

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Report
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REPORT ON
MALICIOUS DAMAGE

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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CHAPTER 1: INTRODUCTION

1. On the 6th March 1987, the then Attorney General requested the Law Reform Commission to formulate proposals for the reform of the law in a number of areas. These included the law relating to various criminal offences, including in particular the law relating to dishonesty, malicious damage and sexual offences.

In the case of sexual offences, the Commission presented its Report on *Rape* to the Attorney General earlier this year. Work on Child Sexual Abuse (which, of course, also involves aspects of the civil law) is far advanced and a Discussion Paper will be published shortly. In the area of dishonesty generally, the Commission presented its Report on *Receiving Stolen Property* to the Attorney General in December 1987 and work has begun on the other aspects of the subject, i.e. the law of theft and fraud.

2. In this Report, we address the topic of malicious damage. It is a subject which is neither as complex as dishonesty nor as controversial as rape. At the same time, however, its importance is undeniable: it is a crime which is notoriously prevalent in Ireland today,¹ but which is prosecuted under archaic and cumbersome Victorian legislation. Reform in this area raises no acute social issues and can be achieved by the enactment of relatively straightforward legislation.

3. Earlier this year we circulated a Discussion Paper on the subject among interested groups, institutions and persons. We received a wide range of observations and suggestions, for which we are very grateful. On 4th July we held a meeting at the Commission's offices, at which a number of persons concerned with the topic attended. The meeting considered the policy issues raised in the Discussion Paper. The discussion was most helpful to us in our deliberations.

4. The Commission expresses its gratitude to the following who assisted them in coming to their conclusions:

District Justice Flannan Brennan;
 Mr. Peter Charleton, Barrister-at-Law;
 Mr. Brendan Grogan, Barrister-at-Law;
 Mr. Eamonn Hall, Solicitor, Bord Telecom Eireann;
 *Mr. George Hart, Special Legal Adviser, Dept. of Justice;
 District Justice Brian Kirby;
 Deputy Commissioner John Paul McMahon;
 Mr. Domhnall Murray, Solicitor, Office of the Director of Public Prosecutions;
 Mr. Robert Sheehan, Solicitor, Chief State Solicitor's Office;
 *Mr. Thomas Tobin, Principal Officer, Dept. of Tourism and Transport;
 Mr. Patrick Treacy, State Solicitor, County Tipperary (NR).

We must emphasise that, while we much appreciate the assistance freely given by the foregoing, the Commission itself is solely responsible for the contents of this Report.

¹ See Appendix.

*In his personal capacity.

CHAPTER 2: *THE MALICIOUS DAMAGE ACT 1861*

5. Several centuries ago, the only common law offence for damage to property was arson.¹ Arson was confined to the wilful and malicious burning of a dwelling-house.² A number of statutes, however, imposed criminal liability for the burning of other buildings and things. The law was finally consolidated in the *Malicious Damage Act 1861*, referred to in this Report as “the Act”.

The Act, in ss. 1 to 50, includes a host of specific offences, ranging from setting fire to a church or chapel to sending letters threatening to burn or destroy houses or other buildings. Sections 51 and 52 catch all cases of malicious injury and damage not already specifically provided for in the legislation.

6. The Act has been subject to some amendment. Section 60 had provided that in any indictment for an offence under the Act involving an allegation of intent to injure or defraud it should not be necessary to allege an attempt to injure or defraud any particular person. This provision was repealed and re-enacted for all statutory offences by Rule 10 of the Rules in the *Criminal Justice (Administration) Act, 1924*. Section 12 of the *Criminal Justice Act, 1951* increased the fine payable under s. 51 of the Act for damaging property not dealt with under other sections of the Act from £5 to £50. Section 21 (2) of the *Criminal Law (Jurisdiction) Act 1976* was in essence an adaptation of that portion of s. 5 of the Act which applied to public buildings and state buildings. Offences under ss. 1 to 7 and under s. 35 of the Act are scheduled in the *Criminal Law (Jurisdiction) Act* and a person who commits an offence under these sections anywhere in the island of Ireland may be prosecuted for that offence in either jurisdiction.

Offences under the Act are also scheduled under the *Offences Against the State Act 1939*. In addition, offences under ss. 20-23 and 51 of the Act are scheduled for the purposes of summary trial under the *Criminal Justice Act, 1951* as amended by the *Criminal Procedure Act, 1967*.

7. On the 4th March, 1986 three men were indicted before a jury in Portlaoise Circuit Court for maliciously damaging a statue in Ballinspittle, County Cork, contrary to s. 39 of the Act. This was the famous “moving statue” which attracted so much publicity that year. The indictment described the relevant place in Ballinspittle as “a place of Divine Worship”. The judge directed the jury to acquit the accused on the ground that the relevant place at Ballinspittle was no more a place of Divine Worship than Croke Park when “Faith of Our Fathers” is sung on the occasion of an All Ireland Final. The accused were unrepresented and the judge refused to amend the indictment. Section 39 does in fact cater specifically for “any statue or monument exposed to public view”.

The outcome of the prosecution caused some public concern and criticism of the prosecuting authorities. It is unnecessary for the Commission to express any view on the aspects of the case which caused controversy: it is sufficient to say that it gave added emphasis to the need for a simplified and modernised law of malicious damage in Ireland.

8. Irish lawyers, in general, would probably agree with Professor Brian Hogan’s assessment of the Act:

“In retrospect it seems astonishing that Parliament (or rather the lawyers responsible) could have foisted on the public and the professions so inelegant an instrument as the *Malicious Damage Act 1861*. It came, of course, as part of a package along with the other Criminal Law Bills, and although voices were raised in protest (there are bound to be some of these anyway, whatever the issue) against the consolidation as a whole, the Malicious Damage Bill does not appear to have been singled out for special vituperation. Rubbing shoulders, as it did, with such companions as the Larceny Bill and the Forgery Bill it may not have looked half so bad.

And yet the Malicious Damage Act has survived, with only relatively minor amendments, for over one hundred years... It can, and has, been criticised at many points, but there is a significant absence of the adverse judicial comment which the Larceny Act attracted. Does this indicate that the difficulties inherent in the Malicious Damage Act have been merely overlooked, or that, given a deal of goodwill, the courts can make anything workable? Is there perhaps an element of luck in legislation? One Act, for which the direst consequences are forecast, passes down the years with hardly a case to its name; another, which seems assured of a peaceful life, provokes a barrage of litigation. On the whole the Malicious Damage Act has done none too badly for itself.”⁴

Irish prosecutors and Gardai, however, would say that the legislation has only worked because much time has been spent making sure that the right charge was preferred under the right section or part of a section. It is only when a case such as the Ballinspittle case arises that one realises how successfully, in general, prosecutors have navigated their way through the shoals of the Act. Alternatively, they may have been very lucky.

9. The wide range of offences for which the Act provides, in terms of both the mode of commission and the objects of injury or damage, should be emphasised at the outset. Only the most conscientious should, however, feel obliged to read every word of the paragraphs which follow. All that we wish to convey is a general impression.

(i) *Modes of Commission*

The Act prescribes offences expressed in the following terms, which, with few omissions, can be reduced to the word "damage":

Set fire to, by any overt act attempt to set fire to, destroy, throw down, damage, place gun powder or other explosive substance or throw same in, into, upon, against or near any building with intent to destroy or damage, demolish, pull down, begin to demolish, pull down or destroy, injure, sever from the freehold, cut, break, damage with intent to destroy, render useless, cut or otherwise destroy, bark, root up, cause water to be conveyed or run into, fill up, obstruct, stop, hinder the working of, partially cut through, sever, unfasten, breakdown, cut down, level, undermine, cut off, draw up, remove, open, do injury or mischief to, put lime or noxious material in, put, place, cast or throw wood, stone or other matter or thing upon, displace, turn, move, divert (points), show, hide, remove (signals), overthrow, cause to be obstructed, prevent (sending of communication), kill, maim or wound (cattle), cast away (ship), mask, alter (light or signal), exhibit (false light or signal), do anything tending to the immediate loss or destruction of, cast adrift, deface, sink, conceal, permit damage, injury or spoil unto.

(ii) *The Objects of Injury or Damage*

The offences in the Act mention the following objects of injury or damage, which can all be reduced to the word "property":

Church, chapel, meeting house, other place of divine worship, dwelling-house, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, fold, farm-building, any building or erection used in farming land or in carrying on any trade or manufacture or any branch thereof, station, engine house, warehouse or other building belonging or appertaining to any railway, port, dock, or harbour or to any canal or other navigation, a building not before mentioned belonging to the Queen or to any County, Riding, division, city, borough, Poor Law Union, parish or place or belonging to any university or to any Inn of Court or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, any building not before mentioned, any matter or thing, being in, against, or under any building, engine, machinery, working tools, fixtures, goods, chattels, steam engine or other engine for sinking, working, ventilating or draining any mine, staith, erection used in conducting the business of any mine, bridge, wagon way, trunk for conveying materials from any mine, fixture in a dwelling-house or building, goods or articles of silk, woollen, linen, cotton, hair, mohair, alpaca, any more of those materials mixed with

each other, or mixed with any other material, framework-knitted piece, stocking, hose, lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, loom, frame, machine, rack, tackle, tool, implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing such articles, any machine or engine whether fixed or moveable used or intended to be used for sewing, reaping, moving, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any tool or implement whether fixed or moveable prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen, cotton, hair, mohair or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material or any framework-knitted piece, stocking hose or lace), crop of hay, grass, corn, grain, or pulse, any cultivated vegetable produce, whether standing or cut down, any part of any wood, coppice, or plantation of trees, heath, gorse, furze, fern, stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, any steer of wood or bark, hopbinds growing on poles in any plantation of hops, any part of any tree, sapling, shrub, underwood, growing in any part, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, plant, root, or vegetable production, growing in any garden, orchard, nursery ground, pothouse, greenhouse, or conservatory, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture and growing in any land open or enclosed, not being a garden, orchard or nursery ground, any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof, any mine or coal, cannel coal, antracite, or other mineral fuel, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, any steam engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any line, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon way, or trunk for conveying minerals from any mine, any rope, chain or tackle of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, any seabank or seawall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnell, towing-path, drain, watercourse or other work belonging to any port, harbour, dock or reservoir or on or belonging to any navigable river or canal, any piles, chalk, or other materials fixed in the ground, and used for securing any seabank or seawall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty or lock, any navigable river or canal, the dam, floodgate, or sluice of any fish pond, or of any water which shall be private property, or on which there shall be any private right of fishery, the dam or floodgate

of any mill pond, reservoir, or pool, any bridge, any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct, any highway, railway, or canal shall pass, any turnpike, gate or tollbar, any wall, chain, rail, post, bar or other fence belonging to any turnpike gate or tollbar, any house, building or weighing engine erected for the better collection, ascertainment or security of any toll, any rail, sleeper, or other matter or thing belonging to any railway, any engine or carriage using any railway, any battery, machinery, wire, cable, post or other matter or thing whatsoever being part of or being used or employed in or about any electric or magnetic telegraph, any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purposes of art, science, or literature or as an object of curiosity in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library or other repository is either at all times or from time to time open for the admission of the public, or of any considerable number of persons to view the same either by permission of the proprietor thereof or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art in any church, chapel, meeting house, or other place of divine worship, or in any place belonging to the Queen, or to any County, Riding, division, city, borough, Poor Law Union, parish, or place, or to any university, or college or hall of any university or to any Inn of Court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railway, or fence surrounding such statue or monument, any cattle, any dog, bird, beast, or other animal not being cattle, any ship or vessel, any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, any real or personal property whatsoever, either of a public or private nature not heretofore provided for.

10. The English Law Commission¹ have set out a helpful scheme of the Act, as follows:

(a) <i>Type of property damaged</i>	<i>Sections of the Principal Act</i>
Buildings and their contents	1 to 13
Goods in process of manufacture; machinery	14 & 15
Corn, trees and vegetable products	16 to 24
Fences	25
Mines	26, 28 & 29
Sea and river banks and works on rivers and canals	30 & 31
Ponds	32
Bridges, viaducts and toll-bars	33 & 34
Railway engines or carriages and telegraphs	35 to 38
Works of art	39
Cattle and other domestic animals	40 & 41
Ships	42 & 45 to 47
Sea marks, wrecks and wrecked goods	48 & 49

<i>(b) Method used</i>	<i>Sections of the Principal Act</i>
Fire (buildings and their contents)	1 to 7
(stacks of corn)	17, 18
(coal mines)	26
(ships)	42
Explosives (buildings and their contents)	9 & 10
(ships)	45
(making or possessing explosives with intent)	54
Water (mines)	28
 <i>(c) Status of offender</i>	
Rioters (certain buildings and machinery)	11, 12
Tenants	13
 <i>(d) Circumstances of aggravation</i>	
Setting fire to a dwelling house, any person being therein	2
Setting fire to a public building	5
Destroying or damaging a dwelling house with gun- powder, any person being therein	9
Killing or maiming cattle as opposed to other animals	40
Damaging property exceeding £5 at night	51
 <i>(e) The offender's object</i>	
Injuring property in the offender's possession with intent to injure or defraud	59
 <i>(f) Extent of damage done</i>	
Destroying or damaging trees, shrubs etc. to the extent of more than £1, in a garden etc.	20
Destroying or damaging trees, shrubs etc. to the extent of more than £5, outside a garden	21
Destroying or damaging trees, etc. to the extent of 1s. or more, anywhere	22
All property other than as listed in (a) above the damage exceeding £5	51

Sir James Fitzjames Stephen, 3 *A History of the Criminal Law of England*, 488 (1883).
 See Poulos, *The Metamorphosis of the Law of Arson*, 51 *Missouri L. Rev.* 296, at 297
 (1985); the American Law Institute's *Model Penal Code and Commentaries*, vol. 2, p. 4
 (1980).

[1969] *Crim. L. Rev.*, at 283.

² In *Criminal Law: Report on Offences of Damage to Property*, para. 10 (Law Com.
 No. 29, 1970).

Law Com. No. 29 (1970).

CHAPTER 3: THE ENGLISH APPROACH

11. The English Law Commission reported on this topic in 1970.¹ From their report flowed the English *Criminal Damage Act of 1971*.

On the question of simplification, the English Law Commission dealing with the Act said:

“Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged should not affect the basic nature of the offence . . . Such features as the means used or their consequences are subsidiary matters relevant, if at all, in regard to sentence.”²

12. The *Criminal Damage Act 1971* is a model of simplicity. It comprises twelve sections, of which four contain the substantive ingredients of the new offences. Section 1 provides as follows:

- “(1) A person who without lawful excuse destroys or damages any property belonging another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another —
 - (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
 - (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;
 shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.”

13. Under s. 2 it is an offence to make a threat to destroy or damage another's property (or to damage or destroy one's own property in a way which one knows is likely to endanger the life of another). Under s. 3, it is an offence to have anything in one's custody or under one's control intending without lawful excuse to use it to destroy or damage another's property (or one's own property in a way one knows is likely to endanger the life of another).

Section 5 prescribes specific circumstances which are to be treated as affording a lawful excuse. These in essence depend on an honest belief in the actual or constructive consent of those entitled to consent in the destruction of or damage to the property or an honest belief that one's conduct was a reasonable means of protecting one's own property or the property of another.

¹ Law Com. No. 29 (1970).

² *Id.*, para. 13.

CHAPTER 4: GENERAL SCHEME OF REFORM

14. The subject of malicious damage has excited little attention among law reform agencies in other common law jurisdictions in recent years. We consider that the most sensible approach, therefore, is to use the English Act of 1971 as a model for reform, while at the same time subjecting it to close critical scrutiny.

15. At the outset, we should state our basic proposals. We consider that *the approach, favoured in the Act, of providing for a long list of specific offences, should be replaced by one based on a general offence in respect of criminal damage to another person's property. That general offence should be supplemented by a small number of other offences dealing with liability in specific instances.*

16. In some respects, the English Act of 1971 requires particularly close examination when considering the suitability of its provisions for this jurisdiction. These features of the legislation, which are considered in detail in the chapters which follow, can be summarised as follows:

- (1) The use of the expression "destroy or damage".
- (2) The concept of "property".
- (3) The mental element.
- (4) The retention of arson as a specific offence.

CHAPTER 5: "DESTROY OR DAMAGE"

17. Section 1(1) of the 1971 Act, as we have seen, makes it an offence (subject to certain qualifications) to *destroy or damage* another's *property*. The notion of destruction as an alternative to damage merits some consideration. On one view, the reference to destruction is unnecessary, as property can scarcely be destroyed without being damaged. As against this, it is possible to envisage cases where the interference with the property would more easily be described as destruction than as damage. If, for example, a person burns down a haystack, it may be considered more appropriate to describe the act as one of destruction. From the standpoint of the prosecution, nothing can be gained by unnecessary semantic uncertainties. The risk that a defendant charged with damaging property could escape liability by showing that in fact he destroyed it is one that should not arise under the legislation.

18. It is also worth examining the limits of the concept of "damage" in this context. The question is one that can arise under existing law. In *R. v. Fisher*,¹ for example, the accused plugged up the feed-pipe of an engine and otherwise interfered with it in such a way as to render it temporarily useless and liable to cause an explosion unless the obstruction was removed. It was unanimously held that he had been properly convicted of damaging the engine with intent to render it useless within the meaning of s. 15 of the 1861 Act. Pollock, C. B., for the Court, said:

"We are all of opinion that the conviction is good. It is like the case of spiking a gun, where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression 'damage with intent to render useless'. Can it be said that the machine was not damaged, when it was placed in such a position that, if the water had gone on boiling, the boiler would have burst? Moreover, great injury may be done to a machine

by the displacement of its parts; and in this case, until the parts were replaced, the machine was useless. Surely the displacement of the parts was a damage within the fifteenth section, if done with intent to render the machine useless.”²

In England, the use of the word “damage” in the 1971 Act has been subjected to some degree of judicial analysis.³ Thus eradicable graffiti have been held capable of constituting damage within the meaning of s. 1 of the 1971 Act. In *Roe v Kingerlee*,⁴ where the respondent had smeared mud graffiti on the wall of a police cell which cost £7 to clean, the Divisional Court held that the justices had been wrong in taking the view that what occurred *could not*, as a matter of law, amount to criminal damage:

“What constitutes criminal damage is a matter of fact and degree and it is for the justices, applying their common sense, to decide whether what occurred was damage or not. It is not necessary that the damage should be permanent before an act can constitute criminal damage... The application of graffiti to a structure will not necessarily amount to causing damage. That must be a question of fact and degree for the tribunal of fact.”

Having regard to the extent of the damage, however, the Divisional Court considered that no order should be made on the appeal.⁵

19. The difficulty in determining when an interference with property is sufficiently substantial to be designated “damage” is well illustrated by the Crown Court decision of *“A” (a juvenile) v The Queen*.⁶ It was there held that a conviction of criminal damage was improper for lack of proof of damage, where the appellant had spat at the back of a uniformed police sergeant, the spittle landing on his raincoat. When removed with a tissue some time later, it left a faint mark. The Crown Court held that, when interpreting the word “damage” the court must consider the use of an ordinary English word. Spitting at a garment could be an act capable of causing damage. However, one had to consider the specific garment which had been allegedly damaged. If someone spat upon a satin wedding dress, for example, any attempt to remove the spittle might in itself leave a mark or stain. The court would find no difficulty in saying that an article had been rendered “imperfect” if, after a reasonable attempt at cleaning it, a stain remained. An article might also have been rendered “inoperative” if, as a result of what happened, it had been taken to dry cleaners.

However, in the present case, no attempt had been made, even with soap and water, to clean the raincoat, which was a service raincoat designed to resist the elements. Consequently, there was no likelihood that if wiped with a damp cloth, the first obvious remedy, there would be any trace or mark remaining on the raincoat requiring further cleaning. Furthermore, the raincoat was not rendered “inoperative” at the time; if it was “inoperative” it was solely on account of being kept as an exhibit.

Thus, in the view of the court, nothing occurred which could properly be described as damage. A charge of assault might well have been appropriate but this was not a point which the court had to decide.⁷

Another case which illustrates the difficulties that can arise is *Henderson v Battley*.⁸ There the Court of Appeal held that the unauthorised dumping of waste on a cleared building site constituted damage, since the site's usefulness was impaired and work and expenditure was required to restore it to its former state. Professor Smith states, in relation to *Henderson v Battley*:

"If the land had not been intended for use as a building site, it is possible that the result might have been different. In so far as the conclusion that the effect constitutes 'damage' depends on the purpose for which the property is to be used, it would seem that the defendant must have known that, or been reckless whether, the owner had that purpose in mind; for he must be proved to have intended that, or been reckless whether, damage be caused."⁹

20. Advances in technology can also result in new applications of the concept of "damage". In *Cox v Riley*,¹⁰ the erasure of programmes from a plastic circuit card used to operate a computerised saw was held to fall within the scope of s. 1(1) of the 1971 Act because the card was undoubtedly property of a tangible nature within s. 10(1) and the erasure of the programmes constituted damage.¹¹

21. One solution to the problem of what is meant by "damage" is to use the expression "destroys or damages" as s. 1 of the 1971 Act does. Another solution is for the substantive offence to use the word "damage" but to define "damage" so as to include "destroying, defacing, dismantling, or rendering inoperable or unfit for use". We prefer the latter approach, which retains the comprehensive concept of "damage" but ensures that activities for which that expression might, on one view, be considered inapt are included.

⁸ L.R. 1 C.C.R. 7 (1865).

⁹ See also *R. v Tacey*, Russ. & Ry. 452, 168 E.R. 893 (1821), where the defendant removed a part of a knitting frame, with the result that the frame would not work. The Court of Crown Cases Reserved was unanimously of opinion that this amounted to damaging the frame within the meaning of the legislation (28 Geo. III. c. 55, s. 4) "as it made the frame imperfect and inoperative".

¹⁰ See Elliott, *Criminal Damage*, [1988] Crim. L. Rev. 403, at 403-404.

¹¹ [1986] Crim. L. Rev. 735 (Q.B.Div.Ct.).

¹² See also *Hardman v Chief Constable of Avon & Somerset Constabulary* (Bristol) Crown Ct., Judge Llewellyn-Jones and Justices, 1986).

¹³ [1978] Crim. L. Rev. 689 (Kent Crown Ct., Judge Streeter and Justices).

¹⁴ As to this aspect of the case, cf. the Commentary, *id.*, at 690.

¹⁵ Unreported, C.A., 1984, referred to in *Cox v Riley*, [1986] Crim. L. Rev. 460, which applied its reasoning.

¹⁶ [1986] Crim. L. Rev. at 461.

¹⁷ [1986] Crim. L. Rev. 460 (Q.B.Div.Ct.).

¹⁸ Cf. s. 387(1.1) of Canada's *Criminal Code*.

CHAPTER 6: THE CONCEPT OF "PROPERTY"

22. We must now consider how the notion of property should be defined in the legislation. As we have seen, the Act marshals a bewildering array of specific types of property, as well as including residual generic provisions. It seems to us far preferable to adopt a simple generic definition of property.

S. 10(1) of the English Act of 1971 contains some useful material, though it does not provide a fully satisfactory solution, for a reason we mention presently. It provides as follows:

"In this Act 'property' means property of a tangible nature, whether real or personal, including money and —

- (a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcases if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but
- (b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

For the purposes of this subsection 'mushroom' includes any fungus and 'plant' includes any shrub or tree."

The problem with this definition, from an Irish standpoint, is that it largely reflects policy decisions made three years previously in relation to the destruction of property for the purposes of theft and related offences when the *Theft Act 1968* was being enacted.¹ While some relevant issues have been addressed in our Report on *Receiving Stolen Property*,² our examination of the law of theft and related offences with a view to proposals for its reform is still in progress. We accordingly consider it premature to engage in detailed analysis of the specific issues raised in s. 10(1). We are satisfied that a broad definition of "property" would suffice if it embraces "property of a tangible nature, whether real or personal, including money, and animals that are capable of being stolen". We also recommend the retention of ss. 40 and 41 of the Act.³

23. As regards ownership and control we are satisfied that s. 10(2)-(4) of the 1971 Act offers a suitable model for adoption in our legislation. These provisions are as follows:

- “(2) Property shall be treated for the purposes of this Act as belonging to any person –
- (a) having the custody or control of it;
 - (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
 - (c) having a charge over it.
- (3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.
- (4) Property of a corporation sole shall be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.”

¹ But not entirely. In contrast to the definition of property contained in s. 4 of the *Theft Act 1968*, s. 10(1) requires that the property be of a tangible nature, includes realty and does not contain any proviso as to commercial purpose in relation to mushrooms or flowers, fruit or foliage of a plant, growing wild on any land. See the note to s. 10(1) by F. E. Smith, in his Annotation to the Act in *Current Law Statutes Annotated 1971*.

² LRC 23-1987.

³ Cf. the *Larceny Act 1916*, s. 1(3). Sections 40 and 41 of the Act deal with killing or maiming cattle and other animals. Pending our consideration of the definition of “property” in the context of theft and related offences, we think that these sections should be retained. There will of course be some overlap with the offences we propose.

CHAPTER 7: THE MENTAL ELEMENT

(i) *Mens Rea in General*

24. In the preceding chapters, we have considered the physical elements which make up the crime of malicious damage, i.e. what the law calls the *actus reus*. In this chapter we consider the mental element which is also an essential ingredient of the crime, i.e. the *mens rea*. With certain qualifications, which do not arise in the context of this report, no one may be convicted of crime, unless, in addition to having brought about a harm which the law forbids, he had at the time “a guilty mind”.¹ In the case of malicious damage, this means in general that he must either have intended to cause the actual damage or been reckless as to whether he caused it or not.

25. Consideration of the *mens rea* in malicious damage raises a further problem peculiar to that crime. The person who lights the fire in the grate with yesterday’s newspaper obviously intends to destroy the paper, but commits no crime since it is his property. What if he sets fire to his own house to defraud the insurance company? It would be generally agreed that this should be a crime, where a specific intent of that kind — i.e. to injure or defraud — can be established. Problems do arise, however, in this context which are also examined in this chapter.

26. Most of the offences under the Act require the defendant to have acted “unlawfully and maliciously”. Malice in this context, as in any statutory definition of a crime, must be taken, not in the old vague sense of wickedness in general, but as requiring either (1) an actual intent or (2) recklessness as to whether such harm should occur or not, i.e. the accused must have foreseen that the particular kind of harm might be done and yet gone on to take the risk of it. It is neither limited to, nor does it indeed require, any ill-will towards the person injured.² So long as the particular kind of harm intended or risked was in fact done, it makes no difference that it fell upon a different object or person from that on which it was expected to fall.

This was made clear by *R v Pembrilton*³ a successful appeal against conviction under s. 51 of the Act for unlawfully and maliciously breaking a window. The appellant had been involved in a quarrel at night in a public house, and after he and his adversaries had been ejected the fight continued in the street. The appellant threw a stone at his adversaries which missed them and broke the window of the public house. The jury found that he did not intend to break the window, but nevertheless convicted him. The Court for Crown Cases Reserved quashed the conviction, stating:

“The jury might perhaps have found on this evidence that ... he was reckless whether he did it or not; but the jury have not so found.”

In an Irish case of *R v Faulkner*,⁴ a sailor, while stealing rum from a cask in the hold of his ship, held in his hand a lighted match, which ignited the rum thereby burning down the ship. The Court for Crown Cases Reserved in Ireland quashed his conviction, following *R v Pembrilton*. In a recent Irish decision, *The People v Hayes*,⁵ the accused was successful in an appeal against his conviction for setting fire to the Church of the Assumption, Tullamore. The evidence was that Hayes and his companion had broken into the church allegedly searching for money. There being no light they used candles. While they were searching a confession box for cash, having been unsuccessful in their search of the shrines, the curtain on the confession box caught fire and the fire spread throughout the church. Hayes's appeal against conviction was also allowed on the *Pembrilton* basis.

(ii) *Recklessness as Mens Rea*

27. Recklessness in criminal law has traditionally been defined in a subjective sense. Applying that test, the accused must have at least adverted to the risk that the particular damage caused might result from his actions if he is to be convicted. In two of the cases cited in the preceding paragraph, the accused were successful in their appeals because they had said in evidence that their minds were on theft and theft alone.

Faulkner and *Hayes* were, of course, cases of arson, which, for reasons examined in Chapter 8, is a specific offence distinct from the offence of malicious damage, although the *mens rea* required is the same for each offence. More often than not, prosecutions for arson are based on admissions by the accused that he was negligent in the lighting of a small fire in a premises for heat or light or the careless discarding of a match or cigarette butt. (Such admissions have been more readily available in recent years since, as the offences are scheduled under the *Offences Against the State Act 1939*, the Gardai have been able to detain and interrogate suspects for 48 hours).⁶ While conscientious jurors may well suspect that a particular accused is not telling the truth they will usually find themselves left with his account of events only, proclaiming his inadvertence to the actual risk, without any independent and persuasive forensic evidence suggesting advertence. Such forensic evidence is rarely available after a fire.

28. Because fire is such a dangerous entity we should therefore give consideration to an offence based on objective recklessness or negligence specifically for fire offences. The arguments for and against a distinct *mens rea* for arson were put as follows by the Law Reform Commission of Canada:⁷

“... there are some who would argue that, in the case of arson at least, negligence should be criminalised. They argue that everyone knows that playing with fire is a dangerous activity that may easily result in damage to another person’s property. Hence there is a fairly high standard of care expected of those who use fire, and, so the argument goes, failure to meet that standard of care should be a criminal offence. On the other hand, fire is an agency which is necessary for many worthwhile human activities so that it might be unreasonable to criminalise mere carelessness in the use of fire. Indeed, the courts have been reluctant to convict persons accused of ... arson offences where they have been only negligent as to the consequences of their actions.”

While many would argue that the motor car has become a necessity of life, indictable road traffic offences such as manslaughter and dangerous driving causing death are grounded on differing degrees of negligence because a car is such a lethal weapon when badly driven. As fire is equally dangerous, there is an argument that the legislation should impose similar sanctions for arson offences. The options for the mental element are therefore:

- (a) To retain a subjective recklessness test for all offences, but applying the definition of subjective recklessness recommended in our Report on *Receiving Stolen Property*;
- (b) to provide an objective recklessness ‘reasonable man’ type test for fire offences only and retain the subjective recklessness test for all other damage offences and
- (c) to provide an objective recklessness ‘reasonable man’ test for all damage offences.

29. The English Law Commission decided to replace the “unlawfully and maliciously” formula in the 1861 Act with a formula of intention or recklessness. It is clear from paragraphs 44 and 45 of their Report that they desired to retain the same *mens rea* elements formerly embodied in the term “maliciously” as defined in the *Cunningham* case. It is therefore clear that the recklessness they envisaged for the new offence was subjective recklessness. A person would be reckless if:

- (a) knowing that there was a risk that an event might result from his conduct or that circumstances might exist, he took that risk, and
- (b) it was unreasonable for him to take it having regard to the degree and nature of the risk which he knew to be present.

The *Criminal Damage Act 1971* did not, however, define recklessness specifically. This left it open for the House of Lords to define it as they

saw fit. They did so in the case of *R v Caldwell*.⁸ In that case the House of Lords laid down the rule for the purpose of statutory offences based on recklessness that:

“a person is reckless if

- (1) he does an act which in fact creates an obvious risk and
- (2) he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to take it.”

Thus, both the English Law Commission and the British Parliament having set out to achieve a recklessness test based on a subjective approach to the guilt of the accused, the House of Lords decided that a test with an objective element was what was in fact provided and intended all along. The *Caldwell* decision (together with a similar decision in *Laurence*⁹) caused consternation in legal circles and had a profound effect on English criminal law. Professor J. C. Smith was driven to describe an aspect of the majority decision as “pathetically inadequate”.¹⁰ Dr. Glanville Williams described the decision as “slap-happy” and “profoundly regrettable”.¹¹ These commentators even called for the abolition of the House of Lords.

In *Caldwell*, the majority of the House of Lords were concerned lest every drunk successfully put forward the defence that drink made him inadvertent. However, that not unreasonable concern gave rise to the promulgation of a doctrine of recklessness of more general application which captured the inadvertent, sober but unreasonable person also.

30. In our Report on *Receiving Stolen Property*, we recommended that the *mens rea* for the offence of handling unlawfully obtained property should be based on recklessness but that recklessness should be specifically defined as subjective recklessness. We proposed that the formulation from a tentative draft of the Model Penal Code, approved of by Henchy J. in his judgment in *Murray*,¹² should be adopted:

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree.”

We would recommend the adoption of the same formula for offences relating to criminal damage under the legislation. We see an advantage in maintaining a common approach to the question of *mens rea* in relation to criminal offences generally, unless there are special reasons, having regard to the particular offence under consideration, to adopt a different approach.

(iii) Intoxication

31. In a significant number of cases of malicious damage, intoxication plays an important role. Where such intoxication is self-induced, it is in general not an excuse for criminal misconduct.¹³ However, a

series of cases beginning in the early 19th century and culminating in the well known House of Lords decision in *DPP v Beard*¹⁴ established that, in the words of Lord Birkenhead, LC:

“Where a *specific intent* is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.”
(Emphasis added).

More recently, it has been held in England by the same tribunal in *DPP v Majewski*¹⁵ that Lord Birkenhead’s formulation does not apply to crimes of what has been termed “basic intent”. Thus, murder requires a specific intention to kill or do grievous bodily harm and, if the state of drunkenness is such as to render the accused incapable of forming that specific intention, he must be acquitted of murder although he may be convicted of manslaughter. But assault, for example, requires no specific intent, merely an intent to commit the act charged, and to such crimes of “basic intent” drunkenness, when self-induced, cannot afford a defence.

The distinction thus drawn in *Majewski* was justified, as the speeches made clear, on grounds of public policy. In the words of Lord Salmon:

“If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequences could be appalling.”

32. The series of decisions of which *Majewski* is the culmination has evoked much criticism from commentators.¹⁶ It has been pointed out that such a formulation of the law is both illogical and unethical. It is illogical because, once it is conceded that the elimination of the intent required for a particular crime by self induced drunkenness can constitute in law a defence, it should make no difference whether the intent in question is “basic” or “specific”. It is unethical because people should not be convicted of crimes involving a certain state of mind when they lack that guilty mind, even though that condition is the result of morally culpable behaviour, e.g. self-induced drunkenness.

The law lords in *Majewski*, which was a unanimous decision, used different nuances to justify their approach. Lord Salmon had this robust answer to the critics of illogicality:

“This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous

master. The law is primarily concerned with human affairs. I believe that the main object of our legal system is to preserve individual liberty. One important aspect of individual liberty is protection against physical violence."

Lord Edmund-Davies preferred the rationale given by Stroud:

"By allowing himself to get drunk, and thereby putting himself in such condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to *mens rea* for the purpose of all ordinary crime."

While acknowledging that this approach savoured unattractively of a "judge made fiction", Lord Edmund-Davies was prepared to defend it:

"In my judgment little can properly be made out of the criticisms that a law which demands the conviction of such persons who behave as the appellant did is both illogical and unethical. It may be that Parliament should look at it, and devise a new way of dealing with drunken or drugged offenders. But, until it does, the continued application of the existing law is far better calculated to preserve order than the recommendation that he and all who act similarly should leave the dock a free man."

Disquiet at the *Majewski* approach to drunkenness is not confined to academic critics. In Australia, Monahan J. said, referring to charges of assault occasioning actual bodily harm:

"Speaking for myself, I hold firmly to the view that a state of automatism, even that which has been brought about by drunkenness, precludes the forming of the guilty intent which is the fundamental concept in criminal wrongdoing."¹⁷

33. What was the effect of *Majewski* where the necessary mental ingredient could be supplied by "recklessness" but the defence was that the accused was too drunk to appreciate the risk?

In *Caldwell*, as we have already noted, it was held by a majority of the House of Lords that a person is "reckless" within the meaning of s. 1(1) of the 1971 Act if (1) he does an act which creates an obvious risk that property will be damaged and (2) when he does the act he has not given any thought to the possibility of there being any such risk involved and has nonetheless gone on to do it. While Lord Diplock was clearly unhappy at the attaching of "subjective" and "objective" labels to such tests, it has generally been accepted that his formulation introduced an objective criterion into the determination as to whether recklessness existed. In addition, *Majewski* was treated as authority for the proposition that crimes of recklessness were crimes of basic intent to which self-induced intoxication was no defence.

It followed — and was, indeed, the essence of the decision — that

- (a) the fact that an accused was unaware of a risk owing to his self-induced intoxication was no defence if that risk would have been obvious to him had he been sober; and
- (b) whether it would have been so obvious had to be determined by reference to what would have been obvious to "the ordinary prudent individual", i.e. objectively.

34. The prophecy of Dr. Glanville Williams commenting on *Majewski* was thus fulfilled. He had said:

"There can hardly be any doubt that all crimes of recklessness except murder will now be held to be crimes of basic intent within *Majewski*."¹⁸

To this, *Caldwell* added the further factor of the objective criterion for determining recklessness. Given the legislative tendency in England to replace "maliciously" by "intentionally or recklessly" in defining statutory crimes, the implications were far-reaching. Indeed, lamenting the result of the majority decision in *Caldwell*, Lord Edmund-Davies, dissenting, said:

"The consequence is that, however grave the crime charged, if recklessness can constitute its *mens rea* the fact that it was committed in drink can afford no defence. It is a very long time since we had so harsh a law in this country."

35. There is no modern decision, of which we are aware, in this difficult area in Ireland. In our Report on *Rape*, we drew attention to the problem but pointed out that none of the many submissions we had received in relation to rape had suggested that the law was giving rise to any problems. We added that:

"Since the question of when drunkenness constitutes a defence has implications for the criminal law in general, we think it is better dealt with in a wider context than the present."

We also drew attention to a similar conclusion in the third report of the Henchy Committee on *Mentally Ill and Maladjusted Persons*,¹⁹ i.e.:

"The whole question of the attitude which the criminal law should adopt to intoxication, whether as a defence or as an aggravating factor, would need to be dealt with as part of a more general reform of the criminal law."

Again, in relation to malicious damage, we are not aware of any difficulties being encountered in practice with the defence of drunkenness. It is, however, more likely to arise in this area, having regard to the far greater number of offences of malicious damage which come before the courts.

36. The question as to how the law on this topic might best be altered by legislation has been the subject of two major reports in England. The Report of the Butler Committee on *Mentally Abnormal Offenders*²⁰ recommended the creation of a strict liability offence where a person while voluntarily intoxicated does an act (or makes an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for that offence. A minority of the Criminal Law Revision Committee²¹ in their 14th Report on *Offences Against the Person*²² proposed an amended and, as it was thought, improved version of this approach. The majority, however, preferred an approach which avoided the complications which they saw inherent in the creation of a new offence. In essence, their recom-

mendation would have given legislative form to the statement of the law in *Majewski*, but without the additional elements introduced by *Caldwell*, which was not, of course, decided by the House of Lords until the following year. Their formulation, which was based on the U.S. Model Penal Code, was as follows:

- (1) that evidence of voluntary intoxication should be capable of negating the mental element in murder and the intention required for the commission of any other offence; and
- (2) in offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such lack of appreciation is immaterial."

We think that there is much to be said for this latter approach.²³ Combined with the definition of recklessness which we have already recommended, it would appear to avoid the two extremes of permitting drunkenness as a defence to every form of crime and virtually excluding it as a relevant factor in *mens rea* in every case. We should point out, however, that the majority proposal of the Criminal Law Revision Committee is related in part to the proposal for a redefinition of the mental ingredient in murder. Even apart from that consideration, it might be undesirable to make recommendations affecting the criminal law in general in the context of a particular crime. With some hesitation, therefore, we have come to the conclusion that we should adhere to the position taken in our Report on *Rape*, i.e. to defer any final recommendation on the matter until it can be made in the context of the criminal law as a whole.

(iv) *Intention to Injure or Defraud or Recklessness in that Regard*

37. Under the Act, setting fire to certain buildings with an intent to injure or defraud is an offence if the buildings are in the defendant's possession.²⁴ Moreover, s. 59 makes it an offence to commit any damage set out in the Act with intent to injure or defraud.

The principal argument against retaining these offences is that they are designed to deal with wrongful and anti-social behaviour of a different type from that dealt with by the malicious damage legislation. Dishonest conduct is of course worthy of criminal sanction; even more so conduct designed to injure others or place persons' lives in danger. But it may be argued that the law relating to dishonesty and to offences against the person would more appropriately deal with these acts.

As against this, it may be considered unwise to remove the present criminal sanction against a person who burns down his house with the intention of defrauding an insurance company. He would not be guilty of attempted false pretences unless he took matters a stage further. The present sanction seems to us an appropriate and sensible one, and we would be loathe to remove it unless a particularly strong argument could be made for doing so.

38. One concern, which exercised the English Law Commission, was that if the notion of dishonesty were to be interpreted broadly in this context, a man who burnt his own house or felled his scheduled tree to circumvent planning legislation could find himself exposed to a severe penalty. This prospect does not, however, present any true difficulty. The conduct designed to frustrate the planning legislation, for example, if it is considered to be *sui generis*, and lacking a sufficient degree of dishonesty to fall within the scope of the offence we are now describing, can always be "severed off" by the legislation and dealt with separately. We are satisfied, however, that such conduct may properly be treated as falling within the scope of the general offence.

39. Cases where a person damages his own property with intent to endanger life or with recklessness in that regard also seem to us deserving of a specific criminal sanction. It is true that, if they result in injury or death, the person would be likely to be capable of being convicted of one or more other offences against the person, but this would not necessarily be so in every case. These difficulties are enhanced where no injury in fact results.

40. Accordingly we recommend that the *legislation should make it an offence to destroy or damage any property belonging to oneself or another with intent to defraud or with intent to endanger life or with recklessness in that regard.*

FOOTNOTES TO CHAPTER 7

¹A convenient but somewhat misleading translation of *mens rea*. Smith and Hogan, (*Criminal Law*, 5th edition, p. 60) suggest the following definition: "intention or recklessness with respect to all the consequences and circumstances of the accused's act (or the state of affairs) which constitute the *actus reus*, together with any ulterior intent which the definition of the crime requires."

²*R v Cunningham*, [1957] 2 Q.B. 396, *R v Pembleton*, 2 C.C.R. 119 (1874).

³*Supra*.

⁴13 Cox 550 (1877).

⁵Unreported, Court of Criminal Appeal; judgement delivered 9th June, 1986.

⁶See para. 54 below.

⁷W.P. No. 36, p. 19.

⁸[1982] A.C. 341.

⁹[1982] A.C. 510.

¹⁰[1981] Crim. L. Rev. at p. 394.

¹¹[1981] C.L.J. at p. 252.

¹²[1977] I.R. 360, at 403.

¹³Such intoxication can be the result of alcohol or other drugs or a combination of both. While in the discussion which follows reference is made occasionally to "drunkenness", this should be taken as referring to any of these forms of intoxication.

¹⁴[1920] A.C. 479.

¹⁵[1977] A.C. 443.

¹⁶Glanville Williams, *Textbook of Criminal Law*, 2nd edition, pp. 471-6; Smith and Hogan, *Criminal Law*, 5th edition, pp. 192-3.

¹⁷*R v Keogh*, [1964] VR 400, at 401.

¹⁸*Op. cit.*, 1st edition, p. 431.

¹⁹Pri. 8275.

²⁰Cmd. 6244 (1975).

²¹Professors Smith and Glanville Williams.

²²Professors Smith and Glanville Williams.

²³Cmd. 7844 (March 1980).

²⁴It has been embodied in Cl 26 of the English *Draft Criminal Code*. It has not met with universal approval, however. Cf *Mental Malfunction and Criminal Responsibility*, Discussion Paper No. 14 (1988), Law Reform Commission of Victoria, para. 245.

²⁵S. 3.

CHAPTER 8: ARSON¹

41. We must now consider whether or not arson should be retained as a specific offence. In favour of abolishing it as such an offence, it may be argued that setting fire to a house is merely one mode of damaging or destroying it and that there is no need for the law to isolate this particular type of damage or destruction. If the purpose of reforming the law is to remove unnecessary complexities, then it may be considered that retention of arson as a separate offence is inconsistent with this goal.

As against this it may be argued that arson should be retained as a separate offence because of the distinctive abhorrence which society has for arson. Fire is capable of inflicting enormous injury and damage. It respects no legal boundaries. Anyone who starts a fire with the intention of damaging or destroying property is engaging in an act that may be considered distinctively different (at least in its potential implications) from damaging or destroying a house (or other property) by other means.

42. A second reason for retaining arson as a separate offence is that some persons engaging in this type of conduct (in contrast to other malicious damage offences) suffer from mental illness.² There may be some benefit, from an administrative standpoint at least, in retaining arson as a distinctive offence in this context. As against this, it may be considered unnecessary "to complicate the substantive law mainly to provide information regarding the disposal of offenders (such as pyromaniacs). The kind of information which procedures for informing the courts of relevant details of offenders' records are designed to provide may need to be changed from time to time in the light of further research".³

On balance we have come to the conclusion that *it would be better to retain arson as a separate offence*. This was also the view of the clear majority of those whom we consulted.⁴ *We do not, however, consider that arson should carry a higher maximum penalty than other acts*

involving damage to, or destruction of, property. The common law offence of arson should be abolished.

Some particular issues relating to arson and *mens rea* have already been considered in our discussion of the mental element of malicious damage offences.⁵

¹ Strictly speaking the common law offence is the only offence of "arson" as such. The term does not appear in the Act although the term is prescribed in the appendix to the rules in the First Schedule to the Criminal Law (Administration) Act 1924 as the appropriate description for the Statement of Offence in indictments for various offences of burning under the Act. The term is similarly used in Archbold. "Arson" is used in general speech to describe offences of causing damage by fire under the Act and is a convenient shorthand description for the latter offences.

² Cf. O'Sullivan & Kelleher, *A Study of Firesetters in the South-West of Ireland*, 151 J. of Psychiat. 818 (1987).

³ English Law Commission's Working Paper No. 23, para. 22.

⁴ In Britain, in Working Paper No. 23, the English Law Commission took the view that there was no need to distinguish in any way offences of damage to property caused by damage by fire. However, their consultations persuaded them to change their mind and in their Report (Law Com. No. 29), while they still considered it unnecessary to retain a separate offence of damaging property by fire, they recommended that, where fire was used to damage property, the maximum penalty should be imprisonment for life. The British Parliament ultimately decided that the name "arson" should be retained. Thus s. 1(3) of the 1971 Act provides that an offence committed under s. 1 by destroying or damaging property by fire is to be charged as arson.

⁵ Paras. 26 *et seq.* above.

CHAPTER 9: CAUSING A CATASTROPHE

43. We now must consider whether the legislation should introduce the offence of causing or risking a catastrophe. This offence is patterned on the penal codes in several civil law countries,¹ and was imported to the United States by the *Model Penal Code* where a small number of States have included it in their criminal law.

Section 220.2 of the *Model Penal Code* provides as follows:

- “(1) *Causing Catastrophe*. A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage, commits a felony of the second degree if he does so purposely or knowingly, or a felony of the third degree if he does so recklessly.
- (2) *Risking Catastrophe*. A person is guilty of a misdemeanor if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in Subsection (1).
- (3) *Failure to Prevent Catastrophe*. A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate a catastrophe commits a misdemeanour if:
 - (a) he knows that he is under an official, contractual or other legal duty to take such measures; or
 - (b) he did or assented to the act causing or threatening the catastrophe.”

The principle on which this offence is based is that fires, explosions, floods, avalanches and similar calamities are properly the subject of the criminal law in situations where they are intentionally or recklessly created by human agencies.²

44. We appreciate the force of the argument that such an offence should be introduced into our law. Two objections must, however, be considered. The first is that the concept of causing or risking a catastrophe is of somewhat uncertain scope.⁴ The American Law Institute is conscious of this criticism. It states:

“The word ‘catastrophe’ is not defined in the Model Code but is designed to refer to mishaps of disastrous extent, affecting directly or indirectly the safety or property of many people. There is case law in other contexts to the effect that the plain and ordinary meaning of the term is ‘a notable disaster; a more serious calamity than might ordinarily be understood from the term “casualty”’.”⁴ This sense of the term can be drawn from the context of Subsection (1), which refers generically to any ‘means of causing potentially widespread injury or damage’ and which specifically illustrates this concept by including catastrophe caused by ‘explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance.’

Several of the recently drafted codes and proposals have attempted to give more specific meaning to this concept by statutory definition. For example, the Maine and the proposed Vermont code define the term ‘catastrophe’ as death or serious bodily injury to 10 or more persons or substantial damage to five or more structures. The Missouri code is similar except that it uses ‘buildings or inhabitable structures’ instead of ‘structures’ and adds ‘substantial damage to a vital public facility which seriously impairs its usefulness or operation’ as part of the definition. North Dakota defines a catastrophe as ‘serious bodily injury to 10 or more people, damage to 10 or more habitations or structures, or property loss in excess of \$500,000’. The New Jersey statute is similar but deletes the \$500,000 property damage loss and includes ‘a building which would normally have contained 50 or more persons at the time of the offence’. Pennsylvania, Utah, and the proposed West Virginia code do not define catastrophe but instead describe it in terms similar to the Model Code. Each of these definitions is consistent with the basic objective of Section 220.2.”⁵

45. We see a difficulty with this line of argument. The perceived need to modify the generic concept of a catastrophe by specific instances and qualifications suggests that, on its own, the concept would be dangerously uncertain. Yet distinctions based on the number of persons injured or “normally”⁶ occupying a building can lead to arbitrary and unattractive results.

46. A second objection to the introduction of this offence is that our criminal law already covers much of the range of conduct embraced by this offence. The law of murder, attempted murder, manslaughter, explosives offences, dangerous driving and malicious damage (especially if reformed as we propose) go a good way towards covering the cases mentioned in s. 220.2.

We consider that the balance of the argument lies against the introduction of this offence and we so recommend.

¹ Cf. the Swiss *Penal Code*, Ann. tit. 7 (Panchard 1951), Danish *Criminal Code*, sections 180, 183 (G.E.C.Gad. 1958), the Federal German *Penal Code*, section 312-314, in *The Statutory Criminal Law of Germany* (James ed. 1947) and the Soviet *Criminal Code*, article 175 (Fonteyne 1951), all cited in the American Law Institute's *Model Penal Code and Commentaries*, vol. 2, p. 36, fn. 1.

² Cf. the *Model Penal Code and Commentaries*, vol. 2, p. 36.

³ Cf. the English Law Commission's Report, Law Com. No. 29, para. 24.

⁴ *W. A. Woodward Lumber Co. v. Unemployment Compensation Comm.*, 173 Ore. 333, 338, 145 P.2d 477, 479 (1944).

⁵ *Op. cit.*, vol. 2, pp. 36-37.

⁶ Itself a word with a considerable lack of specificity.

CHAPTER 10: PROCEDURE

(i) *Offences Scheduled Under the Criminal Justice Act 1951*

47. At the moment, offences under ss. 20, 21, 22, 23 or 51 of the Act are scheduled under the *Criminal Justice Act, 1951* as amended by the *Criminal Procedure Act, 1967* and can therefore be tried summarily if the District Justice is of opinion that the offence is a minor offence fit to be so tried and the defendant consents. Under s. 51, a prosecution can be brought for malicious damage to any property not listed elsewhere in the Act where the damage exceeds £50. Under ss. 20, 21 and 22 a prosecution can be brought in respect of malicious damage to trees, shrubs, etc., again where the damage exceeds a certain figure.

This leaves many offences under the Act, apart from summary offences, which can only be tried in the District Court on a plea of guilty. Most charges preferred under the Act would fall under s. 51 and therefore, the disposal of most offences is in the control of the District Justice and the accused, the accused having an absolute right to trial by jury if he causes damage exceeding a cost of repair of £50 in extent.

In our reports on *Receiving Stolen Property* and on *Rape*, we recommended that the new offences of handling and sexual assault should be triable summarily or on indictment at the election of the D.P.P. and that the accused should not have an absolute right to trial by jury for minor offences in these categories. The District Justice may conclude that, having regard to the circumstances of a particular case, the offence charged is not a minor one in which case it can only proceed, if at all, on indictment, thus preserving the constitutional right of the accused to a trial by jury in such circumstances.¹ *We recommend the same approach in the present context.*

48. If this recommendation is implemented, there will be no summary offence as such: there will simply be an indictable offence triable summarily at the election of the prosecution. Where this statutory framework already exists, the D.P.P. has in recent years, as a matter of

administrative convenience, given the Gardai or the relevant Minister a blanket election for summary trial of offences such as common assault, unauthorised taking of motor vehicles and casual and occasional trading, unless the Gardai or the Minister request a trial on indictment in a particular case for a specific reason.

49. Offences of criminal damage would seem to lend themselves well to prosecution guidelines of this nature. Monetary thresholds adopted from time to time as a matter of policy by the D.P.P. and not “frozen” in a statute can be easily adjusted either for inflation or for the perception of the courts as to what constitutes a minor offence. The propriety of such prosecution guidelines was upheld by the Supreme Court in the *State (Comerford) v District Justice Kirby*.²

50. The abolition of the ceiling of £50 will also reduce delay and expense, since at the moment the courts, understandably concerned that they do not exceed their jurisdiction, frequently insist on strict proof that the damage alleged to have been caused did in fact exceed £50 in value, necessitating in the result the attendance of witnesses such as garage men and glaziers.

(ii) *Offences Against the State Act, 1939*

51. Offences under the Act are scheduled under the *Offences Against the State Act, 1939*. This means that, if a person is brought before the District Justice charged with a malicious damage offence under the Act which the justice has jurisdiction to dispose of summarily, the justice must, if the D.P.P. so requests, send him for trial by a Special Criminal Court.³ It does *not* mean that a District Justice can only deal with such an offence when the D.P.P. consents. It is for the D.P.P. to take the initiative in such cases if he desires a trial in the Special Criminal Court. Where, however, a person is brought before the District Court charged with a malicious damage offence which is an indictable offence and the justice finds there is a *prima facie* case and sends him forward for trial, the justice *must*, unless the D.P.P. otherwise directs, send him forward for trial by a Special Criminal Court.⁴

The fact that offences under the Act are scheduled under the 1939 Act also means that a member of the Gardai may arrest a person under s. 30 of the 1939 Act for a malicious damage offence. Such a person may be detained for up to 48 hours.

52. When, in 1973, offences under the 1861 Act were declared to be scheduled offences under the 1939 Act, it may well have been anticipated that a considerable number of offences of arson and indictable malicious damage would be committed by members of unlawful organisations or their associates. Had the expectation been otherwise, the Attorney General would have been assigned the task of certifying such offences for trial by the Special Criminal Court when he considered it necessary.⁵ (This has been the situation with offences such as murder and robbery.)

53. Over the past fifteen years, trials in the Special Criminal Court for arson or indictable malicious damage have in fact been few and far between. By contrast, we are informed that during the same period the D.P.P. has been inundated with requests for directions under s. 45(2) of the 1939 Act in order to enable District Justices return indictable cases of malicious damage to the ordinary courts for trial. In addition, returns for trial have been made to the ordinary courts without the necessary direction from the D.P.P., necessitating State Side proceedings. Worst of all, there has been an increasing flow of unnecessary requests to the D.P.P. for consent to the disposal of both indictable and summary cases of malicious damage summarily, which stems from a misunderstanding of the law set out above. Malicious damage is very much part and parcel of "ordinary" non-subversive crime and, at the moment, the law caters for the exception rather than for the norm.

54. Another and more important consequence of this scheduling is the ability it has given the Gardaí to detain a person in custody for up to 48 hours for an offence under the Act, a power which before the coming into force of the *Criminal Justice Act 1984* they did not have in respect of offences such as murder and rape. Even since the 1984 Act came into force, the maximum period of detention for non-scheduled offences, such as murder and rape, is twelve hours. It is true that because the Gardaí have this power at their disposal murderers and other serious offenders have been brought to justice who might otherwise have eluded prosecution.⁶ After an initial arrest under s. 30 for malicious damage followed by detention, they confessed to these other crimes. Notwithstanding that, an anomaly exists which should be removed. The argument that it is necessary to have malicious damage offences scheduled in order properly to investigate other offences has no validity. It would seem to us more convincing to argue for longer periods of detention for such other offences. We do not intend to address the latter issue in this Report, since it is clearly outside its terms. We limit ourselves to pointing out this anomaly and to stating our conclusion that the scheduling of malicious damage offences cannot be justified on the basis that this is necessary in order properly to investigate other offences. In addition, it leads to the unnecessary confusion and expense to which we have already referred.

We recommend that malicious or criminal damage offences should not be scheduled offences for the purposes of the Offences Against the State Act, 1939.

(iii) *Proof of Ownership*

55. We consider that, in cases where the charge is of damaging property that is not one's own, the *legislation should provide that it is presumed, until the contrary is shown, that the property in question is not the property of the accused and that the owner, bailee or other person in possession of the property, had not given the defendant permission to damage it.* There is often an element of unreality in requiring the owner of damaged property to identify the property as his in cases where it patently does not belong to the accused and then to say that he gave no one permission to damage the property.

56. We think it would also be desirable to provide that, for the purposes of the proposed legislation, *a family home from which a spouse is barred or otherwise excluded by law should be deemed to be the property of the spouse not barred only*. This would enable a prosecution to be brought against a spouse who damaged the family home in an attempt, for example, to assert a right to possession where he or she was excluded under a “barring order” or its equivalent.

(iv) *Ouster of Jurisdiction*

57. We consider that it would be quite anomalous for the old doctrine of ouster of jurisdiction⁷ to have any operation in relation to the criminal damage offences we have proposed. The doctrine, which is of great antiquity, deprives the District Court of jurisdiction if, in giving a decision on the case before it, it is called upon to adjudicate on a dispute of title to real property. The application of the doctrine would cause much complexity and uncertainty for no benefit. We have no hesitation in recommending that *the doctrine should not apply to any of these offences*. We leave to another day consideration of the question whether the doctrine in its entirety should be abolished.

⁷ Cf. *The State (McEvitt) v Delap*, [1981] I.R. 125.

⁸ Unreported, judgment delivered 26 January 1988.

⁹ *Offences Against the State Act, 1939*, s. 45(1).

¹⁰ *Ibid.*, s. 45(2).

¹¹ The office of the Director of Public Prosecutions was not established until 1974.

¹² See, for example, *Howley v DPP*, Supreme Court, unreported, judgment delivered 29 July 1988.

¹³ See *Anon., Ouster of Justices' Jurisdiction*, I.L.T. & Sol. J. 87 (1954); the English Law Commission's Report, Law Com. No. 29, paras. 74-80; *R. (Moore) v O'Hanrahan*, 61 I.L.T.R. 125 (Sup. Ct., 1927).

CHAPTER 11: PENALTIES AND COMPENSATION

(i) *Penalties*

58. Fifteen sections of the Act carry sentences of penal servitude for life. These sections cover various offences of damage by fire, damage by the use of explosives and riotous damage. Eight sections carry a maximum sentence of fourteen years penal servitude. For example, the defendant can be sentenced to 14 years penal servitude for burning grass or wounding a cow. By way of contrast the maximum penalty for destroying a work of art, for example, a rare book or picture, or indeed for defacing a statue in Ballinaspittle is a maximum of six months' imprisonment. If one were to destroy the dam, flood gate, or sluice of any fish pond one could end up serving seven years' penal servitude. A maximum of only one month's imprisonment is available if one destroys or damages any cultivated root or plant used for the food of man or beast. It is all very haphazard.

We consider that a *maximum of ten years' imprisonment suffices for all criminal damage offences, whether by fire or otherwise, prosecuted on indictment, which do not involve intent to endanger life or recklessness as to whether life would be endangered.*¹ A life sentence would be appropriate where such intent or recklessness exists.²

(ii) *Compensation*

59. There can be no offence in respect of which it would be more appropriate to make statutory provision for the payment of compensation to victims than the offences of criminal damage and the related offences we have proposed. A possible difficulty, however, presented by the decision of the High Court in *Cullen v AG*³ must be considered.

In that case, Hamilton J. decided that s. 57 of the *Road Traffic Act, 1961* was unconstitutional insofar as it gave the court permission to "inflict" on a person convicted of driving without insurance "in

addition to any other punishment" a fine not exceeding the damages such person could recover in a civil action against such convicted person. The decision was based on the proposition that this power to compensate provided in effect for the summary trial of non-minor offences.

We agree with Professor Casey⁴ that it was regrettable that the appeal lodged against this decision was withdrawn "... as it is not clear that the judgment can stand with *Conroy's* case.⁵ The order to pay damages would not appear to be 'an intentional penal deprivation of property'; the object is not to punish the offender but to compensate the victim". Later Professor Casey says:

"It would be unfortunate if every provision on the lines of section 57 offended against the Constitution, because it represents a useful device. The underlying idea is that it is sometimes convenient to apply civil and criminal sanctions in the same proceedings (the intervention of a *partie civile* is familiar in French criminal law). In avoiding unnecessary litigation, and consequently saving expense, the idea seems a beneficial one and it would be unfortunate if the Constitution barred the Oireachtas from adopting it."⁶

We agree. The wording of s. 57 was also singularly unfortunate as what was essentially the awarding of compensation was expressed as the inflicting of punishment. *We consider that a compensation provision expressed as such should survive and should be included in legislation.*

¹ Cf. s. 4(2) of the 1971 Act.

² Cf. *id.*, s. 4(1), which prescribes imprisonment for life in cases of such intent or recklessness, as well as in cases of arson, under s. 1(2).

³ [1979] I.R. 394.

⁴ J. Casey, *Constitutional Law in Ireland*, 252 (1987).

⁵ [1962] I.R. 411.

⁶ *Op. cit.*, 253.

CHAPTER 12: MISCELLANEOUS

(A) *Defence of "Lawful Excuse"*

60. As we have seen, most of the offences under the Act require the defendant to have acted "unlawfully and maliciously". Use of the word "unlawfully" in this context is hardly felicitous: it suggests that, were it not for the addition of that adverb, damaging another's property might be *prima facie* lawful. The reverse is, or should be, the case: damaging another's property should be *prima facie* unlawful. There are of course cases where it can be justified, e.g., where the accused can show that he had a legal right to do the harm complained of.

61. We consider that *the correct approach is to abandon the word "unlawfully", but to provide for a defence of "lawful excuse"*. We agree in general with the recommendation of the English Law Commission in their Report:

"Our view is that where a person is acting to protect the property, or a right or interest in the property, of another or of himself (even if he only believes that he or another owns such property, right or interest), an honest (though erroneous) belief that:

- (a) the property or the right or interest in it was in immediate need of protection by him; and
- (b) the means of protection adopted were reasonable in the circumstances.

should provide a lawful excuse for the destruction of or damage to property."

Section 5 of the English 1971 Act which gives effect to this recommendation provides that it is not to be construed as casting doubt on any other existing defences recognised by the law. However, as Professor Glanville Williams has pointed out,¹ a lacuna remains. The section in its terms is confined to an honestly held belief that a person's *property* is endangered. Where his person is endangered, he would be

obliged to fall back on the common law defence which will not be available to him in the case of an unreasonable belief, however honestly held. Hence a person who injured a vicious dog in the unreasonable but honestly held belief that it was about to injure his person would still have no defence. We recommend that *a provision on the lines of s. 5 of the 1971 Act should be included in the legislation, but amended so as to include cases of apprehended injury to the person.*

(B) *Threats*

62. Section 50 of the Act creates an offence of sending a written threat to burn or destroy houses, barns or other property. That offence could easily be extended to apply to all types of property and not simply the specific types of property specified in the section. The offence can similarly be extended to provide for threats indicated by telephone or otherwise. The property need not be the property of the person threatened. Even the accused's own property may be included if the threat is to destroy it in a manner likely to endanger others. We agree with the English Law Commission recommendation in relation to this offence and recommend that *our legislation should include a provision drafted on the same lines as s. 2 of the English 1971 Act.*²

(C) *Possession Offences*

63. Section 54 of the 1861 Act creates an offence of possession of gunpowder, explosive substances, or other things with intent thereby or by means thereof, to commit any of the felonies in the Act. Explosive substances are also captured by the *Explosive Substances Act 1883*.

We agree with the English Law Commission that this provision can be simplified and improved by making it an offence to have in one's possession or control anything which one intends to use, or cause or permit another to use, to damage property. Broad as the definition of explosive substance in s. 9 of the 1883 Act may be, it is prudent to have a provision to capture things in themselves innocent, such as stones, for example, where they are clearly possessed for an aggressive purpose. Accordingly *we recommend that the legislation include a provision drafted on the lines of s. 3 of the English 1971 Act.*

(D) *Power of Arrest*

64. As we are recommending the creation of indictable offences with penalties ranging at the upper end of the scale from ten years to life, it is only reasonable to recommend a power of arrest without warrant for all such offences. This power should extend to the Gardaí and any other person, where, in either cases, there is a reasonable belief that (a) such an offence has been committed and (b) the arrested person committed such offence. Section 61 of the 1861 Act, which affords a right to arrest in relation to persons "found committing" the offence in question is clearly too narrow.

(E) *Search Warrants*

65. Under s. 55 of the Act, a search warrant may be authorised where articles are suspected of being on the premises "for the purpose of being used in any felonies". We consider that this provision is too narrowly drawn, and we recommend that it be extended to cases of past commission as well as future intention. *We recommend the inclusion in the legislation of a provision drafted on the lines of s. 6 of the English 1971 Act.*

(F) *Transport*

66. In England, the *Criminal Damage Act 1971* did not repeal ss. 35 and 36 of the Act relating to railways and ss. 47 and 48 relating to ships. It seems probable that this was because these offences involved disruption and tampering rather than "damage", as that expression is generally understood.

The Act did not, of course, refer to aircraft. There are, however, some modern legislative provisions which are relevant, mainly enacted in response to hijacking. Section 10 of the *Criminal Law (Jurisdiction) Act 1976* deals with the unlawful seizure of, or exercise of control over, vehicles other than aircraft. Similar offences in relation to aircraft are created by the *Air Navigation and Transport Acts 1973* and 1975, but the offences are confined to acts committed on aircraft *in flight* by persons *on board* such aircraft. While the period during which an aircraft is in flight is deemed to include periods just before take-off and after landing, there is no specific provision for offences falling short of seizure and control or offences consisting of damage committed by a person *not on board* the aircraft. Section 16 of the *Air Navigation and Transport Act 1950*, however, gives the Minister for Tourism and Transport extensive powers to make by-laws for purposes which extend to the exclusion from aerodromes of persons and vehicles and securing the safety of aerodromes and of aircraft using them against damage, including in particular damage by fire.

The definition of damage we propose could be extended further still so as to apply to offences of "obstruction". A second approach would be to create an offence of obstructing or doing any other act which prevents or endangers the safe use or operation of any mode of transport by land, sea, air or, indeed, space. A third approach would be to retain the sections in the Act.

All the offences provided for in s. 35 of the Act, except those which consist of the commission of acts "with intent to obstruct", would be captured under the legislation we propose. The offence of obstructing engines or carriages created by s. 36 would not be captured under the expanded definition of damage we propose.

Sections 47 and 48 of the Act contain a mixture of offences, some of which would be captured by our proposed definition of "damage" or an attempt to commit such damage. Some, however, such as casting adrift or cutting away boats and buoys, might not be so covered.

67. Since not all the possible offences envisaged under ss. 35, 36, 47 and 48 of the Act would be captured by the legislation we propose, *we think that the sensible course is to provide for the retention of these*

sections, but to provide also for the same penalties as for offences under s. 2(1) and (2) of our proposed Bill. As other vehicles, including aircraft, are dealt with in other legislation, it would not appear appropriate to amend the sections in the Act to cover them. We have consulted with the interested bodies in the State on this matter and are satisfied that this is the most practical course to adopt. It was also the approach adopted in England in the 1971 Act.

(G) *Implications in Relation to the Criminal Law (Jurisdiction) Act 1976*

68. In Northern Ireland, the *Criminal Damage (Northern Ireland) Order 1977* introduced provisions similar in all material respects to the *English Criminal Damage Act, 1971* as the relevant law in Northern Ireland for damage to property except for the purposes of the *Criminal Jurisdiction Act, 1975*, the Act which corresponds to our *Criminal Law (Jurisdiction) Act 1976*. Sections 1 to 7 of the Act are retained as scheduled offences for the purposes of the 1975 Act.

Our proposals in relation to criminal damage have no necessary implications in relation to the *Criminal Law (Jurisdiction) Act 1976*. Whatever policy the Government may wish to adopt at any time, their freedom of choice will be unaffected by our proposals.

It would, for example, be entirely possible for our Government to retain specified offences from the Act in the Schedule to the 1976 Act. Under another approach, some (or all) of the offences we have proposed in this Report could be scheduled. (This might prove attractive in view of the close similarity between these proposed offences and some of the offences in the 1977 Order.) A third approach would be to specify new offences for the purposes of the 1976 Act. The point worth noting in the present context is that our recommendations do not restrict the freedom of choice of the Government on this subject in any way.

¹ *Op. cit.*, pp. 911-12.

² Section 2 provides as follows:

"(2) A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, —
 (a) to destroy or damage any property belonging to that other or a third person; or
 (b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person;
 shall be guilty of an offence."

CHAPTER 13: SUMMARY OF RECOMMENDATIONS

1. The present approach, of providing a long list of specific offences, should be replaced by a general offence in respect of criminal damage to another person's property, supplemented by a small number of other offences, dealing with liability in specific instances: para. 15.
2. The legislation should use the word "damage" in the substantive offence; a subsection should provide that this term includes cases where the interference consists wholly or partly of destroying, defacing or dismantling the property or rendering it inoperable or unfit for use: para. 21.
3. "Property" should be defined as embracing property of a tangible nature, whether real or personal, including money, and animals that are capable of being stolen; ss. 40 and 41 of the *Malicious Damage Act 1861* should be retained: para. 22.
4. Property should be treated as belonging to any person (a) having the custody or control of it; (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or (c) having a charge over it. Where property is subject to a trust, the persons to whom it belongs should be so treated as including any person having a right to enforce the trust. Property of a corporation sole should be so treated as belonging to the corporation notwithstanding a vacancy in the corporation: para. 23.
5. The same test of recklessness should apply to offences relating to criminal damage as we recommended should apply to the offence of handling unlawfully obtained property, in our Report on *Receiving Stolen Property*: para. 30.

6. The legislation should make it an offence to destroy or damage property whether belonging to oneself or another with intent to defraud or with intent to endanger life or with recklessness in that regard: para. 40.
7. Arson should be retained as a separate offence. It should not carry a higher maximum penalty than other acts involving damage to property. The common law offence of arson should be abolished: para. 42.
8. The legislation should not include an offence of causing or risking a catastrophe, as provided for by section 220.2 of the Model Penal Code: para. 46.
9. The District Court should have jurisdiction to try summarily offences of criminal damage where the Director of Public Prosecutions so elects: para. 47.
10. Offences of malicious or criminal damage should not be scheduled for the purposes of the *Offences Against the State Act, 1939*: para. 54.
11. In cases where the charge is of damaging property that is not one's own, it should be presumed until the contrary is shown that the property in question is not the property of the accused and that the owner, bailee or other person in possession of the property had not given the accused permission to damage it: para. 55.
12. For the purposes of the proposed legislation, a family home from which the accused is barred should be deemed to be the property of the spouse of the accused only: para. 56.
13. The doctrine of ouster of jurisdiction should have no application to the proposed offences: para. 57.
14. The maximum penalty for all criminal damage offences, whether by fire or otherwise, prosecuted on indictment, which do not involve intent to endanger life or recklessness as to whether life would be endangered should be ten years' imprisonment. Where such intent or recklessness exists, a life sentence would apply: para. 58.
15. The legislation should include a provision for the payment of compensation to victims of criminal damage and the related offences already proposed: para. 59.
16. In prosecutions for offences relating to damaging property or an ancillary threat or possession of anything with intent to damage property, other than an offence involving a threat to damage property in a way which the defendant knows is likely to endanger the life of another or involving an intent to use or cause or permit the use of something in his custody or under his control so as to damage property, the defendant is to be treated as having a lawful excuse —

- (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the damage to the property in question had so consented, or would have so consented to it if he or they had known of the damage and its circumstances; or
- (b) if he damaged or threatened to damage the property in question or, in the case of a charge for the offence recommended in paragraph 18 below, intended to use or cause or permit the use of something to damage it, in order to protect himself or another person or property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed —
 - (i) that he or such other person or the property, right or interest was in immediate need of protection; and
 - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

The test should be that of the honesty, rather than the reasonableness, of the belief. This defence should be without prejudice to other existing defences: para. 61.

17. A person who without lawful excuse makes to another person a threat, intending that he or she would fear it would be carried out, (a) to damage any property belonging to that other person or a third person, or (b) to damage his own property in a way which he knows is likely to endanger the life of that other person or a third person, should be guilty of an offence: para. 62.

18. A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it (a) to destroy or damage any property belonging to some other person, or (b) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person, should be guilty of an offence: para. 63.

19. There should be a power of arrest without warrant, by a member of the Gardai or any other person, in respect of the offences proposed, where, in either case, there is a reasonable belief that (a) such an offence has been committed and (b) the arrested person committed such offence: para. 64.

20. There should be a power to authorise a search warrant where there is reasonable cause to believe that a person has in his custody or under his control or in his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse (a) to damage property belonging to another, or (b) to damage any property in a way likely to endanger the life of another: para. 65.

21. Sections 35, 36, 47 and 48 of the *Malicious Damage Act 1861*, relating to offences in regard to railways and ships, should not be repealed, but the proposed legislation should provide for the same penalties for those offences as for offences under the proposed legislation: para. 67.

CHAPTER 14 GENERAL SCHEME OF A BILL TO PROVIDE
FOR AMENDMENTS OF THE LAW IN
RELATION TO MALICIOUS DAMAGE TO
PROPERTY AND OTHER MATTERS
CONNECTED THEREWITH

1. Provide that the Act may be cited as the Criminal Damage Act, 1988.
2. Provide that:
 - (1) A person who without lawful excuse damages any property belonging to another intending to damage the same or being reckless as to whether the same would be damaged shall be guilty of an offence.
 - (2) A person who without lawful excuse damages any property whether belonging to himself or another with intent to defraud shall be guilty of an offence.
 - (3) A person who without lawful excuse damages any property, whether belonging to himself or another —
 - (a) intending to damage any property or being reckless as to whether any property would be damaged; and
 - (b) intending by the damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;shall be guilty of an offence.
 - (4) An offence committed under this section by damaging property by fire shall be charged as arson.
 - (5) For the purpose of this section, where a person accused of damaging a family home within the meaning of the Family Home Protection Act, 1976 is a spouse barred from the said family home pursuant to the provisions of the Family Law (Protection of Spouses and Children) Act, 1981, or is otherwise excluded by law from the said family home, the said family home shall be deemed to belong solely to the other spouse.

3. Provide that:

- (1) where a person is charged with damaging his own property, the charge will so specify,
- (2) where a person is charged with damaging any property not his own
 - (a) it shall not be necessary to lay the ownership of the property in any person,
 - (b) it shall be presumed until the contrary is shown that the property is not the property of the accused, and
 - (c) it shall be presumed that the owner, bailee or other person in possession of the property had not given the accused permission to damage it.

4. *Definitions*: Provide the following definitions for the purpose of the Act:

"Damage" shall include 'destroy, deface, dismantle or render inoperable or unfit for use whether temporarily or otherwise'.

"Reckless": a person is reckless if

- (a) he consciously disregards a substantial and unjustifiable risk that the property will be damaged through his act or omission, and
- (b) the risk is of such a nature and degree that, considering the nature and purpose of the conduct of the accused and the circumstances known to him, its disregard involves culpability of a high degree.

"Property" should be defined as embracing all property of a tangible nature, whether real or personal, including money, and animals that are capable of being stolen.

5. Provide that property should be treated as belonging to any person
- (a) having the custody or control of it;
 - (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
 - (c) having a charge over it.

Where property is subject to a trust, the persons to whom it belongs should be so treated as including any person having a right to enforce the trust. Property of a corporation sole should be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.

6. Provide that in prosecutions for offences relating to damaging property or an ancillary threat made, or possession of anything with intent, to damage property, other than an offence involving a threat to destroy or damage property in a way which the defendant knows is likely to endanger the life of another or involving an intent to use or cause or permit the use of something in his custody or under his control so as to damage property, the defendant is to be treated as having a lawful excuse:

- (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the damage to the property in question had so consented, or would have so consented to it, if he or they had known of the damage and its circumstances; or
- (b) if he damaged or threatened to damage the property in question or, in the case of a charge for an offence under section 8 below, intended to use or cause or permit the use of something to damage it, in order to protect himself or another person or property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed —
 - (i) that he or such other person or the property, right or interest was in immediate need of protection; and
 - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

Provide that the test should be that of the honesty, rather than the reasonableness, of the belief and that this defence should be without prejudice to other existing defences.

7. Provide that a person who without lawful excuse makes to another person a threat, intending that he or she would fear it would be carried out

- (a) to damage any property belonging to that other person or a third person, or
- (b) to damage his own property in a way which he knows is likely to endanger the life of that other person or a third person

shall be guilty of an offence.

8. Provide that a person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it

- (a) to damage any property belonging to some other person, or
- (b) to damage his own or the user's property in a way which he knows is likely to endanger the life of some other person

shall be guilty of an offence.

9. Provide that

- (a) a person guilty of an offence under Section 2(3) shall be liable to a maximum penalty of life imprisonment,
- (b) a person guilty of an offence under Section 2(1) or 2(2) convicted on indictment shall be liable to be imprisoned for a period not exceeding 10 years and to a fine not exceeding 10,000 pounds or to both such fine and imprisonment and on

summary conviction to be imprisoned for a period not exceeding one year and to a fine not exceeding 1,000 pounds or to both such fine and imprisonment.

10. Provide for the payment of compensation to the victim of offences under the Act.

11. For the avoidance of doubt, provide that there shall be no ouster of the District Justice's jurisdiction where an offence under the Act is prosecuted summarily.

12. Provide that there shall be a power of arrest without warrant, on the part of the Gardai and of any other person, in respect of the offences proposed, where, in either case, there is a reasonable belief that

- (a) such offence has been committed, and
- (b) the arrested person has committed such offence.

13. Provide for the issuing of a search warrant where there is reasonable cause to believe that a person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use in committing an offence under the Act.

- 14. (a) Provide for the abolition of the common law offence of arson.
- (b) Provide for the repeal of the *Malicious Damage Act 1861*, save for sections 35, 36, 40, 41, 47 and 48, and for appropriate amendments to other legislation and for amendments to the retained sections so as to provide for the same penalties for offences under those sections as offences under section 2(1) and (2).

NOTES ON THE SCHEME

- 2. This section contains the principal offences under the Bill.
- 3. This facilitates the proofs and should render it unnecessary for the owner of the property damaged to be called as a witness in every case.
- 4. This defines words fundamental to the Bill.
- 5. This defines ownership for the purpose of the Bill.
- 6. This provides a defence of lawful excuse.
- 7. This provides a new offence of threatening to damage property.

8. This provides a new offence of possessing things with intent to damage.

9. This provides penalties.

10. This provides for compensation to victims.

11. This removes an antiquated clog on the jurisdiction of the District Court.

12. This provides for a power of arrest without warrant.

13. This provides for the issuing of search warrants.

14. This provides for repeals and amendments.

APPENDIX: STATISTICAL DATA

The Gardai have furnished the following statistics:

Malicious Damage Offences 1986 - 1987

	1982	1983	1984	1985	1986	1987
Arson	172	172	189	181	236	206
Other Indictable						
Malicious Damage . .	1690	2202	2466	2808	2945	2995
Summary Offences . . .	2264	2237	1756	2126	2149	*

*Not yet available.

*Some types of indictable malicious damage committed between
March 1986 and February 1988*

Amusement Centre	17
Bakery	8
Bank	33
Betting Office	14
Building Society	5
Cinema	7
Club	41
Creamery	1
Credit Union	3
Dairy	2
Dance Hall	18
Factory	74
Garage	124

Hotel & Grounds	116
Jewellers	9
Licensed Premises	211
Office	94
Petrol Station	33
Rent Office	1
Restaurant	99
Shop	577
Showroom	20
Store	64
Supermarket	43
Warehouse	28
Detention Centre	3
Garda Stations	54
Labour Exchange	1
Post Office	13
Public Buildings	46
Caravan	35
Flat	21
Hostel	9
House	427
Mobile Home	7
Farm	80
Garden Centre	4
Mine	3
Nursery	7
Stable	2
Chemist	9
Hospital	18
Local Authority Clinic	7
Local Authority Dispensary	3
Surgery-Dentist	1
Surgery-Doctor	2
Boat	11
Bus Station	2
Dock	6
Motor Vehicle	328
Port	3
Rail Station	14
Train	2
Other	222