Theft in the Louisiana Criminal Code of 1942

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Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

Article 67, Louisiana Criminal Code of 1942

There seems to be absolutely no reason why today the fundamental notion that it is socially wrong to take the property of another, in any fashion whatsoever, cannot be stated as clearly and simply as it has been above.

Comment to Article 67

In General

One of the major reforms of the Louisiana Criminal Code was to consolidate the existing stealing offenses into one combined theft provision. The simple, direct provisions of Article 67 replaced the separate common law offenses of larceny, embezzlement and obtaining by false pretenses, and eliminated the technical distinctions between custody and possession, between obtaining title and possession and between real and personal property as applied to those crimes.¹

The new offense simply required a “taking or misappropriation” of something. It had to be “something of value,” a term of art broadly defined. It had to be taken “without the consent of the other” or by “fraudulent conduct, practices or representations.” The common law requirement of an “intent to deprive the other permanently” was retained.

The drafters of Article 67 succeeded in their primary aim of simplifying the law and the courts, in the main, have applied the article with little difficulty. Two early cases rejected amorphous and vague constitutional attacks against the criminal code generally and Article 67

¹. Some 60 statutes were replaced by Article 67. They are listed in the comment to La. R.S. 14:67.

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particularly. *State v. Pete* concluded it was not an adoption of system of laws by reference prohibited by the state constitution. *State v. Smith* considered and rejected the argument that Article 67 was unconstitutional because it purported to denote two or more separate and distinct crimes in one provision. It also concluded that prosecution under the article was not a denial of due process.

Early on, *State v. Mills* departed from the common law rule that real property could not be the subject of larceny. Even though steel rails were part of a bridge and arguably immovables under Louisiana's civil law of property, they were nonetheless something of value and covered by Article 67. The supreme court in *State v. Blankenship* applied literally the requirement that the thing taken simply belong to another, saying "in cases of theft proof of ownership of the property stolen in the particular person alleged is unimportant, the state being required to show only that it belonged to someone other than the accused."

Simple and straightforward application of the elements of the new crime became the standard method of analysis. No doubt, the ease with which the legal community was able to incorporate and apply the reform can be traced to the continuing efforts of Dr. Dale Bennett, one of the three reporters for the code, to teach the new provisions to successive classes of law students at LSU, and to his regular commentary in the *Louisiana Law Review* on the developing cases. Also available were the authoritative drafters' comments to Article 67 to guide the application of the new provision.

An important aspect of the 1942 Criminal Code was its clarity and simplicity. Some would say it is ironic that a document incorporating the substance of common law crimes displayed a civil law approach to

2. 20 So. 2d 368 (La. 1944).
3. La. Const. art. III, § 18 (1921): "The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall recite at length the several provisions of the laws it may enact."
4. 28 So. 2d 487 (La. 1946).
5. 39 So. 2d 439 (La. 1949).
6. 93 So. 2d 533 (La. 1957).
8. Upon adoption of the code, he wrote a major article explaining its provisions, Dale E. Bennett, The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law, 5 La. L. Rev. 6 (1942). In subsequent years he was the author of the annual survey of Louisiana criminal law developments in the *Louisiana Law Review*.
9. The comments continue to be reproduced in most editions of the Louisiana Criminal Code. Some caution must be exercised in using them today, as changes in the text of some articles are not reflected in the text of the comments.
drafting statutes with a high level of generality and simplicity. Indeed, the first year course in criminal law at LSU, as developed by Dr. Bennett and continued by the current crop of teachers, is an excellent introduction to statutory construction and statutory analysis because of the technical quality of the code.

The elegant simplicity of Article 67 is striking in comparison with the complex provisions of the Model Penal Code which were adopted decades later to achieve similar reforms. The Model Penal Code contains several longer provisions—section 223.1 Consolidation of Theft Offenses; section 223.2 Theft by Unlawful Taking or Disposition; section 223.3 Theft by Deception; section 223.4 Theft by Extortion; section 223.5 Theft of Property Lost, Misplaced, or Delivered by Mistake; section 223.7 Theft of Services; section 223.8 Theft by Failure to Make Required Disposition of Funds Received. It is true that some of the detail in these model code provisions might be added to Article 67 with some benefit. Nonetheless, the theft article was superior in clarity and made the law understandable for police officers and lay persons as well as lawyers. It is true that subsequent legislative additions to the theft article have complicated matters, often unnecessarily so, and have confused the gradation of penalty policies of the theft law. In most of these instances, however, the simplest solution would be to return to the original provisions of the 1942 code.

**Misappropriation or Taking**

The “taking” element evolved from larceny’s requirement of a caption or trespassory taking out of the possession of another and some

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10. "The Institute was mandated to prepare a codification of the substantive criminal law. In view of Louisiana’s civil law background this could only mean that the projet was to constitute a true code and not a compilation of separate and independent statutes. The reporters followed faithfully this direction. Their consistent effort throughout was to avoid detail as much as the character of the subject would permit and by the choice of words and form of expression to achieve an internal homogeneity that would tend to assure uniformity of application." J. Denson Smith, The Louisiana Criminal Code (Its Background and General Plan), 5 La. L. Rev. 1, 4 (1942).


12. The phrase is used with appreciation to Julio C. Cueto-Rua, whose appreciation for "elegance" in drafting was well known among his students at LSU.

asportation or movement of the thing. The "misappropriation" element comes from the embezzlement requirement that there be some misuse of property that was in one's possession.

The Comment to Article 67 suggested that the slightest asportation or misuse should be sufficient to meet the requirements, and the cases have followed that suggestion. It was sufficient in State v. Neal that the defendant held a wallet for a second or two before the victim fired a shot at him, whereupon he dropped the wallet. The court stated, "A theft occurs, when the thing is taken, although it may remain in possession of the thief for only seconds." Even if the court did apparently equate the taking requirement with the common law taking and asportation requirement, "it fortunately continues the common law liberal construction of that requirement." It is enough that the thief acquire some control over the property; "the duration of such control, and the extent and nature of the movement (asportation) of the article, is immaterial."

The pre-code decision of State v. Laborde suggested that the thief himself must carry away the thing to constitute asportation. It was not larceny if the defendant sold a heifer he did not own to an innocent third party who carried it away from an open range where it was located. The case was criticized even under the old law, and was described as "not persuasive authority" under the new law by Justice Albert Tate in State v. Victor. In Victor, the defendant had his daughters carry a TV set in a terrarium box to a checkout counter; he was nonetheless held to be guilty under Article 67.

Victor also addressed directly the problem of applying the taking or misappropriation requirement to a patron who handles items in a self service store. The defendant had removed a terrarium from its box

15. 275 So. 2d 765, 770 (La. 1973).
17. Id. Accord: State v. Wisham, 476 So. 2d 534 (La. App. 1st Cir. 1985) (wallet removed from victim's pocket and was approximately eight inches from his body before he was able to immediately grab it).
18. 11 So. 2d 404 (La. 1942).
20. 368 So. 2d 711, 713 (La. 1979).
and replaced it with a more expensive television set. The box was placed on a shopping cart and his two daughters then pushed it to the checkout counter. At that point, the clerk discovered the television set. Judge Tate concluded that this conduct met the requirements of Article 67. He stated "that a theft may occur when there is a 'misappropriation' (exercise of wrongful dominion) or a 'taking' (unauthorized control) of the property of another, without regard to whether there is physical movement (asportation) or as to whether the thief has accomplished the misappropriation or taking by himself personally or through the agency of others." He further elaborated that this involved exerting control over the thing "adverse to or usurpatory of the owner's dominion."

In other words, in a self-service store, one has an expectation "under usual circumstances" of being able to handle and inspect goods without disturbing the owner's dominion. But concealing an item in another box and then directing the daughters to the checkout clerk were beyond what is permitted. What developed is basically a fictional standard as to what conduct a reasonable store owner consents to. It can be a taking without consent if one exerts control contrary to that fictional standard. It is a misappropriation of the thing by fraud if one changes a box or label with the intent to mislead the cashier as to the correct price.

In any event, the general language of Article 67 was skillfully applied to the shoplifting situation based on failing to adhere to customary expectations in self-service stores. This conclusion resulted simply from application of Article 67. The later addition of Article 67.10 in 1987 (Theft of goods) was unnecessary to obtain convictions in these shoplifting situations.

21. The "unlawful control" language is that used in Model Penal Code § 223.2(1) (1980).
22. 368 So. 2d at 714.
23. Id.
24. Accord in dictum is Fauria v. Doe, 483 So. 2d 148 (La. App. 4th Cir. 1985) (store did not consent to customer spraying some of the contents of a Static Guard aerosol can on her pants).
25. Accord as to the taking or misappropriation issue: State v. Nguyen, 584 So. 2d 256 (La. App. 4th Cir. 1991). The case is questionable in its analysis of something of value. The defendant intended to take clothing by fraudulent representations as to the price, by paying part of that price. What was taken was not "value"; it was corporeal items that were to be taken. But since part of the price was to be paid, the amount of the taking should be the difference in the retail price and the amount to be paid. Punishment should be based on that amount.
26. La. R.S. 14:67.10 was added by 1987 La. Acts No. 914 after Victor was decided. The main thrust of the new article, however, was not to elaborate on the taking or misappropriation requirement. Instead, it concentrated on the mental element, stating an intent to deprive "may be inferred when a person: (1) Intentionally conceals, on his
Determining whether a fictionalized consent or lack of consent existed was a problem in *State v. Byars.* Although the rules for use of a telephone credit card number issued to the mayor of a city did not appear to be written or definite, a conviction of the mayor’s son for theft by using the card was affirmed. The mayor gave the card to his son when the latter left on tour with a Christian singing group, instructing him to use it only in case of emergency. The simplest approach to the case, which the court of appeal ultimately used, was to conclude that the son exceeded the scope of his father’s permission when he used the card frequently for non-emergency calls after his return. However, the opinion also refers to the argument made by the State that the use was without the city’s consent. In response, the court pointed to a secretary’s testimony that she and others had made personal calls in the past using the city’s card, even if the practice was not encouraged, and that the employees reimbursed the city for the calls. The intimation is that such a regular, tolerated practice could establish a fictionalized consent to such conduct.

In a domestic relations context, a court of appeal divided 2-1 over whether the defendant/girlfriend exceeded the scope of her lover’s consent to deal with blank checks he signed and left with her while he was away at work for a week or two. The bank account was his alone, but his practice when he left was to leave one or two signed checks to cover living expenses for her and his son who lived with them. After their relationship ended, he complained to the police, and the State argued based on his testimony, that she made some checks out to herself and for more than the receipts she kept for items purchased. The court of appeal noted he gave her no explicit instructions not to make the checks to herself or for more than the purchase amount on the receipts and reversed the conviction.

person or otherwise, goods held for sale; (2) Alters or transfers any price marking reflecting the actual retail price of the goods; (3) Transfers goods from one container or package to another or places goods in any container, package, or wrapping in a manner to avoid detection; (4) Willfully causes the cash register or other sales recording device to reflect less than the actual retail price of the goods; or (5) Removes any price marking with the intent to deceive the merchant as to the actual retail price of the goods."

27. 550 So. 2d 876 (La. App. 2d Cir. 1989).
28. *State v. Fuqua,* 558 So. 2d 740 (La. App. 3d Cir. 1990). Judge Domengeaux dissented, concluding the evidence supported a determination that “defendant’s conduct was fraudulent and was a violation of the trust which was placed in her by her paramour.” Note that with respect to community property not subject to the requirements of concurrence of both spouses to alienate, one spouse acting alone has the right to alienate the property without the consent of the other. Such a right would appear to be a justification for a defendant spouse if it is urged that such an alienation was without the consent of the other spouse. On the other hand, if the misappropriation by a spouse is by a fraudulent act of a spouse, it could meet the theft requirement. See Katherine S.
Fraudulent conduct was found in *State v. Volentine*,29 when a defendant induced an elderly couple to write 142 checks for a total of more than $100,000 over a three year period by statements of assorted reasons for needing more money, including medical treatment for terminal cancer, of which defendant once said she had only six months to live without surgery. On different occasions, defendant would request and receive a replacement of a previously executed check, said to have been destroyed or lost, although later both instruments would be found to have been negotiated by her. She also misrepresented that certain checks had been drawn against insufficient funds, and . . . that, without a second instrument, they both would "go to jail."30

Absent a specific provision covering lost property or property received by mistake, the courts have construed the taking or misappropriation element of theft to cover such situations. It has not been a tidy solution, as *State v. Langford*31 demonstrates. Because of a mistake by a clerk, defendant's new bank account was computer coded to allow payment of unlimited amounts of overdrafts. This occurred soon after defendant was denied a loan for $225,000. Once defendant learned his overdrafts were being honored, he continued to issue more checks, at an almost logarithmic increase, until the total amount overdrawn was $848,000. Despite the bank's error and the negligence of its officers in throwing away the unread computer printouts that indicated the increasing overdrafts, the court of appeal concluded, "The bank was a victim of its own mistakes . . . . The bank's intention was to allow no overdrafts . . . . That the bank consented to the defendant's taking $848,000 as some sort of loan is not a reasonable hypothesis when its refusal to loan defendant $225,000 one week before the account was opened is considered."32 The supreme court agreed, stating that the evidence "supports the fact that no human person with the bank ever made a conscious decision to honor defendant's checks. . . ."33 That approach obviously involves a fiction and a questionable analysis of how a corporation expresses consent to anything.34

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29. 565 So. 2d 511 (La. App. 2d Cir. 1990).  
30. Id. at 514.  
31. 483 So. 2d 979 (La. 1986).  
32. State v. Langford, 467 So. 2d 41, 43 (La. App. 4th Cir. 1985).  
33. 483 So. 2d at 984.  
34. Chief Justice Dixon and Justice Watson dissented. Dixon explained, "The state argues that only the manager could consent to an overdraft. I do not think it is incumbent
More to the point, however, the supreme court also states its decision is equally supported by the fact that "the defendant had to have known a mistake was being made." Then it cites LaFave and Scott's commentary describing the common law larceny rule as applied to obligations to return property delivered by mistake. Perhaps straightforward adoption of the common law rule would be the better approach to cover this possible hiatus in Article 67. Otherwise, the court's first rationale would make thieves of all persons who write overdrafts if the bank mistakenly pays them. Section 223.5 of the Model Penal Code has the benefit of more precision in this regard and its language might be incorporated into Article 67. It provides: "A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake . . . 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."

**The Mental Element**

Article 67 continued the common law mental element, stating simply that "[a]n intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential." The drafters' comments refer to it as a "special mental element," supporting the subsequent cases holding that it is a specific criminal intent requirement rather than general intent. Theft is thus subject to a defense of voluntary intoxication—in the unlikely event that a defendant was so intoxicated as to be unable to form that intent.

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35. 483 So. 2d at 984.
38. Louisiana Revised Statutes 14:11 explains that specific intent requires the subjective desire to produce stated consequences while general intent is a more objective standard. See State v. White, 404 So. 2d 1202 (La. 1981); State v. Crosby, 515 So. 2d 570 (La. App. 1st Cir. 1987); State v. Thibodeaux, 441 So. 2d 821 (La. App. 3d Cir. 1983); Andre Doguet, Comment, The Louisiana Criminal Code and Criminal Intent: Distinguishing Between Specific and General Intent, 46 La. L. Rev. 1061 (1986).
A strict application of the "permanent" requirement has expectedly not taken place. The courts have continued the common law's loose construction of that element.\textsuperscript{40} In \textit{State v. Langford},\textsuperscript{41} the court affirmed the conviction even though the defendant may have had the intent to repay the entire amount of his overdrafts at some point. Even so, the court stated, "a defendant must show both that he had the intent to return the property within a reasonable time, and that he had a substantial ability to do so."\textsuperscript{42} Applying the same standard, the supreme court reversed a conviction for theft in \textit{State v. McBride}.\textsuperscript{43} The defendant took jewelry worth more than $1000 from his sister and pawned it to borrow $100. He gave the pawn ticket to his mother, along with an explanation of what he did. The court concluded that he had the ability to repay the loan and redeem the jewelry. "Under these circumstances, we conclude that any reasonable trier of fact would have a reasonable doubt that the defendant intended to permanently deprive his sister..."\textsuperscript{44}

If this approach is to continue, it might be helpful to adopt the rule as a statute using the Model Penal Code's updated language. Section 223.0 includes in the definition of deprive: "(a) to withhold property of another permanently 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."

A literal analysis might suggest that the first sentence of Article 67 does not include a mental element. It states, "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations." In a literal approach, it would be sufficient if the taking is without the consent of the other and if it is something of value belonging to another that is taken. One could be guilty even if one believed the owner consented or that it was one's own property that was being taken. The scope of the mistake of fact defense provided in Article 16, however, suggests that such a literal reading is improper. Comments to Article 16 give as illustrations of the mistake of fact defense the misappropriation of another's property under the reasonable belief it belonged to the offender or receiving stolen goods reasonably believed not to be stolen. This view is also supported by the language of the second sentence of

\textsuperscript{40} Model Penal Code & Commentaries, § 223.2 commentary at 174 (1980).
\textsuperscript{41} 483 So. 2d 979 (La. 1986).
\textsuperscript{42} Id. at 985, citing Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 88 (1972).
\textsuperscript{43} 504 So. 2d 840 (La. 1987).
\textsuperscript{44} Id. at 842.
Article 67. It would not be an intent to deprive another if one thought the thing was one's own property; it would not be an intent to deprive if one thought one had permission.45

The cases have routinely construed the mental element to allow a defense if one thought the other consented to the takings.46 More difficult are the cases in which disputes over the extent of one's consent arises. Often these matters are contractual disputes, and the tendency in the cases is to apply a strict construction of the criminal law requirements. In State v. Thibodeaux,47 the defendant/lessee of a house and its owners apparently agreed that the defendant would repair the house in exchange for the furniture in it. It was disputed whether the agreement was also contingent on the defendant agreeing to purchase the house. Three months later, the defendant, now delinquent in paying rent, moved out with the furniture and without notifying the owners. The defendant did not conceal himself and left a forwarding address. The court of appeal reversed a theft conviction, stating, "In this case, the evidence simply does not reasonably support the inference of mens rea or criminal intent. It is this state of mind that normally distinguishes criminal acts (punishable by the State alone) from mere civil wrongs (actionable by private individuals against one another)."48

Similarly, in State v. Saucier,49 the court of appeal reversed a conviction for attempted theft arising out of failure to pay for a dog. The owner initially allowed defendant to take custody of his male dog to mate with her bitch, with the understanding he would take one of the puppies. The mating was unsuccessful, and, according to the owner, she then agreed to purchase the dog for $100, which she did not pay. The court pointed out that there was no proof that at the time of the

45. Most common synonyms for deprive have a pejorative connotation, which would not be an apt expression to use in the case of one who consented to the taking. WordPerfect 5.1's synonyms include: despoil, rob, seize, strip, deny, refuse, withhold. Accord as to the claim of right defense is Section 223.1(3) of the Model Penal Code, which makes it a defense if 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." See Model Penal Code & Commentaries, § 223.1 and commentary at 151, also § 223.2 commentary at 171, 178 (1980).

46. State v. Webb, 372 So. 2d 1209 (La. 1979) (error to exclude evidence that defendant was told by others that the building was to be demolished and that the owner did not object to anyone taking whatever he wanted); State v. Kinney, 431 So. 2d 16 (La. App. 3d Cir. 1983) (defendant thought he was taking fish from a friend's net and that his friend would not mind). Contrast State v. Sloan, 426 So. 2d 368 (La. App. 2d Cir. 1983) (unreasonable to believe used parts stacked outside a repair shop were abandoned).

47. 441 So. 2d 821 (La. App. 3d Cir. 1983).
48. Id. at 823.
49. 485 So. 2d 584 (La. App. 4th Cir. 1986).
taking, which was consented to, she had a specific intent to deprive the owner. Although “her failure to return the dog or pay cash for the animal might give rise to a civil action by the McLoughlins for breach of contract, the facts do not support a criminal conviction for theft or attempted theft of the animal.” 50

Such cases of failure to pay the price for items sold are on the borderline of the criminal law. Under traditional larceny principles, the taking must occur at the same moment the defendant has the intent not to pay for the item. If the intent not to pay is formed later, it is not larceny. Actual failure to pay becomes a fact from which some inferences might be made as to the mental state of the defendant at the time of transfer of the item. Failure to pay of itself is not enough. If it were, the criminal law would be close to imprisoning persons for nonpayment of debts, a throwback to Medieval times. A modern listing of the reasons for not criminalizing non-payment of debts comes from the commentaries to the Model Penal Code:

Among the valid objections to the employment of criminal sanctions to enforce debts, as distinct from protecting “ownership” of “property,” may be included the following: (i) the legitimacy of contract breach in contexts where it becomes advantageous to the breaching party to pay damages rather than to fulfill his agreement; (ii) the propriety of withholding funds that may be burdened by contractual obligation, an action which is often recognized as an effective self-help remedy to force the obligee to negotiate or initiate litigation; (iii) a feeling that it is up to the contract maker to select his risks and that the invocation of criminal sanctions in cases of non-performance involves the impairment of the incentive to make wise risk selections and thus impairment of the social functions of contract-making, as well as possibilities of abuse; (iv) the impropriety of using the moral stigma of the criminal law to enforce contracts in situations where non-performance is regarded as a morally neutral act; (v) the unlikeliness of deterring honest insolvency by criminal threats, since insolvency is so often a result of factors beyond the control of the individual; (vi) the dangers, in attempting to punish insolvency for which the actor may properly be viewed as at fault, of discouraging the kind of speculation that is properly a part of a free-enterprise system and of securing unjust convictions by hindsight; and (vii) the futility, from the creditors’ standpoint, of imprisoning a debtor who is unable to pay. 51

50. Id. at 585.
The traditional approach reflecting these policy concerns seems to continue in the supreme court's constructions of Article 67, with a strict construction approach that tends to avoid injustice. The court reversed a conviction in State v. Hoffer. Although defendant may have misrepresented himself at an automobile auction as a licensed and bonded dealer, the State failed to prove an intent to deprive. The defendant had paid for fourteen vehicles with fourteen drafts, three of which were honored and eleven of which were not. Chief Justice Dixon wrote:

The defendant also challenges the trial judge's reliance on the fact that the drafts were never paid as indicating an intention, at the time they were signed, not to honor them. To allow such a conclusion, argues the defendant, would subject every defaulting debtor to criminal charges. While non-payment is consistent with the intention not to pay, and, of course, a prerequisite to bringing criminal charges, it is not sufficiently indicative of intention not to pay to exclude beyond a reasonable doubt the intention to pay. There was also evidence presented that three of the fourteen drafts were paid, and that the defendant and Mr. Musselwhite had agreed that the drafts were to be paid by Musselwhite, as he was the owner of the lot and would receive the purchase price of the cars from their eventual retail buyers. This is a reasonable hypothesis of innocence that was not excluded by the evidence.

**ANYTHING OF VALUE**

Article 2(2) of the Criminal Code of 1942 (Definitions) provided that "anything of value"

must be given the broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal, public or private. It must be construed in the broad popular sense of the phrase, not necessarily as synonymous with the traditional legal term "property."

Explaining these terms, the drafters stated "it is extremely important that they be taken to include as much as possible. They have been used

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52. 420 So. 2d 1090 (La. 1982). Accord: State v. Robinson, 463 So. 2d 663 (La. App. 4th Cir. 1985) (defendant falsely said he was an attorney when he took $500 to have a relative transferred from prison to a work release program; if he made any effort to obtain the transfer, his actions would not be theft).

53. 420 So. 2d at 1093.

54. The last sentence of the definition was added by amendment in 1977. It was directed to determining amount taken rather than whether a thing was a thing of value or not. It states, "In all cases involving shoplifting the term 'value' is the actual retail price of the property at the time of the offense."
in place of long enumerations in many articles, and only by an extensive interpretation will their purpose be served.

The definition was complicated by the addition in 1962 of the phrase, "and including transportation, telephone and telegraph services, or any other service available for hire." The initial broad approach, plus the specific examples, solved most of the problems of applying the article to immovable property, to incorporeal rights, and to obtaining services without payment. The courts, however, have not been able to develop a consistent rationale to establish limits to what may be the object of theft. Indeed, the code itself poses some structural problems in apparently defining the concept to be anything, and indicating the "broadest possible construction" of those terms is to be used.

Use of an automobile, for example, could be included in the definition of anything of value. But the existence of Article 68, Unauthorized Use of Movables, which applies when one has no intent to deprive the owner of the vehicle and its different penalty structure, suggests that it would be inconsistent with the gradation of punishment policies to allow a conviction for the more serious crime of theft for such conduct. This conclusion is also supported by the language added in 1962 which refers to any service available for hire. Rental car services would seem to be included in theft, so that if one takes a rental car with the intent to return it, theft occurs, with the penalty based on the amount not paid, that sum being the value of the service. At the same time, the added language has the negative connotation that a similar service that is not available for hire—using a car that is not available for rental—would not be included in the definition of anything of value.

Indeed, a regular part of any law school criminal law class involves the possibility of extending the notion of anything of value to any use of things that lessen the useful life of the object. It might also extend to a competitive advantage being gained by cheating on an admissions test or obtaining forcible sex from another. Drawing the line and stating the rationale for such a line has been a problem for the courts.

State v. Picou57 affirmed the quashing of an indictment for theft. The State alleged the defendant/attorney misled a client into hiring him to prosecute a personal injury claim for a contingent fee. He recorded

57. State v. Mills, 39 So. 2d 439 (La. 1949) (rails incorporated into a railroad bridge).
58. 107 So. 2d 691 (La. 1959).
the contingent fee contract two weeks later, invoking the statute which provided that upon such recordation, third persons could not settle the suit without the attorney's consent. The State's theory was that a portion of a cause of action was taken, and that cause of action was something of value. Obviously, the incorporeal right to sue met the literal definition of Article 2, and it is well known that such incorporeals are transferable and bring in substantial sums depending on the facts of the case. But the court did not inquire into those facts, which were not available on the appeal of the motion to quash. It simply stated that the defendant did not take anything of value.

Justice Hamiter suggested that the case involved "nothing more" than an employment agreement, and that the transfer of a part of the cause of action was a device to protect the attorney's fee. But he does admit that if the attorney won, he would be paid. Presumably that would be something—a contingent right—that meets the definition of Article 2. He also refers to the contingent aspect of the contract, saying it had only "potential value" and no "real value." But potential value would seem to come within the definition's reference to the "slightest" value. He adds that what the attorney acquired was something that was not salable and transferrable by him. But again, Article 2 does not seem to exclude items of value because they cannot be sold or transferred. Justice Hamiter also reasoned that even if there was a taking of something of value, the intent to deprive permanently did not exist at that time; only upon recordation of the contract was the intent developed. That analysis may be more sound, but it would still seem to require a factual determination of the defendant's mental state, which would have to occur at trial, and not on a preliminary motion to quash. The opinion of the four-judge majority is weakened by Justice Simon's dissent in which he stated his opinion that the cause of action was a thing of value. Justices McCaleb and Fournet concurred, stating they believed a cause of action was a thing of value, but that defendant's conduct did not meet the taking requirement. They took that view since the transfer was founded on valid consideration—promise of legal services. They stated any fraud would give rise only to a civil action for annulment.

A critical law review analysis of Picou suggested a plausible justification for the result—the existence of a specialized procedure for disciplining attorneys for improper solicitation of clients. One could perhaps fashion a legislative intent policy argument that allowing theft

59. Due v. Due, 342 So. 2d 161 (La. 1977) (attorney contingent fee contracts a community asset subject to partition at termination).

prosecutions in such matters would be inconsistent with the minor penalties associated with control of solicitation and that the narrowed construction of anything of value responds to that concern.

Another possible justification of the decision might be the notion that, given the larceny roots of Article 67, the thing of value must preexist the defendant's conduct. If the fraud occurs in the creation of the thing, albeit an incorporeal thing, there is no taking of something already existing.

Eight years later, the supreme court affirmed a conviction using a contrary analysis in State v. Fruge. The opinion was written by Chief Justice Fournet, who had concurred in Picou. Again, the defendant was a prominent politician, a high ranking state senator. He was convicted of theft for aiding a full-time state employee in getting a second job as secretary of the committee of which he was chairman. Under senate rules, he was entitled to hire a secretary and to prescribe her duties. To avoid the state's prohibition against dual office holding, she gave her sister's name and social security number. The conviction was affirmed in a weak opinion that relied in large part on Criminal Code articles 137-139 defining the crime of Dual Office Holding. Indeed, the defense had used the gradation of penalty argument—that the existence in the same code of a specific crime with a smaller penalty was an indication of legislative purpose not to consider such conduct as theft. Chief Justice Fournet wrote:

This argument would seem to logically follow, but it is clear the theft article in its broad and all embracive language includes the conduct forming the basis of the charge in this case; hence, the district attorney, under the express provisions of the Criminal Code had the discretion of proceeding under either the general article or the special article.

Under the majority's approach, it is not clear exactly what the thing of value was—the money received? Or the job? Presumably, the Picou majority would have found that it was employment that she obtained, which it held in the prior case was not something of value. Also, in Fruge as in Picou, consideration was received by the state—secretarial services.

Other than the inconsistency with Picou, the Fruge result could be justified as a simple application of the textual requirements. The thing obtained was money; it was obtained by fraudulent representations and there was the intent to keep the funds. That the work required was performed would be irrelevant since the state was misled into hiring the

61. 204 So. 2d 287 (La. 1967).
62. Id. at 291-92.
worker. But would the court be willing to say, for example, that a plumber who lies and says he is a Christian in order to do work for a customer who employs only Christians be guilty of theft if he received money in return for the work? Perhaps, more realistically, there was a tinge of possible corruption in that the legislative oversight provisions were so weak that the secretary could have received pay and done no work.

Later decisions did not follow the change of approach that might have been signaled by FrUGE. State v. McIntyre, decided five years later, is the oft-cited decision which suggests that viewing an LSU football game is not something of value. Of course, a literal application of Article 2 would apply to this service available for hire, so that one who sneaked into the stadium or who forged a ticket would be guilty of theft. In McIntyre, however, the defendant was a non-student who tried to use a student’s identification card to obtain admission to the game. At that time, students did not have to purchase individual game tickets, but were admitted into a student section upon showing an ID card. Defendant was apprehended before entry and accused of attempted theft. Since another person, a student, would have been entitled to admission using the card, the court reasoned that the university lost nothing. But, as Dr. Dale Bennett commented at the time, that analysis “loses sight of the true nature of attempts. . . . The attempt is punishable even though the defendant failed to accomplish his criminal purpose and no harm was actually suffered by the intended victim.” And in fact, if he had achieved his purpose, the university would have been deprived of the difference in price charged non-students and students to attend the football games.

The court also suggested that such a matter was one which “addresses itself to the internal discipline of Louisiana State University. . . .” That approach may be more fruitful, in light of the suggestion that Picou could be explained by the inferences of legislative intent coming from bar discipline powers. In the same way, the university’s power to discipline students would be a reflection of a gradation policy of lesser non-criminal punishment in such situations. But in McIntyre, the defendant was not a student and not subject to the university’s disciplinary powers; only the student who loaned his card could be punished by LSU. Dr. Bennett concluded, “In essence the court was not ready to

63. Note that the Model Penal Code, in Section 223.3 (theft by deception), states that the term deceive does not include “falsity as to matters having no pecuniary significance.” Model Penal Code & Commentaries, § 223.3 (1980).
64. 269 So. 2d 448 (La. 1972).
66. 269 So. 2d at 449.
treat defendant's conduct as 'fraudulent,' within the meaning of the Louisiana theft article. A very close case, which might well have been decided the other way, was presented. 67 Under this view, then, McIntyre does not represent so much a case explaining the anything of value requirement, but one making a narrow construction of the fraud requirement.

Narrow construction remained the norm in the 1980's when the court decided State v. Gisclair. 68 Again, a public official was involved, a parish assessor whose employees worked on his private camp during regular working hours. The only pay they received was their salaries from the state, but the employees testified they voluntarily performed the tasks and also worked an equivalent time after hours in the assessor's office so that the state lost no services. Essentially, the odd factual record would indicate that the assessor was shifting the time of the work for the state from regular hours to other times.

The lower court had found the assessor guilty of Unauthorized Use of Movables as a responsive verdict under an accusation of theft. The supreme court's analysis of guilt of this lesser included offense under a responsive verdict to a theft charge is thus convoluted in that it discusses whether defendant would be guilty of theft. On that issue, the lower court had found no deprivation of services to the state and no intent to deprive. But Chief Justice Dixon went further. Though he admitted that services are within the definition of something of value, he also indicated, "The indictment charges that the services belonged to the parish and the state. The parish and the state cannot own the services of their employees." 69 He also suggested that if anyone owns the services, it is the employees themselves and "there is no charge that the services were stolen from the employees." 70 But if that is so, then never can a customer who refuses to pay for the work by an employee of a service station be found guilty if the employee consents, even though the owner suffers an economic detriment. To support his conclusion, Justice Dixon cites the proposition that use of services did not constitute larceny. 71 But that begs the question, which is whether the

67. Bennett, supra note 65, at 344.
68. 382 So. 2d 914 (La. 1980).
69. Id. at 916.
70. Id.
71. Justice Dixon relies on Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, § 87, at 634 (1972). The court also cites Chappell v. United States, 270 F.2d 274 (9th Cir. 1959) which held that an air force sergeant who had an airman paint his private property during working hours was not guilty of theft. The court concluded that services were not a subject of theft under a federal statute. That decision was criticized in Comment, Theft of Labor and Services, 12 Stan. L. Rev. 663 (1960). The Model Penal Code Section 223.7 was adopted to depart from cases like Chappell. See Model Penal Code & Commentaries, § 223.7 and commentary at 250 n.1 (1980).
change from the elements in larceny was the adoption of a statute that would include services. The definition in Article 2 would certainly indicate as much, so long as they are services available for hire.

It is of course possible to consider the discussion in *Gisclair* as dictum, since the conviction was not for theft, but for unauthorized use of a movable as a responsive verdict for theft. Article 68, the unauthorized use of a movable, does not refer to anything of value, but to "taking or use of a movable which belongs to another." In that regard, Justice Dixon stated, "It is clear that the choice of the term 'moveables' in the statute was due to the lack of another term to describe the tangible objects covered under prior laws. The services of employees are not tangible objects and cannot be the object of a charge of unauthorized use of moveables under R.S. 14:68." Supporting this approach is the fact that the listing of statutes that Article 68 was designed to consolidate refers only to corporeal things, even though the term movable as used in the civil code includes incorporeal rights.

In a civil case, the fourth circuit court of appeal, by a 3-2 decision, was expansive in its construction. *Fauria v. Doe* was an action by an alleged shoplifter for damages because she suffered a miscarriage after being improperly detained by supermarket security officers. Plaintiff had taken a can of Static Guard from the shelf, sprayed some on her pants, then placed the can in her shopping cart. Later, she decided she did not want the product and replaced it on the shelf. The court concluded that the small amount of product sprayed was sufficient to justify her arrest. On the other hand, simply using another's soap in a washroom without consent would not seem to be enough to be theft.

Most recently, *State v. Berry* also produced a narrow construction of the anything of value requirement. There, defendant was convicted of attempted theft for inducing an allegedly incompetent Alzheimer's disease victim to execute a notarial act of adoption of the major defendant. The State's theory was that she thus intended to become the victim's heir who would inherit all her property. Defendant argued that theft of a hope to inherit does not constitute a thing of value.

The court recognized the weakness in the *Picou* analysis, but stated, "we nevertheless find it to be good precedent." Apparently thinking in terms of a taking from the heirs, the court said, "we conclude that there was only a potential value as to the heirs." On the other hand,

72. 382 So. 2d at 916.
74. 483 So. 2d 148 (La. App. 4th Cir. 1986).
75. A fabric conditioner and anti-static electricity product sold in aerosol cans.
76. State v. Marcello, 385 So. 2d 244 (La. 1980).
77. 545 So. 2d 1151 (La. App. 4th Cir. 1989).
78. Id. at 1154.
79. Id.
it would seem that what defendant wanted was clearly something valuable—the movable and immovable\(^{80}\) property of the aged victim. Perhaps one could technically conclude that these things would not belong to another at the time of the taking—when she died. But then they would, at least fictitiously, be the property of the legal heirs, and then they belonged to another in a broad sense. More realistically, perhaps the case can be explained in terms of there not being an act tending directly toward the accomplishment of her purpose. Two weeks after the adoption, the victim was interdicted by other persons and a civil action was filed to rescind the adoption. Defendant then agreed to a consent judgment rescinding the adoption. In that case, she was quite far from success and would not be guilty under traditional attempt principles.

In any event, this construction of anything of value does not present the neatest of packages. Perhaps the best that can be said is that given the possible due process problems of vagueness in these cases at the edge, the courts use strict construction and find some guidance from the policies of other statutes in and out of the criminal code.

Another legislative alternative to improve the situation seems difficult to find. The Model Penal Code’s definition would not be much more precise in the vague areas. It states that property means “anything of value” and then gives a listing, “including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.”\(^{81}\) The perils of a long list of examples, however, are ever present, and the enumeration can be seen as a limitation of the generic definition. For example, the attempts in Massachusetts to expand coverage by a long listing failed to consider the development of video tape. The court in *Commonwealth v. Yourawski*\(^{82}\) held that property did not include making an authorized videocassette copy of the movie Star Wars.

WHICH BELONGS TO ANOTHER

Article 67 does not require the State to prove who owns the property taken, only that the thing belonged to another—someone who is not the defendant.\(^{83}\)

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80. Under the Model Penal Code, immovable property can be the object of theft only if one “unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.” There was no transfer under the facts of Berry. See Model Penal Code & Commentaries, § 223.2(1) and commentary at 172 (1980).


As stated earlier, it seems simple to conclude that one is not guilty of theft if one takes what one reasonably believes is one's own property. If one takes one's property from another who has some right of possession of it, one should meet the requirements of theft since this right of possession is something of value. The intangible right itself is what is taken under this analysis, and one avoids the common law fictions that were used to make such takings larceny of the object itself. Under Article 67, the penalty should be based on the value of the right of possession rather than on the value of the object.

Article 2(1) defines "another" to include any other legal person or legal entity. Since Louisiana partnership law has been construed as giving the partnership a legal personality, it follows that a partner can be guilty of theft from the partnership in which he has an interest. State v. Morales, so held, overruling State v. Peterson.

Husbands and wives in Louisiana, given the state's civil law roots, were never merged into one personality as they were under the common law. It should easily follow that spouses can be guilty of taking the property of another if they steal from each other. That seems clear as to separate property. If the items involved are community property, they are co-owned in indivision by the spouses under a special management scheme. Under that scheme, each spouse has a right to alienate community movables without the consent of the other. Thus, the conduct should not constitute theft; it is a permitted taking which is justified by law. That authorization, however, does not include the alienation if it is done fraudulently or with bad faith; such action would give the spouse an action in damages. The crucial question then becomes the mental state of the defendant—he should be guilty of theft if he

84. State v. Cohen, 263 N.W. 922 (Minn. 1935).
86. 95 So. 2d 608 (La. 1957).
87. The Model Penal Code abandoned the common law rule, providing that it is no defense for theft that it was taken from a 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." Model Penal Code & Commentaries, § 223.1(4) (1980).
90. La. R.S. 14:18(3) (offender's conduct justified "when for any reason the offender's conduct is authorized by law"). In McVay v. McVay, 318 So. 2d 660 (La. App. 3d Cir. 1975), a civil action for conversion, the court reasoned that the ex-husband was liable because he improperly took and hid a former community automobile that the wife was using.
acts fraudulently with the specific intent to deprive the other spouse of that property.

Indeed, the legislation itself provides the instances in which both spouses must concur in a transaction; the obvious implication is that in other transactions, the spouses need not agree, and one alone can act even with the fact of the other spouse's opposition. Additional support for this view comes from the fact that under the prior law the husband could act even if the wife opposed the transaction; the current revision sought to make the spouses equal, and each now possesses that right. In other words, simple opposition by the other spouse is not enough to make the first spouse in bad faith; more subjective ill will or intent to injure the other spouse is needed.

In any event, the inquiry must focus on the motivation of a spouse in making the questionable management decisions, and on inferences from conduct that give an indication of that mental state. Considerations given weight in prior cases include the value of the property sold in relation to the value of the community; the time of the transaction in relation to an expected termination of the community; whether the spouses were on good terms at the time of the conduct; the consideration received for the transaction; and whether the transaction was a simulation.92

In Bagur v. Commissioner of Internal Revenue,93 the court determined in an income tax case that the wife would be entitled to a theft deduction if her husband squandered community funds. Judge John Minor Wisdom stated, "We hold, however, that an intent to deprive a wife permanently of her share of the community income may be inferred from a husband's wanton appropriation of community assets in pursuit of his own pleasure or needs."94 Even if the analysis in Bagur depended on state law, one should conclude that spouses can be guilty of theft from each other under Article 67 of the Louisiana Criminal Code. If a taking or misappropriation of the other spouse's interest in community property is fraudulent or without the consent of the other (when consent is required) and if there is a specific intent to deprive the other of property, the requirements of the text are satisfied. The difficulty, though, is finding a specific intent to deprive the other of property, as opposed to generalized desires of squandering assets or simply making bad investments.

The mistake of fact defense applies if one takes what one reasonably believes is one's property. Less clear is the situation when one takes a

93. 603 F.2d 491 (5th Cir. 1979).
94. Id. at 502.
thing, or money, which clearly is that of another, but with the belief that one has a claim of right. The classic case is when one tries to collect a debt by force. In State v. Randolph, Justice Albert Tate wrote one of his masterful ambiguous opinions to support reversal of the armed robbery conviction of a former employee who obtained $96 in wages he claimed were owed him. At that time, robbery required a theft by the use of force. Reversals of such convictions have been criticized in failing to deter conduct which can pose harm to others and in rewarding self-help instead of encouraging civil actions to settle disputes. Since the amendment to the Louisiana robbery articles, so that they now require only a taking and not a theft, the use of force in such situations is reached and otherwise deterred. If the taking takes place without force, however, there would still seem to be room for arguing that such conduct is not theft, and the claim of right defense would not be subject to criticism because it allows conduct which poses a danger to life. Further, when small amounts are in dispute, it is not realistic to argue that a civil remedy is available.

Property owned by the state qualifies as belonging to another. At least things the state owns in its private capacity. And it should include money that the state acquires in its sovereign capacity [escheat] that

95 275 So. 2d 174 (La. 1973).
96 Our finding is to some extent based upon the extreme facts of this case, which show: (a) without contradiction, a bona fide dispute about the payment of wages in the presence of many witnesses, i.e., no pattern of criminal conduct; (b) the belated but diligent discovery, after conviction, of witnesses only transiently at the scene, who strongly indicate the defendant's innocence of criminal conduct or intent (and no real opportunity, until after the trial, to produce such independent proof, where the defense at the trial was based upon the testimony of the defendant alone); (c) the actions of the trial court at the preliminary examination, indicating the apparent weakness of the State's case; (d) the testimony of the prosecuting witness at the trial substantially increasing and changing the alleged criminal nature of the defendant's conduct, as compared with his testimony at the preliminary examination (with the intimations of prosecutorial overkill); and (e) the lack of a real opportunity, until the new witnesses were discovered after the conviction, to present evidence from independent witnesses which casts great doubt upon the version of the prosecuting witness, nor the real need to do so until the prosecuting witness produced his trial version of the incident.
97 Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 725 (2d Ed. 1986).
98 The Model Penal Code is in accord, see § 223.1 commentary at 157 n.99: "One who is prepared to use violence to regain what he regards as his own property is, properly viewed, one who should be subjected to the laws designed to regulate violence and not to the laws designed to regulate the misappropriation of property of another."
produces interest that was taken by the custodian of the funds. On the other hand, wild animals that the state claims ownership of through a statute are not owned in a proprietary capacity, so their taking from the wilds should not constitute theft. Otherwise, every game violation in which an animal is killed becomes a theft.

**Gradation of Penalty: Value**

Article 67 maintains three levels of penalty, two felonies and one misdemeanor, depending on the value of the thing or things taken. Initially, ten years imprisonment at hard labor was possible if the thing was valued at $100 or more; two years if the value was $20 up to $100; 6 months if less than $20. The levels of punishment have remained, with amendments raising the respective thresholds from $100 to $500 and from $20 to $100. Corresponding fines have been increased, so that the maximum is now $3,000. Considering the recent inflation, it may well be an opportune time to raise those thresholds once more.

The 1942 code did not purport to establish rules for determining the monetary value of things stolen. Early cases did not consider the question in substantial detail, and the supreme court tended to uphold most factual determinations of value even with little evidentiary support. Since *Jackson v. Virginia*, however, the State must prove the value beyond a reasonable doubt, subject to appellate review, and the courts are routinely reviewing value determinations. In the absence of conflicting testimony about the value of furniture taken in *State v. McCray*, the victim's testimony that "she had bought it new about a year earlier at a cost of $1,968 and that it had depreciated only 'a little' in value" was adequate to support a conviction. On the other hand, in *State v. Peoples*, the court reversed when the State proved the original purchase price of items two to seven years old but offered no evidence of current value. Defendant had offered the testimony of an expert in used office machines who testified the value was less than $500.

The code does not contain a provision like the federal statute which provides that value means "face, par, or market value, or cost price,

103. E.g., State v. Tullos, 182 So. 321 (La. 1938); State v. Young, 115 So. 407 (La. 1927).
105. 305 So. 2d 433 (La. 1974).
106. Id. at 435.
107. 383 So. 2d 1006 (La. 1980).
either wholesale or retail, *whichever is greater.*" This leaves the value question an open one that is basically a fact issue. An amendment to Article 2(2) in 1977 did add that in cases of shoplifting, "the actual retail price of the property at the time of the offense" is the value. A 1978 statute provided that an affidavit of the value of property is admissible evidence and can be deemed "prima facie evidence of the value and ownership of the property alleged to be the object of a theft." But if the defendant objects, the affidavit shall not be admissible and not be deemed prima facie evidence of the value and ownership.  

Still in effect is the aggregation principle—if a defendant has committed several thefts, the aggregate of the amounts taken governs the penalty. That aggregation concept has often been used to enhance punishment for several small takings. However, aggregation is not mandatory. The courts have construed the district attorney's powers under Article 4 to include deciding whether or not to aggregate the values. In some instances, as in *State v. Joles,* the non-aggregated penalty can be more severe. In *Joles,* the supreme court concluded that when a person has been accused of committing a series of distinct thefts which are properly joinable in a single bill of information, the person may *either* be charged with one offense and sentenced upon conviction within the sentencing range for the grade of the offense determined by the aggregate amount of all of the thefts or may be charged with each separate offense and sentenced upon conviction within the sentencing range for the grade of each particular offense determined by the amount of the theft.  

Under that view, for example, twenty $500 thefts could be aggregated into one $10,000 theft punishable by ten years imprisonment or prosecuted separately with 200 years imprisonment. Justice Harry Lemmon apparently acknowledges the danger in vesting so much discretion in a prosecutor. He suggests, however, that there would be control over the prosecutor's discretion in such a case; "the sentencing discretion vested in the trial judge, subject to appellate review for excessiveness, provides an adequate safeguard against an abuse of that charging discretion."  

108. 18 U.S.C. 641 (emphasis added). The Model Penal Code in Section 223.1(2)(c) adopts a similar, but less precise rule, "The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property..." Model Penal Code & Commentaries, § 223.1(2)(c) and commentary at 140 (1980).  
111. 492 So. 2d 490 (La. 1986) (Calogero & Watson dissenting; Dennis concurring).  
112. Id. at 490 (emphasis in original).  
113. Id. at 495.
In *Joles*, a defendant accused of stealing $115,000 in public funds was sentenced to a total of fifteen years imprisonment.\textsuperscript{114}

In any event, the simple gradation of punishment suggested in Article 67 has grown into a much broader and complex matter, one with penalties going much beyond ten years imprisonment. That ongoing process, described in more detail below, is of long standing, but it may be curtailed somewhat by the recently adopted sentencing guidelines and the attempt therein to standardize sentencing.\textsuperscript{115}

The legislature itself departed several times from the basic pattern of gradation of theft according to value. As early as 1950,\textsuperscript{116} Article 67.1 was added to cover theft of some livestock (cattle, horses, mules, sheep, hogs, or goats), conduct which would otherwise fit under Article 67. The frontier myth about hanging horse thieves was still abroad, and the penalty for this special theft was made more severe—not less than three years nor more than five years imprisonment at hard labor, without regard to the value of the livestock taken. In 1956, the maximum penalty was increased to ten years, but the minimum was also removed.\textsuperscript{117} Later amendments added more animals to the list to the point that the list seems overly inclusive, extending now to "any animal, hybrid, mixture, or mutation of the species of horses, mules, donkeys, asses, cattle, swine, sheep, goats, domesticated deer, buffalo, bison, beefalo, or oxen."

Even with this separate offense for theft of livestock, the prosecutor still has the option, under the provisions of Article 4, to prosecute under the special statute or the general theft provisions under Article 67. He can proceed with penalties either according to value or according to the category of things taken.\textsuperscript{118} Conduct under Article 67 may also

\textsuperscript{114} In a similar vein, the supreme court did not definitively decide whether each homosexual act during a short time constituted a separate crime. Concurring in *State v. Cramer*, 358 So. 2d 1277 (La. 1978), Justice Tate looked at the total jail time ordered, by virtue of concurrent sentences, and found that the total did not result in reversible error. On the other hand, note *State v. Lejeune*, 489 So. 2d 907, 908 (La. 1986) ("The defendants may not be punished twice for multiple batteries committed against the same victim in the same encounter. . . .")


\textsuperscript{116} 1950 La. Acts No. 173.

\textsuperscript{117} 1956 La. Acts No. 154.

\textsuperscript{118} 1981 La. Acts No. 165, § 2, an amendment to La. R.S. 14:67.1 provided, "Nothing herein shall be construed to limit the discretion of the district attorney to determine how he shall prosecute pursuant to Article 61 of the Code of Criminal Procedure." Dale E. Bennett, Criminal Law, The Work of the Louisiana Supreme Court for the 1950-51 Term, 12 La. L. Rev. 125, 128 (1952): "In view of the fact that the special provision provides the almost Draconic penalty of not less than three years imprisonment, regardless of the value of the animal stolen, it is entirely conceivable that prosecuting authorities may frequently choose to prosecute less serious cases of livestock stealing under the general theft article." See also, Louisiana Legislation of 1950, Student Symposium, 11 La. L. Rev. 22, 41 (1950); *State v. Fruge*, 204 So. 2d 287 (La. 1967).
meet the requirements of forgery, dual office holding, improper credit card use, and several other crimes. In those instances, the prosecutor gains additional discretion in choosing the range of sentences, one which is often defended as a valuable incentive in plea bargaining negotiations.

Cats presumably are covered under Article 67, but if a dog is taken, prosecution may be under Article 67.2, another added special theft statute whose elements are already covered by Article 67, but with a special penalty. No minimum imprisonment is specified, but if imprisonment is in the sentence, it has to be for not less than three months nor more than six months. Of course, if it is a dog worth more than $500, punishment can be under Article 67 for up to ten years. Again, the rationality of the scheme is difficult to fathom. Even under Article 67.2, if there are multiple offenses of dog theft, a mandatory imprisonment penalty is included—thirty to sixty days for each additional dog.

MORE DECIMALIZATION

Articles 67.4 and 67.5, defining theft of domesticated fish and crawfish from private ponds, added in 1970 \(^{120}\) and 1977 \(^{121}\) are unnecessary in that those seafood items are anything of value, and if they are in a private pond, they belong to another. The new provisions also borrow the value based penalties of Article 67. A possible additional impact might have been that both statutes make it a crime not only to take the seafood, but also to fish in a crawfish farm or private pond or farm. However, since the penalty depends on the value of the fish or crawfish taken, if one fishes and nothing is caught, there is no penalty and thus no crime. \(^{122}\)

Acts 1982, No. 762 added three special thefts related to oilfield equipment that were already covered by Article 67: Article 67.7—theft of petroleum products; Article 67.8—theft of oilfield geological survey, seismograph and production maps; and, Article 67.9—theft of oil and gas equipment. The impact of these additions is in the sentencing provisions, allowing harsher penalties even if items of small value are taken. Article 67.12 is a misplaced addition establishing no crime, but directing a bureaucratic agency to assist in collecting information about theft of timber.

\(^{119}\) Since the criminal code's original numbering scheme was a straight chronological one, additions are given decimal numbers; hence the semi-pejorative reference to the decimalization of the code. Perhaps one could posit a new maxim of construction: whole number integer articles must be preferred to decimal articles.

\(^{120}\) 1970 La. Acts No. 453.

\(^{121}\) 1977 La. Acts No. 349.

\(^{122}\) Nulla poena sine lege. See Jerome Hall, General Principles of Criminal Law 27 (1960).
Although use of credit cards to obtain anything of value without consent or by fraud would be theft or attempted theft, Article 67.3 was added, with complicated and unnecessary detail more appropriate for a common law jurisdiction than Louisiana, to cover that conduct. Here, no special penalties were adopted, and the penalties of Article 67 were incorporated by reference. Article 67.11 was added to cover other credit card activity thought to be harmful, with heavier penalties than Article 67, although most of the conduct there would also be covered by Article 67. Article 67.6, theft of utility service, was an unnecessary addition, and its attempts at making presumptions of the mental element caused constitutional problems and prompted later amendments.  

Unauthorized Use of a Movable

The primary element of theft not included in Article 68 is the requirement of an intent to deprive permanently. Typically, the automobile joy rider is given as an example of the application of the statute, since he plans to use the vehicle for a short time and then leave it where it can be found by the owner. The text, of course, is broader and it includes any movable item, even though, as the text states, it could be an immovable according to civil laws. Interestingly, however, the text does not use the broad term “anything of value” but the possibly narrower term “movable.” The Model Penal Code took an even narrower approach, limiting the similar offense to one who “operates” (rather than uses) an “automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner.”

124. Comment to La. R.S. 14:68: “The lack of an intention to deprive the owner of the movable permanently is the factor which distinguishes this offense from theft. A verdict of guilty of this offense should be responsive to an indictment for theft.”
125. La. R.S. 14:68 replaced statutes that covered using automobiles of another and animals of another. See the comment to La. R.S. 14:68.
126. “To penalize a non-operational ‘use’ of a vehicle without the owner’s consent, however, would extend the section beyond its rationale. A man who climbs into a parked truck in order to conceal himself from the weather or to sleep is not using the vehicle in any way that involves the dangers of ‘joyriding.’” Model Penal Code & Commentaries, § 223.9 commentary at 273 (1980).
127. Model Penal Code & Commentaries, § 223.9. Id. commentary at 271-72, indirectly criticizing the Louisiana broad approach: “Under such a law, a girl would be a criminal if she wore her roommate’s dress to a party without the roommate’s consent. This extension of criminal liability is rejected because it goes beyond prevailing moral notions and cannot be justified as necessitated by the dangerousness of the behavior.”
THE MENTAL STATE

Article 68 contains the negative statement that the offense occurs "without any intention to deprive the other of the movable permanently." It also states that there must be "the intentional taking or use of a movable which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations." Presumably, the modifier "intentional" carries over to the remaining elements of the offense so that a reasonable belief that one had another's consent, even if that were not in fact true, would preclude guilt of the offense. Such mistakes of fact preclude guilt for theft, as discussed earlier. The rationale of those decisions is even stronger when applied to Article 68, where the use of the term "intentional" emphasizes the mental state whereas the corresponding first sentence of Article 67 omits the use of "intentional."'*

The supreme court in State v. Bias" also concluded that Article 68 "must reasonably be construed to require the existence of fraudulent intent."" If the statute were construed otherwise, every breach of a rental contract would be included within the reach of the statute, and the Legislature certainly did not intend such a result. In Bias, defendant was convicted of Unauthorized Use of Movables on the theory that he violated a TV rental agreement which required him to notify the owner of changes of address in addition to making monthly payments. Defendant missed several payments and was discovered at a new address. In that factual setting, the court refused to conclude that defendant was using the TV sets without consent or by fraudulent practices without further evidence of his mental state. It is of course possible that even though the initial taking of the set was with consent and without fraud, through a continuing use with knowledge that the owner did not consent or by some later fraudulent representations a defendant could be guilty." If simple misuse without a fraudulent animus would not be enough."

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*128. Accord: Model Penal Code & Commentaries, § 223.9, which also goes further and states it is a defense if one "reasonably believed that the owner would have consented to the operation had he known of it."
129. 400 So. 2d 650 (La. 1981).
132. The Model Penal Code restated and defined the contours of fraud and false pretenses in its definition of deception. Section 223.3 states one deceives if he purposely: (1) 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 (2) prevents another from acquiring information which would affect his judgment of a transaction; or (3) fails to correct a false impression which the deceiver
State v. Carmon\textsuperscript{133} found a defendant guilty of attempted Unauthorized Use of Movables\textsuperscript{134} based on his taking a "long" test drive of a car offered for sale at a car dealership. "He basically argues that since Whitaker did not say that he could not keep the car overnight, it was implied that he could keep the car overnight . . . . We find this argument unpersuasive."\textsuperscript{135} On the other hand, in State ex rel O.B. and W. L.,\textsuperscript{136} the fact that two juveniles were riding in a stolen car after being given a ride by the driver was insufficient to sustain a conviction. "O.B. testified that he had no idea the car was stolen when he accepted the ride. He said he saw a set of keys in the ignition and could not see the broken steering column . . . had no reason to doubt him when the adult driver told him the car belonged to his cousin."\textsuperscript{137} The court of appeal for the fourth circuit reversed the adjudication of delinquency.

**MOVABLES?**

Article 68 does not use the broad term "anything of value" but the possibly narrower term "movable." That textual anomaly would support a narrower application of Article 68. On the other hand, a comment suggests that the distinguishing difference between theft and Unauthorized Use of Movables is the mental state; another suggests that immovables are excluded since unauthorized use of land or structures would instead be trespass.\textsuperscript{138} These references could be construed to support a second view that the objects are the same in both offenses except when the conduct is a trespass. The supreme court’s alternative holding in State v. Gisclair\textsuperscript{39} leans toward the former view. Chief Justice Dixon argued "there can be no foundation" for the trial judge equating movables in Article 68 with anything of value in Article 67. He states

\textit{previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (4) 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."} It also provides, "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."

\textsuperscript{133} 539 So. 2d 752 (La. App. 3d Cir. 1989).
\textsuperscript{134} Because of the attempt conviction, the jury had to believe the defendant had the specific intent to commit the crime. See La. R.S. 14:27.
\textsuperscript{135} 539 So. 2d at 753.
\textsuperscript{136} 559 So. 2d 31 (La. App. 4th Cir. 1990).
\textsuperscript{137} Id. at 33. The Model Penal Code is in accord, Model Penal Code & Commentaries, § 223.8 commentary at 273 (1980).
\textsuperscript{138} The Model Penal Code is in accord, Model Penal Code & Commentaries, § 223 introductory note at 123, also § 223.2 and commentary at 172 (1980).
\textsuperscript{139} 382 So. 2d 914 (La. 1980).
it was meant to cover "tangible objects" since the prior statutes that were being continued dealt with such objects. Services of employees were not, in his view, such tangible objects.

**Punishment**

Unauthorized Use of Movables in the 1942 code was a minor misdemeanor, with punishment set at no more than a $100 fine and no more than 6 months imprisonment. As amended in 1980 and 1981, it can be a serious felony. If the thing used is worth $1,000 or less, the offense is a misdemeanor—with a fine up to $500 or imprisonment for no more than six months or both. If the thing used has a value of $1,000 or more, the offense is a felony with a fine up to $5,000 or imprisonment at hard labor for three years or both. Oddly, the punishment is not based on the value of the use of the thing. It is based on the value of the thing used. Hardly will one ever find a car worth less than $1,000, so the stereotypical joy riding offense becomes a serious felony. Even more questionable, composing a letter on a computer worth more than $1,000 becomes a felony. Some would argue the felony penalty was necessary because some states refuse to extradite defendants accused of misdemeanors, including persons who drive automobiles to other states and leave them there. Perhaps so, but such conduct would be better addressed by a separate offense for expensive automobiles and heavy equipment, rather than making the penalty so serious for some minor infractions.

**In Lieu of a Conclusion**

In lieu of a traditional summary, this article concludes its discussion of Articles 67 and 68 of the Louisiana Criminal Code with the text of those articles as originally adopted in 1942, with minor suggested changes. A return to those basics along with repeal of the decimal statutory encrustations would perhaps be the best way of honoring the durability and desirability of the basic code provisions:

Article 67. Theft is the intentional misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. Theft also is the failure of a person who comes into control of anything of value knowing that it has been lost, mislaid, or delivered under a mistake to take reasonable measures to restore the property to a person entitled to have it. An intent to deprive

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141. The suggested changes are indicated by italics.
the other permanently of whatever may be subject of the misappropriation or taking is essential.

[Penalty unchanged, or perhaps thresholds increased.]

Article 68. Unauthorized Use of Movables is the intentional taking or use of any corporeal movable which belongs to another, either without the other’s consent, or by means of fraudulent conduct, practices or representations, but without any intention to deprive the other of the movable permanently. The fact that the movable so taken or used may be classified as an immovable, according to the law pertaining to civil matters, is immaterial. Whoever commits the crime of unauthorized use of movables shall be fined not more than one hundred dollars, or imprisoned for not more than six months, or both.

Article 2. “Deprive” means to withhold property of another permanently or for so extended a time as to appropriate a major portion of its economic value or with intent to restore only upon payment of a reward or other compensation or to dispose of the property so as to make it unlikely that the owner will recover it. With respect to services available for hire, it means to use the service with intent not to pay the fee for use of that service.

Article 2. “Fraudulent conduct, practices or representations” means conduct that (1) 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 (2) prevents another from acquiring information which would affect his judgment of a transaction;

or (3) 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 (4) 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;

It 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.