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**LEGISLATIVE REVISION OF PROPERTY CRIMES IN INDIANA**

The Indiana legislature in 1963 enacted a comprehensive statute entitled “The Offenses Against Property Act” which became effective January 1, 1964. The primary purpose of this act is to unify several traditionally distinct property crimes in order to eliminate the procedural technicalities which have hindered or precluded the conviction of offenders in the past. Specifically, larceny, embezzlement, obtaining property by false pretenses, receiving stolen property and blackmail are no longer separate offenses; they have been consolidated into a single offense, theft, which can be committed in various ways. In addition to consolidation, substantive changes have been incorporated. Therefore, the act represents a revision rather than merely a re-codification of prior Indiana law relating to property crimes.

Prior to the effective date of the act, the property crime sections of the Indiana criminal code were a hodge-podge of multiplicitous provisions and penalties. Seventy separate statutory sections dealing with property crimes were in force, scattered throughout the criminal code. Since many of these provisions were enacted years apart and without reference to other sections, a great deal of duplication as well as much unnecessary specificity resulted. More serious, however, was the fact that similar criminal conduct was frequently accorded substantially different punishment. For example, the criminal code not only contained general

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sections which defined and set the punishment for grand larceny and petit larceny, but other sections dealt with larceny of public records, wills and codicils, horses, mares, mules and jennets, male and female dogs, vehicles, and shoplifting, and the punishment under each was different.

A consideration of the multitude of former embezzlement provisions makes the deficiencies of the prior law even more evident. There were separate provisions dealing with embezzlement by public officers, private employees, attorneys, railroad employees, innkeepers and carriers, bailees, tenants, treasurers, city officials, fiduciaries and bankers. Again, the penalties for substantially similar conduct frequently varied. Moreover,

3. Ind. Acts 1941, ch. 148, § 9 (grand larceny). If the property taken exceeded one hundred dollars, the penalty was a maximum fine of five hundred dollars and one to ten years imprisonment. Ind. Acts 1929, ch. 156, § 2 (petit larceny). The maximum penalty was a fine of five hundred dollars and five years imprisonment.

4. Ind. Acts 1905, ch. 169, § 384 (public records: maximum fine of one thousand dollars and imprisonment of from six months to fourteen years); Ind. Acts 1905, ch. 169, § 383 (wills and codicils: maximum fine of one thousand dollars and two to fourteen years imprisonment); Ind. Acts 1911, ch. 180, § 1 (horses etc.: imprisonment from three to fifteen years); Ind. Acts 1951, ch. 237, § 1 (dogs: penalty was "the punishment prescribed for larceny provided the dog had not maimed any sheep." If the dog was worth up to $99, the penalty for petit larceny applied); Ind. Acts 1927, ch. 201, § 4 (vehicles: imprisonment for one to ten years); and Ind. Acts 1959, ch. 194, § 1 (shoplifting: fine of two hundred dollars and one year in jail).

5. Ind. Acts 1905, ch. 169, § 390 (public officers: maximum fine of one thousand dollars and imprisonment of from one to five years); Ind. Acts 1935, ch. 233, § 1 (private employees: if the property taken was valued at over one hundred dollars, the maximum fine was one thousand dollars and imprisonment of from two to twenty years. If the property was worth less than one hundred dollars, the maximum fine was five hundred dollars and imprisonment for one year); Ind. Acts 1905, ch. 169 § 393 (attorneys: maximum penalty was a one thousand dollar fine and imprisonment of from two to fourteen years); Ind. Acts 1905, ch. 169, § 394 (railroad employees: maximum fine of five hundred dollars and imprisonment of from one to five years); Ind. Acts 1905, ch. 169, § 395 (innkeepers and carriers: maximum fine of one thousand dollars and imprisonment of from six months to fourteen years); Ind. Acts 1905, ch. 169, § 396 (bailees: fine of one hundred dollars and imprisonment of from one to five years); Ind. Acts 1905, ch. 169, § 398 (tenants: fine of five thousand dollars and imprisonment for six months); Ind. Acts 1907, ch. 85, § 1 (treasurers: fine of one hundred dollars and one to three years imprisonment); Ind. Acts 1919, ch. 146, § 1 (city officials: fine of one thousand dollars and one to five years imprisonment); Ind. Acts 1905, ch. 169, § 400 (fiduciaries: fine of one thousand dollars and one to five years imprisonment); Ind. Acts 1933, ch. 103, § 1 (bankers: fine of one thousand dollars and one to five years imprisonment).

6. For example, the penalty for embezzlement of public funds by a government official was two to twenty-one years imprisonment and a maximum fine of double the value of the property embezzled. Another section punished as embezzlement the fraudulent failure by any such government official to turn over to his successor any such funds, and the penalty under this section was one to five years imprisonment and a maximum fine of one thousand dollars. See Ind. Acts 1905, ch. 169, § 390. As to embezzlement by private employees, the penalty depended upon the amount embezzled. Oddly enough, this was the only embezzlement provision where the amount embezzled had any relation to the penalty. See Ind. Acts 1935, ch. 233, § 1. An innkeeper who embezzled property entrusted to him was subject to a maximum of fourteen years imprisonment whereas a bailee who converted property was subject to a maximum penalty of only five years imprisonment, and neither section attached any significance
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in situations where larceny and embezzlement were distinguishable only upon purely technical grounds, there could be significant variations in penalty. A court’s decision on such a nice question as whether an accused had enough control over property to amount to possession rather than mere access could determine whether he was subject to a maximum imprisonment of twenty years for embezzlement or of only ten years for grand larceny.7

To complete the picture, obtaining property by fraudulent means was prohibited by numerous statutory provisions covering such specific conduct as the fraudulent obtaining of any written instrument or signature, the fraudulent dealing with certain negotiable instruments, fraud on hotel-keepers, fraudulent disposal of mortgaged swine, sheep or cattle, fraudulent solicitation of charity, fraudulent conversion of personal property held under a conditional sale contract, the use of spurious coins in vending machines, and the fraudulent procurement of tourist camp accommodations.8 These provisions also contained significant variations in penalties based, in large part, upon insignificant artificial distinctions.9 In addition, the archaic distinction between obtaining property by false pretenses and larceny by trick offered no rational basis for a differentiation in punishment, and yet a difference persisted as long as the distinction was recognized.10

The fact that offenses such as larceny, embezzlement, obtaining property by false pretenses and receiving stolen property have tradition-

7. See, e.g., Warren v. State, 223 Ind. 552, 62 N.E.2d 624 (1945), where it was held that the defendant employee who possessed the key to a storage room in which the stolen property was located could not be convicted of embezzlement since he lacked the possession necessary to constitute embezzlement.


9. For example, the penalty under the general provision dealing with obtaining property by false pretenses was one to seven years imprisonment and a maximum fine of one thousand dollars, the court or jury having the discretion to reduce the prison term to as low as ten days, Ind. Acts 1907, ch. 228, § 1. The punishment for use of a fraudulent check, which due to Indiana case law was not punishable under the general false pretenses section, was one to ten years imprisonment if the property obtained was worth more than one hundred dollars and a maximum of one year if the property was worth less than one hundred dollars. Thus, wholly different factors determined the penalty in each instance—the discretion of the judge or jury on the one hand and a mechanical test based upon the amount of money obtained on the other. See Ind. Acts 1916, ch. 303 §§ 1, 2. The conduct involved in each offense was differentiated upon the technical basis that a promise could not be a false pretense. Pierce v. State, 226 Ind. 312, 79 N.E.2d 903 (1947).

10. See Johnson v. State, 222 Ind. 473, 54 N.E.2d 273 (1944), where the distinction was reaffirmed. The new act abrogates the common law separation.
ally been considered distinct, combined with the principles that all defendants are entitled to adequate notice of the offense charged and cannot be charged with one crime and convicted of a different crime, often resulted in procedural problems of great magnitude under the former Indiana criminal code. Technical and antiquated distinctions between the various offenses enabled imaginative lawyers to obstruct the just administration of the criminal law by utilizing those distinctions on behalf of their clients under the guise of acceptable and desirable principles, such as the requirement of adequate notice of the offense charged.

The extent to which such tactics can effectively be employed depends upon the substantive and procedural rules in force in the particular jurisdiction. In Indiana, a statute provides that an indictment or affidavit for larceny may contain a count for obtaining property by false pretenses, a count for embezzlement and a count for criminal receiving, and “the accused may be convicted of either offense, and the court or jury trying the cause may find all or any of the persons accused guilty of any of the offenses charged.”\(^1\) The prosecution did not have to elect which count of the indictment it would rely on.\(^2\) Further, Indiana courts have held that a general verdict of guilty is permissible in a criminal case where only one offense is charged in separate counts.\(^3\) If such a verdict could have been rendered in a situation where, for example, larceny and embezzlement were both charged, and if such a verdict would have been affirmed on appeal where the evidence supported a conviction for either offense, the technical distinctions between the two offenses would have been of little effect. However, the case law did not authorize a general verdict in such a situation. Since each count alleged a separate offense,\(^4\) the statute required that the jury convict the accused of one or the other. If the jury selected the wrong offense because it failed to understand or appreciate a technical distinction, the defendant could obtain a reversal of his conviction on appeal. Thus, the statute placed the burden of making the critical choice as to what offense the defendant had committed on the jury instead of on the prosecutor. Of course, the prosecution could have charged the defendant with a single offense since the joinder statute

\(^{11}\) IND. ANN. STAT., § 9-1114 (Burns 1956).
\(^{12}\) Bowen v. State, 189 Ind. 644, 128 N.E. 926 (1920).
\(^{13}\) Nordyke v. State, 213 Ind. 243, 11 N.E.2d 165 (1937); Dunlap v. State, 205 Ind. 384, 18 N.E. 475 (1932); Menick v. State, 63 Ind. 327 (1878).
\(^{14}\) Bowen v. State, 189 Ind. 644, 128 N.E. 926 (1920). That this conclusion is correct is also evidenced by the fact that no case has been found in which a general verdict was rendered where the accused was charged with two or more counts involving larceny, embezzlement or false pretenses.
was not mandatory. But, whether the choice was made by the prosecutor or the jury, the possibility that a conviction would be reversed on appeal for purely technical grounds was always present.

In addition to the mechanical problems of prior law, the vast statutory conglomeration failed to define and provide punishment for certain anti-social conduct which should be prohibited by a modern penal scheme.

I. THE OFFENSES AGAINST PROPERTY ACT

A. Section 10-3030: Substantive Consolidation of Property Offenses

1. Section 10-3030(1)(a).

Indiana law formerly recognized the traditional distinction between larceny and embezzlement. If one had mere access to or bare custody of another's personal property, a conversion of that property with animus furandi was larceny. On the other hand, if one had legal possession of another's personal property and occupied a position of special trust in relation to that property, his wrongful conversion of that property was embezzlement. Yet, the case of Shackleford v. State suggests that a conviction for larceny could not have been set aside on the ground that embezzlement had actually been committed. Shackleford claimed that his conviction for larceny of a quantity of lead which he had allegedly taken from his employer was erroneous since his conduct was covered by the statutory provision concerning embezzlement by employees. The court,

15. "An indictment or affidavit for larceny may contain a count . . . etc." Ind. Ann. Stat. § 9-1114 (Burns 1956). Numerous cases indicate that the common practice has not been to combine these counts. In many situations the prosecutor probably felt that the conduct in question clearly fell within a particular larceny or embezzlement provision. Since a prosecutor should be better qualified to make this critical choice than the jury, the failure to have used this permissible joinder statute appears to have been both justified and desirable.

16. See, e.g., Gentry v. State, 223 Ind. 459, 61 N.E.2d 641 (1945), where the affidavit charged the receipt of stolen goods and the evidence showed the receipt of embezzled goods. On appeal, this was held to constitute a fatal variance. See also Roberts v. State, 181 Ind. 520, 106 N.E. 970 (1914), where a conviction for larceny by trick was reversed because the victim intended to part with title rather than just possession of a check which the defendant had procured by fraud. In Wright v. State, 168 Ind. 643, 81 N.E. 660 (1907) a conviction was reversed because the affidavit in a prosecution for embezzlement alleged that the defendant had possession of the property embezzled "as such employee" instead of "by virtue of such employment."

17. For example, prior law failed to punish criminal conduct relating to the theft of realty, labor or the use of property.


affirming the conviction, tersely stated that the defendant "could have been charged under either statute," and since the larceny provision carried a lighter penalty the defendant "was not harmed, but, in fact, benefited by such action." This decision was apparently rendered in total disregard of existing law; the court surely failed to recognize the essentially distinct natures of larceny and embezzlement. The decision allowed a defendant to be charged and convicted of one crime even though a totally different crime was proved, and thus vitiated a defendant's right to adequate notice of the offense charged. The court's opinion made uncertain both the pleading requirements and substantive elements of the offenses of larceny and embezzlement.

The Offenses Against Property Act should clarify this area of the law. Section 10-3030(1) (a) of the new act, which states that a person commits theft if he "knowingly" obtains or exerts unauthorized control over property of the owner ...,23 eliminates the problem of distinguishing larceny and embezzlement for it consolidatesthe two offenses into one form of the new crime of "theft." The proscription as to obtaining unauthorized control encompasses what formerly was larcenous conduct, while the prohibition as to exerting unauthorized control includes former embezzlement situations. This conclusion is reinforced by the statute's definition of "obtains" as the bringing about of a "transfer of interest or possession, whether to the actor or another. . . ."24

22. 'Knowingly' means that a person knows, or acts knowingly or with knowledge, of: (a) the nature or attendant circumstances of his conduct, described by the section defining the offense, when he is consciously aware that his conduct is of such a nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists. (b) the result of his conduct, described by the section defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct. IND. ANN. STAT. §§ 10-3040(8) (a), (b) (Burns Spec. Supp. 1963).

A unique problem that affects the entire statute should be mentioned at the outset. The concept of control which forms the essential element of the criminal conduct under the various provisions of the act is not specifically defined, although the phrase "obtains or exerts control over property" is defined as including but not being limited to the "taking, carrying, driving, or leading away, concealment, or the sale, conveyance, encumbrance, transfer of title to or interest in or possession of property, or the securing or extending a right to retain that to which another is entitled." IND. ANN. STAT. § 10-3040(10) (Burns Spec. Supp. 1963). This definition, however, does not appear to serve any function since the phrase it defines does not appear verbatim in any substantive provision of the act. The intent of the drafters apparently was to give some context to the general concept of control wherever that concept was a relevant consideration. However, since the defined phrase does not appear verbatim in the act, it could be argued that because under ordinary rules of strict construction of penal statutes the phrase cannot be used to give meaning to other terms in the act such as "control," and because the concept of control has no established common law meaning, the entire act is
The old problems of distinguishing the two crimes which resulted from technical distinctions between "possession," "access" and "custody" no longer exist.

2. Section 10-3030(1)(b).

This section prohibits obtaining "by deception control over property of the owner or a signature to any written instrument . . .," and thereby transforms the previously separate offense of obtaining property by false pretense into one form of "theft." It also eliminates one of the most troublesome and unjustifiable distinctions, from a criminological standpoint, which existed under the common law and prior Indiana law: the distinction between the crimes of obtaining property by false pretenses and larceny by trick. Indiana cases recognized that when a person who was defrauded had intended to pass both title and possession of the property involved to the defrauder, the offense was obtaining property by false pretenses, but that when he intended to pass only possession, the offense was larceny by trick. For example, where an accused falsely represented that he was an officer of the law with authority to arrest and extorted money from a third person by virtue of this representation, the accused was guilty of obtaining property by false pretenses because the victim intended to pass title to the money. However, if the accused's conduct consisted of falsely representing that he was an agent of a third party and the victim intended title to pass to the third party and not to the accused, the offense was larceny by trick. The distinction was based on the notion that when a victim intended to pass title the offense could not be larceny by trick, for larceny was the obtaining only of possession by fraud. The fallacy of the former law is that when one obtains title to goods by deception he also obtains either actual possession or the right to possession. Thus, there was no logical basis for precluding a conviction of larceny by trick in any instance. From a criminological standpoint, it is difficult to see what difference the victim's intent as to the passage or retention of title should have made.

The new act, in section 10-3030(1)(b), abrogates the artificial distinction between larceny by trick and obtaining property by false pre-
tenses by classifying all forms of fraudulent theft as theft by deception. That section’s prohibition against obtaining control over property by deception, because of the statute’s definition of “obtains,” encompasses both a “transfer of title to or interest in or possession of property.”

In addition to consolidating offenses, section 10-3030(1)(b) introduces significant substantive changes into Indiana law. Under former Indiana law and the common law, a charge of obtaining property by false pretenses could not be predicated upon a fraudulent promise by the defendant to perform an act in the future. The charge could only be based upon a misrepresentation as to the existence or non-existence of a fact. The reason for this limitation was a fear that if fraudulent promises were recognized as a false pretense, mere breach of contract could be made the basis for imposing criminal liability. The unfortunate consequence of the exclusion was that it operated to remove from the offense of larceny by trick conduct very similar to that which was included within it.

Now, section 10-3040 states that “deception” includes knowingly promising performance which the actor does not intend to perform or knows will not be performed. It also provides that a failure of promised performance, standing alone, is not evidence that the actor, at the time of the promise, did not intend that performance would be rendered. This proviso protects defendants from unwarranted criminal liability for ordinary breaches of contract, but it does impose criminal liability where property is obtained through a fraudulent promise and the necessary intent is proved beyond a reasonable doubt.

Similar innovations under the new law result from the expansion of the kind of statements which can be “deceptive” to include state-

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31. In Brown v. State, supra note 30, the court stated that to permit any criminal prosecution for obtaining money by virtue of a fraudulent promise would mean that “breach of contract and crime will scarcely be divided by any appreciable line, and acts which have been understood as creating mere civil liabilities, will be punished criminally. A pretense, therefore, that a party would do an act he did not intend to do is not within the statute.” Ibid.
34. In the case of a drawer of a check upon which payment is refused by the drawee, the fact that the drawer has insufficient funds or no account with the drawee does create an inference that the drawer intended to deprive the owner permanently of the benefit of the property received. Ind. Ann. Stat. § 10-3040(3) (f) (Burns Spec. Supp. 1963). This presumption is preserved from the former fraudulent check act, Ind. Acts 1927, ch. 201, § 6, as amended by Ind. Acts 1959, ch. 92, § 1, and represents one situation where a subsequent failure to perform does create an inference of fraudulent intent as of the time the promise was made.
ments of value, law or opinion. Under prior Indiana law, such statements could only give rise to criminal liability as false representations when they were such as would deceive a man of ordinary intelligence or knowledge. But this objective standard was certainly inadequate. A victim's negligence or sub-standard knowledge should not have been a basis for exculpating a defendant who perpetrated a fraud upon such an individual. Such persons are likely to be the most common targets for swindlers, so the force of the criminal law should have been vigorously applied rather than withheld in such cases. The new law recognizes this inadequacy of prior law and seems to correct it. Section 10-3040(3), in stating the various meanings of "deception" under the new law, places primary emphasis upon the actual false impression created in the mind of the victim by the defendant's conscious action or inaction. The section suggests no requirement that the false impression must be such as would exist in the mind of a reasonable man.

Finally, former Indiana law imposed no criminal liability for obtaining property following a false representation unless the victim's reliance upon that representation was the basis of the transfer. Since theft under the new statute is only committed if one gains control over property of another by deception, former law as to the necessity for reliance is apparently retained. This requirement is sound since it guarantees a causal relation between social harm and the conduct of the accused.

3. Section 10-3030(1)(c).

Section 10-3030(1)(c) makes obtaining "by threat control over property of the owner or a signature to any written instrument . . . ."

36. See, e.g., State v. Burnett, 119 Ind. 392, 21 N.E. 912 (1889); Miller v. State, 73 Ind. 88 (1880).
Deception means knowingly to: (a) create or confirm another's impression which is false and which the actor does not believe to be true; or (b) fail to correct a false impression which the actor 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 encumber property and fail 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) fails to correct a false impression which he knows to be influencing another to whom he stands in a relationship of special trust and confidence; or (f) promise performance which the actor does not intend to perform or knows will not be performed.
38. The false pretense must at least be one of the inducements without which the defrauded party would not have parted with the property. Greening v. State, 198 Ind. 706, 153 N.E. 412 (1926). The false pretense must have been a "material inducement." Gillespie v. State, 194 Ind. 154, 142 N.E.2d 194 (1942). The false pretense must have been a "controlling cause." McCram v. State, 189 Ind. 677, 128 N.E. 848 (1920).
punishable as one form of theft. It applies to that conduct which under prior law constituted blackmail or extortion.\(^9\) The definition of threat under the act states that the offense can consist of a threat to (1) inflict physical harm on the person threatened or any other person or property; (2) subject any person to physical confinement or restraint; (3) commit any crime [new]; (4) accuse anyone of any crime; (5) expose any person to hatred, contempt or ridicule; (6) harm the credit or business repute of any person; (7) take or withhold official action [new]; (8) bring about a strike, boycott, etc. where the property demanded is not for the benefit of the group which the actor purports to represent [new]; and, (9) be or not be a witness with respect to another's legal claim or defense except where there is an honest and reasonable claim for witness fees or expenses [new].\(^4\) This definition not only extends criminal liability to encompass several types of threats not covered under prior law but it also extends Indiana law to include threats made against persons other than the individual from whom the property is extorted.\(^4\)

Prior case law which held that the commission of blackmail was not precluded by the fact that the person threatened to be accused of a criminal offense was actually guilty of such offense is apparently reaffirmed since the new provisions make no reference to the guilt or innocence of the person threatened.\(^4\)

The full implications of section 10-3030(1)(c) can be appreciated only when juxtaposed with the provision in the new act which states that claim of right is a defense to any crime specified in the statute. Section 10-3034 states that “a person does not commit a crime under this Act when he acts under an honest claim of right in that: (a) he is unaware that the property is that of another; or (b) he believes that he is entitled to the property. . . . ”\(^4\) The effect of the claim of right provision upon theft by threat is that the obtaining of property by any of the threats enumerated above will not result in criminal liability if the actor believes he had a right to the property obtained. It is submitted that such

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41. The former blackmail statute was phrased so that for the offense to be committed, the person threatened had to be the person parting with the property. Ind. Acts 1905, ch. 169, § 370.

42. Kessler v. State, 50 Ind. 229, 233 (1875): “[A]lthough a person may have been guilty of crime or immorality, there is no reason why his money or property should be extorted from him by threatening to accuse him thereof.”

a blanket exculpation is undesirable as to any one of the categories listed above. There are situations under category (a) where a person, in a flash of temper, might threaten to strike another whom he honestly believes has unlawfully obtained property from him. It is unquestionably proper for the criminal law to take account of and leave unsanctioned such frailties which are inherent in human nature. On the other hand, the law of a civilized society should never tolerate a threat to inflict death or serious injury with a deadly weapon, no matter what the actor believes he is entitled to. Similarly, there are situations under category (b) where the law should and does recognize the right of a person who believes he has been wronged to threaten to subject the believed wrongdoer to physical restraint. A good example of this is the store manager who is permitted to temporarily detain for questioning a person he reasonably believes has stolen property from the premises. However, if the manager should threaten to have the person seized, locked up in the basement and searched unless he turns over the item believed to be stolen, it is doubtful that claim of right should be a defense. Similar problems could be shown to exist under the other categories. The point is that any blanket rule in the criminal law that fails to account for distinctions between significantly different types of conduct is undesirable.

The final observation concerning section 10-3030(1)(c) is that if the property obtained by threat does not belong to the person from whose possession it is received, the fact that the victim did not own the property will not exculpate the accused. This is so because the act defines "owner" as any "person, other than the actor, 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 actor has no authority to obtain or exert the complained of control over the property." Indeed, even a thief will be the "owner" of property as to all but the true owner or his agent. And, if the novel case should arise where a person obtains property by threat not realizing that he actually owns the property, theft will result under the new act.

4. Section 10-3030(1)(d).

Section 10-3030(1)(d) provides that theft is committed by one who "obtains control over stolen property knowing the same to have been stolen by another...." It eliminates the distinction between receiving

stolen goods and other property crimes by making criminal receiving a form of theft.

The new section has both good and bad aspects. It does not distinguish between professional receivers who are dealers in stolen property for purposes of re-sale and non-professional receivers who consume or abandon the property they acquire.\(^46\) This is another instance where the new law fails to distinguish between types of conduct which have significantly different social implications. To its favor, the statute codifies the prior fragmented Indiana law on criminal receiving by repealing statutes which had created as separate offenses receiving stolen goods, receiving stolen goods from other states, receiving stolen horses, and receiving stolen vehicles.\(^47\) However, the new law does not retain the proscription of the repealed statutes against aiding or abetting the concealment of stolen goods, and it unquestionably should have.

The new statute also eliminates the necessity which existed under prior law of specifying in the indictment or affidavit whether the accused had received goods obtained by larceny, embezzlement or false pretences.\(^48\) Before, if the prosecution alleged the receipt of stolen goods and the evidence showed that the goods had been embezzled, a conviction could be reversed for a variance between the pleading and the proof.\(^49\) Under the new act, "stolen property" is defined as property over which control has been obtained or exerted by theft.\(^50\) Therefore, a charge which merely alleges that the defendant knowingly received stolen property will be sufficient and will vitiate any danger of a variance since "theft" includes all of the prior, major property offenses. The definition of stolen property in terms of theft will also result in the inclusion of receiving property obtained by threat within the scope of theft by criminal receiving. Under prior law there was no statutory basis for charging the receipt of property obtained by threat as an offense, although such conduct logically should have been subject to penal sanction.

5. Section 10-3030(1)(e).

This section of the new legislation states that theft is committed when a person brings property which he obtained by theft into Indiana,

\(^{46}\) See HALL, THEFT, LAW AND SOCIETY 211-35 (2d ed. 1952).

\(^{47}\) These statutes respectively are Ind. Acts 1905, ch. 169, § 381; Ind. Acts 1905, ch. 169, § 382; Ind. Acts 1911, ch. 180, § 1; and Ind. Acts 1927, ch. 201, § 4.

\(^{48}\) Gentry v. State, 223 Ind. 459, 61 N.E.2d 641 (1945). Proof that the thief (transferor) was convicted of any of these offenses was not required for a conviction for criminal receiving. See IND. ANN. STAT. § 9-1613 (Burns 1956), which was not repealed by the new act.

\(^{49}\) Gentry v. State, supra note 48.

wherever that theft occurred. Prior law was unsatisfactory for it only punished the bringing into the state of goods obtained by larceny; it had no application to property which had been secured by false pretenses, embezzlement, or threat.\(^51\) The new act cures this deficiency since it covers property obtained by "theft," and thus encompasses what formerly was larceny, embezzlement, false pretenses and threat. It will also reach the situation where a receiver brings property which he has criminally received elsewhere into this state, since receiving is now a form of theft. However, one must question the wisdom of defining and punishing such conduct in a theft statute. The only element of theft that occurs in Indiana in such a case is asportation. The statute therefore, in effect, converts asportation alone into "theft." Furthermore, it would seem that the social harm sought to be prevented by this section of the statute is the harm that arises upon a sale of the stolen property in Indiana, and other provisions in the act adequately cover that case.\(^62\)

6. The Mental Element Under Section 10-3030.

Theft under section 10-3030 is only committed if the actor knowingly performs one of the proscribed acts when he "(a) intends to deprive the owner permanently of the use or benefit of the property; or (b) uses, conceals or abandons the property in such manner as knowingly to deprive the owner permanently of such use or benefit; or (c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner permanently of such use or benefit."\(^53\) Thus, the essential evil which the statute enunciates is permanently depriving the owner of the use or benefit of property. The actor must either directly intend this result, or he must deal with the property knowing that a permanent deprivation will probably or necessarily result. Of course, as with any section of the new law, the actor may invoke claim of right as a defense if it is applicable.\(^54\)

The new statute makes significant alterations in the mens rea that has traditionally been required for each of the derivative offenses of "theft." The mens rea formerly required for larceny was that the accused intend at the time of taking to permanently deprive the owner of his property.\(^65\) It was not necessary that the offender intend to

\(^51\) Ind. Acts 1905, ch. 169, § 380.
\(^52\)
\(^55\) Robinson v. State, 113 Ind. 510, 16 N.E. 684 (1887); Keely v. State, 14 Ind. 36 (1860). Presumably, the new act is in accord with the requirement of a concurrence of act and intent.
appropriate the property to his own use. Thus, referring to the quoted provisions above, the new law would seem to retain intact the substance of the larceny mens rea, but it is not at all clear from the statute's language that the intent need any longer exist at the precise moment of original taking.

The requisite intent for what formerly was embezzlement was simply that the accused intend to appropriate the property feloniously, an intent to permanently deprive the owner of the use or benefit of the property was not required. Therefore, insofar as section 10-3030 covers the area of what was embezzlement, emphasis has been shifted from an intent to feloniously appropriate to an intent to permanently deprive. This change would appear unwise since the typical excuse offered by embezzlers, that they intended to return the property embezzled, would now seem to be a valid defense. Because the harm of this form of theft is the unauthorized exertion of control over the property of another and because any intent to return is infrequently carried out, the law should not recognize such a defense.

The intent required for the crime of false pretenses under prior law was described in the cases as merely a "felonious intent" or an "intent to defraud." Under section 10-3030 an intent to defraud without an intent to permanently deprive apparently will not support a conviction of theft by deception.

The primary mental requirement in connection with receiving stolen goods under prior law was knowledge on the part of the receiver that the goods were stolen. The statutory test was phrased in terms of knowledge so as to exclude criminal liability based upon negligence. The issue before the courts was always whether the defendant had known the goods were stolen rather than whether a reasonable man would have known that fact. The new act carries forward prior law, for the defendant must obtain control over property knowing the property to have

56. Best v. State, 155 Ind. 46, 57 N.E. 536 (1900). It has been held that an "intent to steal" must exist at the time of the taking. Hart v. State, 57 Ind. 102 (1877).
58. Fowler v. Wallace, 131 Ind. 347, 31 N.E. 53 (1892).
59. Section 10-3030(1) (a) will not cover all forms of former embezzlement. Section 10-3031 dealing with theft by failure to make the required disposition of property will cover the former crime of embezzlement in situations involving fiduciaries, government employees, and employees of credit institutions. Section 10-3038 will cover similar special duty situations where the crime does not amount to theft.
62. See, e.g., Parsons v. State, 191 Ind. 194, 131 N.E. 381 (1921); Benedict v. State, 165 Ind. 523, 76 N.E. 111 (1905).
been stolen. "Knowingly," under the new act, always includes awareness either of the fact itself or of the substantial probability that the fact exists. Therefore, mere negligence would not support a conviction under this section. It has been argued that certain presumptions of knowledge should be imposed in the case of professional dealers in stolen goods, but the new act does not incorporate any such provisions. Since the social harm posed by dealers who resell stolen goods is much greater than the harm generated by those who receive stolen goods for purposes of consumption, a sound basis exists for imposing presumptions of knowledge in the case of dealers.

A rather serious and perhaps unforeseen consequence may result from the terminology employed in defining the states of mind or "intents" which can result in criminal liability for theft under section 10-3030. It was noted earlier that if the actor deals with property knowing that his action will permanently deprive the owner of the use or benefit of the property, or if the actor uses the property knowing such permanent interference will probably result, theft is committed. Consequently, if the actor intentionally or recklessly destroys property of the owner, theft may result. This broad definition of theft could result in the inclusion under the statute of various types of misconduct which have neither traditionally nor in modern times been connected with theft. Suppose a person, in a fit of anger, intentionally destroys property of another. Such conduct would carry the penalty designated for theft, while formerly such misconduct was punishable only under the malicious trespass statute which is still in force. The maximum penalty under this statute is a fine of twice the value of the property involved and twelve months imprisonment. However, a person convicted of theft can be imprisoned for as long as ten years. This significant disparity in possible penalties for identical conduct is as unfortunate as the numerous situations under prior law where overlapping statutes or technical distinctions in defining particular crimes resulted in widely differing penalties for essentially similar conduct. Moreover, it is questionable whether the malicious or reckless destruction of property should be classified as theft at all. The essential notion of theft has always been that the criminal conduct results both in a deprivation of the owners enjoyment and a benefit to someone other than the owner.

65. Ibid.
67. See, e.g., Model Penal Code § 206.8(4) (Tent. draft No. 2 1954), punishing criminal mischief separately from theft. See also Model Penal Code § 206.1 (Tent.
Section 10-3030(2), however, would seem to be satisfied simply by a deprivation to the owner, and therefore includes cases where property is destroyed. It is submitted that the traditional nature of theft is so entrenched that to include within its concept situations where only deprivation is involved introduces into that concept activities which differ substantially in kind from the activities of thieves and swindlers. Such a classification overlooks the socially significant differences which exist between the types of conduct involved.

C. Section 10-3031: Theft by Failure To Make Required Disposition Of Property

Section 10-3031 sets forth the crime of theft by failure to make a required disposition of property. It replaces some of the former specific sections dealing with embezzlement and contains special rules to be applied in cases involving government employees, fiduciaries, and persons engaged in certain businesses who are subject to a statutory obligation to reserve funds for specified purposes.

Section 10-3031, generally, provides that a person who obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition, whether from the property or its proceeds, commits theft if he deals with the property as his own and fails to make the required payment or disposition. It was enacted for two purposes. First, it covers situations where no one other than the actor ever had possession of the funds or property and hence section 10-3030 would not apply. When a person fails in a duty to reserve a part of certain funds in his own possession for specified purposes, he commits theft by virtue of this provision. Thus, an employer who is under an obligation to reserve a certain part of his employee's wages to satisfy specified obligations to those employees will commit theft if he fails to make such payments. The same fate will befall a retailer who defaults in his duty to collect and pay over sales taxes. Secondly, the section was enacted to replace the former statutory provisions covering embezzlement by persons in positions of special trust and embezzlement by public employees.

Draft No. 2 1954), which states that the actor must have the purpose of disposing of the property for his own benefit or for the benefit of another not entitled thereto. 68. INDIANA LEGISLATIVE ADVISORY COMM., REPORT OF THE CRIMINAL CODE STUDY COMM., App. I, at 271 (1962) (hereinafter cited as REPORT OF THE CRIMINAL CODE STUDY COMM.)

69. Ibid.

70. These sections were formerly found in IND. ANN. STAT. §§ 10-1701 to -1718 (Burns 1956).
or fails to pay over to a successor any funds that should be so disposed of will be inferred both to have had knowledge of any legal obligation imposed with reference to the property in question and to have dealt with the property as his own. The classes of persons subject to this provision are employees of the government and employees of credit institutions, fiduciaries, and persons subject to a statutory obligation to reserve property for specified purposes.

1. Obligations to reserve funds for specified purposes.

Section 10-3031, as stated above, is designed in part to encompass situations where the property in question has never been in the possession of the victim. The essential prerequisite to theft under this section is a present duty on the part of the actor to reserve property for some specified purpose; a general promise to be performed in the future is not sufficient. For example, a mere debtor who fails to pay his obligee could not be guilty of theft under 10-3031 since, in such a case, there is only a general promise to pay in the future rather than a present duty to reserve property for the payment of the debt.

But though it is clear that the section was meant to apply to situations where an employer is to reserve funds due to his employees for specified purposes and fails to do so, it would seem doubtful that the statute’s drafters accomplished that result. The act is phrased in terms of one who obtains property subject to an obligation to reserve all or part of it for some specified purpose. "Obtains," by statutory definition, is receipt by a transfer of interest or possession. In the case posed, the employer has not received a transfer of possession or interest to specific funds but has just withheld part of the employee’s pay and failed to use it for the proper purpose. Unless the withheld funds are segregated it is doubtful that the employee could be said to have any interest in the funds since, there being no res, a trust would not have come into existence under traditional trust theory.

73. IND. ANN. STAT. § 10-3031(1) (Burns Spec. Supp. 1963) states: “A person who obtains property . . . commits theft if he deals with the property obtained as his own . . .”
74. IND. ANN. STAT. § 10-3040(9) (Burns Spec. Supp. 1963) provides in part: “‘Obtains’ means . . . to bring about a transfer of interest or possession, whether to the actor or another . . . .”

What the Indiana provision lacks can best be illustrated by noting a comparable provision in the Model Penal Code: "a person who obtains property upon agreement or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds, or from his own property . . . commits theft." The italicized phrase does not appear in the Indiana provision and, as a result,
2. Inferences For Certain Classes of Persons.

The second noteworthy aspect of section 10-3031 is that it creates certain inferences as to the knowledge of persons in the following classes who mishandle property: fiduciaries, employees of the government and credit institutions, and persons subject to a statutory duty to reserve property for specified purposes. Any person within these categories is inferred to have acted with knowledge of any legal duty imposed with respect to mishandled property and is inferred to have dealt with the property as his own. Under the new act an inference is prima facie evidence of the fact inferred, and, in the absence of proof to the contrary, the question of the existence of that fact is to be presented to the trier of fact. If evidence to the contrary is presented, the question is still one for the trier of fact unless that evidence clearly negates the existence of the fact inferred. Thus, the act creates a permissible inference which eliminates a prosecutor's obligation to establish the fact in the first instance.

Several of the statutory sections which were repealed and are now covered by section 10-3031 apparently required neither guilty knowledge nor intent for a violation. Generally, however, prior provisions did require some form of guilty knowledge or intent. The new act takes a
middle position by the device of permissible inferences. It avoids strict
criminal liability on the one hand and the need for formal proof of
knowledge on the other.

D. Section 10-3032: Theft of Lost or Mislaid Property

The Offenses Against Property Act introduces into Indiana law a
statutory provision which governs theft by finders of lost or mislaid
property. Prior to its enactment the criminal liability of finders was
covered by case law and existed as a form of larceny. An analysis of
Indiana cases shows that, to commit larceny, a finder had to have a
felonious intent to permanently deprive the owner of the property at the
time the finder first secured its possession. In addition, unless the
finder knew or had a reasonable means of discovering the identity of the
owner at the time of the finding, there could be no larceny regardless of
his intent.

Section 10-3032 states that a person who obtains control over lost
or mislaid property commits theft when he knows or learns either the
identity of the owner or a reasonable means of identifying the owner
and fails to take reasonable measures to restore the property to the
owner and intends to permanently deprive the owner of the use or
benefit of the property. The act specifies that reasonable measures in-
clude notifying the owner or any peace officer. If either of these
measures are taken, the finder will not be subject to criminal prosecution.

It is noteworthy that this provision equalizes the emphasis on intent
as between the time when the finder first takes possession and what may
often be a later point in time—when the finder discovers the identity of the
owner or a reasonable means of identifying him. Thus, an intent to
permanently deprive the owner of his property need not exist at the
time the finder takes possession as previously required. Social interests
seem better protected by this change since the harm to be prevented is
not the original taking of possession by the finder but rather the finder's
failure to restore the property to the owner when the opportunity presents
itself. By making the intent of the finder at this potentially later point
a crucial inquiry, the law accentuates the concurrence of criminal intent
with failure to act.

This analysis assumes that the provision stating that reasonable
measures shall include notifying the owner or any police officer will be
interpreted as establishing two specific courses of action which a finder
may, but need not, take to avoid criminal liability for theft. It is possible,

82. Wolfington v. State, 53 Ind. 343 (1876), Bailey v. State, 52 Ind. 462 (1876).
however, that this language will be construed as a statutory prescription of the reasonable measures which a finder must take to return the property to the owner. Therefore, since notifying a police officer would always be an available course of action, any finder who fails to notify an officer or do anything else to identify the owner will commit theft if he intends to keep the found item. A provision which could be construed as favorable to finders by stating the minimum a finder may do to avoid criminal liability might, therefore, also be interpreted as creating minimum requirements that a finder must satisfy to avoid liability. It is questionable whether all finders, without regard to the value of the property found, should be subjected to criminal liability for failing to notify a police officer. The blanket notification requirement is logical in situations where the property found has substantial value, but it places an unreasonable burden upon the person who finds property of little value. It is submitted that the provision should not be construed as providing a minimum standard of reasonable conduct. A finder should be required to take steps to return the goods which are reasonable in light of all of the circumstances, and notification of a peace officer should always be sufficient.

E. Section 10-3033: Theft of Labor or Services or Use of Property

A survey of prior Indiana statutory provisions relating to property crimes discloses that the law primarily protected tangible personalty and intangibles represented by a tangible instrument. For example, the general larceny provision punished the stealing of the "personal goods" of another.88 The general false pretenses statute dealt only with the fraudulent obtaining of "any money, bond, note, draft or check."84 These statutes could not be construed to cover items such as services or the use of property. And, even the embezzlement statute which encompassed "money, coin, bills, notes, credits, choses in action or other article or thing of value ...,"85 was held not to cover services and use of property.86

One of the most significant substantive changes in Indiana law resulting from the enactment of the Offenses Against Property Act is the recognition of labor, services, and the use of property as interests that the criminal law should protect. It is desirable that a person who obtains

84. Ind. Acts 1907, ch. 228, § 1.
86. See, e.g., Mendenhall v. State, 189 Ind. 175, 126 N.E. 434 (1919), where the opinion stated that only the kinds of property specifically enumerated in the embezzlement statute could be embezzled. Such strict interpretation is, of course, common in the criminal law. See Hall, General Principles of Criminal Law 35 (2d ed. 1960).
the labor or services of another by deception or threat with no intent to pay for the same, or who has control over the labor of another and wrongfully diverts such labor for his own benefit, be criminally punished. However, the new law does not reach one who wrongfully diverts the benefit of his own labor or services from his master or employer. Perhaps the reason for this omission is that in such a case there is no fraud, threat or an "obtaining of unauthorized control" by the laborer in an attempt to obtain the benefit of such services. A private decision is all that is required; hence, the basic elements of theft seem lacking. Moreover, no real harm is suffered by the employer since he has a cause of action for breach of contract against the person who wrongfully diverts his own labor. Where the wrongdoer diverts the labor of an innocent third party on the other hand, the employer is legally bound to pay the innocent person though the benefit of his services has inured to another.

Other provisions of section 10-3033 establish as theft the evasion of admission fees, obtaining transportation, lodging, or other services available for hire, and obtaining or exerting control over movable property for hire, with the purpose of evading payment.

Section 10-3033 represents a recognition of the fact that human time, labor and services have economic value and are capable of being wrongfully obtained or diverted by thieves and swindlers. It is beyond question that such legitimate interests can and should be protected by a modern penal code.

87. IND. ANN. STAT. § 10-3033(2) (Burns Spec. Supp. 1963). This section covers situations where the actor gains, by deception or threat, the labor or services of others with the purpose of evading payment for such services. Under this provision the actor is not required to have had prior control over the person providing the services. For example, if a person obtains services from a lawyer, doctor or any other independent contractor with no intent to pay for them, he will commit theft under this section. IND. ANN. STAT. § 10-3033(1) (Burns Spec. Supp. 1963) is phrased so as to apply to any person having a "calling or business" of providing the type of services wrongfully obtained.

91. IND. ANN. STAT. § 10-3033(5) (Burns Spec. Supp. 1963). Prior law was restricted to wrongful conversion of motor vehicles by one who had rented or leased the vehicle. Ind. Acts 1927, ch. 204, § 1. The new law will cover all types of chattels held for rent.
92. The new law's emphasis upon the protection of valuable interests which can be wrongfully appropriated is further illustrated by the inclusion of realty within the definition of property that can be the subject of theft. IND. ANN. STAT. § 10-3040(15) (Burns Spec. Supp. 1963). Thus, a trustee who wrongfully conveys title of trust realty to a bona fide purchaser to the detriment of the trust beneficiaries, or a person who obtains title to realty by fraud, will be guilty of theft. Such conduct is just as wrongful in the case of reality as it is in the case of personalty.
Section 10-3034(1) is Indiana's first statutory declaration that when one acts under an honest claim of right no property crime is committed although the conduct would otherwise constitute theft. Specifically, this section provides that if an actor is unaware that the property involved is that of another, or if he believes that he is entitled to the property or is authorized to dispose of it as he does, no crime will result under any provision of the act. However, the provision will not change Indiana law since such defenses were recognized in prior case law dealing with various property offenses which are now assimilated into the new act.

Section 10-3034(2) is apparently supposed to set forth the circumstances under which an intent to pay for property is a defense as well as when an inference of intent to commit theft is permissible. The wisdom of dealing with two such antithetical concepts even in a single well-drafted sentence would be questionable. But where the sentence is so poorly drafted that it defies rational interpretation, an intolerably confusing situation is bound to result. The provision reads:

The new act would appear, however, to make an adverse possessor who knows that the property is not his own subject to criminal liability for theft. The adverse possessor would be exerting unauthorized control over the property of another within the meaning of section 10-3030 and he would obviously intend to permanently deprive the owner of the use or benefit of the land in question. Whether a person can be an adverse possessor when he knows the property is not his own is not clear in Indiana due to some rather conflicting case law. Analytically, such a person should be treated as an adverse possessor if the statute of limitations for ejectment actions is running against the true owner, whether the possessor believes the property is or is not his own. See, generally, 1 I.L.E. Adverse Possession § 22 (1957). If the adverse possessor believes that the property is his, the claim of right defense would preclude a conviction for theft. Ind. Ann. Stat. § 10-3034 (Burns 1963). This would include the typical adverse possession situation involving mistaken boundaries.

The disappearance of the frontier in this country has substantially underminded the notion that an adverse possessor serves a socially useful function by putting land to use. It is anomalous, however, that the property laws of the state continue to sanction such conduct while the new theft law apparently seeks to punish it as criminal. It is submitted that this inconsistency in the laws of the state should be examined in the light of modern social conditions, and either the property laws or the new theft legislation should be amended so as to make them compatible.

93. The questionable application of this defense to situations involving theft by threat is discussed supra pp. 836-37.

94. See, e.g., Mattingly v. State, 230 Ind. 431, 104 N.E.2d 721 (1952) (where one receives property not knowing that it belongs to a person other than the transferee, he is not guilty of receiving stolen property); Bough v. State, 200 Ind. 585, 105 N.E. 434 (1921) (where the defendant entered and took property out of a church believing he held legal title to the church, no larceny was committed); Ridge v. State, 221 Ind. 101, 46 N.E.2d 592 (1943) (where the defendant believed that his contract with his employer entitled him to keep a certain percentage of all sales, such belief precluded an embezzlement conviction.)
Intent to pay for property does not include [preclude?] criminal liability for theft, except that a person who helps himself to property offered for sale or hire does not commit theft if he intends and is able to pay promptly, provided that concealment of property displayed or offered for sale or hire and the removal of said property from any place of business in, at or from which said property, or services with respect to property, is displayed, or sold or offered for sale to the ultimate consumer, shall constitute an inference that the actor intended to obtain the property by theft. 95

The word "preclude" evidently was intended to appear in the act where the word "include" is now found. 96 If the word preclude was inserted the provision apparently would state that a consumer who takes advantage of self-service facilities in any type of retail establishment would not be guilty of theft merely for removing an item from a shelf. However, it is doubtful that the provision is even necessary, since such control would certainly not be "unauthorized" as required by section 10-3030(1). The provision also states, in effect, that if such person conceals the property obtained and leaves the premises with it, his conduct creates an inference that he intended to obtain the property by theft. 97 Such an inference is sound for it is reasonable to infer that a person intends to obtain property by theft if he conceals it and leaves the premises without paying for it. However, no definition is provided in the statute for the term "conceals," and the omission could allow an inference of guilt to be applied to one who leaves the premises merely forgetting to pay for an item that he has, for example, placed in his pocket. But though the statutory language is not precise, the inference represents what should be a workable compromise between the interest of an accused in not being unjustly convicted of crime and society's interest in effectively dealing with one of the most common and costly forms of theft.

Although replacing "include" with "preclude" does make the provision comprehensible, it has the disadvantage of creating an anomaly: If the actor intends to pay for the use or benefit of property it seems clear that he does not intend illegally to permanently deprive the owner of the use or benefit of the property. 98 In other words, how can the

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96. This conclusion is supported by the fact that the word "preclude" rather than "include" appears in the copy of the statute as proposed in REPORT OF THE CRIMINAL CODE STUDY COMM. 258.
97. This inference was phrased in terms of a presumption under the prior shoplifting statute. Ind. Acts 1959, ch. 194, §§ 3.
98. It is possible that § 10-3030(2)(a), defining the requisite intent for theft as the intent "to deprive the owner permanently of the use or benefit" of the property, could be construed to mean that one could intend to pay for property while still intending to deprive the owner of the use of the particular item taken. However, it is submitted...
intent to pay for property fail to preclude liability for theft?

Clarification through legislative amendment or judicial construction
is necessary before the exact meaning of this provision can be known.

H. Section 10-3035: Effect of Actor’s Interest in Property

This section states that it is no defense to a charge of theft that the
actor has an interest in the property taken so long as the owner also has
an interest in it to which the actor is not entitled. It authorizes a partner
or co-owner of property who steals joint assets to be convicted of theft,
and prior case law holding that a husband may be convicted of stealing
from his wife when his act would be punishable if done by a third person
is apparently reaffirmed.90 These provisions provide additional examples
of the new law’s recognition that interests which are valuable and capable
of being interfered with should be protected regardless of abstract,
technical property concepts.

Section 10-3035 also provides that an owner who is in possession
of encumbered property does not commit theft as against mortgagees,
conditional vendors or others having a security interest even in the form
of title in the property, by removing or otherwise dealing with the
property contrary to the terms of the security agreement. The provision
represents a relaxation of prior law. Statutory provisions now repealed
made criminal the removal, sale or conversion of mortgaged personal
property without the consent of the mortgagee100 and personal property
purchased under a conditional sale contract without the consent of the
conditional vendor.102 Section 10-3040(3)(d) must, however, be con-
sidered in this regard. It states that theft by deception may be committed
when the actor sells or otherwise encumbers property and fails to disclose
a lien or other impediment to the enjoyment of the property, whether the
impediment is valid or invalid, recorded or unrecorded.102 Thus, the new
act punishes a failure to disclose an impediment to the title of property
to a purchaser or subsequent lienor and disregards the actor’s violation
of the prior lienor’s security agreement. Since, depending upon the
particular facts, the ultimate harm may fall either upon the purchaser
or the prior interest holder as a result of the defendant’s conduct, both
the failure to disclose a prior impediment and a violation of a security
agreement should logically be subject to penal sanction. However, the

new law, in excluding criminal liability for violation of a prior security agreement, does eliminate the possibility of criminal liability for purely technical violations of such agreements.

I. Sections 10-3036 to 10-3038: Related Offenses

The Offenses Against Property Act defines various crimes which do not amount to theft, presumably because the elements of intent or control are lacking.

Section 10-3036 states that a person commits a crime when he obtains or exerts unauthorized control over a vehicle\(^{103}\) of another under circumstances not amounting to theft.\(^{104}\) This section will apply when the actor takes a vehicle without the consent of the owner with an intent to use the vehicle temporarily, rather than with an intent to permanently deprive the owner of its use as is required for theft under section 10-3030. Anyone who accompanies another and is aware that the other person knowingly obtained or is exerting unauthorized control over a vehicle is also guilty of an offense.\(^{105}\)

There may be difficult problems under the new act in determining when a person has obtained control of a vehicle. Prior law required some movement (asportation).\(^{106}\) It is not clear whether, under the new statute, a person will be held to have obtained control when he enters the car, starts the engine, or when he moves the car. The best indication of what the drafters intended is contained in the statutory definition of “obtains or exerts control,” which includes “taking, carrying, driving or leading away . . . that to which another is entitled.”\(^{107}\) Arguably, the specific inclusion of “driving” requires movement, since one does not drive a vehicle without moving it. If this interpretation is adopted, prior law will remain unchanged in this respect.

The provisions of section 10-3037 deal with various types of deceptive practices. Section (1) provides that any officer or manager of a bank or credit institution who knowingly receives a deposit or other investment and who knows the institution is insolvent at the time, commits a crime. This conduct was a crime under former law, but it extended to employees as well as to bank officials.\(^{108}\) The prior statute

\(^{103}\) “‘Vehicle’ means any device for transportation by land, water or air, including mobile equipment with provision for transport of an operator, and draft or riding animals.” \textit{Ind. Ann. Stat.} § 10-3040(19) (Burns Spec. Supp. 1963).


\(^{105}\) This same language appeared in the former statutory provision dealing with vehicle taking which is no longer in force. \textit{Ind. Acts 1941}, ch. 748, § 8.


was, however, limited to banks, whereas the new provision extends to any "credit institution" including insurance companies, credit unions, building and loan associations and investment trust companies.¹⁰⁹ Thus, coverage of particular institutions has been increased while coverage of personnel has been reduced.

The broader institutional coverage under the new act is an improvement over prior law since there is no sound basis for distinguishing such conduct on the part of officers and managers of banks from that of their non-bank credit institution counterparts. The exclusion of employees is also desirable since they play no role in determining institutional policy with respect to investments and deposits and must follow the orders of their superiors.

Section 10-3037(2) provides that a person who issues a check or other order upon a credit institution or other person for payment of money or property, knowing that it will not be paid by the drawee, commits a crime. As under prior law,¹¹⁰ the fact that the drawer has insufficient funds in or no account with the drawee creates an inference that the actor knew the instrument would not be paid. The inference is rebutted, however, if the drawer pays the amount due on the instrument to the drawee within thirty days after receiving notice of dishonor. Since lack of funds also creates an inference under section 10-3040(3)(f) that the drawer intended to permanently deprive the owner of the property transferred, a prosecutor will be able to choose whether to utilize the fact of insufficient funds for the purpose of proceeding with a prosecution for the lesser offense under section 10-3037 or for charging theft by deception under section 10-3030. However, the fact that the drawer paid the necessary amount to the drawee within thirty days after notice of dishonor apparently does not rebut the inference of an intent to permanently deprive under section 10-3040 as it does the inference in the lesser offense under section 10-3037(2). Thus, payment by the drawer within the time specified may have the anomalous result of increasing the chances of a prosecution for the major theft offense, since the prosecutor will still have the benefit of the inference of an intent to permanently deprive. Such a result would be unfortunate for obvious reasons.

Section 10-3037(3) provides that any person who knowingly disseminates a false or deceptive advertisement through any medium to promote a purchase or sale or to promote property or services of any kind is guilty of an offense. Nondisclosure of relevant facts can render

an advertisement misleading under this provision, and it is in accord with prior law.\textsuperscript{111}

Section 10-3037(4) states that the making of any false or misleading statement for the purpose of obtaining credit, property, or services is an offense. This, too, was covered in the same manner under prior law.\textsuperscript{112}

Section 10-3038 provides that a person commits a crime when he knowingly misapplies entrusted property or property of the government or of a credit institution under circumstances which do not amount to theft. The offender need not have the intent required for theft. Property is “misapplied” and hence a criminal violation occurs when the actor deals with it in a manner contrary to government regulation as indicated by statutes, ordinances or administrative rulings. Knowledge of the relevant government statute, ordinance or regulation is inferred where the actor is (1) a person responsible for safekeeping or discretionary disposition of property of the government or of a credit institution or (2) one who regularly engages in business as a fiduciary. This provision replaces a large number of former statutes which punished various types of misconduct in handling entrusted property. Some of these former statutes required criminal intent or guilty knowledge while others required neither.\textsuperscript{113} The new provision represents a compromise by inferring the knowledge required for the offense in situations where societal interests require the utmost measure of good faith and honest dealing.

K. Section 10-3039: Penalties

Any system of penal sanctions must be underpinned by a rational basis. Prior Indiana property offense law did not meet this standard for, as noted earlier, numerous statutes enacted at various times, cluttered

\textsuperscript{111} See Ind. Acts 1957, ch. 270, §§ 1-5.
\textsuperscript{112} Ind. Acts 1931, ch. 166, §§ 1-3.
\textsuperscript{113} See, e.g., Ind. Acts 1905, ch. 169, § 389 (misapplication of public funds, requiring neither intent nor knowledge); Ind. Acts, 1905, ch. 169, § 390 (failure to account by city and county officials, requiring the failure to be “fraudulent”); Ind. Acts 1905, ch. 169, § 391 (failure of public officers to account to a successor, requiring neither knowledge nor intent); Ind. Acts 1905, ch. 169, § 395 (innkeepers and carriers who convert entrusted property, requiring the conversion to be “fraudulent”); Ind. Acts 1905, ch. 169, § 396 (bailees such as factors, warehousemen, etc., who misapply entrusted property or documents, requiring an “intent to defraud”); Ind. Acts 1905, ch. 169, § 399 (school and township trustees and county auditors who misappropriate any funds contrary to law, requiring such misappropriation to occur “knowingly”); Ind. Acts 1905, ch. 169, § 400 (fiduciaries who fail to pay over or to account to proper persons any property possessed by virtue of such fiduciary position, requiring neither intent nor knowledge although the failure to pay over must be “without good cause”); Ind. Acts 1933, ch. 103, § 1 (making of false entries by bankers, requiring such entries to be made “knowingly”).
with subtle distinctions and overlapping provisions, filled the statute books. The Offenses Against Property Act represents a significant improvement of prior law for it establishes consistent and rational penalties for the various property offenses.

An intelligent system of penalties must take account both of the conduct involved and the extent of social harm caused or threatened, and the new act seems to do so. Section 10-3039 states basically that any person who is convicted of theft of property not from the person which is less than one hundred dollars in value shall, except as provided, be subject to a maximum fine of five hundred dollars and imprisonment of either one year or one to five years. If the property taken is worth more than one hundred dollars, the offender may be fined a maximum of five thousand dollars and/or imprisoned for a maximum of ten years. The value of the property taken thus serves as one basis for the imposition of differing punishments under the act, and this differentiation at the same time takes account of the extent of social harm caused. However, the value of property approach tends to de-emphasize conduct, especially in situations where the defendant reasonably believes the property taken is worth less than it actually is.

The value of the property taken, as the statute recognizes, is not the only criterion for measuring social harm. The act subjects a person who steals certain types of property to the more severe maximum penalties of ten years imprisonment and a five thousand dollar fine, regardless of the value involved. Theft of motor vehicles, firearms, property of a credit institution, government property, and testamentary instruments can result in the imposition of the more severe penalty. Moreover, the act emphasizes the type of conduct involved as a basis for applying greater penalties, for theft from the person or by means of a threat of physical harm to any person is punishable by ten years imprisonment and/or a five thousand dollar fine, regardless of the value of the stolen property.


115. The penalties for all forms of theft also include disenfranchisement and removal of the privilege of holding any public office of profit or trust for any determinate period.

116. See, e.g., Model Penal Code § 206.15 (Tent. Draft No. 2 1954), where the following provision appears: "[T]he amount involved [which serves the function of grading the offense] shall be deemed to be the highest value which the defendant could reasonably have anticipated." Thus, the mental element or conduct in its broad sense is given its role even where the amount taken is used as a basis for grading the offense. However, a disadvantage of such a provision is the fact that it would place an additional and problematical element of proof upon the prosecution in any case where the maximum penalty was sought.
Where the offense involved is a related offense under the statute not amounting to theft, the maximum penalty is a fine of five hundred dollars and imprisonment for one year.\textsuperscript{117} Since one who violates a related offense either lacks the necessary intent for theft or has failed to obtain control over the property involved, the imposition of lesser penalties is justified by reference to both the conduct and social harm criteria. Where the actor has no intent to permanently deprive, his conduct differs significantly from that of a person who does entertain such an intent. Likewise, the social harm caused is significantly less in a case where control over the property was never obtained by the offender.

Finally, a defendant who is convicted of a second or subsequent offense of theft of property displayed for sale or hire in a business establishment is subject to a maximum fine of ten thousand dollars and/or imprisonment for ten years. A greater penalty in such a case cannot be justified on the basis of the conduct since, while two offenders may commit identical crimes, one is subject to a greater penalty solely on the basis of a past conviction. The greater penalty for a second or subsequent offender can be grounded only on some idea that there is an increased threat of social harm by repetitive criminal conduct. It is beyond the scope of this Note to examine and debate the pros and cons of habitual criminal legislation. However, it should be noted that several distinguished writers have bitterly criticized such legislation as unfair, ineffective and based upon erroneous premises as to the criminological aspects of recidivism.\textsuperscript{118}

II. GENERAL OBSERVATIONS

A. Procedural Effect of Substantive Consolidation

A major objective of those who drafted and helped enact the Offenses Against Property Act was to eliminate many of the arbitrary, technical distinctions which permeated prior theft law in order to end the dilatory

\textsuperscript{117} It should be noted that since one could be imprisoned for one year for committing only a related offense not amounting to theft, it is arguable that related offenses under the act are felonies due to the statutory definition of felonies as "offenses which may be punished with death or imprisonment in the state prison." \textit{Ind. Ann. Stat.} § 9-101 (Burns 1956). This classification could have significant effects when considered in conjunction with other statutes such as the Indiana Habitual Criminal statute which subjects persons twice convicted of felonies to a possible sentence of life imprisonment upon a third conviction. See \textit{Ind. Ann. Stat.} § 9-2207 (Burns 1956). It is doubtful that the drafters intended to make all offenses under the act felonies, especially in view of the serious consequences of such a classification. Legislative redefinition of felonies so as to exclude all offenses where the maximum imprisonment is a year or less would seem the best solution to this problem.

and exculpatory procedural maneuverings on the part of defense attorneys. Whether that goal will be realized depends in large measure upon how Indiana’s judiciary will construe the effect of substantive consolidation upon criminal procedure.

One question is whether the prosecution will be able to allege the violation of a section of the new act in statutory language even though the section by conjunction encompasses what formerly were separate criminal offenses. Can an indictment or affidavit, for example, charge a defendant with theft by knowingly obtaining or exerting unauthorized control over the property of another, so that it will make little difference whether the evidence shows the defendant had custody or possession at the time he obtained the property allegedly stolen? It can be speculated that such a practice will be allowed, for only in that event can the act’s primary purpose of eliminating archaic distinctions between essentially similar conduct be achieved and unnecessary procedural technicality eliminated.¹¹⁹

A somewhat different problem will arise where a provision other than the one charged governs the conduct of the defendant. For example, the prosecution may charge theft under section 10-3031 for failure to make a required disposition of property and it could become clear at trial that the general theft by deception provision of section 10-3030 is applicable. Or, situations may occur where theft by threat is charged and theft by deception is established. The question in such a situation will be whether the prosecution can prove a violation of the non-pleaded section since it and the section which actually covers the accused’s conduct both deal with the single offense of theft. The answer to that question can not be found by reference to the act’s legislative history or to its language. Nor can the answer be prophesied, since courts in other states where consolidation statutes have been enacted disagree as to the extent of the procedural effects of such legislation.¹²⁰ Thus, whether the courts of Indiana will hold that evidence showing the commission of theft under a provision other than that specifically pleaded will be sufficient to uphold

¹¹⁹. Should the suggested construction be adopted, when a defendant is charged with theft by deception it will not matter whether the person defrauded intended to part with possession alone or with both title and possession. Similarly, if a defendant is charged with theft by receiving stolen property, whether the property received was embezzled or taken by larceny will no longer be of procedural consequence.

¹²⁰. Compare State v. Smith, 2 Wash.2d 118, 98 P.2d 647 (1939), State v. McCullough, 157 Minn. 69, 195 N.W. 764 (1923), People v. Noblett, 244 N.Y. 355, 155 N.E. 670 (1920), and State v. Dickinson, 21 Mont. 595, 55 Pac. 539 (1898), holding that pleading and variance requirements have not been affected by such legislation, with People v. Nor Woods, 37 Cal.2d 584, 233 P.2d 891 (1951), and State v. Pete, 206 La. 1078, 20 So.2d 368 (1944), holding that a general charge will suffice to uphold a conviction if the defendant is found guilty of any one of the included crimes.
a conviction remains to be seen. The Model Penal Code provides, "An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, despite particularization in the indictment . . . subject only to the power of the court to insure a fair trial by granting a continuance or other appropriate relief where the defense would be prejudiced by lack of fair notice of the charge or by surprise." It is suggested in view of the uncertainty which now exists in Indiana in regard to this problem, that the wisest course would have been to have included a similar provision in the Indiana act.

B. Attempts

Another purpose of the Offenses Against Property Act is to define and provide punishment for anti-social conduct that prior law should have but did not prohibit. Several areas have been noted above where this effort should prove beneficial, but one serious inadequacy of prior law remains unremedied: The new act leaves unpunished the majority of attempts to commit property crimes.

The Indiana criminal code does not include a general statutory crime of attempting to commit a felony or misdemeanor. One statutory provision does state that upon an indictment or affidavit for an offense consisting of differing degrees, the jury may find the defendant not guilty of the degree charged in the indictment while finding the defendant guilty of a lesser degree or of an attempt to commit the offense charged. However, this section has not been construed as a blanket provision authorizing conviction for an attempt to commit any crime; it only means that if the statutory definition of a crime contains a specific reference to an attempt to commit the crime, a conviction for an attempt is procedurally proper. The only statutory provisions in force outside of the Offenses Against Property Act which specifically punish attempts to commit property crimes are section 10-4709 which covers attempts to commit robbery or larceny while armed with a deadly weapon and section 10-4710 which prohibits an attempt to commit a felony in connection with automobile banditry. The only provision of the new act expressly dealing with attempts is section 10-3041 which punishes an attempt to obtain control over property by threat. Section 10-3037,

although not expressly referring to attempts, does in substance penalize certain types of attempts to obtain property by deception. As a result, the only punishable attempts to commit property crimes at the present time are attempts to obtain property by threat or by the use of certain deceptive practices, and attempts in connection with automobile banditry. Prompt legislative action in this area should be forthcoming.

C. Conclusion

The Offenses Against Property Act will eliminate many of the questionable tactics previously employed by attorneys by its consolidation of previously distinct crimes into the single offense of theft. Many substantive advancements based upon sound social policy and social need have been incorporated into the new law. Although all possible problems have not and never could be resolved in a single effort such as the act represents, it is a significant and desirable advancement of our law in relation to property offenses.

126. Ind. Ann. Stat. § 10-3037 (Burns Spec. Supp. 1963). For example, the section punishes as a related offense false advertising which is in substance an attempt to obtain property by deception. Similarly, this section punishes as a related offense the making of a knowingly false written statement for the purpose of obtaining credit or other property, which also is actually an attempt to obtain property by deception.