Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

DAMAGE TO PROPERTY

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VANDALISM

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Law Reform Commission
of Canada

Working Paper 31

DAMAGE TO PROPERTY
VANDALISM

1984

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Commission

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Introduction

The Special Part of the criminal law can be roughly divided into three classes of offences: offences against the state or society at large, offences against the person and offences against property. Within the third class this Commission has already published a Report to Parliament, dealing with theft and fraud, offences of dishonesty. In this Working Paper, the Commission addresses itself to another group of property offences, which consists primarily of the offences of mischief and arson.

It should be noted that the term "mischief" is presently used in two different senses in the criminal law. One is that employed in section 128 of the *Criminal Code*, which deals principally with the making of false accusations or reports, commonly described as "public mischief". The other, a quite different sense, is that employed in sections 387 and 388 of the *Code* where "mischief" forms the title to three sections dealing with wilful damage to, or other interference with property. It is in this latter sense that the term is used in this Working Paper.

For the purpose of this Working Paper "mischief" is also used in a more global sense to include arson and other related offences, since these may be regarded as types of wilful damage or interference. In general, this Paper deals with the offences contained in Part IX of the *Criminal Code*, although reference is made from time to time to related offences falling outside Part IX. Although some polluting activities may fall within the purview of certain of the mischief and related offences, consideration of the most appropriate means by which to control pollution will be reserved for another Commission study which focuses particularly on problems of pollution.

Part IX of the *Criminal Code* is entitled "Wilful and Forbidden Acts in Respect of Certain Property" and comprises twenty sections, sections 385 to 403. Short though it is, this Part is of considerable legal and social significance for a variety of reasons. First, as indicated above, it complements the law of theft and fraud insofar as it deals with the notion of respect for the property of others. Second, like the law of theft and fraud, it deals with matters governed not only by the criminal

law but also by the civil law of contract, tort and property. Third, and particularly important from a social standpoint, it defines offences which are often committed by relatively young offenders[1] — a fact which not only poses problems for the criminal justice system but also raises questions about the quality of life in our society, the role of property within it and the upbringing and education of children.

It has to be admitted, then, that mischief is primarily a social problem. Most acts of wilful damage to property are manifestations of more worrisome disorders rooted in the deeper structure of contemporary society. As such they pose difficulties of a general nature for our criminal justice system, difficulties already addressed to some extent by this Commission in connection with sentencing and diversion.[2] For they are not acts which occur simply for want of laws prohibiting them or which will necessarily abate in response to improvements in those laws.[3]

Within the broader context of the criminal law review, however, those laws merit examination, which is the focus of this paper. Although comparatively little has been written by way of legal doctrine on the various mischief provisions and although certain of the relevant *Code* sections suffer from an almost total lack of reported jurisprudence, their function is quite clear, namely, to underscore the value of respect for others' property. While misappropriation of such property is dealt with by laws on theft and fraud, its destruction (total or partial) is prohibited by laws on mischief and arson, laws which are, it may be argued, of more significance than those on theft and fraud to our society. While property stolen or otherwise misappropriated can in principle be recovered, property damaged or destroyed cannot. To put it another way, theft leaves the owner poorer but mischief impoverishes society in general.

It is also apparent that certain offences presently found in Part IX serve a secondary function, that is, to underscore certain other values. One such value is respect for human life and safety, underlined and protected by, among other offences, paragraph 387(1)(*b*), which makes it a crime to render property dangerous. Another value is honesty, underlined for example by paragraph 386(3)(*b*), which provides that an absolute owner of property can commit mischief in respect of his own property if he destroys or damages it with fraudulent intent. Finally, there is the value of respect for other living creatures, underscored by sections 402 and 403 on cruelty to animals.

PART ONE

The Principles of Criminal Law Reform

Before turning to examine and evaluate the law of mischief in detail, we shall briefly set out the principles which in our opinion should govern the Special Part of the *Criminal Code*, and the law on mischief in particular. Some of these principles were articulated in *Our Criminal Law*[4] and have to do with substance. Others were to some extent formulated in *Theft and Fraud*[5] and have to do with form.

In terms of substance, the law on mischief, as on any other "real" crime, should comply with the following three principles:

(1) It should only criminalize conduct which either causes serious harm to other people or seriously contravenes our fundamental values. Accordingly, the law on mischief should not make a real crime out of facts which are too trivial to cause serious harm or serious value contravention.

(2) It should not run seriously counter to our fundamental values, for example, those of freedom and privacy. In particular, the law on mischief should not conflict, except insofar as is unavoidable, with a person's freedom to do as he likes with his own property.

(3) It should not find a place in the *Code* unless we are satisfied that the use of criminal law in this regard can make a suitable contribution to the solution of the relevant problems. Interferences that are adequately dealt with by civil law should not fall under the criminal law of mischief.

In terms of form, the law on mischief, again like any other area of the Special Part, should accord with the following three principles:

(4) It should be expressed so far as possible in a manner which is clear and simple but at the same time comparatively certain, so that the citizen has a reasonable chance of understanding what he is forbidden to do. For this reason the law on mischief should avoid overly complex arrangement, unduly legalistic style and approaches to offences that are not straightforward.

(5) It should as far as possible avoid both overlaps and gaps. For example, it may be redundant to have a generally-worded offence of mischief as well as offences which spell out in detail a particular way of committing mischief.

(6) It should avoid what may be loosely termed "fictions". On the one hand, it should avoid as much as possible the use of artificial definitions resulting in the application of ordinary words to items not ordinarily covered by them. On the other hand, it should eschew "deeming" provisions, whereby a person who does a certain thing is taken to have done something quite different.

PART TWO

The Present Law

The law of mischief (including related offences such as arson) is contained primarily in Part IX of the *Criminal Code*. In order to provide a basis for a detailed discussion in Part Three of certain issues affecting this group of offences, this Part will give a general outline of the present law.

I. The Offences

Part IX is entitled "Wilful and Forbidden Acts in Respect of Certain Property", which indicates that it concentrates on wider issues than simply damage to, or destruction of, property.[6] There are five groups of offences under separate headings, namely, "Mischief", "Arson and Other Fires", "Other Interference with Property", "Cattle and Other Animals", and "Cruelty to Animals". Of these, the key group consists of the mischief offences. The remaining offences can be described as specific types of the more generally-worded mischief offences, and can be divided into two classes. The first class is made up of those offences which are tailored to particular modes of committing the offence, such as arson, where property is damaged or destroyed by means of fire. The second class includes offences which focus on damage to particular types of property, an example being the offence of injuring cattle.

II. Interpretation

A. *"Property"*

Certain words are given special meanings for the purposes of the Part IX offences, one of those words being the "property" to which the

offences are directed. Whereas the usual meaning of "property" in the *Criminal Code* includes incorporeal as well as corporeal real or personal property,[7] the definition of "property" in Part IX eliminates incorporeal property.[8] Thus, intellectual property such as patents and copyrights is not protected by these offences.

Where offences of damaging or destroying property are committed,[9] the property against which the offence is directed need not necessarily be owned by another person. It is possible for a person to commit an offence by damaging or destroying property in which he has only a partial interest, since his act will harm the partial interest of another person.[10] Thus, a tenant in possession of a building may be guilty of damaging or destroying the building or removing fixtures from it if it prejudices an owner or mortgagee.[11] Furthermore, even a person who is an absolute owner of property is guilty of an offence of damaging or destroying it if he does so with intent to defraud.[12] Finally, when an offence of interfering with the lawful use of property is involved, the person whose use is interfered with need not be the owner or leaseholder of the property, but may be a person such as an employee or invitee of the owner.[13]

B. *"Wilfully"*

The mental element required for commission of a Part IX offence is more often than not specified to be wilfulness. Although "wilfully" has in normal parlance the connotation of intention,[14] it is given here an extended meaning.[15] Broadly speaking, it corresponds to the state of mind denoted by recklessness as well as intention.[16]

Negligence generally does not fall within the meaning of "wilfully", since the test for wilfulness is whether the accused did the act actually knowing the probable result as opposed to whether he ought to have known. It will be seen, however, that a negligent state of mind is deemed to be wilfulness where loss of life or damage results when the person who owns, occupies or controls the property causes a fire by violation of a fire-related law.[17]

III. The Key Group of Mischief Offences

According to the present *Criminal Code*, the main offence of mischief can be committed in four ways,[18] the first of which is by

destroying or damaging property. An example of this, the most clear-cut and direct form of mischief, is shattering the showroom window of business premises with a pellet gun.[19] Even when actual physical damage is small, it will be sufficient to find the accused guilty as long as the damage can be proven.[20]

The second method of committing mischief is by rendering property dangerous, useless, inoperative or ineffective. It would appear that few charges have been tried for committing mischief by this method, but examples would be rendering a car dangerous by tampering with the brake system or rendering a building dangerous by weakening a step in a stairway.[21] This method extends mischief to circumstances where actual damage may not be done to the property, but the property will no longer be capable of use, or of safe use.

The third method consists in obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property. Liability for mischief committed by this method has been found in a broad range of circumstances where the property itself may not have been directly interfered or tampered with, but the use of it was somehow obstructed or hampered. For example, students were convicted for barricading and occupying a university computer centre,[22] as was a protester who prevented patrons from entering a restaurant and encouraged them to go elsewhere.[23] Furthermore, a prisoner's actions in a lock-up were held to constitute an obstruction because they created so much mess as to render it difficult for police officers and staff to use the building.[24]

The fourth method is by obstructing, interrupting or interfering with a person in the lawful use, enjoyment or operation of property. It differs from the third method by focusing upon the protection of persons in their use of property as opposed to protection of the property itself. The act of blocking the access of office workers to elevators in an office tower would constitute this form of mischief.[25]

Although mischief may be committed by any of the four methods outlined above, the penalty varies according to other criteria set out in the *Criminal Code*. For instance, mischief which is committed in relation to public property evokes a higher penalty than mischief which is committed in relation to private property.[26]

An accused who commits mischief that causes actual danger to life is liable to an even higher penalty, namely imprisonment for life, and is triable on indictment only.[27] This provision underscores the high value

placed by our society on the protection of human life. The danger to life must be a direct physical outcome of the mischief to property and not merely incidental to the means by which the mischief is committed.[28]

IV. Inchoate Mischief

Even when no offence of mischief is carried to fruition by the above-mentioned four methods, a person may be guilty of an offence for conduct which is likely to constitute mischief in relation to public or private property, or mischief which causes actual danger to life.[29] This offence creates criminal liability for wilful acts which do not actually result in, but are likely to result in, mischief. It is probable that certain preparations to commit mischief, as well as attempts to commit mischief, would fall within the ambit of this offence. For example, wilfully placing explosives on a railway track may be sufficient for a conviction even if they do not explode or a train does not come along while they are on the track.[30]

V. Damage Not Exceeding Fifty Dollars

A separate summary conviction offence exists to cover wilful damage or destruction of property when actual danger to life is not involved and the alleged amount of damage is not more than fifty dollars.[31] The choice of prosecuting under this offence or under one of the key mischief offences, where the relevant circumstances would allow prosecution under either, is that of the Crown.[32] The court may, in addition to any punishment imposed, order an amount not in excess of fifty dollars to be paid to the aggrieved person as reasonable compensation for the damage or destruction. Failure to pay such compensation may result in imprisonment for no longer than two months.

VI. Specialized Offences

As was mentioned earlier, the key group of offences in Part IX comprises the four methods of committing mischief described above. The next group of offences to be considered is more specialized, in that the definition of each offence incorporates either or both the means by which the offence is committed or the nature of the property interfered with.

A. *Arson and Related Offences*

Although arson at common law consisted only in the "malicious and wilful burning of the house or outhouse of another man",[33] the offence has been modified and expanded by both English and Canadian statutes.[34] The *Criminal Code* now has three sections containing various fire-related offences, none of which actually use the word "arson", and which differ from the original offence with respect to not only the property protected but also the mental element required to prove some offences.

The principal offence consists in wilfully setting fire to certain items of real and personal property specified in the section. A person accused of this offence is triable only on indictment and is liable to imprisonment for a maximum of fourteen years.[35] It is also an offence to set fire wilfully to anything which is likely to cause any of these specified items to catch fire.[36]

Where fire is set to personal property which is not specified in the principal offence, or to anything likely to cause unspecified personal property to catch fire, a further mental state must be proven in order for the offence of arson to be committed.[37] In addition to proving that the fire was set wilfully, one must prove that it was set "for a fraudulent purpose", and there is a presumption of intent to defraud where the accused is the holder of, or a beneficiary under, a fire insurance policy relating specifically to the property to which fire was set.[38] The presumption will only be made where intention to defraud is a material element to be proven and where there is no evidence led to contradict the intent to defraud.[39]

If a person has not actually set fire to property,[40] he may still be charged with an offence if he causes a fire which results in loss of life or destruction of, or damage to, property.[41] The fire may be caused either wilfully or by violating a law in force in the place where the fire occurs, the latter of which may require no more than a negligent state of mind.[42] A person who owns, occupies or controls the relevant property will be deemed to have caused the fire wilfully if he has failed to comply with a fire prevention law or a law that requires certain extinguishing or escape apparatus to be installed. This deeming provision applies only if it is established that the fire, loss of life, damage or destruction would not have occurred had the accused complied with the law.[43] If it does apply, once again a negligent state of mind will suffice for a conviction to be made.

B. *False Alarm of Fire*

Another example of a specialized mischief offence is that of making, or causing to be made, an alarm of fire without reasonable cause.[44] The commission of this offence will not necessarily involve damage to or interference with, property, although often property, such as a fire alarm, will be tampered with.

C. *Premises, Residence or Transport of Internationally Protected Person*

This offence implements Canada's obligations under the United Nations Convention on the *Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973*. It creates an indictable offence of committing an attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger his life or liberty.[45]

D. *Building in Possession*

The only other offence which deals specifically with buildings makes it an indictable offence for the occupant or person in possession of a building to pull down, demolish or remove all or any part of it, or to sever any fixture from it, to the prejudice of a mortgagee or owner.[46]

E. *Wrecked Vessels and Wreck*

Vessels which are wrecked, stranded, abandoned or in distress are given special attention, it being an indictable offence wilfully to prevent or impede, or to endeavour to prevent or impede, the saving of such a vessel. It is similarly an indictable offence to prevent or impede, or to try to prevent or impede, a person who attempts to save such a vessel.[47] If these same actions are undertaken with regard to "wreck", a summary conviction offence may be charged.[48]

F. *Sea Marks*

Signals, buoys or other sea marks used for purposes of navigation are protected by two offences. It is an indictable offence to alter, remove or conceal a sea mark,[49] and a summary conviction offence to make fast to one.[50]

G. *Natural Bars*

Natural bars which are necessary to the existence of public harbours are protected by making it an indictable offence to remove without permission any stone, wood, earth or other material forming or protecting the bar.[51]

H. *Boundary Lines*

The protection of boundary lines and marks is undertaken by two sections which prohibit the pulling down, defacing, altering or removing of them, whether they be international, provincial, county, municipal or land boundaries. An exemption is provided for land surveyors who act in the course of their duty.[52]

I. *Domesticated Animals*

Animals are given extensive attention in Part IX. Cattle are mentioned specifically, it being an indictable offence not only to kill, maim, wound, poison or injure them, but also to place poison where they may easily consume it.[53] It is a summary conviction offence to do the same things to dogs, birds or animals other than cattle which are kept for a lawful purpose.[54]

J. *Animals*

Although the offences described immediately above would usually involve animals which are the property of someone, a complex group of offences protects animals whether or not they are owned by anyone. In certain circumstances the offence may be committed by the owner of the animal. Eight different summary conviction offences prohibit various means of causing unnecessary suffering or injury to animals and birds.[55] These offences include failure to provide suitable food and shelter, administering poison, and promoting animal fighting or trap shooting with live birds. The court may, in sentencing, prohibit an offender from having custody or control of an animal or bird for a period of up to two years. The act of keeping a cock-pit is made separately punishable on summary conviction.[56]

VII. Defences and Saving Provisions

Certain acts or omissions which would otherwise constitute offences under Part IX are exempted from characterization as criminal acts by means of specified defences and saving clauses.

A. *Defences*

Three defences provided for in Part IX apply to all offences (except that of keeping a cock-pit) and are established by demonstrating that the accused "acted with legal justification or excuse and with colour of right".[57] Athough this wording suggests that only two defences are available, that is, colour of right combined with either legal justification or excuse, the phrase "and with colour of right" has been interpreted as meaning "or with colour of right", thus creating three separate defences.[58]

There has been confusion in the cases as to the exact import of each of the three defences, and they are often treated collectively in the mischief cases. In general, legal justification will arise when acts which would normally be criminal are rendered right and lawful.[59] Many cases which consider this defence involve circumstances where a person has wilfully damaged another person's property in the course of protecting his own property. For example, an accused was acquitted of shooting another person's dog when he found the dog in his poultry house and reasonably believed that the dog would kill his poultry if not prevented.[60]

Legal excuse, on the other hand, arises where a wrongful act is committed but in circumstances where an ordinary person could not be expected to do otherwise.[61] For example, if an individual damaged property such as the plumbing in his prison cell under threats of immediate death or bodily harm, he would not be criminally liable for his act.[62]

Colour of right has been judicially defined for the purposes of mischief as "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse".[63] Thus, while colour of right provides a third and separate defence, it refers back to the first two defences. It would seem that only a mistake as to fact, and not a mistake as to law, will provide a basis for the defence of colour of right when a Part IX offence is involved.[64]

B. *Saving Provisions*

When an industrial dispute arises, certain acts occur which might well be regarded as conduct constituting mischief. For example, if employees in a plant which grows mushrooms were to stop work pursuant to a labour dispute at a time when failure to pick the mushrooms would result in their spoiling, the employees could be regarded as damaging property or rendering it useless by omitting to do an act which it was their duty to do. If this were treated as an offence, it would negate the right to strike of all persons employed in industries or businesses which were peculiarly susceptible to damage as a result of work stoppage. Thus, saving clauses provide that no one commits mischief by reason only of stopping work as a result of, first, the failure of his employer and himself, or his employer and his bargaining agent, to agree on any matter related to his employment;[65] and second, taking part in a combination of employees or workmen for their reasonable protection as such.[66] As long as no damage is wilfully done other than that which results from the work stoppage, no criminal liability attaches in these circumstances.

Picketing is another incident of an industrial dispute which could obstruct the lawful use of property. Thus a saving clause provides that mischief is not committed by reason only of attending at or approaching a place for the purpose only of obtaining or communicating information.[67] Although the saving clause makes no specific reference to industrial disputes, it is generally taken to refer to lawful picketing in furtherance of these disputes.[68]

VIII. Conclusion

In a sense, Part IX of the *Criminal Code* provides a miniature code of mischief and related offences, with special definitions of the mental element required and special defences for some of the offences. Despite this character as a code within a code, several of the offences in Part IX have little in common with others. It cannot even be said that all of the offences relate to the integrity of property. In Part Three, an analysis of the problems to be found in the present law will be undertaken in order to provide direction for the reform of the law of mischief.

PART THREE

Reshaping the Present Law: Issues and Problems

An important objective in reviewing criminal offences is to ensure that the prohibited conduct causes serious harm to persons or otherwise runs contrary to fundamental values held by Canadians. If it does not, the conduct should not be punished by the criminal law. A secondary objective, which may be regarded as subordinate to the first, is to achieve an internal logic within the *Criminal Code* as a whole, within the Special Part of the *Code*, and within each group of offences as well. Having outlined what many would regard as an unwieldly, disorganized and overlapping list of offences in the present *Code*, we must ask ourselves whether this assemblage of offences contributes in the most effective way to the reinforcement of the values which underlie it.

It is difficult to delineate the boundary between these two objectives, since internal logic will be achieved in part by ensuring that each offence is directed towards the protection of an appropriate value and that offences are grouped so as to avoid unnecessary mixing of values in any given area of the *Code*.[69] In turn, these values are more likely to be supported by a *Criminal Code* that is both logical and understandable than by one that is not.

In developing an appropriate direction for the reform of the law of mischief, we shall first, in this Part, raise questions that we believe should be addressed in pursuit of the objectives just mentioned. Most of the questions deal with matters of substance, although several are better described as questions of reclassification or of form. In Part Four we shall present our tentative recommendations for reform.

I. Respect for Property

The value most commonly considered as being protected by the law of mischief is respect for property. The original offences of malicious damage, from which the present law derives, focused on physically damaging or destroying the property of others.[70] These offences, which were often quite detailed, are presently synthesized in general language in what is called committing mischief "by damaging or destroying property".[71] The other three methods by which the key offence of mischief may be committed continue to engender respect for property,[72] but have expanded the original focus to include conduct that many would view as being less significant than damaging or destroying property. The first question for law reform, then, is whether the law of mischief now casts its net of criminality too widely, so as to embrace conduct too diverse, and perhaps even too trivial, to fall within it, given its rather narrow historical objectives.

A. *Damage and Interference with Property*

An historical examination sheds some light upon the reasons why the law of mischief has expanded beyond its original prohibition of damage and destruction. By 1892, when the first *Criminal Code* was adopted, the law of malicious damage had expanded to include interference with, and obstruction of, certain types of property. Interference with property falling short of damage but done with intent to render the property useless, had become the object of criminal liability. For example, it was an offence to unfasten a rope used in a mine, if one's intent was to render it useless and thereby to obstruct the working of the mine.[73] Although physical damage need not have occurred for an offence to be committed, physical tampering with property was usually necessary. What we described earlier as the second method of committing mischief, by rendering property dangerous, useless, inoperative or ineffective,[74] derives from such offences.

With the advent of systems of mass transportation and communication, such as the railway and the telegraph, came not only specific offences directed towards actions which damaged the property forming these systems, but also offences which prohibited obstruction of the use of these facilities. For example, it was an offence to prevent or obstruct the conveyance of a communication by telegraph or telephone, or the transmission of electricity.[75] Similarly, it was an offence to obstruct or interrupt the free use of a railway.[76]

When the *Criminal Code* was revised in 1953-54, more generally-worded provisions were introduced. The first two methods of committing mischief, namely damaging or destroying property, and rendering property useless, replaced a host of more specific offences. Although these provisions alone did not reflect a substantial change in the law, the addition of what we have described as the third and fourth methods of committing mischief did. New general language used to prohibit obstructing the lawful use of property, or obstructing a person in the lawful use of property, extended the ambit of the *Code* to acts which had not previously been affected by the law of mischief.[77] Whereas the prohibitions of the 1892 *Criminal Code* had been restricted to obstructing the use of facilities such as canals, railways and telegraphs, the offences of obstructing lawful use in the 1955 *Criminal Code* were so generally worded as to catch such activities as preventing access to a building, and interfering with sales transactions in a store.[78] While it is accurate to say that such conduct represents an interference with property in the broad sense, it may seem to some more closely related to the offences of assault,[79] intimidation[80] and causing a disturbance[81] than to the serious interferences with property prohibited by the earlier law.

A further objection to the expansive wording of the third and fourth methods of committing mischief is that criminal prosecutions can be brought for matters which may be dealt with adequately by the private law in both common law and civil law jurisdictions, if indeed they are serious enough to be dealt with at all,[82] and which may not concern the public as a whole.[83] Take, for example, the case of an individual interfering with the lawful enjoyment of his neighbour's property by erecting a "spite-fence" which deprives the neighbour of light or a view. The encroachment upon the law of property is particularly troublesome in this example, since the act may be civilly actionable in one jurisdiction but quite legal in another.[84] While it is questionable whether such conduct would be caught by the mischief provisions, their language is broad enough to support an argument that it would be. Furthermore, in view of the fact that such situations are frequently dealt with by zoning and other administrative regulations, it is questionable whether the criminal law has a role to play.

It appears, then, that the contemporary law of mischief prohibits acts which go far beyond the original notion of damaging and destroy-

ing property. What the law now protects is not only the property itself, but the relationships persons have with property which they have a lawful right to use or enjoy. As we have seen, this extends the law of mischief to cover situations already dealt with, first, by areas of criminal law such as assault and intimidation, and second, by private and public law governing the use of property.

B. *Damaging One's Own Property*

Traditionally, the owner of property has had, for the most part, the right to enjoy and dispose of his property as he saw fit. The original offences of malicious damage and arson could only be committed against property owned or possessed by another person.[85] This general rule was subsequently modified in both English and Canadian law to provide that where intent to injure or defraud was present, an accused could be found guilty of setting fire to, damaging or destroying his own property.[86] The Canadian *Criminal Code* of 1892 retained this exception to the general rule, but only where intent to defraud was present.[87] The current *Criminal Code* does not state expressly the general rule that a person cannot commit mischief or arson against his own property; however, such a rule is implied by providing that an offence of damaging or destroying something may be committed by a person with a partial interest in the property, and by a person with a total interest where intent to defraud is present.[88] In all other circumstances, a person appears to be free to damage or destroy his own property without incurring criminal prosecution for mischief or arson.

It is understandable that one might not want to allow persons to escape criminal liability if they deliberately destroy their own property with intent to defraud someone, usually by obtaining insurance money. At the same time, it is not immediately apparent that it should be the law of mischief which renders them criminally liable. Overlap with other areas of criminal law, such as fraud, raises serious concerns about the scope of the provision which permits a charge to be brought against a person for damaging or destroying his own property with intent to defraud.

There is, to be sure, a measure of practical utility in using the law of mischief to combat the practice of damaging or destroying one's own property in order to defraud insurance companies. It allows an act that would ordinarily be an integral part of a fraudulent scheme to be prosecuted as mischief or arson, even where there is no basis for prosecuting for a fraud-related scheme or even an attempt to commit

fraud.[89] Furthermore, in a prosecution of an accused charged with setting a fire, a special provision of Part IX allows intent to defraud to be presumed where the accused holds, or is beneficiary of, a fire insurance policy on the property to which fire was set.[90] But surely practical considerations such as these are not the sole determinants of the question whether we want to punish this conduct at all, and if so, on what basis. If we regard it as mischief, we must ask ourselves why we wish to restrict a person from damaging his own property, whatever his ultimate purpose. On the other hand, if we want to treat it as fraud, we must ask why we want to punish him if he has decided not to carry out his fraudulent scheme.

It is undoubtedly important to discourage persons from damaging or destroying their own property by inherently dangerous means because of the risk to human life and safety, and to other property. It is the act of deliberately creating a serious risk to life, safety or property, for improper and unlawful purposes, that is particularly objectionable and deserving of criminal punishment. Certainly when the risk materializes there should be criminal liability, as there is within the present law where causing a fire results in loss of life, or destruction of, or damage to, property.[91]

It is evident, however, that deliberately destroying one's own property, even for a fraudulent purpose, does not necessarily create such a risk, and thus the rationale just offered does not appear sufficient to maintain the present exception in the law of mischief. In the absence of circumstances creating a risk to life, safety or property, damaging one's own property for a fraudulent purpose should probably not attract criminal liability unless, under the law of fraud, the fraud has materialized, or has progressed sufficiently to warrant conviction for an attempt.

Even where the circumstances surrounding the destruction of one's own property do involve a substantial risk to life, safety or other property, warranting the invocation of criminal law, the question remains whether the offence should be mischief or something else. Should death be the result, the conduct would already be covered by the law of homicide, since the gravamen of the offence is not so much the destruction of the property as it is the unjustified harm to life. Where life or safety is threatened but neither injury nor death results, it may be better to assess the conduct in the context of a more general offence criminalizing all forms of conduct (not just damaging property) which create significant risks to life or safety.

Similar questions surround the attribution of criminal liability for acts done to one's own property which pose significant risks to the property of others. While there is no problem with rendering persons liable for mischief when damaging their own property results in actual damage to the property of another, it is questionable whether this conduct should be regarded as mischief when the risk to the property of others does not materialize and when the conduct does not qualify as an attempt to damage the property of another. Damaging one's own property is only one of innumerable ways in which persons place the property of others at risk, and again the issue seems to beg consideration within a more general context than the present.

Where fire is used to damage or destroy an individual's own property, a risk to other property and other persons will almost always be created because of the speed with which fire spreads. Because of this risk, the fear engendered by fire and the capacity of fire to destroy evidence of how and by whom the fire was set, it is arguable that an individual should be subject to criminal prosecution for setting fire to any property, whether it be his own or another's.[92] This argument may apply also to the use of explosives to damage one's own property, given the wide area which may be affected by an explosion. Whether such use of fire and explosives should be charged under arson, or should be encompassed within more wide-ranging offences of creating significant risks to life, safety or property is an issue which deserves further debate.

C. *The Nature of the Property*

Until 1892, the law of mischief dealt only with corporeal real or personal property. While the 1892 Canadian *Criminal Code* contained general sections concerning "corporeal or incorporeal" property not made the subject of specific mischief offences,[93] English law never adopted such a wide definition of the property protected by the law of malicious damage. Indeed, most of the specific mischief offences in the Canadian *Code* continued to deal only with corporeal property, and in the 1953-54 revisions the references to incorporeal property were dropped.[94]

It is a result of the specialized nature of incorporeal property such as copyrights and patents that interferences with it are dealt with in separate legislation. It is difficult to speak of damaging or destroying intangible property such as copyright, which represents the exclusive right of an author or artist to reproduce his own works during a certain

period. Accordingly, it seems inappropriate to expand mischief to deal with interference with such rights.

New problems regarding the definition of property have arisen as a result of technological developments, most notably with reference to computer technology. Should the law of mischief be expanded to deal with damage to, or destruction of, aspects of this new technology? Whereas computer hardware is protected by mischief because it falls within the traditional concept of corporeal property, computer software and data may not be. Indeed, it is debatable whether they fall within a traditional definition of "property" at all, let alone whether they are incorporeal or corporeal property.[95]

Most people would probably agree that data and computer programs which are susceptible to physical damage or destruction[96] should be protected by the criminal law, as are more traditional means of storing information.[97] One way to achieve protection of the new technology would be to extend the application of the law of mischief to data and computer programs without including them within corporeal property, or indeed property at all.[98] On the other hand, in organizing a new *Criminal Code*, it may be more appropriate to develop special offences which comprehensively address the varied aspects of the new technology without unduly distorting the scope of traditional offences like mischief to meet the needs of novel situations. Clearly, further research and analysis are required with regard to this question.

D. *Distinguishing Public and Private Property*

While the law of mischief promotes respect for both private and public property, the present *Criminal Code* provides a greater maximum penalty for mischief committed against public property than against private property.[99] The implication that public property has a higher value than private property probably flows from a history and tradition in which government rights took precedence over all others.[100] It is interesting, however, that the detailed 1892 *Criminal Code* did not draw such a categorical distinction between private and public property as the present *Code* does, although the private or public character of property was sometimes prescribed in certain offences.[101]

Today, any implication that public property is more important and more worthy of protection than private property seems out of step with social and economic reality. The distinction between the two types of

property is blurred by joint venture arrangements between government and the private sector, by taxation structures, by subsidy policies and by employment strategies. Furthermore, the pervasiveness of government activity makes it difficult to identify given property as private or public,[102] which creates problems for the prosecution of mischief offences. Cases have failed where inadequate proof was presented of the private or public nature of the relevant property, since an offence against private property is not regarded as an included offence within an offence against public property.[103] Neither is the prosecution permitted to rely on presumptions of ownership; it must give evidence establishing the actual owner.[104] Given present economic reality and the practical problems encountered as a result of the distinction between private and public property, there would seem to be little justification for its retention.

E. *Negligent Damage to Property*

As noted earlier, the concept of negligence has been introduced into Part IX of the *Code*, it being a sufficient mental state to convict an individual of causing a fire resulting in loss of life or in the destruction of, or damage to, property.[105] An owner or occupier of property who fails to comply with a fire-related by-law, for example, can be held liable under the *Criminal Code* for a result he neither intended nor foresaw.

At least three brief observations can be made about this provision. First, to criminalize conduct that is neither deliberate, nor leading to a foreseen result, it is argued, does nothing to engender respect for property. Disrespect inheres in the element of malice, the traditional focus of the law of mischief.[106] Second, the concept of negligence is allowed to enter Part IX by means of a "deeming" provision, so that not only is the mental element "wilfully" artificially defined to include recklessness, but it is deemed to include negligence in certain circumstances. Finally, the offence in question stipulates a single mode of causing the resulting destruction or damage, namely fire. Yet, if it is important to use the criminal law to protect property against damage or destruction, and persons against loss of life, by negligent conduct, why should its reach be limited to the use of fire? It thus appears that the encroachment of negligence warrants reconsideration if the law of mischief and arson is to be given a logical and principled structure.

II. Respect for Honesty

Although honesty does not immediately spring to mind as a value that the law of mischief does or should reflect, it became a relevant consideration as the law of mischief expanded beyond its traditional scope, which was limited to malicious damage and arson committed against the property of another person, to encompass fraudulent damage to or destruction of one's own property. We have already discussed this aspect, observing that it may not be appropriate to focus on a fraudulent state of mind within the law of mischief and arson.[107]

Beyond this, fraudulent intent has become an essential element of a distinct category of arson directed against property in which someone else has an interest. As we have pointed out, there are presently two main categories of arson. The more serious one, which includes setting fire to real property and certain classes of personal property, requires wilfulness and is punishable by up to fourteen years imprisonment. The less serious category, which encompasses personal property not included in the more serious category, requires not only wilfulness but also fraudulent purpose, and is punishable by up to five years imprisonment.[108] This distinction is maintained in the further offences of setting fire to anything that is likely to cause property within those categories to catch fire.[109] Before these offences were created, the burning of most personal property did not warrant prosecution as arson, although it could be prosecuted as mischief. In 1921, concern that setting fire to personal property as part of a fraudulent scheme did not constitute arson, but only mischief, led to the reconstruction of the offence of arson to cover these situations.[110]

To provide that setting fire to certain property is not arson, only mischief, unless done fraudulently, encroaches upon the law of fraud and attempted fraud. Dishonesty, not protection of property, becomes the key ingredient, the gravamen of the offence. There appears to be little justification to support this focus on fraudulent conduct within the law of mischief and arson, and for this reason these offences seem particularly out of place. Unless the conduct involves a substantial risk to life, safety or other property, it would seem more appropriate to leave it to the law of fraud and attempted fraud.

III. Respect for Human Life and Safety

A third value which is protected by the present law of mischief is respect for human life and safety. It is a factor in several offences, such as the second method of committing mischief which includes rendering property dangerous,[111] and interference with marine signals;[112] but it is most significant as an aggravating factor in the key group of mischief offences and as an additional element to be proven in certain related offences.

A. *Danger to Life as an Aggravating Factor in the Law of Mischief*

Danger to human life has been specified as an element of certain offences at various times in the history of the law of mischief. For example, both the English *Malicious Damage Act* of 1861 and the Canadian *Act Respecting Malicious Injuries to Property* of 1869 imposed maximum penalties of life imprisonment where fire was set to a dwelling-house with a person inside, and where explosives were used to destroy or damage a dwelling-house with a person inside whereby the life of a person was endangered.[113] Similarly, the Canadian *Criminal Code* of 1892 imposed a maximum penalty of life imprisonment where a person was in a dwelling-house, ship or boat to which damage was caused by an explosion, and actual danger to life was caused.[114]

In the present *Criminal Code*, actual danger to life acts as an aggravating factor to all of the key mischief offences by increasing the maximum penalty to life imprisonment.[115] To an extent, this provision fills a possible gap in the *Criminal Code* by permitting an offence with a serious penalty to be charged in cases where conduct may be too remote from the danger to life to support a charge of attempted assault or attempted murder.[116] In fact, the aggravated offence carries the same maximum penalty as attempted murder.

The question remains, however, whether the law should seek to express respect for human life through a higher penalty for a mischief offence or whether threats to life and safety would be more appropriately protected in the context of offences against the person, perhaps in a separate offence sufficiently comprehensive to encompass unwarranted risks to human life or safety even where actual harm does not materialize. In cases where the danger to life is questionable, it may be desirable to be able to charge the accused with an aggravated

mischief offence involving danger to life, with the ordinary mischief offence being an included offence. If the danger to life were not established, the accused could be found guilty of the lesser mischief offence. On the other hand, if the *Code* is to reflect clarity, simplicity and structure, it may be better to avoid direct references to risks to human life within the context of mischief offences, provided such risks are adequately dealt with elsewhere.

B. *Loss of Life as an Element of the Offence of Causing a Fire*

Respect for human life is also a factor in the separate offence of causing a fire wilfully or by violation of law, resulting in loss of life or destruction of or damage to property.[117] In order to prove the commission of this offence, evidence need not be shown of actually "setting" a fire, as with arson, but only of "causing" a fire. The proof required will normally be less than for setting a fire and the mental element need only be akin to negligence if violation of a law occurs.[118] Because the offence focuses on loss of life, there is an overlap with the law of homicide; the circumstances might well support a charge of manslaughter. It may be argued that this overlap is unwarranted; it may be inappropriate to have different rules applying to loss of life from fires than those which apply to loss of life from other causes attributable to an accused.

It is argued, as well, that the law falls short by focusing on the materialization of the risk to life rather than on its creation. In any event, these are issues perhaps more appropriately addressed in the context of a discussion of the law of homicide and other offences against the person.

IV. Respect for Animal Life, Safety and Well-Being

The complex of offences relating to cruelty to animals[119] does not really enhance respect for another person's property, since certain offences relate to animals in the offender's possession, and, furthermore, some animals will not be owned at all.[120] These offences are more concerned with prohibiting ill-treatment of animals in order to prevent suffering, and thus promote respect for animal life, safety and well-being. In the interest of streamlining the *Criminal Code* and

emphasizing the nature of the offences, it may be best to relegate them to a separate part of the *Code*.

V. Miscellaneous Reclassification

There are several other offences presently grouped within the law of mischief which involve interferences with property, but which might not be completely subsumed within a restructured general offence of mischief. There may be, however, valid reasons for retaining some of these as separate offences, in which case they might be better associated not with the key mischief offence but rather with other parts of the *Criminal Code*.

For instance, interfering with the saving of a wrecked vessel or wreck[121] will not always involve damage to the vessel or wreck, and should perhaps be taken into account in a reconsideration of offences focusing on transportation. Similarly, the offence of interfering with a marine signal[122] is directed at the protection of vessels which use these signals as navigational aids rather than at the protection of the signal itself. It too might be better dealt with in association with specialized offences focusing on transportation.

The offence of making a false alarm of fire[123] rarely involves interference with property, other than pulling a fire alarm. It might be considered, accordingly, within the context of offences aimed at the maintenance of public order. Interfering with boundary marks and lines[124] will most often involve intent to mislead someone as to the limit of his property, and thus might warrant special treatment in the context of fraud. Finally, the offence of committing an attack on certain property of an internationally protected person[125] might be more appropriately considered in association with offences against international order and security, particularly since many offences with international aspects are entering the criminal law as Canada fulfils her obligations under international law.

It is impossible, in a single Working Paper such as this, to dispose of the innumerable problems of this nature that are encountered in reclassifying offences, even those that are presently associated with the key offences of mischief and arson. The reform of the Special Part of the *Criminal Code* will entail continuous consideration of this kind of reorganization. Suffice it to say for purposes of the law of mischief

that the present *Code* is replete with examples such as we have given, and we shall attempt, in our tentative recommendations, to deal with the most obvious ones. In most cases, however, disposition of these issues will have to await the final alignment of the Special Part of the *Code*.

VI. Form

The present law of mischief is susceptible to criticism not only as to matters of substance and organization, but also as to matters of form. How the criminal law is expressed is of considerable importance if it is to be informative, understandable and enforceable. Two criticisms that aptly apply to the present Part IX of the *Code* are that it is prolix and uncertain.

A. *Prolixity*

This defect is primarily evident in the redundancy of many provisions of Part IX and in their excessive detail. This penchant for detail characterized the 19th century statutes on malicious damage. In the style of the times, the legislators set out each offence in minute detail, and added catch-all provisions to ensure that nothing was left out.[126] The 1892 *Criminal Code* eliminated some of this detail but retained the catch-all provisions in addition to many of the more specific offences.[127]

While the 1953-54 revisions introduced generally-worded mischief offences, many detailed offences were retained, in some cases because the detailed offence did not fall strictly within the broad definition of mischief. It may be argued that these offences should not have been associated with the law of mischief in the first place.[128] In other cases, the specific offences simply spelled out in greater detail a particular method of committing mischief, or a particular type of property which was protected. Removing a natural bar,[129] injuring a building or fixtures in a building while in possession,[130] and injuring cattle and other domestic animals[131] are examples of such redundant offences. These offences could be eliminated, leaving the conduct to be caught under the general offence of mischief.

These comments would seem to apply equally to the arson offences, which describe particular ways of damaging or destroying

property. The main arson section[132] gives a detailed list of no less than twenty different items to which it is an offence to set fire, while subsequent provisions create offences of setting fire to personal property where fraudulent intent is present, and setting fire to anything likely to cause the above-mentioned property to catch fire. A further section makes it an offence to cause a fire where loss of life or damage to, or destruction of, property results. Not only do these provisions provide excessive detail, but essentially, all are directed towards preventing damage to, or destruction of, property, despite the varying terms used such as "set fire to" and "causes a fire". Thus, the whole series of arson and related offences could be regarded as redundant, given the existence of the main offences of mischief and the objective of streamlining the *Criminal Code*.

On the other hand, there are arguments in favour of retaining a separate, albeit simplified, offence of arson. First, it is an offence which is immediately recognized by members of the public as one of the original common law offences. Second, there are characteristics that may set arson apart from mischief. These include the inherent danger to life, the relative ease of commission compared to the gravity of the consequences, the involvement of organized crime, the difficulty of controlling fires once they are started, the problems involved in investigation, since evidence tends to be destroyed in a fire, and the attraction of fire as a means of destruction for mentally unstable persons.[133]

If arson is to remain an offence distinct from mischief, the question remains whether this should be done by establishing categories of property to which arson applies. The alternative would be to draw the distinction between mischief and arson across the board, so that either offence could be committed with reference to any property. If monetary value is a criterion, the present distinction between categories of property appears meaningless, since some personal property, such as paintings or computers, may be worth far more than some real property. Similarly, if respect for life and safety is the controlling factor which dictates that arson should be distinct from mischief, it would seem to be arbitrary to distinguish between setting fire to real property and certain kinds of personal property, on the one hand, and to the bulk of personal property on the other.

The attribution of risk on the basis of the category of property to which fire is set appears to be fruitless. It may therefore be necessary to make a broad policy decision whether or not the risk inherent in setting

fires is so serious as to warrant an across-the-board differentiation between damaging property by fire, and damaging property by other means. If it is, then we should continue the historic recognition of arson as a distinct offence and extend it to all property. If, on the other hand, we believe that the risk is not that serious, or although serious, ought to be reflected in some other criminal offence, we could treat arson as being subsumed or defined by reference to the offence of mischief.

B. *Uncertainty*

Uncertainty in the present law of mischief arises partly from the above-mentioned overlapping of offences. However, it goes beyond this. Confusion, for example, surrounds the import of the summary conviction offence of damaging or destroying property where the damage is not more than fifty dollars.[134] While this separate offence appears to have been created to allow compensation to be awarded in less serious circumstances, it has led to confusion as to when, under the main mischief sections, a prosecutor must proceed on indictment and when he can proceed on summary conviction. While the problem appears to have been sorted out in the courts, the provision remains an example of something to avoid in reconstructing the law of mischief.

In addition, a certain amount of uncertainty surrounds the matter of penalties. Various distinctions are made in the present *Code* which allow for different penalties. As mentioned earlier, for the purposes of the main mischief offences there is a distinction drawn between public and private property. However, this distinction does not apply when arson is charged where, as we have seen, the appropriate distinction is between the specified categories of property and the residual category of unspecified personal property. Furthermore, if fire is set to property and loss of life occurs, an accused might be charged with causing a fire that results in loss of life, which carries a maximum five years imprisonment, or alternatively under the mischief provisions which carry a maximum penalty of life imprisonment where loss of life results.[135]

Uncertainty is further evident in the defences of lawful justification, excuse and colour of right.[136] While the section suggests that only two defences are available, the courts recognize three.[137] In addition, the section which addresses a person's liability for damaging or destroying property in which he has a total or partial interest is open to several interpretations because the word "interest" is not defined.[138] It is not clear, for example, whether equitable interests are covered by the term.

In the context of arson and related offences, the words "sets fire to" are ambiguous and have been interpreted fairly restrictively as requiring actual combustion or red heat; scorching or blackening of material not accompanied by any degree of consumption is not sufficient.[139] This definition has been criticized as overly technical and out of touch with modern realities.[140] Furthermore, it is not clear how "causes a fire"[141] differs from "sets a fire", although it would seem to broaden the ways in which an offence may be committed.

VII. Conclusion

In brief, the present law of mischief is highly complex, considerably overloaded, overlapping and confusing. While it may not cry out for reform in the sense that it has worked manifest injustice in particular cases, it lacks structure and principle and is in need of a thorough overhaul on that account. In Part Four we shall recommend a plan for restructuring and realigning the law presently found in Part IX of the *Code*, a plan that responds to many of the concerns we have just raised.

PART FOUR

Proposed Reform

What follows is a series of recommendations which we believe are appropriate to the restructuring of the law presently found in Part IX of the *Criminal Code*. Having reflected upon the considerations raised in the previous chapter, we tentatively conclude that to get rid of complexity, duplication, excessive detail and lack of overall direction, the focus of reform should be the redefinition of an offence of causing damage to the property of others.

I. Primary Reforms

RECOMMENDATION

1. That there be an offence which prohibits conduct which:

(a) damages or destroys property, or

(b) renders property useless by tampering with it.

The effect of this recommendation would be to retain in part what is presently covered by section 387 of the *Code*, the key mischief offence. It would cover what we have described as the first method of committing mischief, and also in large part the second method of committing mischief under the present law, although we would omit the adjectives "dangerous", "inoperative" and "ineffective".[142] We would avoid "dangerous" in view of our preference to cover acts creating risks to safety within the context of offences against the person. "Inoperative" overlaps considerably with "useless", and "ineffective" is so broad as to encompass acts which may well be too trivial to deal with in the context of an offence that, in some cases at present, carries a maximum penalty of fourteen years for an interference with property. We have added the words "by tampering with it" to indicate that some sort of physical interference with the property is necessary.

It should be noted that our recommendation is to eliminate what we have referred to as the third and fourth methods of committing mischief. As we have observed, these methods are more concerned with interferences with the relationships between the owner or user of property and the property than with the integrity of the property itself. Our preference is to restrict the offence to conduct which directly affects the property.

Where conduct obstructs or interferes with persons lawfully using property, the law relating to assault and intimidation may provide an effective control. In other cases, where conduct involves interference with the use of property, the conduct may have a sufficient public dimension to fall within offences respecting the disturbance of public order. It may also be that certain interferences with property, short of damage, will in a particular context raise concerns of such a serious nature as to warrant the special protection of the criminal law. Transportation and communications are fields to which, historically, special protection has been extended by the criminal law of mischief. Further consideration can be given to this issue in the context of the forthcoming study of these and other specialized areas. In other cases of interference short of damage, however, the owner or user of property may be required to seek civil law remedies to obtain relief. As this Commission has pointed out so frequently, there are limits to the use of criminal law; it cannot rationally be expected to provide effective relief from every interference that arises in the course of living in close proximity to others.

RECOMMENDATION

2. That the offence be named "vandalism".

An important issue which arises during the process of refining the ambit of the offence of causing damage to property is which label is most appropriate for the offence. Although it has frequently been used in the context of damage to property,[143] the term "mischief" is fraught with inappropriate connotations which relate to the seriousness of the offence, the culpability of the offender and the nature of the offence.

First, regarding the seriousness of the offence, the word "mischief" suggests different things to different people. To many, it connotes practical jokes and pranks of the kind played on occasions such as Hallowe'en. Most of such acts are minor, with consequences which

are rarely serious enough to warrant criminal prosecutions. To others, however, the word "mischief" indicates serious acts as well as more minor acts which tend to be associated with juvenile offences.[144]

Second, as to culpability, "mischief" does not effectively convey the necessity that an intent to do wrong be present, but rather suggests that a merely mischievous frame of mind will suffice as the mental element. It implies that the sort of act and mental element that is best ignored by the criminal law as being *de minimis* should be caught in the net of criminality.

Third, as to the nature of the offence, the use of the word "mischief" causes the offence to be confused with the concept of "public mischief", which in the present *Code* at least has a limited meaning concerned with improperly instigating a criminal investigation.[145] Furthermore, neither the English word nor the French equivalent «méfait» effectively indicate the nature of the offence, since in common usage they have no specific connection with damage to property.[146]

Possible alternatives to the name "mischief" are "malicious damage", "vandalism", "criminal damage" or "damage to property". A problem with "malicious damage", however, is that the legal meaning of the word "malicious", which denotes the mental elements which came to be associated with the offence, namely intention or recklessness, differs from the ordinary meaning of ill-will or spite towards another. We do not favour the use of this label.

"Vandalism" is reasonably well understood by the public to relate to damage to, or destruction of, property, and carries the desired negative connotation. Being new to the law, it is free from technicality, and has the advantage of being a single term which is the same in both official languages («vandalisme»). It has been urged that making vandalism a specific offence in the *Criminal Code* would enhance efforts to hold people accountable for acts of vandalism since the offence would be designated by a term which the public recognizes. Such efforts are, it may be argued, frustrated at present because acts of vandalism are subsumed under the wider label of "mischief" in the *Criminal Code*.[147]

There are, however, problems with using "vandalism" which may counteract the educational and deterrent advantages gained by its use. Although its meaning in English has expanded from the original definition of damaging or destroying items of great aesthetic value, in

French it has not generally come to signify damaging or destroying all property.[148] Thus, the educational value of linking acts which are commonly called vandalism to a specific offence in the *Code* might be less in French Canada than in English Canada. Indeed, even within English Canada there is some confusion as to the exact meaning of the word, with some people associating it primarily with acts of damage to, or destruction of, property by juveniles. A further distinctive element of vandalism for many is its wantonness; it is the arbitrary and senseless nature of the conduct that instills fear and despair in the public. Thus, "vandalism" may tend to indicate a narrower range of conduct than we would wish to cover by the new offence.

The third option is a term which is sufficiently neutral to cover all kinds of damage to, destruction of, and rendering useless of, property, including acts of vandalism.[149] It is "criminal damage", the term used by the English *Criminal Damage Act, 1971*. Although its use in a *Criminal Code* can be regarded as tautological, the adjective "criminal" has the advantage of connoting serious acts rather than mischievous acts or states of mind which should not be caught in the net of criminality. However, the neutrality of the term, which does not stress that the offence is a property offence, may preclude a sufficient focus on the socially reprehensible character of the conduct which many people tend to associate with "vandalism".

A fourth option, "damage to property", would seem to be an obvious possibility for labelling the offence; it refers to the property element of the offence and translates easily into «dommage à la propriété». However, the neutrality of the term fails to convey adequately the criminal nature of the conduct which we wish to prohibit. Indeed, the term may be more appropriate as a general label by which to describe the Part of the *Code* which will deal with all offences which relate to damaging or destroying property. Finally, both the English and French terms suffer from the disadvantage of being longer than one word, as do "malicious damage" and "criminal damage". A single word such as "mischief" or "vandalism" probably has more impact on the public and is more readily remembered as a criminal offence.

A final option would be to combine two of the previous options. Should the educational value of having the term "vandalism" in the *Code* be persuasive, a range of conduct within a general offence of "criminal damage" or "damage to property" could be labelled "vandalism", for instance, "criminal damage demonstrating a wanton disregard for the property of others". This would stress the wantonness of

the conduct as an additional element, perhaps supporting a higher maximum penalty. On the other hand, having two offences to deal with conduct which is so closely related may be unnecessarily complex.

Overall, the term "vandalism" appears to be the most satisfactory choice. It avoids most of the problems involved in using the present label "mischief" and highlights a social problem which is of increasing concern in today's society. The two methods by which the present offence of mischief may be committed, but which would unduly stretch the ordinary meaning of "vandalism" (interfering with the lawful use of, or a person in the lawful use of, property), have been eliminated from the new offence. With a definition of the term "vandalism" in the *Criminal Code* and some effort to educate the public that the offence of "vandalism" includes both intentional and reckless damaging, destroying and rendering useless of property, the remaining problems associated with "vandalism" should be easily resolved.

RECOMMENDATION

3. That the offence of vandalism be restricted to conduct affecting the property of others.

This recommendation marks a change from the present law. As we have observed, damaging or destroying one's own property for fraudulent purposes is presently caught by the mischief and arson provisions. For the offence of vandalism, our approach would be to deal with fraudulent conduct under the rules of fraud, and thus to eliminate these provisions from the law of vandalism.

While we recognize that the inherent risk to life and safety involved in the deliberate use of certain devices used to damage property represents a possible justification for the present law, we are of the view that damaging one's own property constitutes but one of many ways in which persons put others at risk for motives of all kinds, both lawful and unlawful. For this reason, the question of how the criminal law should deal with unwarranted risk-taking in respect of human life and safety would be better considered in another context, such as our review of offences against the person.

We have also discussed, as a possible rationale behind the existing law, the risk to other property that can be created by acts directed at one's own property. Again, to treat this as a sufficient basis for the proposed offence of vandalism appears to us to be ill-conceived. If

creating such a risk to property were to constitute a criminal offence, there would appear to be no logical reason why it should be restricted to creating the risk while in the course of damaging one's own property; a more general offence covering all activities creating risks to property might be more appropriate.

In the result, a person damaging or destroying his own property would only be caught under our proposed offence of vandalism where his act had the effect of damaging, destroying or rendering useless the property of another. Because the offence can be committed recklessly, any act of a person, whether or not directed at his own property, which resulted in damage to another's property, would constitute vandalism if damage to someone else's property was foreseen as a possible consequence. In the context of arson, however, where fire and possibly explosives are used to damage or destroy one's own property, the almost inevitable risk to other persons and property may justify the imposition of criminal liability in wider circumstances. How best to deal with such risks will be discussed further in the context of a more detailed review of arson as well as in the context of risk-creating activities.

As far as the definition of property of others which will be protected by the vandalism offence is concerned, we believe that the definition should follow as closely as possible that given for "another's property" in the draft statute on theft and fraud. This would mean that property would be regarded as another's "if he owns it, has possession, control or custody of it or has any legally protected interest in it".[150] For the purposes of vandalism, however, it may be advisable to refine the definition to indicate that the interest should be a proprietary interest, so that interests such as an insurer's interest would be excluded.[151] It may further be advisable to state explicitly that equitable interests arising only from an agreement to transfer or grant an interest would not be protected, although charges, on the other hand, would.[152]

RECOMMENDATION

4. That the offence of vandalism be limited to acts affecting corporeal property.

Here we recommend no change from the existing law. Our recommendation reflects the traditional scope of the offence, and while we recognize that in today's society the protection of technology

such as data and computer software is an appropriate objective of criminal law, we prefer to consider the problems associated with this area in a separate context before determining the best means by which to protect it in a new *Criminal Code*, whether within the ambit of vandalism or otherwise.

RECOMMENDATION

5. That the distinction between public and private property be abolished with reference to the law of vandalism.

Our recommendation is that there should not be separate offences of vandalism in relation to private property and vandalism in relation to public property, with the latter offence being supported by a higher maximum penalty. Certainly the nature and value of the property affected in each case is relevant to the seriousness of the offence, but this should be only one of several considerations taken into account by a court in sentencing in individual cases.

RECOMMENDATION

6. That the offence of vandalism may be dealt with summarily where the damage alleged is of a minor nature.

Whether a summary conviction offence for vandalism resulting in damage not in excess of a certain amount, and jurisdiction of a summary conviction court to award compensation, should be retained is essentially a matter of criminal procedure and classification of offences.[153] In principle, it seems desirable to permit minor damage to be dealt with more expeditiously than that of a more serious nature, with the criteria to be discussed further.

RECOMMENDATION

7. That the mental element for vandalism be intent or recklessness, and be controlled by the rules of the General Part. The word "wilfully" should be avoided and mere negligence should not be a basis for culpability under the vandalism provisions.

Traditionally, the mental element required for the offence of mischief was intent or recklessness, which was designated by the specially defined word "wilfully". Our recommendation would eliminate the word "wilfully", which does not on its face inform the reader that it

includes the mental element of recklessness as well as intent. This recommendation would bring the offence of vandalism into line with our recommendations in Working Paper 29, *The General Part — Liability and Defences*. The *actus reus* of vandalism would be defined by the appropriate section within the Special Part of the *Code*; the *mens rea* would be implied by the rules of interpretation contained in the General Part. Accordingly, given that an accused did an act constituting vandalism (for example, causing damage to property of another), the prosecution would then have to show two further things:

(1) that the act causing the damage was done with knowledge of the relevant circumstances,[154] and

(2) since vandalism is a "consequence offence", that the consequence (the damage) was one that he knew he might cause.[155]

The concept of negligence is inconsistent with the essence of the offence of vandalism, since disrespect for property is not reflected by a negligent act where the consequential damage to property is not foreseen. We would therefore recommend that provisions such as those found in paragraph 392(1)(*b*) and subsection 392(2) (causing a fire by violating a law) not be carried into the new offence of vandalism.

RECOMMENDATION

8. That the offence of vandalism specify that the damage to the property of another be done "without the other's consent", and that the specific reference to the defences of "legal justification or excuse" and "colour of right" be avoided.

Under the present law, subsection 386(2) provides defences in terms of "legal justification or excuse" and "colour of right", which arise basically in three situations. The first is where the damage is done with the authority or consent of the owner; the second is where it is done in self-defence, in protection of one's own property, out of necessity or for advancement of justice; and the third is where it is done in the honest but mistaken belief that the actor has a right to do it. The first situation can be covered by inserting into the definition of vandalism the words "without the other's consent", the second by the general defences under the relevant heads in the General Part, and the third by the general defences in the General Part of mistake of fact and mistake of law concerning private rights.[156] Accordingly, no specific references to such defences will be necessary.

RECOMMENDATION

9. That there continue to be a specific saving provision to ensure that the offence of vandalism does not prohibit lawful activities associated with an industrial dispute.

This recommendation is made with specific reference to subsections 387(6) and (7), which provide saving provisions with respect to work stoppages and picketing associated with labour disputes between employees and employers. If interference with the use of property is to be excluded from the vandalism offence, there is probably no need for the saving provision in subsection 387(7) which is directed toward picketing activities. However, where it is lawful for employees to stop work, a saving clause similar to that in subsection 387(6) should ensure that such work stoppages which result in damage do not constitute vandalism. It is recommended that the wording of the saving provision be changed from the present provision so that the saving provision will apply only to work stoppages which are lawful and in accordance with the relevant labour legislation.

RECOMMENDATION

10. That there be a separate offence of arson, the content of which will be further explored in a subsequent study.

Since arson is in theory a specific kind of vandalism in that it involves damaging or destroying property by means of fire, it could be omitted as a separate offence in the interests of logic and streamlining of the *Code*. On the other hand, as we have pointed out earlier, there are practical arguments for the retention of arson as an offence distinct from vandalism, most importantly the inherent risk to life and safety involved in the use of fire. The demands of both logic and pragmatism could conceivably be reconciled and satisfied by defining a separate offence of arson as a special type of vandalism committed by means of fire, and by affixing a higher maximum penalty to it than that imposed for ordinary vandalism. It would thereby be recognized that while arson was essentially a subcategory within the general topic of vandalism, the danger inherent in the use of fire merited the explicit inclusion of a separate offence and a higher penalty. The rules which had been developed for the offence of vandalism would be automatically incorporated into the offence of arson.

However, the seriousness of setting fires might be undermined by defining the offence of arson by reference to the offence of vandalism, even if it were retained as a separate offence. Furthermore, as mentioned above under Recommendation 3, it is possible that contrary to the case for vandalism, we would want to extend the offence of arson to the burning of one's own property. Thus, further work should be undertaken in order to determine how best to distinguish arson from vandalism. Issues such as whether the presumption presently contained in section 391 should be retained and whether explosives should be included as a means by which to commit arson should also be further explored.

In any case, it is tentatively recommended that there be no categories of property established against which arson can be committed. The risk which arises from the use of fire to damage property is sufficiently serious to warrant an overall differentiation between damaging property by fire and damaging property by other methods, no matter what kind of property is involved. This overall differentiation would, in turn, eliminate the necessity for the varying degrees of maximum penalties which presently exist for the fire-related offences, and which depend on whether the property is specified real and personal property or unspecified personal property.

II. Consequential Reforms

There are a number of implications involved in the reforms recommended thus far. There is a considerable range of conduct which is now dealt with in Part IX of the *Code* which must either be relocated in association with other *Code* offences or disappear from the *Code* altogether, being subsumed in the restructured vandalism offence.[157] Although the Commission's work on restructuring the Special Part is still at a preliminary stage, we tentatively recommend the following dispositions of existing provisions of Part IX.

RECOMMENDATION

11. That some conduct presently prohibited by paragraphs 387(1)(*c*) and 387(1)(*d*) be dealt with in the context of offences against the person, or intimidation, or causing a disturbance.

Where conduct which obstructs the lawful use of, or persons in the lawful use of, property is prohibited, the focus of the offence is protection of the person or his relationship to the property. Thus, much of such conduct should be considered in the context of offences against the person, intimidation or causing a disturbance.

RECOMMENDATION

12. That some conduct presently prohibited by paragraphs 387(1)(*c*) and 387(1)(*d*) be dealt with in the context of offences against social institutions such as transportation and communications systems.

Some acts of obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property will fall neither within the new offence of vandalism nor within offences against the person, intimidation or causing a disturbance. Where private or public law relating to property adequately deals with this conduct, this gap may not be a problem, but it may be appropriate to prohibit acts of interference which affect or disrupt social institutions such as transportation or communications systems in a separate part of the *Code*.

RECOMMENDATION

13. That conduct presently affected by paragraph 386(3)(*b*) be dealt with, at least where arson is not involved, in the context of theft and fraud. That conduct presently prohibited by subsection 389(2) and paragraph 390(*b*) be dealt with, insofar as intent to defraud is concerned, in the context of theft and fraud.

Since it has been recommended that the offence of vandalism may be committed only with respect to the property of others, and not one's own property, the provision which currently provides an exception to this rule (paragraph 386(3)(*b*)) in cases where an intent to defraud is shown is no longer necessary. In the case of arson, however, this provision will be further considered in a separate study, as will the presumption of intent to defraud in section 391. The tentative recommendation that the offence of arson, whatever form it ultimately takes, may be committed with reference to all real and personal property of another means that the requirement of a fraudulent intent where unspecified personal property is set fire to would no longer be necessary (subsection 389(2) and paragraph 390(*b*)). Conduct which involves damage done to property with an intent to defraud may be more properly dealt with in the part of the *Code* on theft and fraud.

RECOMMENDATION

14. That conduct presently prohibited by paragraph 387(1)(*b*), subsection 387(2) and subsection 387(5) (insofar as these sections deal with danger to life) be dealt with in the context of offences against the person.

This recommendation reflects a decision that the value of human life and safety should be protected in the context of offences against the person rather than by special provisions in the law of vandalism. The aggravating factor of causing danger to life which increases the maximum penalty for committing mischief (subsection 387(2)) highlights but one method of causing danger to life. As we have mentioned under Recommendation 3 above, a separate and more general offence focusing on the creation of unwarranted risks to life or safety by all methods might be considered when offences against the person are reviewed. Such an offence would also cover the elements of danger to life and safety implied in the current second method of committing mischief by rendering property dangerous (paragraph 387(1)(*b*)) and in part of the inchoate mischief provision (subsection 387(5)).

The offence presently contained in section 392, which may be committed by a person who "causes" rather than "sets" a fire with a mental element closer to negligence than to wilfulness where loss of life results, also overlaps with offences against the person such as manslaughter. Such conduct should, it is argued, be subject to the same rules which govern other conduct which results in a charge of manslaughter. Whether it is also desirable to refer to danger to life in the context of offences which deal with fire will be further discussed in the separate study on arson. Thus, we make no specific recommendation on section 392 at this time.

RECOMMENDATION

15. That conduct presently prohibited by sections 402 and 403 be dealt with in a separate part of the *Code*.

The offences dealing with cruelty to animals are not directed principally at interference with the property of others, for many of them relate to animals in the offender's ownership or custody. They are concerned rather with the prohibition of ill-treatment of animals in order that suffering be prevented, and as such, should not be included in a part of the *Code* that deals with interferences with the property of others.

RECOMMENDATION

16. That conduct presently prohibited by sections 394 and 395 be subsumed in part by the proposed offence of vandalism and be dealt with further in the context of offences against transportation.

The offences of interfering with marine signals and with the saving of a wrecked vessel or wreck will not necessarily involve direct damage to another's property. These offences are closely related to the protection of transportation facilities, and should be considered in that context. If, however, damage to, destruction of, or rendering useless of, marine signals, a wrecked vessel or wreck resulted, it could be prosecuted under the proposed vandalism offence.

RECOMMENDATION

17. That conduct presently prohibited by section 393 be dealt with in the context of offences concerned with the maintenance of public order.

The offence of making a false alarm of fire has little to do with direct interference with property of another other than a fire alarm itself, and might best be considered with offences which are directed toward the maintenance of public order.

RECOMMENDATION

18. That conduct presently prohibited by sections 398 and 399 be subsumed in part by the proposed offence of vandalism and be dealt with in part in the context of theft and fraud.

Any physical damage to boundary marks or lines would fall within the new offence of vandalism. However, the elements of the present offences which relate to attempts to mislead persons as to the limits of their property might best be dealt with in the context of theft and fraud.

RECOMMENDATION

19. That conduct presently prohibited by section 387.1 be dealt with in the context of offences against international order and security.

Although the offence which is directed towards protecting the life and safety of internationally protected persons by prohibiting attacks

against property used by such persons could conceivably be included within offences against the person, the overall focus of the offence is the maintenance of international order and security. Furthermore, as Canada is under an international obligation to enact a specific provision relating to this matter, it may be appropriate to deal with all offences against international order and security together. If the property were damaged, destroyed or rendered useless, such conduct could, of course, also be prosecuted under the proposed vandalism offence.

RECOMMENDATION

20. That conduct presently prohibited by subsection 387(5) attract criminal liability only where it constitutes attempted vandalism.

The offence which we have called inchoate mischief will be covered in part by the law on attempts. Some conduct which might otherwise be regarded as mere preparation rather than an attempt would also be caught if it is considered desirable to create general offences covering acts which create unwarranted risks to property or persons.

RECOMMENDATION

21. That the offence presently contained in section 396 be subsumed by the proposed offence of vandalism.

Any damage to, or rendering useless of, a natural bar would be covered by the proposed offence of vandalism. If specific prohibition of such conduct were desired, a provision could be included in the National Harbours Board legislation.

RECOMMENDATION

22. That the offence presently contained in section 397 be subsumed by the proposed offence of vandalism.

Since the proposed offence of vandalism will prohibit injury to property in which another person has a proprietary interest, the act of an occupant harming a building to the prejudice of the owner or mortgagee will be covered.

RECOMMENDATION

23. That the offences presently contained in sections 400 and 401 be subsumed in part by the proposed offence of vandalism and be dealt with further in the context of cruelty to animals.

These offences which protect domesticated animals from injury will be adequately covered by the proposed offence of vandalism where the animals are the property of another. Where the animals are not the property of another, the offences regarding cruelty to animals, which will be contained in a separate part of the *Code*, will be relevant.

PART FIVE

Summary of Recommendations

1. That there be an offence which prohibits conduct which:

(a) damages or destroys property, or

(b) renders property useless by tampering with it.

2. That the offence be named "vandalism".

3. That the offence of vandalism be restricted to conduct affecting the property of others.

4. That the offence of vandalism be limited to acts affecting corporeal property.

5. That the distinction between public and private property be abolished with reference to the law of vandalism.

6. That the offence of vandalism may be dealt with summarily where the damage alleged is of a minor nature.

7. That the mental element for vandalism be intent or recklessness, and be controlled by the rules of the General Part. The word "wilfully" should be avoided and mere negligence should not be a basis for culpability under the vandalism provisions.

8. That the offence of vandalism specify that the damage to the property of another be done "without the other's consent", and that the

specific reference to the defences of "legal justification or excuse" and "colour of right" be avoided.

9. That there continue to be a specific saving provision to ensure that the offence of vandalism does not prohibit lawful activities associated with an industrial dispute.

10. That there be a separate offence of arson, the content of which will be further explored in a subsequent study.

11. That some conduct presently prohibited by paragraphs 387(1)(*c*) and 387(1)(*d*) be dealt with in the context of offences against the person, or intimidation, or causing a disturbance.

12. That some conduct presently prohibited by paragraphs 387(1)(*c*) and 387(1)(*d*) be dealt with in the context of offences against social institutions such as transportation and communications systems.

13. That conduct presently affected by paragraph 386(3)(*b*) be dealt with, at least where arson is not involved, in the context of theft and fraud. That conduct presently prohibited by subsection 389(2) and paragraph 390(*b*) be dealt with, insofar as intent to defraud is concerned, in the context of theft and fraud.

14. That conduct presently prohibited by paragraph 387(1)(*b*), subsection 387(2) and subsection 387(5) (insofar as these sections deal with danger to life) be dealt with in the context of offences against the person.

15. That conduct presently prohibited by sections 402 and 403 be dealt with in a separate part of the *Code*.

16. That conduct presently prohibited by sections 394 and 395 be subsumed in part by the proposed offence of vandalism and be dealt with further in the context of offences against transportation.

17. That conduct presently prohibited by section 393 be dealt with in the context of offences concerned with the maintenance of public order.

18. That conduct presently prohibited by sections 398 and 399 be subsumed in part by the proposed offence of vandalism and be dealt with in part in the context of theft and fraud.

19. That conduct presently prohibited by section 387.1 be dealt with in the context of offences against international order and security.

20. That conduct presently prohibited by subsection 387(5) attract criminal liability only where it constitutes attempted vandalism.

21. That the offence presently contained in section 396 be subsumed by the proposed offence of vandalism.

22. That the offence presently contained in section 397 be subsumed by the proposed offence of vandalism.

23. That the offences presently contained in sections 400 and 401 be subsumed in part by the proposed offence of vandalism and be dealt with further in the context of cruelty to animals.

Endnotes

1. See *Vandalism: Responses and Responsibilities*, Report of the Ontario Task Force on Vandalism (Toronto: Queen's Printer, 1981).

2. Law Reform Commission of Canada, *A Report on Dispositions and Sentences in the Criminal Process — Guidelines* (Ottawa: Information Canada, 1976), and *Studies on Diversion* (Ottawa: Information Canada, 1975), which includes Working Paper 7 on *Diversion* (Ottawa: Supply and Services, 1977).

3. See *supra*, note 1, p. 131, for comments of the Ontario Task Force on this issue.

4. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976).

5. Law Reform Commission of Canada, *Theft and Fraud* [Report 12] (Ottawa: Supply and Services, 1979).

6. Originally at common law, the only damage to, or destruction of, property which was made the subject of a criminal offence was arson. By statute, however, other methods of damaging or interfering with property were made criminal offences and by the time of the 1861 English *Malicious Damage Act*, 24 & 25 Vict., c. 97, and the 1869 Canadian *Act Respecting Malicious Injuries to Property*, 32 & 33 Vict., c. 22, many particular offences were specified which included damaging or interfering with property other than by fire. See Kenny's *Outlines of Criminal Law*, 19th ed. by J. W. Cecil Turner (Cambridge: Cambridge University Press, 1966), para. 186, p. 239.

7. *Criminal Code*, R.S.C. 1970, c. C-34, s. 2.

8. *Criminal Code*, R.S.C. 1970, c. C-34, s. 385.

9. As opposed to offences of interfering with the use of property.

10. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(3)(*a*).

11. *Criminal Code*, R.S.C. 1970, c. C-34, s. 397.

12. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(3)(*b*).

13. *R.* v. *Biggin* (1980), 30 O.R. (2d) 280, 116 D.L.R. (3d) 380, 55 C.C.C. (2d) 408 (O.C.A.).

14. Intending the natural consequences of one's own act.

15. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(1).

16. "Recklessness" means doing an act realizing what the result of one's conduct will probably be, but being indifferent about the result: see *R.* v. *Gotto*, [1974] 6 W.W.R. 454 (Sask. Dist. Ct.), where the accused was recklessly indifferent to the results of leaving a burning map near a vehicle which then caught on fire; *R.* v. *Entwhistle*, 59 N.S.R. 181, 47 C.C.C. 121, [1927] 2 D.L.R. 558 (N.S. C.A.) where the accused was reckless as to whether damage would result from his driving his car across the road for no cause.

    The history of the mental element required for mischief and related offences shows that recklessness was always a sufficient mental element for an accused to be found guilty. In the English *Malicious Damage Act*, 1861 and the Canadian *Act Respecting Malicious Injuries to Property* of 1869, the mental requirement was "unlawfully and maliciously". The word "maliciously" was interpreted to mean done recklessly by anyone with a result which he foresaw or ought to have foreseen although that result was not his wish: *R.* v. *Pembliton* (1874), L.R. 2 C.C.R. 119; *R.* v. *Welch* (1875), 1 Q.B.D. 23.

    The Canadian *Criminal Code* of 1892 abandoned "unlawfully and maliciously" for the word "wilfully"; and recklessness as to a result which was known to be probable was deemed, as now, to fall within the meaning of "wilfully": section 481 of the 1892 *Criminal Code*.

17. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392(2). See further under "Arson and Related Offences" below.

18. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(1).

19. *R.* v. *Cheung* (1977), 5 A.R. 356 (T.D.).

20. *R.* v. *Ninos and Walker*, 48 M.P.R. 383, [1964] 1 C.C.C. 326 (N.S. C.A.).

21. These examples are suggested by K. L. Clarke, R. Barnhorst and S. Barnhorst, *Criminal Law and the Canadian Criminal Code* (Toronto: McGraw, 1977) at pp. 264 and 265.

22. *R.* v. *A.C.S.*, 7 C.R.N.S. 42; *R.* v. *Snarch*, [1969] 4 C.C.C. 484. (C.S. Qué.).

23. *R.* c. *Gertel*, [1981] R.L. 317 (Tribunal de Montréal).

24. *R.* v. *Rodak* (1982), District Ct. of the District of Thunder Bay, File No. 10544/82, Trembley, J.

25. *R.* v. *Biggin*, *supra*, note 13.

26. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 387(3) and (4); mischief to public property can result in imprisonment for a maximum of fourteen years, whereas mischief to private property results in a maximum of five years. Both offences may be tried as indictable offences as well as on summary conviction.

27. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(2).

28. Thus, if a rifle shot hit a bottle and a splinter entered the eye of a person drinking from the bottle, the danger would be a direct physical outcome of the damage to the bottle. However, if a rifle shot simply made holes in the wall of a building, such damage would not in itself cause danger to life; only the means of committing the damage (the rifle) would cause danger to life, if other persons were in the vicinity: *R.* v. *Nairn* (1955), 36 M.P.R. 151, 112 C.C.C. 272 (Nfld. C.A.).

29. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(5). This offence may be tried on indictment or on summary conviction, and has a maximum penalty of imprisonment for five years.

30. A. W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworths, 1978), p. 527.

31. *Criminal Code*, R.S.C. 1970, c. C-34, s. 388.

32. *R.* v. *O'Connor*, [1963] 1 C.C.C. 239 (P.E.I. S.C.). Prosecution under the fifty dollar offence may proceed even if the damage is revealed to be greater than fifty dollars, provided that the damage alleged in the information is no more than fifty dollars: *R.* v. *Duchnitski*, 25 C.C.C. (2d) 238, [1975] 6 W.W.R. 286 (Sask. C.A.). The predecessors of this section were not worded in such a way as to provide an alternative remedy to the main mischief offences, as at present, but rather provided a summary remedy and provision for compensation when damage was committed for which no specific punishment had been provided in the relevant statute: see subsection 511(1) of the 1892 *Criminal Code*, and section 59 of the 1869 *Act Respecting Malicious Injuries to Property*.

33. Kenny's *Outlines*, *supra*, note 6, para. 201, p. 249.

34. The English *Malicious Damage Act* of 1861 and the Canadian *Act Respecting Malicious Injuries to Property* of 1869 each contained approximately fifteen different provisions dealing with arson and detailing specific property which it was an offence to burn. The Canadian *Code* of 1892 grouped together these various offences in the part of the *Code* called "Mischief", reducing the number of separate offences.

35. *Criminal Code*, R.S.C. 1970, c. C-34, s. 389(1). All other offences under "Arson and Related Offences" are triable only on indictment as well, but invoke a lesser maximum penalty of five years imprisonment.

36. *Criminal Code*, R.S.C. 1970, c. C-34, s. 390(*a*).

37. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 389(2) and 390(*b*). If the additional mental element cannot be shown, prosecution could proceed instead under the mischief section dealing with damaging or destroying property: paragraph 387(1)(*a*).

38. *Criminal Code*, R.S.C. 1970, c. C-34, s. 391. *R.* v. *Drouin and Drouin*, [1973] S.C.R. 747, 10 C.C.C. (2d) 381, 33 D.L.R. (3d) 615.

    This presumption was introduced into the *Criminal Code* in 1938 by section 34 of *An Act to Amend the Criminal Code*, S.C. 1938, c. 44, "at the strong urging of the Fire Marshals in view of cases in which juries had been charged that intent to defraud was negatived by the fact that no claim had been made on the policy": *Martin's Criminal Code, 1955* (Toronto: Cartwright, 1955), p. 629.

39. See *R.* v. *Bernardi* (1974), 20 C.C.C. (2d) 523 (O.C.A.) and *R.* v. *Latour*, 61 C.C.C. (2d) 312, [1981] 5 W.W.R. 160 (Alta. Q.B.), for varying opinions about whether or not the presumption will only apply where an accused has a total interest in the property.

40. To "set fire to" has been interpreted to mean the same thing as "burn" meant in the common law definition of arson: "There must be actual combustion, although it is not necessary for the material to blaze openly, so long as it comes to a red heat. Charring, that is, the carbonization of the material by combustion, is evidence of burning, but blackening of the material not accompanied by any degree of consumption is not, nor is mere scorching..." *R.* v. *Jorgenson* (1954), 20 C.R. 382, 14 W.W.R. 359, 111 C.C.C. 30 (B.C. C.A.).

41. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392. These results are not necessarily required in order that a charge be brought under the above-mentioned arson offences.

42. Indeed, the pre-1955 *Criminal Code* expressly mentioned negligence in the equivalent section 515, which may explain the annotation to the present section 392 which reads "Setting a fire by negligence".

43. Although there has been controversy over whether this provision applies to the part of the section creating an offence of wilfully causing the fire or the part dealing with a violation of the law, the weight of opinion is that it either applies to both (*R.* v. *Abbas* (1982), 68 C.C.C. (2d) 330 (O.C.A.)) or to violation of a law only (*R.* v. *Rist and Four Others* (1976), 30 C.C.C. (2d) 119 (Alta. T.D.)). For a contrary opinion, see *R.* v. *Alter* (1982), 65 C.C.C. (2d) 381, which was quoted with disapproval in the *Abbas* case.

44. *Criminal Code*, R.S.C. 1970, c. C-34, s. 393. The offence is triable on indictment or on summary conviction, with a maximum penalty of two years imprisonment.

45. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387.1.

46. *Criminal Code*, R.S.C. 1970, c. C-34, s. 397. This is an indictable offence subject to a maximum of five years imprisonment.

47. *Criminal Code*, R.S.C. 1970, c. C-34, s. 394(1). This offence is punishable by a maximum of five years imprisonment.

48. *Criminal Code*, R.S.C. 1970, c. C-34, s. 394(2). "Wreck" is defined in section 2 to include "the cargo, stores and tackle of a vessel and all parts of a vessel separated from the vessel, and the property of persons who belong to, are on board or have quitted a vessel that is wrecked, stranded or in distress at any place in Canada".

49. *Criminal Code*, R.S.C. 1970, c. C-34, s. 395(2). This offence is punishable by a maximum of ten years imprisonment.

50. *Criminal Code*, R.S.C. 1970, c. C-34, s. 395(1).

51. *Criminal Code*, R.S.C. 1970, c. C-34, s. 396. This offence is punishable by a maximum of two years imprisonment; permission must be in writing from the Minister of Transport.

52. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 398 and 399. An offence involving boundary marks which are "lawfully placed" to mark inter-

national, provincial, county or municipal boundaries or to mark a limit, boundary, or angle of a concession, range, lot or parcel of land is triable on indictment, the maximum penalty being five years imprisonment: subsection 399(1). Other things which are planted or set up as boundary lines, perhaps on a less official basis, are protected by a summary conviction offence: section 398. The exemption for land surveyors applies only to the first offence: subsection 399(2).

53. *Criminal Code*, R.S.C. 1970, c. C-34, s. 400. Note that "cattle" is defined in section 2 to include animals of the bovine species, a horse, mule, ass, pig, sheep or goat. The penalty is a maximum of five years imprisonment.

54. *Criminal Code*, R.S.C. 1970, c. C-34, s. 401.

55. *Criminal Code*, R.S.C. 1970, c. C-34, s. 402.

56. *Criminal Code*, R.S.C. 1970, c. C-34, s. 403.

57. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(2).

58. *R.* v. *Ninos and Walker*, *supra*, note 20, at p. 331; *Regina ex. rel. Mino* v. *Corliss* (1957), 120 C.C.C. 341 at 359 (O.C.A.). The listing of the three defences is a relatively new development in the history of mischief offences, first appearing in the 1892 *Criminal Code* in slightly different wording: subsection 481(2) provided that "[n]othing shall be an offence under any provision contained in this part unless it is done without legal justification or excuse, and without colour of right". Prior to this, the defences were included by implication because anyone acting with legal justification or excuse or with colour of right would not have been acting "unlawfully and maliciously", which was the usual mental element required under the English *Malicious Damage Act* of 1861 and the Canadian *Act Respecting Malicious Injuries to Property* of 1869. The Canadian Act had a precursor in section 60 to the 1892 provision for cases where damage did not exceed twenty dollars for which no punishment was specifically provided, namely that "nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of". The current wording of the defences, with its shifting of the burden of proof, was introduced in the 1953-54 amendments in subsection 371(2) of the *Code*. The confusion caused by the word "and" in s. 386(*a*) will be eliminated if s. 87(1) of Bill C-19, the *Criminal Law Reform Act, 1984* is adopted. The Bill received first reading on February 7, 1984.

59. Law Reform Commission of Canada, *The General Part — Liability and Defences* [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 36.

60. *O'Leary* v. *Therrien* (1915), 25 C.C.C. 110 (Qué. K.B.).

61. *Supra*, note 59, p. 36.

62. *R.* v. *Carker (No. 2)*, [1967] S.C.R. 114, 2 C.R.N.S. 16, 60 W.W.R. 365, [1967] 2 C.C.C. 190, where the defence failed because the threats were not of "immediate" death or bodily harm.

63. Boyd, C. in *R.* v. *Johnson* (1904), 8 C.C.C. 123 at 128, quoting Mr. Justice Edwards in *R.* v. *Fetzner* (1900), 19 N.Z.L.R. 438, a New Zealand case.

    The belief must be a reasonable one: *R.* v. *Watier* (1910), 17 C.C.C. 9 (Y.T. Terr. Ct.).

    Although colour of right would not provide a defence to a civil action, as would the first two defences, it removes the *mens rea* from what might otherwise be a criminal act.

64. *R.* v. *Ninos and Walker*, *supra*, note 20, where the conclusions that the accused reached as a result of believing that a submarine cable was for sale were mistakes as to law. See also *R.* v. *Moore* (1981), 23 C.R. (3d) 303.

    Charges other than mischief may be defended successfully by reference to an honest but mistaken belief in a right in law: *R.* v. *Howson*, [1966] 3 C.C.C. 348 (O.C.A.), a case involving theft.

65. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 387(6)(*a*) and (*b*).

66. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(6)(*c*). Note that these saving clauses provide wider exemptions than does the equivalent saving in subsection 380(2) (breach of contract), which does not include the second provision (taking part in a combination of employees or workmen for their reasonable protection as such) and which requires that the work stoppage be lawful.

67. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(7).

68. More reported cases arise under the intimidation section of "watching and besetting" (section 381) than under paragraphs 387(1)(*c*) and (*d*).

Section 381 has a similar peaceful picketing provision to that in subsections 387(7) and 381(2). See *Labour Relations Law*, 3rd edition, Industrial Relations Centre, Queen's University (1981), p. 507.

69. Some overlapping is, of course, inevitable, but any mixing which does occur should be carefully scrutinized to ascertain whether it is necessary or not. It should be noted that a particular value may be protected by more than one group of offences. For example, respect for the property of others is protected not only by mischief and related offences, but also by theft and fraud provisions.

70. Sir J. F. Stephen, *A History of the Criminal Law of England*, Vol. 3 (London: MacMillan and Co., 1883), p. 188, where some of the earliest English statutes are cited.

71. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(1)(*a*) and s. 388.

72. The newer offences were usually prompted by a development in society which demanded a response from the law, for example, the development of new kinds of property such as transportation systems which required protection.

73. Paragraph 498(*e*) of the 1892 *Criminal Code*.

74. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(1)(*b*).

75. Paragraph 492(*b*) of the 1892 *Criminal Code*.

76. Section 490 of the 1892 *Criminal Code*.

77. Subsection 372(1) of the 1955 *Criminal Code*. The offence in subsection 387(5) which we have called "Inchoate Mischief" was also introduced at this time, in subsection 372(5). It covered, in part, the old offence of mischief on railways (section 489 of the 1892 *Criminal Code*) which focused on acts which were likely to result in damage to valuable property.

78. See cases above in Part Two at notes 22, 23, 24 and 25. See also *R.* v. *Starlight*, [1980] 4 W.W.R. 301 (Alta. Prov. Ct.), where an intoxicated man acted in a belligerent manner in a store, thereby interfering with normal sales transactions between clerks and customers.

79. *Criminal Code*, R.S.C. 1970, c. C-34, s. 244.

80. *Criminal Code*, R.S.C. 1970, c. C-34, s. 381.

81. *Criminal Code*, R.S.C. 1970, c. C-34, s. 171.

82. Many annoying acts caught by these methods, such as children ringing doorbells in a neighbourhood, may be better resolved within the community itself, by the parents for example, than in a court of law.

83. In other words, some matters encompassed by paragraphs 387(1)(*c*) and (*d*) may not contravene fundamental values held by Canadian society, and may be more properly dealt with by civil actions between individuals under the rules of private law than by the criminal law.

84. Such an act may be actionable under the theory of abuse of rights in Québec: *Brodeur* v. *Choinière*, [1945] C.S. 334; *Laperrière* c. *Lemieux*, [1958] R.L. 228 (C.S.); *Blais* c. *Giroux*, [1958] C.S. 569. But in common law jurisdictions there is generally no right to a prospect or to light: *Brummell* v. *Wharin* (1866), 12 Gr. 283; *McBean* v. *Wyllie* (1902), 14 Man. R. 135; *Colls* v. *Home and Colonial Stores*, [1904] A.C. 179 (H.L.); *Earl Putnam Org. Ltd.* v. *MacDonald* (1978), 21 O.R. (2d) 815 (O.C.A.).

85. Under the common law of arson, "property of another" did not refer to ownership but rather to possession or occupation by another: Kenny's *Outlines*, *supra*, note 6, paragraph 201, p. 249. The intention was to protect the safety of the dwelling-place of a person, whether he owned it or not.

86. See sections 3 and 59 of the English *Malicious Damage Act*, 1861 and sections 3 and 67 of the Canadian *Act Respecting Malicious Injuries to Property* of 1869.

87. See subsection 481(3) of the 1892 *Criminal Code*, which also provided an exception where the accused had a partial interest in the injured property.

88. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(3).

89. If an accused destroyed his property but did not make a claim on his insurance policy, the act of destroying his property would likely be found to be "mere preparation" rather than an attempt to commit fraud. See *R.* v. *Robinson*, [1915] 2 K.B. 342, 11 Cr. App. R. 124, where a jeweller, who faked a robbery of his premises but did not apply for insurance money before being apprehended, could not be convicted of attempting to obtain insurance by false pretences. His acts were only a preparation of evidence for commission of the crime, and not steps taken with a view to committing the crime.

90. The presumption is found in section 391 and applies only to charges under sections 389 and 390. Whether the presumption violates the right to be presumed innocent until proven guilty under subsection 11(*d*) of the *Canadian Charter of Rights and Freedoms* is debatable. If the existence of a fire insurance policy held by the person who set fire to the property does not tend to prove that intent to defraud exists, or if the presumed intent to defraud is not always rationally open to the accused to disprove, then the presumption in section 391 may be unreasonable and therefore not constitutional. See *Re Boyle and The Queen* (1983), 41 O.R. 713 (O.C.A.) and cases cited therein.

91. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392.

92. The danger created by using fire to damage or destroy property will not usually vary with the intent involved, so that it may be that intent to defraud should not be the only kind of intent which will render an individual criminally liable for damaging or destroying his property by fire. The kind of intent and circumstances required would have to be carefully defined so that an individual who set fire to his own property for a lawful and reasonable purpose, such as burning brush, would not be prosecuted.

93. Paragraphs 499(D)(*e*), 499(E)(*a*) and subsection 511(1) of the 1892 *Criminal Code*.

94. See section 370 of *Martin's Criminal Code, 1955*, *supra*, note 38, p. 614.

95. See M. Dunning, "Some Aspects of Theft of Computer Software" (1982), 4 *Auckland University Law Review* 273.

96. In John M. Carroll, *Computer Security* (Los Angeles: Security World Publishing, 1977), pp. 29-30, examples are given of computer programs and data stored on computer tape being destroyed, which are distinct from cases of information in computers being stolen or copied.

97. For example, if a person destroyed the contents of a filing cabinet by shredding them, he could be charged under the law of mischief, not for destroying the information, which is intangible, but for destroying the paper upon which the information was recorded.

98. This approach has been taken in Bill C-19 *supra*, note 58. See section 88.

99. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 387(3) and (4). Note, however, that subsection 88(2) of Bill C-19, *supra*, note 58 would eliminate this distinction.

100. Take, for example, the rule that in administration of estates, taxes owing to the Crown ranked prior to debts owed to private creditors.

101. Section 499 of the 1892 *Criminal Code*, for example.

102. See *Vandalism: Responses and Responsibilities*, *supra*, note 1, p. 74, where examples are given of property which is sometimes difficult to classify: property of Crown corporations, single family dwellings owned by municipalities as rental units, property of children's aid societies.

103. *R.* v. *Flindall* (1978), 42 C.C.C. (2d) 65 (O.C.A.); *R.* v. *Linton and Wray* and *R.* v. *McDermott and Ramsby* (1981), 58 C.C.C. (2d) 263, 32 Nfld. & P.E.I.R. and 91 A.P.R. 1 (Nfld. Dist. Ct.).

104. *R.* v. *Linton and Wray*, *supra*, note 103.

105. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392; see above under "Arson and Related Offences" in Part Two.

106. Malice was interpreted to mean intention or recklessness: *supra*, note 16.

107. See above under "Damaging One's Own Property".

108. *Criminal Code*, R.S.C. 1970, c. C-34, s. 389(2).

109. *Criminal Code*, R.S.C. 1970, c. C-34, s. 390.

110. *Martin's Criminal Code, 1955*, *supra*, note 38, p. 628.

111. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(1)(*b*).

112. *Criminal Code*, R.S.C. 1970, c. C-34, s. 395.

113. Sections 2 and 9 of the English *Malicious Damage Act* and sections 2 and 13 of the Canadian *Act Respecting Malicious Injuries to Property*.

114. Section 499 of the 1892 *Criminal Code*.

115. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387(2).

116. See J. C. Smith and Brian Hogan, *Criminal Law*, 4th ed. (London: Butterworth, 1977), p. 667, where this comment is made about a similar provision at subsections 1(2) and 4(1) of the English *Criminal Damage*

Act, 1971. In contrast to the Canadian *Code* which requires actual danger to life, the English Act requires only that the person who damages property intend to endanger the life of another or be reckless as to this consequence in order that the higher penalty be imposed.

117. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392.

118. See above under "Arson and Related Offences" in Part Two.

119. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 402 and 403.

120. See, for example, *Criminal Code*, R.S.C. 1970, c. C-34, s. 402(1)(*a*).

121. *Criminal Code*, R.S.C. 1970, c. C-34, s. 394.

122. *Criminal Code*, R.S.C. 1970, c. C-34, s. 395.

123. *Criminal Code*, R.S.C. 1970, c. C-34, s. 393.

124. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 398 and 399.

125. *Criminal Code*, R.S.C. 1970, c. C-34, s. 387.1.

126. Such as sections 59 and 60 of the 1869 *Act Respecting Malicious Injuries to Property*.

127. Paragraph 499(E)(*a*) and subsection 511(1) of the 1892 *Criminal Code*.

128. These questions were addressed above under "Miscellaneous Reclassification".

129. *Criminal Code*, R.S.C. 1970, c. C-34, s. 396.

130. *Criminal Code*, R.S.C. 1970, c. C-34, s. 397.

131. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 400 and 401.

132. *Criminal Code*, R.S.C. 1970, c. C-34, s. 389.

133. F. Jaggi, «Les Incendiaires: Mentalement Anormaux» (1963), 2 *Bulletin Qué. Soc. Crim.* 3.

134. *Criminal Code*, R.S.C. 1970, c. C-34, s. 388.

135. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 392(1) and 387(2).

136. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(2).

137. See above under "Defences" in Part Two.

138. *Criminal Code*, R.S.C. 1970, c. C-34, s. 386(3); nor has it been defined in the jurisprudence.

139. *R.* v. *Jorgenson*, *supra*, note 40.

140. See the dissent of O'Halloran, J. in *R.* v. *Jorgenson*, *supra*, note 40.

141. *Criminal Code*, R.S.C. 1970, c. C-34, s. 392.

142. It remains a possibility that charges could be brought under the proposed mischief offence for polluting activities which damage property, just as a charge was brought under the present mischief offence for dumping liquid pollutants into a pit, from which they escaped into the ground, instead of transporting them away or burning them: *R.* v. *American Iron and Metal Company (1969) Ltd. et André Leduc* (1983), Cour des Sessions de la Paix, District de Montréal, No. 500-01-001492-823, Gérard Girouard, j.c.s.p. (The accused were acquitted because the so-called victim, Gaz Métropolitain, consented to the polluting act.)

However, as mentioned above in the Introduction, while the mischief offences may play a certain role in controlling polluting activities which damage property, the focus of this Working Paper has not been directed at the problem of pollution. In view of the importance of the issue, the overall delineation of the role of the criminal law and other areas of the law in effectively controlling pollution will be left to the study of pollution to be done by the Protection of Life Project.

143. The term "mischief" has been used to describe offences to property in Scotland, the United States, in England in Blackstone's *Commentaries* and in the English Draft Code of 1880, and in Canada in the *Criminal Code* since 1892.

144. These differences of opinion about the import of the word "mischief" have come to our attention during consultations with lawyers and other persons working in the area as well as from dictionary definitions. The *Shorter Oxford English Dictionary* includes as well as "[v]exatious or annoying action or conduct" the more serious definition "[h]arm or evil as wrought by a person or a particular cause".

145. *Criminal Code*, R.S.C. 1970, c. C-34, s. 128.

146. *Dictionnaire Robert* defines «méfait» as «[a]ction mauvaise, nuisible à autrui». See note 144 for English definitions.

147. The Ontario Task Force on Vandalism, *supra*, note 1, p. 19, makes this argument:

> ... defining vandalism as a criminal offence will underline the point of the first recommendation that persons who commit vandalism must be held accountable for their conduct. It will emphasize the seriousness of the behaviour. It will distinguish vandalism from other criminal offences, such as theft and breaking and entering. It will provide precision and clarity and so facilitate measurement. It will have a strong educative impact on society and especially young people.

148. The *Grand Larousse* defines «vandalisme» as «[d]isposition d'esprit qui porte à détruire ou à détériorer les belles choses, et en particulier les œuvres d'art». There are, however, indications that «vandalisme» is beginning to be used in the context of damage to property in general, for example, in some newspaper reports in Québec.

The *Oxford English Dictionary* defines "vandalism" as "ruthless destruction or spoiling of anything beautiful or venerable; in weakened sense, barbarous, ignorant, or inartistic treatment".

The *Canadian Living Webster* defines "vandalism" as "willful or ignorant destruction of public or private property", a definition which reflects the newer meaning of the word.

149. Conduct which might fall outside the meaning of "vandalism" would include cutting a submarine cable not with the idea of damaging it, but rather to ascertain its value (*R.* v. *Ninos and Walker*, *supra*, note 20), and reckless conduct.

150. *Supra*, note 5, pp. 18 and 38.

151. *Supra*, note 116, pp. 653-4.

152. As was done in the English *Criminal Damage Act*, 1971, in subsection 10(2).

153. We do not wish to imply that jurisdiction to award compensation should not exist where vandalism is punished on indictment. Such jurisdiction may be granted by a general section such as the present section 653. Indeed, a general section granting such jurisdiction to summary convic-

tion courts may well be present in the new *Code*, in which case a specific provision would not be needed.

154. Subsections 3(*a*) and (*b*) of the Draft Legislation in Working Paper 29, *supra*, note 59, p. 26.

155. Subsection 3(*d*) of the Draft Legislation in Working Paper 29, *supra*, note 59, p. 27.

156. See Working Paper 29, *supra*, note 59.

157. It should also be noted that some conduct which is presently prohibited in specific offences outside Part IX of the *Code* would be caught by the generally-worded offence of vandalism. Primary examples are the offences currently contained in sections 300 and 335 which relate to damaging or destroying documents, which would largely be covered by the new offence. Many of such specific offences would thus be unnecessary in a revised *Criminal Code*.

END