

See: Minutes of Subcommittee on Grading
and Sentencing
4/5/70, p. 45, Vol. X
Tapes #56 & 57

ARTICLE 14. THEFT AND RELATED OFFENSES

Tentative Draft No. 1; April 1968

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CRIMINAL LAW REVISION COMMISSION
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THEFT

Tentative Draft No. 1; April 1968

Section 1. Definitions. As used in _____,
except as the context may require otherwise:

(1) "Appropriate property of another to oneself or a
third person" or "appropriate" means to:

(a) Exercise control over property of another, or to
aid a third person to exercise control over property of another,
permanently or for so extended a period or under such circumstances
as to acquire the major portion of the economic value or benefit of
such property; or

(b) Dispose of the property of another for the benefit of
oneself or a third person.

(2) "Deprive another of property" or "deprive" means to:

(a) Withhold property of another or cause property of another to
be withheld from him permanently or for so extended a period or under
such circumstances that the major portion of its economic value or
benefit is lost to him; or

(b) Dispose of the property in such manner or under such
circumstances as to render it unlikely that an owner will recover such
property.

(3) "Obtain" includes, but is not limited to, the bringing about
of a transfer or purported transfer of property or of a legal interest
therein, whether to the obtainer or another.

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(4) "Owner of property taken, obtained or withheld" or "owner" means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.

(5) "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract.

COMMENTARY - DEFINITIONS

This section contains definitions of terms used in several succeeding sections of the Theft draft, thereby providing for a shorter and clearer definition of the crime and ensuring a uniformity of meaning throughout the sections. The definitions employed are patterned generally after the New York Revised Penal Law section 155.00.

Subsections (1) and (2) define "appropriate" and "deprive," both fundamental to a definition of the requisite intent (See section 2) on the part of the thief to exert permanent or virtually permanent control over the property taken, or to cause permanent or ~~virtually permanent~~ loss to the owner of the possession and use thereof. These definitions retain the traditional distinction between larceny and some other offenses which, though similar, do not reach the stature of larceny because of a lesser intent to obtain temporary possession or use of the property or to cause temporary loss to the owner. CJS Larceny, ss 27, 28; State v. Teller, 45 Or 571 (1904); State v. Ducher, 8 Or 394 (1880).

The definition of "obtain" in subsection (3) extends the concept of a taking to include the constructive acquisition of property, and is consistent with the ensuing definition of "property," which includes real property.

Subsection (4), in defining the terms "owner of property taken, obtained or withheld" and "owner," articulates the relationship that must exist between a person and the property involved in order for him to be the victim of a larceny if the property is wrongfully taken from him. The word is not found in our existing larceny statute; however, the phrase "the property of another" that appears in ORS 164.310, as well as in the common law definition of larceny, means "ownership." State v. Broom, 135 Or 641 (1939); State v. Poyntz, 168 Or 69 (1942).

For larceny purposes, it is uniformly held that "ownership" of property means "possession" of it and that having a legally recognizable interest in property gives a person possession of it. State v. Luckey, 150 Or 566 (1935); State v. Swayzer, 11 Or 357 (1884).

Subsection (5), "property," is defined broadly enough to avoid a limitation to the enumerated kinds and to encompass the subjects of larceny now covered in ORS 164.310, including real property. By specifically including intangible property within its scope, the definition remedies the type of problem that occurred in State v. Tauscher, 227 Or 1 (1961), wherein it was held that only property that is tangible and capable of being possessed may be the subject of larceny or embezzlement under the existing statutes and an agent who, without authority and for her own purposes, drew a check on her principal's account was guilty of neither crime.

Section 2. Theft. A person commits theft when, with intent to deprive another of property or to appropriate property to himself or to a third person, he:

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(1) Takes, appropriates, obtains or withholds such property from an owner thereof.

(2) Acquires property lost, mislaid or delivered by mistake as provided in section 3 of this Act.

(3) Commits theft by extortion as provided in section 4 of this Act.

(4) Commits theft by deception as provided in section 5 of this Act.

(5) Commits theft by receiving as provided in section 6 of this Act.

COMMENTARY - THEFT

A. Summary

The primary purpose in drafting this section is to eliminate the traditionally distinct crimes of larceny, larceny by trick, embezzlement, obtaining property by false pretenses, receiving stolen property and extortion and to consolidate them into one crime called "theft." Consolidation is accomplished by the language of subsection (1), aided by the definitions contained in the previous section.

The secondary purpose of broadening the scope of existing law is effected by subsections (2) through (5).

Subsection (2) designates as a form of theft the acquisition of property lost, mislaid or delivered by mistake.

Subsection (3) provides that theft may be committed by "extortion."

Subsection (4) designates "deception" as theft.

Subsection (5) continues the expanded concept of the crime to include theft by "receiving."

The penalty provisions will not be incorporated into the Theft draft until the preliminary articles covering classes of crimes have been drafted; however, this draft is intended to lay the groundwork for a more rational and logical classification of offenders in the property crimes area to reduce the disparity in punishment provisions that now exists.

B. Derivation

The basic definition of theft is similar to New York Revised Penal Law section 155.05, although, contrary to that code, the enumeration of the old crimes of larceny, larceny by trick, embezzlement and obtaining by false pretenses as ways of committing theft has been purposely avoided. The Commission hoped thereby to preclude the implication that the artificial technicalities of these crimes were being retained in the theft articles.

Following the example of the Model Penal Code and several other states, we have attempted to abolish completely the labels and highly technical distinctions between the various larceny-type offenses and propose to codify them into one comprehensive theft statute.

C. Relationship to Existing Law

ORS 164.310 is the basic larceny statute, but it is merely one of numerous statutes relating to the stealing of property. Our present statutes contain three general types of provisions proscribing the criminal taking of property and draw technical distinctions between the traditionally separate crimes of larceny, embezzlement and obtaining property by false pretense. In addition many of the existing statutes found in ORS chapter 164 describe specific criminal acts that are covered by the basic larceny section but are distinguished from it by the subject matter of the theft or its locus. These other statutes cover separately, and often prescribe different penalties for, the crimes of stealing from the person, stealing minerals, trees or plants, livestock, railroad property, animals and motor vehicles, to mention a few.

It is apparent that this multiplicity of statutory provisions with its confusing diversity of penalties for similar crimes, gradually developed over the years as the result of piecemeal legislation.

The embezzlement laws themselves are further refined into a perplexing series of distinct statutory crimes, each with its own special penalty provision. Often, the vastly different penalties between one type of embezzlement and another appear to rest on no logical or reasonable foundation.

Fraudulent criminal conduct which results in the defendant obtaining property from the victim is dealt with as separate crimes in ORS chapter 165.

A substantial body of case law exists in which the Oregon Supreme Court has grappled with the distressing problems created by our archaic theft statutes and related provisions. The structure of the Oregon statutes, inherited as it was from the old common law, retains today distinctions that are not only meaningless in a modern society, but are, also, unnecessary handicaps to effective administration of the laws.

Section 3. Theft of lost, mislaid property. A person who comes into control of property of another that he knows or has good reason to know to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to the owner.

COMMENTARY - THEFT OF LOST, MISLAID PROPERTY

A. Summary

This section is concerned with theft of three types of property: (1) Lost; (2) Mislaid; or (3) Delivered by mistake.

A person who comes into control of property of another that he knows or has good reason to know to have been lost, mislaid, or delivered by mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to the owner.

A person who merely learns of the whereabouts of lost property but does not assume control over it would not commit theft. A finder who casually handles a lost article would not be considered to have "come into control" of it. The chances of restoration to the owner might often be increased rather than lessened by non-interference of casual finders.

Even though a finder may take possession with intent to keep the property from the owner, he does not commit theft if he then proceeds to take reasonable measures to restore the property to its owner.

This section is intended to punish finders for failure to act rather than for an initial misappropriation. The mens rea element of the crime -- the intent to deprive the owner of the property -- must exist at the time of the actor's failure to take reasonable measures to restore the property to the owner.

The following statement from the Commentary to Model Penal Code (T.D. #2, pp. 83-84) details the type of fact situation in which the section would apply:

"Common law theory of larceny as an infringement of another's possession required a determination of the actor's state of mind at the moment of finding, for an honest state of mind at that point would preclude the felony conviction; the subsequent formation of a dishonest purpose would not be criminal since he would already be in possession. The search for an initial fraudulent intent appears to be largely make-believe. The realistic

objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner. Therefore the section permits conviction even where the original taking was honest in the sense that the finder then intended to restore, but subsequently changed his mind; and it bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a fraudulent purpose at some time during his possession."

The section deals with property that is lost, mislaid or delivered by mistake. The latter category covers the kind of situation wherein one accepts a \$10 bill knowing that the other person thinks he is handing over a \$1 bill. In such a case the receiver acquires the property without trespass or false pretense and the traditional concept of larceny fails to reach such conduct. However, it is not proposed to make criminal certain types of tolerated sharp trading such as the purchase of another's property at a bargain price on a mere showing that the buyer was aware that the seller was mistaken regarding the value of the property sold.

B. Derivation

The section is a blending of Model Penal Code Section 223.5; New York Revised Penal Law Section 155.05 1 (b); and Illinois Criminal Code Section 16-2.

C. Relationship to Existing Law

At common law, "lost property" is property not intentionally deposited by the owner in a place where it was found. Jackson v. Steinberg, 186 Or 129 (1949). "Mislaid property" is that which the owner has voluntarily and intentionally laid down in a place where he can again resort to it and then has forgotten where he laid it. Ibid.

ORS sections 98.010 - 98.040 presently impose certain affirmative duties on the finders of lost goods; however, none of the criminal statutes deal with the question.

Under existing case law one who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud, is guilty of larceny. State v. Ducher, 8 Or 394 (1880).

Section 4. Theft by extortion. A person commits theft by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will in the future:

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- (1) Cause physical injury to some person; or
- (2) Cause damage to property; or
- (3) Engage in other conduct constituting a crime; or
- (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (6) Cause or continue a strike, boycott or other collective action injurious to some person's business; except that such conduct shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (7) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (8) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (9) Inflict any other harm which would not benefit the actor.

COMMENTARY - THEFT BY EXTORTION

A. Summary

This section continues the comprehensive definition of theft and deals with situations where coercion is employed to obtain property of another. The crime would consist of the wrongful acquisition of property by intimidation or threat.

Although the penalty provisions have not been drafted, the subcommittee anticipates that theft committed by extortion, along with theft from the person, would be considered as more serious than theft accomplished by conventional larcenous methods.

Subsections (1) through (9) list the kinds and varieties of threats or intimidating conduct that would amount to theft by extortion.

As recommended by the Model Penal Code, subsection (1) covers threats to injure anyone, on the theory that if the threat is in fact the effective means of compelling another to give up property, the nature of the relationship between the victim and the person he chooses to protect is immaterial. The issues are whether the threat is intended to intimidate and whether it is effective for that purpose.

Subsection (2) is aimed at the threat to cause damage to someone's business, home or other property. A common example would be the selling of "protection" to a store owner.

The provisions of subsection (3) are taken directly from New York Revised Penal Law and are similar to the Model Penal Code which employs the language "commit any other criminal offense." Commentary to Model Penal Code (T.D. #2, p. 76) indicates its purpose is to cover a situation like this: A racketeer obtains property from another racketeer by threatening to operate houses of prostitution or illegal gambling enterprises in competition with him. Threat to compete would not ordinarily be criminal because the right to compete is one which, in our society, may be bargained away. However, where the competition itself would be criminal activity, there is no need to immunize a threat to engage in that activity when it is used for the purpose of extortion.

Subsection (4) resembles closely the language now appearing in ORS 163.480 and is common to most extortion statutes.

Subsection (5) amounts to a threat to defame. Unlike defamation actions, the truth of the matter threatened to be exposed would not constitute a defense to a prosecution under this subsection. The prohibition is directed against "selling" forbearance from defamation and not against the publication of defamation itself. It is emphasized, however, that the subsection is not intended to make it criminal to conduct legitimate negotiation or to agree to settlement of an asserted claim as consideration for a promise to forbear from civil litigation.

The provisions of subsection (6) are aimed at racketeering, but do not in any way jeopardize the collective bargaining process, since even menaces are not criminal if the benefits are to be received by the group on behalf of which the "bargaining" is conducted. The group representative or official who threatens such action unless he gets a "kickback" would be reached by this subsection, however.

Subsection (7) is self-explanatory.

Subsection (8) is aimed at extortion committed under cover of public office and is close to the "bribery" type of crimes now incorporated in ORS 162.230, 162.240 and 162.510.

Subsection (9) is a statement of the general principle on which other threats are to be included within extortion. Examples suggested by Model Penal Code commentary (T.D. #2, p. 79) are: (a) The foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) A close friend of the purchasing agent of a corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) A professor obtains property from a student by threatening to give him a failing grade.

B. Derivation

The draft follows the lead of Model Penal Code section 223.4 and is a blend of that section and New York Revised Penal Law section 155.05 (e). The New York statute proscribes larceny of property by threat to cause physical injury to some person in the future. The Model Penal Code punishes obtaining of property by a threat to inflict bodily injury on anyone. It is submitted that the New York provision is preferable because it more clearly distinguishes between this type of theft and robbery, which is the threatening of immediate use of physical force upon another. Illinois Criminal Code (1961) and Michigan Revised Criminal Code (1967) contain comparable statutes.

C. Relationship to Existing Law

ORS 163.480, Oregon's present "extortion" law, provides that any person who threatens any injury to the person or property of another or threatens to accuse another of any crime with the intent to extort any "pecuniary advantage or property" from him or to compel him to do any act against his will shall be punished. It can be observed that the crime is committed by making the threat, and obtaining property thereby is not an element.

The proposed draft would go beyond the existing statute by providing that the actor would commit theft if he actually obtained property from another as a result of the threat. It should be noted, however, that the Commission does not propose thereby to eliminate the proscription against the conduct now covered by ORS 163.480. It will be dealt with when the articles relating to crimes against persons are drafted. Too, it seems logical to assume that such conduct would, in any event, amount to "attempted theft by extortion" under the draft.

Section 5. Theft by deception. (1) A person, who obtains property of another thereby, commits theft by deception when, with intent to defraud, he:

(a) Creates or confirms another's false impression of law, value, intention or other state of mind which the actor does not believe to be true; or

(b) Fails to correct a false impression which he previously created or confirmed; or

(c) Prevents another from acquiring information pertinent to the disposition of the property involved; or

(d) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which he does not intend to perform or knows will not be performed.

(2) "Deception" does not include falsity as to matters having no pecuniary significance, or representations unlikely to deceive ordinary persons in the group addressed.

(3) In any prosecution for theft by deception the actor's intention or belief that a promise would not be performed shall not be established by or inferred from the fact alone that such promise was not performed.

COMMENTARY - THEFT BY DECEPTION

A. Summary

Section 5 defines the crime of theft by deception. The section is restricted to include only those instances wherein there exists an intent to defraud and to exclude cases essentially civil in nature and amounting to little more than breaches of contract.

Subsection (1) (a) retains the traditional false pretenses concept of creating a false impression, and broadens the scope to include the act of confirming another's false impression which the actor does not believe to be true. If the actor confirms the false impression for the purpose of inducing consent and obtains property thereby, he will commit theft. The false impression may relate to law, value, intention or other state of mind of the victim. The traditional restriction to "existing fact" is rejected.

If the actor fails to correct a false impression which he previously created or confirmed and obtains property thereby, he would commit theft under (1) (b).

A person who prevents another from acquiring information pertinent to the disposition of the property would commit theft if he does so with fraudulent intent and obtains property of another as the result. (Subsection (1) (c)).

If with like intent and with like result the actor sells, transfers or otherwise encumbers property and fails to disclose a lien or other legal impediment to the enjoyment of the property, he would be guilty of theft under the provisions of (1) (d).

Subsection (1) (e) covers theft committed by "false promise" and represents a significant departure from the familiar limitation to misrepresentation of fact and includes promises of future performance which the actor does not intend to perform or knows will not be performed. However, mere nonperformance alone would not be sufficient to establish that the actor intended or believed that a promise would not be performed. (See subsection (3)).

The exception contained in subsection (2) is designed to deal with the problem of mass advertising and "commendation of wares" that would be considered unlikely to deceive ordinary persons, and to situations wherein a misrepresentation may be made during the "bargaining" but the person deceived nonetheless gets everything he bargained for. For example, a salesman who misrepresents his political or lodge affiliations to make a sale.

B. Derivation

Subsection (1) is derived from Illinois Criminal Code section 15-4 and Michigan Criminal Code (Final Draft) section 3201. In paragraph (a) the prepositional phrase "of law, value, intention or other state of mind" which modifies the word "impression" is taken from Model Penal Code section 223.3. This language seems desirable because it clearly indicates the intent to eliminate needless distinctions based on "fact" as contrasted with "opinion" or "present or past fact" as opposed to "future events."

The exception contained in subsection (2) is taken from Model Penal Code section 223.3; however, the term "representations" has been substituted for the phrase "puffing by statements" used therein.

Subsection (3) is a restatement of language from New York Revised Penal Law section 155.05, and is similar to provisions contained in Model Penal Code section 223.3 (a).

C. Relationship to Existing Law

The section brings what is now the crime of obtaining property by false pretenses (ORS 165.205) within the ambit of theft and greatly broadens the scope of the offense to

include conduct not now covered. Deception would include, also, the type of fraudulent activity which presently would be prosecuted as "larceny by trick." Eliminated is the tricky question of whether "title" as opposed to "possession" passes. Obtaining property by means of a bad check also could be prosecuted as theft by deception.

Section 6. Theft by receiving. (1) "Receiving" (Existing Law
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means acquiring possession, control or title, or lending on the security of the property.

(2) A person commits theft by receiving if he receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property was the subject of theft.

COMMENTARY - THEFT BY RECEIVING

A. Summary

The draft follows the lead of the Model Penal Code by incorporating the traditionally distinct crime of receiving stolen property as part of the comprehensive "theft" offense.

The definition of "receiving" is taken directly from Model Penal Code section 223.6 (1). The commentary thereto (T.D. #2, pp. 94-95) stresses that the essential idea to be expressed in statutes prohibiting receiving stolen property is that of acquisition of control whether in the sense of physical dominion or of legal power to dispose. The definition is broad enough to cover "constructive possession" and the activities of those who buy stolen property, as well as persons who acquire title thereto otherwise than by purchase, and who make loans and advances on such property.

Consolidation of receiving with other forms of theft provides the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the similar activities of stealing and receiving the fruits of the theft.

It will be noted, however, that consolidation would make it impossible to convict of two offenses based on the same transaction. A person found in possession of recently stolen property may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief. (See section 9 for defense.)

B. Derivation

Section 6 is based upon Model Penal Code section 223.6.

C. Relationship to Existing Law

The terms "receives" and "conceals" are retained from ORS 165.045 although the concept of "receiving" has been greatly expanded by the definition of that term in subsection (1) and would continue to include "buying."

The knowledge or belief of the actor that the property is stolen is stated in substantially the same manner as in the present statute, "knowing or having good reason to know." This is more severe than the Model Penal Code which demands actual awareness by the defendant, with the requisite state of mind required to be "knowing that it has been stolen, or believing that it has probably been stolen." (MPC section 223.6). Nevertheless, under the Model Penal Code version, proof of reason to believe would authorize a jury to draw an inference of actual knowledge, so the difference between the two drafts is largely academic.

Section 7. Right of possession. Right of possession of property is as follows:

(1) A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds the property from him by means of theft.

(2) A joint or common owner of property shall not be deemed to have a right of possession of the property superior to that of any other joint or common owner of the property.

(3) In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest in the property, even if legal title to the property lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

COMMENTARY - RIGHT OF POSSESSION

A. Summary

This section spells out the right of possession of property. Subsection (1) is consistent with the definition of "owner" contained in section 1 (4) by providing that one who obtained possession of property by theft or other illegal means has a right of possession superior to that of one who takes, obtains or withholds it from him by means of theft. This is a codification of a generally accepted principle in the larceny area. (52 CJS, s. 13, p. 811).

Subsection (2) defines the rights of joint or common owners, such as partners, and is a restatement of the generally accepted principle that one cannot "steal" from the other if the taker has a right to possession at the time of the taking.

Subsection (3) deals with the difficult cases in which there is some sort of security agreement between the parties, and provides that in the absence of a specific agreement to the contrary, a person in lawful possession of property has a right of possession superior to one having only a security interest therein. The gist of the subsection is to protect lawful possession.

B. Derivation

Section 7 is taken directly from New York Revised Penal Law section 155.00.

C. Relationship to Existing Law

The section represents basically a codification of existing common law principles.

Section 8. Value of stolen property. For the purposes of this _____, the value of property shall be ascertained as follows:

(1) Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot reasonably be ascertained, the cost of replacement of the property within a reasonable time after the crime.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt, including, but not limited to, a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby.

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner might reasonably suffer because of the loss of the instrument.

(3) When the value of property cannot reasonably be ascertained, it shall be presumed to be an amount less than \$_____.

COMMENTARY - VALUE OF STOLEN PROPERTY

A. Summary

This section sets forth three criteria to establish value.

B. Derivation

This section is derived substantially from New York Revised Penal Law section 155.20 and appears to be a more

appropriate system of determining value than the Model Penal Code which establishes value merely as "the highest value by reasonable standard of the property or services."

C. Relationship to Existing Law

Value of stolen property for purposes of determining the degree of larceny is its market value at the inception of the taking thereof. State v. Albert, 117 Or 179 (1926).

Section 9. Theft; defenses. (1) A person does not commit theft if he acts under an honest claim of right, in that:

(a) He is unaware that the property is that of another; or

(b) He reasonably believes that he is entitled to the property involved or has a right to acquire or dispose of it as he does.

(2) The burden of injecting the issue of claim of right is on the defendant, but this does not shift the burden of proof.

(3) In any prosecution for theft by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

(4) In any prosecution for theft by receiving, it is a defense that the defendant received, retained, concealed or disposed of the property with the intent of restoring it to the owner.

(5) It is a defense that the property involved is that of the defendant's spouse unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.

COMMENTARY - THEFT; DEFENSES

A. Summary

Subsection (1) restates existing case law and provides that a person does not commit theft if he acts under an honest claim of right in that he is unaware that the property is that of another, or reasonably believes he is entitled to deal with the property as he does.

Subsection (2) requires the defendant to produce evidence to support the claim of right, but specifies that this does not shift the burden of proof. This is in accord with Oregon case law.

Subsection (3) excludes from criminal liability the victim of a theft or other crime causing financial loss, who threatens the thief with criminal prosecution based upon his conduct unless he makes good the loss.

Subsection (4) sets forth a defense to the crime of theft by receiving.

Subsection (5) abrogates the common law rule that because of the legal unity of husband and wife one could not steal property of the other. (52 CJS, Larceny, s. 40). The common law immunity has been abolished or narrowed in a majority of states on the ground that the Married Women's Property Acts and the changed status of women in society today call for treating her in property matters as a separate person independent of her husband. (See Model Penal Code, T.D. #2, pp. 103-5).

This subsection is substantially the same as the provision found in the Illinois Criminal Code of 1961. Comments to that statute indicate that the Illinois revision committee felt that unless the husband and wife have separated and are living in separate abodes when the theft occurs, the criminal law should not intrude into what usually is a civil dispute wherein the true ownership of the property involved is uncertain at best. If, however, the parties have separated and are living apart and theft occurs, there seems to be no good reason why such conduct should not be punishable in the criminal courts.

Members of the Commission generally agree that such an approach is a reasonable one and would leave most property fights between spouses to the divorce courts, but, at the same time, would provide criminal sanctions in those situations where the separate property rights of a spouse require the protection of the criminal law.

B. Derivation

Subsections (1) and (2) are borrowed from Michigan Revised Criminal Code (Final Draft 1967) section 3240.

Subsection (3) is adapted from New York Revised Penal Law section 155.15.

Subsection (4) is a modified version of language taken from Model Penal Code section 223.6.

The language in subsection (5) is substantially the same as that used in Illinois Criminal Code section 16-4 (b). The Model Penal Code also rejects the rule of absolute immunity between spouses (see Tentative Draft No. 2, pp. 103-5); and the Michigan Revised Criminal Code section 3240 adopts a similar position.

C. Relationship to Existing Law

(1) Common law larceny required that the defendant have the intent to deprive the owner permanently of his property. A person is not guilty of larceny if he takes the property of another under a bona fide claim of right or under a mistaken belief that he has authority to deal with the property. 52 CJS Larceny s. 25; State v. Teller, 45 Or 571 (1904); State v. Meldrum, 41 Or 380 (1902); State v. Minnick, 54 Or 86 (1909); State v. Sally, 41 Or 366 (1902). Subsection (1) is, in effect, a restatement of common law principles, in language broad enough to cover all conduct designated as "theft" by the draft.

(2) The defendant must develop evidence on the issue of claim of right, a mere assertion of the possibility of a claim of right being insufficient. The state is not now required to prove the lack of a subjective belief of authority to act by the defendant. If the theft statute is to be enforceable, the state could not be expected to discharge such a burden. What the defendant does by his evidence is to "raise a reasonable doubt" about the mens rea element of the crime, and the draft makes it clear that the burden continues on the state to prove every element of the crime charged beyond a reasonable doubt. Unquestionably, a jury would be so instructed in the absence of such a provision in the draft, but it seems preferable to make the code as comprehensive as possible by spelling it out.

(3) The defense to prosecution for theft by extortion committed by a threat to charge another person of a crime is

analogous to the "claim of right" defense, but more limited in its application.

(4) This subsection is directed at cases such as that of an insurance company receiving property on behalf of the owner. The subcommittee believed it was better to insert this provision in the section relating to defenses rather than as an exception in the substantive statement of the crime to avoid any possible interpretation that it was an element to be negated by the prosecution.

#

TEXT OF MODEL PENAL CODE

ARTICLE 223. THEFT AND RELATED OFFENSES

Section 223.0. Definitions

In this Article, unless a different meaning plainly is required:

(1) "deprive" means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

(2) "financial institution" means a bank, insurance company, credit union, building and loan association, investment trust or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(3) "government" means the United States, any State, county, municipality, or other political unit, or any department, agency or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government.

(4) "movable property" means property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location. "Immovable property" is all other property.

(5) "obtain" means: (a) in relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another; or (b) in relation to labor or service, to secure performance thereof.

(6) "property" means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

(7) "property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

Section 223.1. Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally.

(1) Consolidation of Theft Offenses. Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(2) Grading of Theft Offenses.

(a) Theft constitutes a felony of the third degree if the amount involved exceeds \$500, or if the property stolen is a firearm, automobile, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.

(b) Theft not within the preceding paragraph constitutes a misdemeanor, except that if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the actor proves by a preponderance of the evidence that the amount involved was less than \$50, the offense constitutes a petty misdemeanor.

(c) The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

(3) Claim of Right. It is an affirmative defense to prosecution for theft that the actor:

(a) was unaware that the property or service was that of another; or

(b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or

(c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

(4) Theft from Spouse. It is no defense that theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

Section 223.2. Theft by Unlawful Taking or Disposition.

(1) Movable Property. A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

(2) Immovable Property. A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

Section 223.3. Theft by Deception.

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

(a) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or

(b) prevents another from acquiring information which would affect his judgment of a transaction; or

(c) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(d) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

Section 223.4. Theft by Extortion.

A person is guilty of theft if he purposely obtains property of another by threatening to:

(a) inflict bodily injury on anyone or commit any other criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action; or

(e) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(g) inflict any other harm which would not benefit the actor.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

Section 223.5. Theft of Property Lost, Mislaid, or Delivered by Mistake.

A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

Section 223.6. Receiving Stolen Property.

(1) Receiving. A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.

(2) Presumption of Knowledge. The requisite knowledge or belief is presumed in the case of a dealer who:

(a) is found in possession or control of property stolen from two or more persons on separate occasions; or

(b) has received stolen property in another transaction within the year preceding the transaction charged; or

(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

"Dealer" means a person in the business of buying or selling goods. (Includes pawnbrokers.)

Section 223.7. Theft of Services.

(1) A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token or other means to avoid payment for the service. "Services" includes labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

(2) A person commits theft if, having control over the disposition of services of others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

Section 223.8. Theft by Failure to Make Required Disposition of Funds Received.

A person who purposely obtains property upon agreement, or subject to a known legal obligation, to make specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition. An officer or employee of the government or of a financial institution is presumed: (i) to know any legal obligation relevant to his criminal liability under this Section, and (ii) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

NEW YORK REVISED PENAL LAW (1967)

Article 155

Section 155. Larceny

The following definitions are applicable to this title:

1. "Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or any article, substance or thing of value.

2. "Obtain" includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another.

3. "Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

4. "Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

5. "Owner." When property is taken, obtained or withheld by one person from another person, an "owner" thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.

A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds it from him by larcenous means.

A joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any other joint or common owner thereof.

In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest therein, even if legal title lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

6. "Secret scientific material" means a sample, culture, micro-organism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects, or records a scientific or technical process, invention or formula or any part or phase thereof, and which is not, and is not intended to be, available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his or their consent, and when it accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

Section 155.05. Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property.

A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be

performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

- (i) Cause physical injury to some person in the future; or
- (ii) Cause damage to property; or
- (iii) Engage in other conduct constituting a crime; or
- (iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Section 155.10. Larceny; no defense

The crimes of (a) larceny committed by means of extortion and an attempt to commit the same, and (b) bribe receiving by a labor official as defined in section 180.20, and bribe receiving as defined in section 200.05, are not mutually exclusive, and it is no defense to a prosecution for larceny committed by means of extortion or for an attempt to commit the same that, by reason of the same conduct, the defendant also committed one of such specified crimes of bribe receiving.

Section 155.15 Larceny; defenses

1. In any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith.

2. In any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

Section 155.20 Larceny; value of stolen property

For the purposes of this title, the value of property shall be ascertained as follows:

1. Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.

2. Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectable thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

Section 155.20 (Cont'd)

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

3. When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in subdivisions one and two of this section, its value shall be deemed to be an amount less than two hundred fifty dollars.

Section 155.25 Petit larceny

A person is guilty of petit larceny when he steals property.

Petit larceny is a class A misdemeanor.

Section 155.30 Grand larceny in the third degree

A person is guilty of grand larceny in the third degree when he steals property and when:

1. The value of the property exceeds two hundred fifty dollars;
or
2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or
3. The property consists of secret scientific material; or
4. The property, regardless of its nature and value, is taken from the person of another; or
5. The property, regardless of its nature and value, is obtained by extortion.

Grand larceny in the third degree is a class E felony.

Section 155.35 Grand larceny in the second degree

A person is guilty of grand larceny in the second degree when he steals property and when the value of the property exceeds one thousand five hundred dollars.

Grand larceny in the second degree is a class D felony.

Section 155.40 Grand larceny in the first degree

A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Grand larceny in the first degree is a class C felony.

Section 155.45 Larceny; pleading and proof

1. Where it is an element of the crime charged that property was taken from the person or obtained by extortion, an indictment for larceny must so specify. In all other cases, an indictment, information or complaint for larceny is sufficient if it alleges that the defendant stole property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which such property was stolen or the particular theory of larceny involved.

2. Proof that the defendant engaged in any conduct constituting larceny as defined in section 155.05 is sufficient to support any indictment, information or complaint for larceny other than one charging larceny by extortion. An indictment charging larceny by extortion must be supported by proof establishing larceny by extortion.

ILLINOIS CRIMINAL CODE OF 1961

PART C. OFFENSES DIRECTED AGAINST PROPERTY

Article 15. Definitions

Section 15-1. Property

As used in this Part C, "property" means anything of value. Property includes real estate, money, commercial instruments, admission or transportation tickets, written instruments representing or embodying rights concerning anything of value, labor, or services, or otherwise of value to the owner; things growing on, affixed to, or found on land, or part of or affixed to any building; electricity, gas and water; birds, animals and fish, which ordinarily are kept in a state of confinement; food and drink.

Section 15-2. Owner

As used in this Part C, "owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

Section 15-3. Permanent Deprivation

As used in this Part C, to "permanently deprive" means to:

- (a) Defeat all recovery of the property by the owner; or
- (b) Deprive the owner permanently of the beneficial use of the property; or
- (c) Retain the property with intent to restore it to the owner only if the owner purchases or leases it back, or pays a reward or other compensation for its return; or
- (d) Sell, give, pledge, or otherwise transfer any interest in the property or subject it to the claim of a person other than the owner.

Section 15-4. Deception

As used in this Part C, "deception" means knowingly to:

- (a) Create or confirm another's impression which is false and which the offender does not believe to be true; or
- (b) Fail to correct a false impression which the offender previously has created or confirmed; or

(c) Prevent another from acquiring information pertinent to the disposition of the property involved; or

(d) Sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

Section 15-5. Threat

As used in this Part C, "threat" means a menace, however communicated, to:

(a) Inflict physical harm on the person threatened or any other person or on property; or

(b) Subject any person to physical confinement or restraint; or

(c) Commit any criminal offense; or

(d) Accuse any person of a criminal offense; or

(e) Expose any person to hatred, contempt or ridicule; or

(f) Harm the credit or business repute of any person; or

(g) Reveal any information sought to be concealed by the person threatened; or

(h) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(i) Bring about or continue a strike, boycott or other similar collective action if the property is not demanded or received for the benefit of the group which he purports to represent; or

(j) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(k) Inflict any other harm which would not benefit the offender.

Section 15-6. Stolen Property

As used in this Part C, "stolen property" means property ~~over~~ which control has been obtained by theft.

Section 15-7. Obtain

As used in this Part C, "obtain" means:

- (a) In relation to property, to bring about a transfer of interest or possession, whether to the offender or to another, and
- (b) In relation to labor or services, to secure the performance thereof.

Section 15-8. Obtains Control

As used in this Part C, the phrase "obtains or exerts control" over property, includes but is not limited to the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property.

ILLINOIS CRIMINAL CODE OF 1961

PART C. OFFENSES DIRECTED AGAINST PROPERTY

Article 16. Theft and Related Offenses

Section 16-1. Theft

A person commits theft when he knowingly:

- (a) Obtains or exerts unauthorized control over property of the owner; or
- (b) Obtains by deception control over property of the owner; or
- (c) Obtains control over stolen property knowing the property to have been stolen by another, and
 - (1) Intends to deprive the owner permanently of the use or benefit of the property; or
 - (2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
 - (3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty.

A person first convicted of theft of property not from the person and not exceeding \$150 in value shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding \$150 in value shall be imprisoned in the penitentiary from one to 10 years.

Section 16-2. Theft of Lost or Mislaid Property

A person who obtains control over lost or mislaid property commits theft when he:

- (a) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner, and
- (b) Fails to take reasonable measures to restore the property to the owner, and

Section 16-2 (Cont'd)

(c) Intends to deprive the owner permanently of the use or benefit of the property.

Penalty.

A person convicted of theft of lost or mislaid property shall be fined not to exceed \$500 or double the value of such property, whichever is greater.

Section 16-3. Theft of Labor or Services or Use of Property

(a) A person commits theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

(b) Penalty.

A person convicted of theft or labor or services or use of property shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Section 16-4. Offender's Interest in the Property

(a) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

(b) Where the property involved is that of the offender's spouse, no prosecution for theft may be maintained unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

ARTICLE ____ . THEFT - RELATED OFFENSES

Theft of Services

Tentative Draft No. 1; July 1968

Reporter: Donald L. Paillette

Subcommittee No. 1

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

THEFT OF SERVICES

Tentative Draft No. 1; July 1968

Section _____. Theft of services. (1) As used in _____, "services" includes, but is not limited to, labor, professional service, toll facilities, transportation, telephone or other communications service, entertainment, the supplying of food, lodging or other accommodations in hotels, restaurants or elsewhere, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water.

(2) A person commits theft if:

(a) With intent to avoid payment therefor, he obtains services which are available only for compensation, by force, threat, deception, or other means; or

(b) Having control over the disposition of labor or of business, commercial or industrial equipment or facilities of another, he uses or diverts to the use of himself or a third person such labor, equipment or facilities with intent to derive a commercial benefit for himself or a third person not entitled thereto.

(3) Absconding without payment or offer to pay for hotel, restaurant, or other services for which compensation is customarily paid immediately upon the receiving of them is prima facie evidence that the services were obtained by deception.

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COMMENTARY - THEFT OF SERVICES

A. Summary

"Services" are not "property" as it is defined in the theft draft (T.D. #1); therefore, "theft" of services must be covered by specific statute. The purpose of this section is to protect commercial enterprises that supply services to the public from the thievish type of conduct now only partially covered by existing statutes.

The draft provides that a person commits theft if he obtains "services," as defined in subsection (1), by any of the means defined in subsection (2).

Subsection (3), to aid in enforceability, provides that absconding without payment or offer to pay for hotel, restaurant, or other services for which compensation is customarily paid immediately is prima facie evidence that the services were obtained by deception.

B. Derivation

The definition of "services" is similar to the definitions employed in Model Penal Code section 223.7 and Michigan Revised Criminal Code section 3220.

Subsection (2) (a) is based on MPC section 223.7; however, the draft spells out the mens rea element of "intent to avoid payment." The enumeration of the various methods by which services can be obtained illegally has been modified to add the term "force" and to delete "false token" which seems redundant as obtaining services by means of a false token would amount to "deception."

Subsection (2) (b) is a modified version of New York Revised Penal Law section 165.15 and seems preferable to the Model Penal Code provision because it specifically covers the use of labor, equipment and facilities, instead of merely "services" and fixes more precisely the sort of acts that are prohibited.

Subsection (3) is a simplified form of ORS 165.230. MPC section 223.7 has a similar provision, as does New York Penal Law section 165.15.

C. Relationship to Existing Law

As observed by the ALI, "There is widespread legislation imposing minor penalties for particular instances of cheating in obtaining service, e.g., obtaining service from hotels and

restaurants without intent to pay, dropping slugs in coin machines. But in general it is no crime to induce a doctor, engineer or lawyer by false representations to render services, since no 'property' is obtained." (MPC, Tent. Draft No. 2, p. 91). As the Oregon court held in State v. Miller, 192 Or 188 (1951), "Property" under false pretenses statute must be something capable of being possessed and the title to which can be transferred.

In Oregon statutory prohibitions have been enacted to protect some enterprises:

ORS

- 164.540 - Unlawfully riding on trains
- 164.610 - Interference with water rights and appliances
- 164.620 - Interference with gas and electric appliances
- 164.630 - Interference with telegraph equipment and service
- 164.635 - Interference with coin telephone
- 165.230 - Defrauding an innkeeper
- 165.270 - Obtaining taxicab transportation by fraud
- 165.280 - Crossing toll bridge without paying
- 165.445 - Defrauding a stablekeeper
- 165.530 - Possessing or using device to obtain service from coin telephone or machine without depositing coin
- 165.532 - Obtaining communications service by fraud

This section of the draft will strengthen the protection for the above service-vending enterprises, and, in addition, will include within its reach any other persons or businesses that furnish "services," including labor or professional services. The draft Article on Criminal Mischief encompasses "interfering or tampering" with property of another and will replace those parts of the present statutes dealing with such activity.

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CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

ARTICLE ____ . THEFT - RELATED OFFENSES

Unauthorized Use of a Vehicle

Tentative Draft No. 1; July 1968

Reporter: Donald L. Paillette

Subcommittee No. 1

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

UNAUTHORIZED USE OF A VEHICLE

Tentative Draft No. 1; July 1968

Section ____ . Unauthorized use of a vehicle. (1) A person commits the crime of unauthorized use of a vehicle when:

(a) He takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner; or

(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between himself or another and the owner thereof whereby he or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, he intentionally uses or operates it, without consent of the owner, for his own purpose in a manner constituting a gross deviation from the agreed purpose; or

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(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, he knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

(2) Unauthorized use of a vehicle, boat or aircraft is a

_____.

COMMENTARY - UNAUTHORIZED USE OF A VEHICLE

A. Summary

This section covers the "joy-riding" type of offense wherein the actor makes unauthorized use of another's vehicle but without the intent to steal it or permanently deprive the owner of its use. The purpose of the language, "takes, operates, exercises control over, rides in or otherwise uses," is to prohibit not only the taking or driving of another's vehicle without permission but, also, to prohibit any unauthorized use of the vehicle.

The first draft of the section limited its coverage to "motor-propelled" vehicles only; however, the Commission felt that the proposal should protect owners of such things as trailers, sailboats and gliders.

B. Derivation

Subsection (1) (a) is adapted from Model Penal Code section 223.9 and New York Revised Penal Law section 165.05.

Subsections (1) (b) and (c) are taken from New York section 165.05 and define offenses that sound of embezzlement, wherein the defendant originally obtains possession or custody legally, but then misuses or withholds the vehicle wrongfully. Subsection (1) (b) would cover the case of a mechanic who unauthorizedly takes a customer's car and uses it for a personal trip. The type of situation that illustrates (c) would be that of a gratuitous bailment in which a person borrows another's car in Oregon for a few hours and then drives it to another state, keeping it there for several months. In each type of case, the conduct must be a "gross deviation" from the agreed purpose of the bailment.

C. Relationship to Existing Law

It is submitted that the scope of the draft is broad enough to include those acts covered by three separate ORS sections.

The existing "joy-riding" statute provides:

"ORS 164.670. (1) Every person who takes or uses without authority any vehicle, watercraft or aircraft without intent to steal it, or is a party to such unauthorized taking or using, shall be punished upon conviction by imprisonment in the penitentiary for not more than two years, or by a fine of not more than \$500. For the first

offense the court may reduce the punishment to imprisonment in the county jail for not more than six months, or a fine of not more than \$200.

"(2) This section applies to any person employed by the owner of a vehicle, watercraft or aircraft or anyone else who, by the nature of his employment, has the charge of or the authority to drive the vehicle, watercraft or aircraft if it is driven or used without the owner's knowledge or consent; and when so operated the owner thereof shall not be responsible."

Companion statutes, ORS 164.650 and 164.660, prohibit manipulating, starting or tampering with motor vehicles.

"ORS 164.650. With the exception of an authorized officer, marshal, constable or policeman, any person who, without the consent of the owner or person lawfully in charge of a motor vehicle, as defined in ORS 483.014, climbs upon or into such motor vehicle, whether it is at rest or in motion; or, while it is at rest or unattended, attempts to manipulate any of the levers, the starting crank or other device, brakes or mechanism, or sets the vehicle in motion, shall be punished, upon conviction, as provided in subsection (1) of ORS 483.990 for violation of the statutes listed therein."

"ORS 164.660. Any person who, individually or in association with one or more others and against the will or consent of the owner of any motor vehicle, as defined in ORS 483.014, wilfully breaks, injures, tampers with or removes any part of such vehicle for the purpose of injuring, defacing or destroying it, or temporarily or permanently preventing its useful operating for any purpose, or in any manner wilfully or maliciously interferes with or prevents the running or operation of such motor vehicle, shall be punished, upon conviction, as for a misdemeanor."

It will be noted that ORS 164.670 uses the terms "vehicle, watercraft or aircraft," while ORS 164.650 and 164.660 employ the term "motor vehicle as defined in ORS 483.014" and in defining the type of property protected by the particular sections. The statute was amended in 1965 to insert the terms "watercraft or aircraft."

ORS 483.014 (4) provides: "'Motor vehicle' means every vehicle which is self-propelled." The "taking or using" statute does not define nor incorporate by reference any other statutory definition of "vehicle."

"Vehicle" is defined in ORS 482.030 (4) as "every device in, upon or by which any person or property is or may

be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks." The term is defined in ORS 486.011 (11) as meaning "every trailer or semi-trailer, and every device which is self-propelled or propelled by electric power from overhead trolley wires but not operated upon rails."

ORS 492.010 (3) defines "aircraft" as "any contrivance used or designed for navigation of or flight in the air."

The statutes contain no definition of the term "watercraft" and the regulatory statutes all employ the word "boat." ORS 488.705 (2) provides:

"'Boat' means every description of watercraft used or capable of being used as a means of transportation on the water, but does not include aircraft equipped to land on water."

Webster's New Collegiate Dictionary (1965 ed.) defines "watercraft" as meaning a "ship or boat."

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