. On the one hand, he wants to show that the law is not a closed and autonomous discourse and that metaphysical concepts in the law are to be interpreted and understood with their normal meanings. On the other hand, he sets out to prove that there is indeed an independent act requirement in the criminal law and that acts are of natural kinds and can only refer to willed bodily movements. This thesis has several necessary entailments: When there is no bodily movement, there can be no act. Therefore, inertia manifested as omission or failure to act cannot count as an act and cannot be the cause of anything. More importantly for my purposes in this paper, *mental states or normative evaluations are not acts and cannot cause anything in the world.*

In order to see how this would apply to the case of appropriation, let us turn to the current law for guidance in the first instance. The TA 1968 defines appropriation as the assumption of the owner's rights. But this begs the question. When

22 M. S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford: Clarendon Press, 1993).

does one assume the owner's rights? The die-hard realist would have to look for willed bodily movements, to which appropriation or the assumption of the owner's rights would refer. Included in the owner's rights are the right and ability to control the thing and dispose of it as the owner likes. Therefore, there is no doubt that removing the thing from the owner will have to count as appropriation. This makes typical cases of theft such as pick-pocketing or shoplifting rather straightforward.

Things get more difficult for the realist when no control is exercised over the thing. In English law it seems to be possible for one to appropriate something that she has not even touched. In *Pitham* and *Hehl*[23] it was held that appropriation (and theft) had taken place, when a man sold to the defendants furniture belonging to another in the owner's house, without ever touching them. In that case, what is the bodily movement that would amount to appropriation? The acceptance of money? The utterance of the words amounting to the speech act of a promise? Either way, what is being done, the act performed, cannot possibly be seen as an assumption of the owner's rights in the same way as, say, snatching a wallet. In the example of selling things, over which one has no control or has not gained any control yet, the property is still safe and the owner has not been evicted from any of his rights.

One possible response for the realist would be that in such cases the assumption of the owner's rights takes place through the institutional fact of selling the things, which consists in the speech acts of offer and acceptance. In turn, these supervene on the movements of the seller's mouth movements and production of the right sounds, as well as the (f)act of money changing hands, perhaps moving towards the thing and so forth. This view could be corroborated by the fact that in English law proximity seems to play a decisive part. Therefore, one would probably not be able to sell a thing, over which she has no control, say an artefact in the basement of the British Museum. The greater the proximity, the greater the risk to the owner's rights. Plausible as this may seem at first sight, it is problematic on at least two counts. First, in cases such as *Pitham* and *Hehl*, the institutional fact never takes place. The speech acts exchanged are infelicitous, because the seller does not own the things, in order for him to be able to sell them. And yet, appropriation does take place but it would be rather counterintuitive to say that this consists in or even supervenes on the willed bodily movements of the person trying to sell things not belonging to him without the mediation of an institutional fact. Secondly, even if the institutional fact did take place, the realist would have to explain how appropriation can be twice removed from the bodily movement.

Of course, the realist has a very strong defence against all this: the criminal law simply gets it wrong. The thesis that acts are willed bodily movements is not legal but ontological. On the assumption that general metaphysics is relevant in the law, there can be no question that the former enjoys priority.[24] What *is* in the world *is*

23 *R* v *Pitham (Charles Henry)*; *R* v *Hehl (Brian Robert)* (1977) 65 Cr App R 45.

24 This is of course a rather ambitious assumption to make, as many of Moore's critics have forcefully pointed out. My purpose in this paper is not to take sides on the debate on whether ontological questions enjoy priority over moral ones and, more specifically, whether the philosophy of action does have a distinct role to play in criminal law theory, although my analysis is perhaps based on the

in the law too. Therefore, uncritically adhering to judgements such as *Pitham and Hehl* is simply unmotivated in the face of better arguments against them. In fact, the realist would coherently argue that the drafters of the TA 1968 were mistaken to opt for the woolly and vague 'appropriation' instead of the real, hard fact of removal. This would be a strong objection, indeed, so let me try to produce a philosophical argument, in order to back the critique of the realist thesis.

In discussing Moore's thesis from acts as natural kinds, Victor Tadros uses two problem cases, in order to show that mental states are salient to questions of causation.[25] In the first scenario, D stabs P in the leg at the entrance of a shop. As a result of the stabbing, P cannot move. Unknown to D, there is a bomb in the shop, which explodes and kills P. D's intention all along was simply to injure P. In the second scenario, D performs all the same acts as in the previous version but this time he knows that there is a bomb in the shop and he injures P, in order for him to be immobilised and be killed in the explosion. Tadros maintains that in the first scenario, it would be counterintuitive to say that D has caused and should therefore be liable for the death of P. On the contrary, in the second example, it is the mental state of D, his intention to have P killed by the explosion, which causes P's death. It therefore seems plausible to hold him liable for P's death. Thus it turns out that mental states *can* have real effects and therefore acts are not always reducible to natural kinds.

There is value in Tadros' argument but, at the same time, it is open to one powerful objection. In order to argue that the mental state of D causes the death of P, Tadros is forced to assume that D *does* something different in those two scenarios because of his different intentions, as it would be impossible to claim that the intention alone causes anything. So, in the former example, D *injures* P. In the latter, he *immobilises* him knowing that the bomb will finish the job for him. But in doing that, in changing the description of the act in accordance with the intention, Tadros includes the consequences of the action in the action itself and this is not something that the realist should feel compelled to concede.[26] What D *does* is stab P, nothing more and nothing less than that. The attribute of the bodily harm, death, or whatever results from the stabbing is not part of the act itself but rather a normative process, which relates to the conditions of responsibility of D. So, the question of whether the act contains something more than the willed bodily movement remains open and what has to be proven first is that mental states can be acts; that, at least in some cases, thinking can amount to acting.

Even though Tadros' example may be unconvincing, the principle he defends seems to be sound. I would agree that, at least some, mental states can count as acts

assumption that at least in some instances, this is indeed the case. See G. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford UP, 1998), 44–56; G. Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 University of Pennsylvania L Rev 1443; J. Gardner, 'Review of Michael Moore's Act and Crime: Act and Crime: The Philosophy of Action and its Implications for Criminal Law' (1994) 110 LQR 496. For a different approach to action in criminal law, see A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990).

25 V. Tadros, *Criminal Responsibility* (Oxford: Oxford UP, 2005) 179–180.

26 See D. Davidson, 'Agency' in his *Essays on Actions and Events*, (Oxford: Oxford UP, 2001). It should be noted that I am not suggesting that Davidson should be firmly located in the realist side of the realist-antirealist divide.

and that the case of appropriation is an excellent example for that thesis and a counterexample to the realist argument. Let us take the case of keeping or dealing. Suppose two friends, Pete and Mary, are in the pub for a quick drink before going to a football match. Mary goes to the bar and leaves her ticket with Pete for safe-keeping. After a few minutes Pete decides to sell it. Such cases throw open several questions. Has there been appropriation? If yes, when did that take place? At time *t*, when Pete acquired possession of the ticket or at time t_1, when he decided to sell it? The TA 1968 offers very little guidance in this respect. According to s 3(1) TA1968 any later assumption of the rights of the owner amounts to appropriation including when one *keeps* or *deals with* the thing as owner. Does Pete appropriate as soon as he decides to sell the ticket or does he have to do something towards that, such as look for a buyer or even offer it to someone? Does *keeping* mean not actively refusing or simply omitting to return? In other words, must keeping be manifested with some other acts? Or does it refer to something wholly different?

It will be much easier to answer the question by highlighting a very important distinction, namely that between property rights and their exercise. The rights of the owner are not tangible or observable in nature. They refer to a mental link between the owner and the thing. Therefore, they are not exhausted in their exercise. This much becomes clear from the description of property rights as the exclusive authority of the bearer of the rights over the thing. This link is not necessarily or exclusively an institutional fact coming about with all the necessary legally prescribed procedures. It is also a mental connection of the person with the thing, the sense of dominion over the physical environment that we can and do develop. Of course, we interact with our natural environment in a variety of ways without necessarily raising a claim of ownership over everything. We handle things with the sense and knowledge that they belong to another or to no one at all. I should emphasise here that this does not mean that property is tied up to autonomy and our make-up as human beings and is, therefore, not meant as a justification of private property.[27] Whether property is private or communal, it still corresponds to a pre-legal psychological state towards certain things in our environment.[28] From now on, I shall refer to this psychological state as *proprietary subjectivity*.

27 The debate concerning whether property rights are natural or tied up to the person in some necessary manner is still haunted by the Lockean idea of 'mixing of labour'. For a powerful objection to the argument from property as an *a priori* right, see L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice*, (Oxford: Oxford UP, 2002). For an argument as to how some instances of property can be seen as inextricably linked to the person conceived in a Hegelian way, see M. J. Radin, 'Property and Personhood' (1982) 34 Stanford L Rev 957. An implication of this argument is that property, which is closely tied up to the person should be market-inalienable because commodification would amount to the degradation of the person. It is easy to see how such a conception of property would impact on the criminal law, our understanding of offences against property and what they are supposed to protect. For the counterargument – that feelings of degradation *alone* are not a sufficient reason for curbing markets – see N. Duxbury, 'Do Markets Degrade?' (1996) 59 MLR 331. Meir Dan-Cohen argues that objects and ownership should be understood as an ontological extension of the self. See M. Dan-Cohen, *Harmful Thoughts* (Princeton UP, 2002) ch 9.

28 This is not a view shared by everyone. See, eg, A. P. Simester and G. R. Sullivan, 'On the Nature and Rationale of Property Offences' in R. A. Duff and S. P. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford UP, 2005) 168, 168.

Let us now go back to the examples employed by Lloyd LJ in *Gallasso* to illustrate this. The person knocking an item off a super-market shelf and then putting it back or the person picking up something someone has dropped do not form proprietary subjectivity, this special psychological link with the items that they handle. It could, for example, be said that they act as proxies of the owners (although this does not mean that they do not act as agents). On the contrary, when one sells or gives away or destroys a thing, she expresses this proprietary mindset in relation to the object. Thus, in the Pete and Mary case, when Pete takes the ticket for safekeeping, he does not appropriate it, despite the fact that he handles it and thus exercises one of the rights of the owner, because he does not replace the owner in that special proprietary relationship with the thing. However, this is precisely what he does, when he decides to sell it. His attitude towards the ticket is that of its owner, he behaves as if the ticket were *his*.[29] This attitude does not have to be expressed by way of bodily movements. The transformation happens only in Pete's mind and that is enough for the appropriation to take place. And this transformation does not have to do with Pete's intention to deprive Mary of her ticket but with his disposition towards the thing, with the fact that he puts himself in the owner's position.

Let me illustrate this further by using an example from a different jurisdiction, in which something akin to proprietary subjectivity has always been recognised. The German Property Law (or more accurately the Law of Things, *Sachenrecht*) and all civil law systems modelled after it distinguish between three types of connection of a person to a thing. First, there is possession (*Besitz*), the power of actual control over the thing. Secondly, there is ownership (*Eigentum*), which refers to the totality of rights of the owner. Thirdly, and most importantly for the purposes of this paper, there is the concept of *Eigenbezitz*, which would translate roughly as proprietary possession.[30] §872 of the *Bürgerliches Gesetzbuch* defines *Eigenbesitz* as follows: *Wer eine Sache als ihm gehörend besitzt, ist Eigenbesitzer*, that is whosoever possesses a thing as if it belong to him, is a proprietary possessor. It should be noted that the question of good or bad faith, which would be analogous to the honesty-dishonesty question in a criminal law context, does not even come into the picture here. Thus, appropriation, which is one way of acquiring property (BGB §985 *Aneignung*), is the possession of an abandoned thing with a proprietary mindset.[31] German Property Law does not, of course, provide any ontological arguments. It is, however, an indication of what is true of acting, namely that mental states can indeed count as acts.

So far, I have shown that the combination of the two acts of obtaining possession and developing proprietary subjectivity amounts to appropriation. But the

29 This is recognised in *Broom* v *Crowther* 148 JP 592 CA, in which it was held that, as the appellant had not come to any decision as to what to do with the thing, and as this was not a case where he had kept it for a long time or attempted to dispose of it or had used it, it would not be right to conclude that he had assumed the rights of an owner.

30 The Greek word for *Eigenbesitz* is νομή(nomé), which means precisely to possess with a proprietary mental state. What is important is that is not merely a legal term but also an ordinary language one.

31 For a basic but comprehensive introduction to German law see N. Foster and S. Sule, *German Legal System and Law* (Oxford: Oxford UP, 3rd ed, 2002).

two do not always have to go hand in hand. In our running example, if Pete did not have possession of the ticket and simply spoke of the ticket *as if it were his* (even without going as far as performing the speech act of promising to sell it or some other such act), he would still be appropriating the ticket. This follows necessarily from the nature of property as a mental link with things. In thinking of the ticket as his own, Pete questions Mary's claim to exclusivity over the thing and places himself in the place of the owner. Therefore the development of proprietary subjectivity is the only necessary and sufficient condition for appropriation. But this raises another question, which I shall address in the next section.

NO HARM DONE?

If I am correct in arguing that appropriation entails the development of proprietary subjectivity, then the focus is shifted from the owner to the appropriator, from the loss of the rights to their assumption. As soon as proprietary subjectivity is formed, the actor appropriates (but does not necessarily lawfully acquire) *all* of the rights of the owner, in that she behaves *qua* owner. And this has a very important implication. It allows for the punishment for thoughts alone. For example, as soon as someone decides to sell an artefact locked away in the basement of the British Museum, she develops proprietary subjectivity and has appropriated. She clearly is dishonest and intends permanently to deprive, therefore commits theft. But what is the harm in what she has done?

I shall suggest a philosophical answer to this without purporting to be doing justice to a very complicated issue, because, as I shall show later, the matter is different in a legal context. So, can thoughts cause harm? The easy, meta-ethical way out of this is to subscribe to a utilitarian overarching principle for the criminal law and do away with the harm requirement altogether or, in any case, downplay its importance.[32] But there is no reason to do so.[33] According to liberal, individualistic orthodoxy, it is only sticks and stones that can hurt us.[34] Thoughts are harmless, if they are not acted upon.[35] However, as Meir Dan-Cohen points out, this argument rests on the assumption that thoughts are only intentions.[36] This, he argues, is clearly not the case. Thoughts are also beliefs, opinions, judgements. He then tackles the two central realist arguments from knowledge and causation. The former rests on two premises: first, when someone does not know something, she cannot be affected by it. Secondly, when something is not externally manifested, it cannot be knowable. Therefore, thoughts, which are not manifested

32 See the exchange between Bernard Williams and Michael Moore: B. Williams, 'Actus Reus of Dr. Caligari' (1994) 142 University of Pennsylvania L Rev 1661.; M. Moore, 'More on Act and Crime: Reply' (1994) 142 University of Pennsylvania L Rev 1749.

33 In fact, I believe that there is very good reason to cling onto the harm requirement, although this is not the right context to explain why.

34 H. Morris, 'Punishment for Thoughts', in *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (Berkeley: University of California Press 1976); R.A. Duff, *Criminal Attempts* (Oxford: Oxford UP, 1996).

35 One inconsistency with this argument, which is purportedly Kantian is that it does not quite square with the Kantian thesis that judgments (*Urteile*) have an objective, true nature.

36 Dan-Cohen, n 27 above 173.

or acted upon are not knowable and cannot affect anyone. Dan-Cohen successfully shows that both premises are shaky. We can clearly be affected by things that are yet unknown to us. This can be demonstrated by examples as simple as tooth cavities to more serious ones such as rape by deception.[37] Similarly, the external manifestation of thoughts as a presupposition of knowledge is weak, not least because we can successfully draw inferences from information, which does not directly disclose a thought.

The argument from causation rests on the premise that in order for one to be affected by something, that something must have a physical causal link to an aspect or constituent of the person. Dan-Cohen shows that thoughts alone can affect us as long as they affect a relational term that defines one of our relational properties without having to affect any of our intrinsic ones.[38, 39] When either of these properties is altered, then the person (or thing) is affected. One can be a husband and suddenly cease being one, if he gets a divorce; the Eiffel tower will not be Parisian, if it is moved to London and so forth. But this leaves open the question of how a thought can affect those relational properties. The problem is that thoughts do not seem to have extra-personal effects. Dan-Cohen singles out two cases, in which that is possible:

> First, although a thought cannot causally affect any relational term that is external to the thinker, the thought itself can simply *be* another's relational term. Second, the thinker can be the relational term that defines another's relational property. Since a thought affects the person whose thought it is, by affecting the thinker the thought will have affected the other as well.[40]

This is precisely how the thoughts of proprietary subjectivity can disturb the relational terms of the thing and the owner: the former by establishing the mental link between her and the thing, the latter by moving the boundaries of her property. Whereas up to the development of proprietary subjectivity, the thing belonged to one person and her alone, after the thought occurs to the appropriator, he establishes himself in that special connection to the thing, albeit not in a way conforming to the relevant legal rules and institutions.

TYING UP LOOSE ENDS

This is what I have argued so far: Appropriation provides an excellent counter-example to the realist thesis that acts are always and only reducible to willed bodily movements. The development of proprietary subjectivity is an act in itself amounting to the assumption of the owner's rights. Not only that but it can also have an effect in the world by changing the relational properties of persons and things. Let me now address some open legal questions.

37 Dan-Cohen uses the American example of *People* v *Minkowski* [1962] 204 CA2d 832. For one closer to home see *The King* v *Williams* [1923] 1 KB 340.
38 Dan-Cohen, n 27 above, 181.
39 Our properties can also be comparative. For instance, one can be the tallest person in his workplace.
40 Dan-Cohen, n 27 above, 181–182.

ACTUS AND *MENS*

What is crucial in my conceptualisation of the act of appropriation is that we are still well within the factual realm of the act. The proprietary attitude towards the thing is not part of the culpable subjectivity of the appropriator. And this is precisely where most judicial decisions and theorists are mistaken. The misleading direction was given by *Lawrence* and made much of the debate revolve around whether the appropriation is lawful or not. This resulted in criminal lawyers seeking a residue of value in appropriation and in conclusions such as Lord Keith's in *Gomez*, namely that the jester, who switches labels as a joke, does not commit theft, because he is not being dishonest and does not intend permanently to deprive the owner of the thing. With the conception of the *act* of appropriation as including a factual subjective element, recourse to the *mens rea* is unnecessary. The jester in this example does not simply not steal, he never even appropriates.

I would therefore suggest that there has never been a genuine disagreement. The re-conceptualisation of appropriation as entailing a factual proprietary subjectivity sheds new light on the arguments exchanged. On the one hand, the thesis from the objective description of the act of appropriation is reinterpreted as requiring a description of the act without reference to culpability and not a description simply with reference to visible or otherwise sensibly identifiable facts. The factual nature of the proprietary subjectivity satisfies that requirement. On the other hand, those who seek a subjective element appear to have in mind precisely this proprietary subjectivity rather than an element relating to the moral responsibility of the actor. Thus inconsistencies and discrepancies between judicial rhetoric and action can be explained away. For example, the court in *Gallasso* does not contradict itself in setting the objectivity criterion and at the same time allowing the appeal despite the fact that the appellant had visibly, physically handled things belonging to another.

Similarly, the dicta in *Morris* are, after all, in line with *Lawrence*, *Gomez*, and *Hinks*. It transpires that consent is not salient to the question of appropriation. Even when the victim provides consent, such as in *Lawrence*, *Gomez*, and *Hinks*, the defendant has indeed appropriated, as she possesses with proprietary subjectivity and appropriation does not have any normative entailment. One can appropriate, even when one acquires property honestly and lawfully, although these do not necessarily go hand in hand. Although proprietary subjectivity will normally emerge with acquisition of property it is possible that there be a discrepancy. This is the case, when, for example, one does not know that he has become the owner of something. Inheriting the estate of a relative, whom you have never met, or having your account credited with an amount of money as a gift without your knowledge would be such cases.

But even where there is no consent, it is not necessary that there is appropriation in the absence of proprietary subjectivity. Here is an example illustrating this: A, the owner of a priceless painting, deliberately throws it in an open fire. B witnesses this, knows A's intentions but saves the painting from getting burnt. If consent is what makes the interference with the owner's rights adverse, we would have to accept that B appropriates. However, this would be clearly counterintuitive precisely because B never develops proprietary subjectivity and we would not

be able to say that he has made the painting his. In fact, such examples show that consent is not even able to do all the work in determining the *mens rea*, as it would again be impossible to consider B's action dishonest by any standards.

In terms of what exactly distinguishes the *mens rea* from the *actus reus* I do not believe that there is any problem in telling apart appropriation with the added requirement of proprietary subjectivity from dishonesty. Dishonesty may have plenty of problems of its own but overlap with appropriation is not one of them. However, things are less straightforward regarding the intention permanently to deprive. One could argue that, if appropriation entails the development of proprietary subjectivity, this amounts to deprivation of the owner of the thing. The requirement of an intention permanently to deprive made sense under the old law of larceny, where the only required act was the removal of the thing.[41] I would suggest that things are not much different now. First, proprietary subjectivity over a thing does not have to be permanent. Secondly, it does not even necessarily amount to deprivation of the owner of the thing. Intention permanently to deprive seems still to refer to the thing rather than to the owner's rights. There must be either a loss of the thing altogether or a loss in value, although how much value should be lost is open to question.

REVISITING THE PROBLEMS

At the beginning of this article, I reclassified the problems to which the concept of appropriation is perceived to give rise under the headings of systemic and ethical. It is now time to see whether reinterpreting appropriation as entailing the development of proprietary subjectivity has a bearing on these two categories and whether it reveals some new problems about the law of theft.

Starting with the ethical side of things, I believe that the rule of law problem relating to fair warning can now be seen in a different light. Establishing that the act of appropriation can be performed with a thought alone or with the combination of a thought and a physical act of obtaining possession, necessarily implies that one knows very well when one appropriates.

However, another pressing and rather more important problem arises. I have argued that thought-acts, of which appropriation is one, can indeed be harmful. But of course, this does not suffice to warrant the intervention of criminal law, as not *all* instances of harm should trigger the latter's response. Here is where it is revealed that the law of theft in England and Wales is morally unsound. If the only conduct requirement is appropriation and since appropriation can be committed by thinking alone, it is conceivable that the scope of the offence can be widened even further so as to make it possible to prosecute people looking at things in shop window displays in a suspicious manner, for instance. This,

41 This is how the Germans still do things. §242 (1) of the German Penal code (*Strafgesetzbuch*) defines theft (*Diebstahl*) as follows: 'Wer eine fremde bewegliche Sache einem anderen in der Absicht wegnimmt, die Sache sich oder einem Dritten rechtswidrig zuzueignen . . . [Whoever takes away moveable property belonging to another with the intent of unlawfully appropriating the property for himself or a third person]'. Embezzlement (*Unterschlagung*) is still a separate offence (§246).

however, would be ethically problematic and inconsistent with fundamental criminal law principles as it falls well below the threshold of harm warranting the intervention of the criminal law. It is also awkward in that it does not capture the ordinary moral conception of theft. We would simply not be prepared to say that someone who appropriates, in the sense in which I have approached appropriation, steals, even when the *mens rea* requirements concur. And it is important to note that this is not a question of the semantics of theft. It is an ethical question pertaining to which acts we consider morally and legally reprehensible.

Furthermore, the *mens rea* and the *actus reus* of theft may not be merged, as has been believed thus far, to the degree that appropriation is a thought-act rather than just a thought, but including a subjective element in the *actus reus* is still problematic not least for evidentiary reasons. *Mens rea* is notoriously difficult to prove and, given that it is subjective in nature, so will be the *actus reus* of theft. Thus, the main pragmatic reason for keeping *actus* and *mens* separate, namely keeping demarcated an arguably easily, sensibly identifiable event and the conditions of responsibility of the actor, is undermined. From a purely pragmatic, strategic point of view, this is clearly unsatisfactory. So, for the purposes of the criminal law, it is necessary both to have the proprietary subjectivity and express it in a way that will pose a sufficient risk to the owner's ability to exercise that right. The question then is how this can be achieved.

It could perhaps be argued that the general principle of criminal law that intentions should be acted upon somehow and to a certain degree for criminal responsibility to be established can be reinterpreted as requiring the act to be manifested and sensibly identifiable. In this light, the law of theft would be interpreted as requiring not only assumption of the rights of the owner but also a manifestation of proprietary subjectivity. In *Pitham* and *Hehl*, for example, the defendant's proximity to the property as well as the fact that he exercised the right to sell them along with proprietary subjectivity should suffice for establishing that appropriation had taken place. Similarly, it could be said that the person selling British Museum artefacts appropriates when she sells them rather than when she merely decides to do so.[42] It would, however, be much easier and would lend the law conceptual and moral clarity, if the requirement of manifestation of proprietary subjectivity be included in the law itself. Predicating appropriation as *manifest* should suffice, as it would bring the act requirement back in line with the kinds of acts that the criminal law is accustomed to without going so far as returning to the old requirement of removal of the thing thus still protecting property (in the loose sense that it does) rather than possession.[43]

42 Clearly, it is counterintuitive to convict for theft in such cases. Indeed, the proper charge would be for fraud as the victim seems to be the person she sells the artefacts to rather than the museum. However, if the good protected by the offence of theft really is property, there is no reason why this should not be considered theft. This is a result I feel uncomfortable with, which is part of the reason why I believe that it should be re-examined very carefully whether property really is a good deserving the protection of the criminal law and whether it is what lends so-called offences against property their coherence.

43 Whether property is a good that ought to be protected in this way by the criminal law is a separate question. I do not believe that it should be so protected, but this is not the right context to explain why.

Lastly, let me turn to the systemic problems. It is true that those are not resolved with the re-conceptualisation of appropriation. But it is never appropriation that gave rise to them in the first place. In cases such as *Gomez* and *Hinks*, it is not a question of whether the defendants appropriate. That they do should never have been open to question and this is underlined by the way I have reinterpreted appropriation in this paper. The real problem lies with one of the reasons behind the appropriation, namely the consent of the owner. If the consent is misguided and the defendant is responsible for that, as was the case in *Gomez* and presumably in *Hinks*, then their behaviour is indeed morally and legally unsound and should be dealt with by the criminal law. But, as has been emphatically pointed out, the right way of doing so was not with the offence of theft but that of obtaining property by deception.[44] And, despite the argument that civil and criminal law have different foci and aims, there is no apparent reason why cases like *Hinks* should be treated any differently by civil law than they are by the criminal law.

44 This is probably what distinguishes *Gomez* from *Hinks*. In the latter, it does not seem that the victim had been deceived but rather that he was not entirely capable of exercising his reason and judgment. If that is the case, *Gomez* should never have been authority for *Hinks*.