DO FREEGANS COMMIT THEFT?

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The environmental impact of mass consumerism is a growing concern, with a particular consequence being the production of significant levels of waste goods. Goods are often disposed of whilst still being useable. One proposed method of reducing the environmental impact of the levels of waste of useable goods is freeganism. This paper provides an overview of freeganism, followed by an evaluation of the impact of English criminal law on freeganism. This paper will consider the claim that freegans commit theft. First there is analysis of the possibility that freegans cannot be guilty of theft because they only deal with abandoned property. Although there is considerable strength in this claim, the difficulties with establishing that property is abandoned necessitates the development of an alternative defence. It will be suggested that freeganism is not an activity that is dishonest in a way so as to attract criminal sanction. This argument is based on the structure of the criminal law relating to theft, which has defences based on claims of right, subjective honesty, and the considerations of ordinary people (ie jury members). It is concluded that freegans should not be guilty of theft under the current English criminal law.

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1. INTRODUCTION

Freeganism is an alternative consumption strategy which involves taking goods that appear abandoned, without paying for them. The freeganism concept is discussed in depth below in Part 2. This article will assess whether freegans commit a property offence, specifically theft. In Part 3 I will show that freeganism cannot be considered to be theft. The first argument concerns the nature of the ownership interest in the relevant goods. I will show that there is a possibility, even taking into account the restrictive nature of the doctrine, that the goods had been abandoned. The second argument, which is more persuasive, concerns the freegan's state of mind. I argue that freegans are not doing anything so dishonest as to attract a criminal sanction. Part 4 is a conclusion.

2. FREEGANISM

Freeganism is not a coherent philosophy, nor does it have a consistent theoretical basis.[1] It can however be loosely characterised as an anti-consumerist movement,

[1] W Skidelsky, 'The freegans' creed: waste not, want not' *The Observer* (London 19 July 2009) http://www.guardian.co.uk/environment/2009/jul/19/freegan-environment-food: it is an 'ill-defined activity … [without] any one clear statement of their aims and motivations.' On freeganism, see generally the information available at http://www.freegan.org.uk; http://en.wikipedia.org/wiki/Freeganism; http://freegan.info/; http://freegan.org.uk/. See A Weissman 'Everyday Revolutions: Practices and Institutions for Living Beyond Capitalism in Everyday Life' (at http://freegan.info/?page_id=174), text accompanying fn 30 – fn 48 for links to various examples of freeganism. See also in general the media links page at http://freegan.info/?page_id=50. There are also newspaper articles describing freeganist behaviour in England, available at http://www.guardian.co.uk/lifeandstyle/2007/aug/19/foodanddrink.ethicalfood; http://www.dailyecho.co.uk/news/features/living/3961963.Freeganism___making_use_of_things_shops_throw_away/; http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/2793564/Dumpster-diving-with-the-freegans-Why-pay-for-food.html. (All URLs cited throughout this article were accessible on 21 July 2009.)

where the market economy is avoided where possible. The reasons for this avoidance can vary. Freegans often tend towards a left-wing political ideology which supports a general opposition to capitalism,[2] although there are exceptions.[3] Others may become freegans in opposition to the considerable waste that is produced by consumer culture, in particular the food waste produced by supermarkets.[4] Although the multifaceted nature of freeganism prohibits an exhaustive definition, it is the aim of this article to analyse freegan practice.

Freegans employ 'strategies for living based on limited participation in the conventional economy and minimal consumption of resources.'[5] Although freeganism is rooted in veganism and vegetarianism, [6] there is no restriction of freeganism to foodstuffs: all types of goods can be "freeganised". Regardless of whether the goods are organic or inorganic, all the goods that a freegan will be interested in have a common element: they reach a point of obsolescence. The point of obsolescence will vary for inherent technological or organic reasons,[7] but different people can and do place different "end-use points" to the same goods. Freegans will

[2] See eg http://freegan.info/, where the front page of the website provides a variety of anti-consumerist and leftist descriptions of and justifications for freeganism, such as this: 'Freeganism is a total boycott of an economic system where the profit motive has eclipsed ethical considerations and where massively complex systems of productions ensure that all the products we buy will have detrimental impacts most of which we may never even consider. Thus, instead of avoiding the purchase of products from one bad company only to support another, we avoid buying anything to the greatest degree we are able.'

[3] L J Strahilevitz 'The Right to Abandon' John M Olin Law & Economics Working Paper No 455 (February 2009, available at http://ssrn.com/abstract=1348211), at p 3, text to fn 3: 'As a testament to the prevalence of abandonment, it appears that some of these freegans are able to live essentially pleasant, middle-class lives.'

[4] See generally T Stuart *Waste: Uncovering the Global Food Scandal* (Penguin: London 2009). Stuart was the subject of a recent newspaper feature: W Skidelsky, 'The freegans' creed: waste not, want not' *The Observer* (London 19 July 2009) http://www.guardian.co.uk/environment/2009/jul/19/freegan-environment-food.

[5] http://freegan.info/.

[6] See eg http://freegan.info/, noting that the term 'freegan' appears to be a portmanteau of 'free' and 'vegan'. See also http://www.freegan.org.uk/ukfreegans/?page_id=6, describing meat-eating freegans as 'meagans'.

[7] See eg S Strasser *Waste and Want: A Social History of Trash* (New York: Henry Holt, 2000) pp 191-201, pp 274-278 (discussing planned obsolescence); J Scanlan *On Garbage* (London: Reaktion Books, 2005) p 34.

consider the "end-use point" to be at a later point in the object's "life-span" compared with non-freegans. This willingness to use goods others deem obsolete provides a basis for freeganism. In addition to this, the aim of freeganism is to obtain goods without having to pay for them. This can occur through many methods, such as barter.[8] However, one particular freegan practice has provoked media interest in the 'sensational':[9] "bin-diving". It is this particular practice which is the focus of this analysis.

One freegan website gives the following description of bin-diving:

> 'Perhaps the most notorious freegan strategy is what is commonly called "urban foraging" or "dumpster diving". This technique involves rummaging through the garbage of retailers, residences, offices, and other facilities for useful goods. Despite our society's [stereotypes] about garbage, the goods recovered by freegans are safe, useable, clean, and in perfect or near-perfect condition, a symptom of a throwaway culture that encourages us to constantly replace our older goods with newer ones, and where retailers plan high-volume product disposal as part of their economic model. Some urban foragers go at it alone, others dive in groups, but we always share the discoveries openly with one another and with anyone along the way who wants them.'[10]

[8] This will cover the Freecycle movement, where individuals post notices on the internet that goods are free for those who are willing to pick them up. See eg http://www.uk.freecycle.org/.
[9] http://freegan.org.uk/pages/faq.php#10.
[10] http://freegan.info/. For a distinction between garbage (animal and vegetable matter) and rubbish, trash and refuse (all other types of waste) see eg Strasser, above n 7, p 29 at fn *. For reasons of clarity this distinction is not maintained herein.

This analysis is restricted to bin-diving, which is defined for these purposes as where someone takes goods, which have been disposed of as rubbish, out of the receptacle containing them, for further use, ie personal consumption.

There are various arguments for and against allowing freeganism in general and bin-diving in particular. On one hand, it is arguable that if the owner of goods wishes to dispose of them as rubbish, then that wish should not be interfered with. The right to alienate one's self from goods is an incident of the rights of ownership,[11] and it is arguable that that right extends beyond the mere privilege of disposal by imposing a duty on others not to interfere with the result of the disposal ie waste. Such an extended duty may be justified on environmental grounds, or on privacy grounds. These issues will be discussed in turn.

Environmental justifications may be put forward as both prohibiting and supporting the practice of bin-diving. If the rubbish is environmentally unsound, then there is a rational public policy justification for restricting access to that rubbish,[12] based on the general duty not to harm others.[13] This manifests itself effectively in a prohibition on abandonment of things where the act of abandonment would have a negative

[11] See eg A M Honoré 'Ownership' in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford: OUP, 1965) pp 107-147, at p 118. There is of course controversy concerning the application of this right to cultural treasures (see eg J L Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (Ann Arbor: University of Michigan Press, 1999)), but freegans will be concerned with foodstuffs, not paintings.

[12] Hudson uses this argument to justify the decision in *R v Edwards and Stacey* (1877) 13 Cox CC 384: see A H Hudson, 'Is Divesting Abandonment Possible at Common Law?' (1984) 100 LQR 110, 115 fn 42: 'Policy considerations of aspects of health clearly underlay the decision'. Later, in 'Abandonment' in N Palmer and E MacKendrick (eds) *Interests in Goods* (London: LLP, 2nd edn, 1998) p 604 this rationalisation was simplified down to 'obvious reasons of policy'. *Edwards and Stacey* (discussed further below, text following n 100) involved the theft of three dead pigs that had been buried as they had been bitten by a mad dog.

[13] See eg Honoré, above n 11, p 123.

environmental effect (ie pollution or rubbish),[14] because 'the maintenance of the environment is a collective good.'[15] This is particularly important for the bin-diving situation. A freegan takes goods that have been disposed of in order to re-use them (or in the case of foodstuffs, put to good initial use). Otherwise, the goods would be disposed in a manner that may well constitute an environmental cost,[16] and thus bin-diving is justifiable as a means of reducing the environmental impact of a consumer culture by increasing the efficient use of goods.[17] However, this fails to fully deal with cases where goods are disposed of because they are actually dangerous. Nevertheless, freegans will not be attempting to acquire goods that have been disposed of because they are dangerous to health, on the contrary the underlying rationale of freeganism, and bin-diving specifically, is that the goods that have been thrown out are perfectly safe and usable.[18] Freegans who bin-dive for food often justify their actions because food is often disposed of for what are essentially economic or regulatory reasons, rather than specific health and safety reasons. The food may be aesthetically unappealing and thus unsellable whilst remaining perfectly edible, or it may have reached a pre-ordained 'sell-by date' whilst remaining safe to eat. The same logic would also apply to bin-diving for obsolete electronic goods, for example. Consequently, it could be said that the environmental argument *against* bin-diving fails to justify a prohibition of the practice, and it could further be argued that the environmental argument in favour of bin-diving is a valid one.[19]

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[14] J E Penner *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) pp 79-80.
[15] Ibid, 79.
[16] See generally Stuart, above n 4.
[17] See eg Hudson, 'Abandonment', above n 12, p 614.
[18] This issue, and the ones that follow in the main text, were all raised by Tristram Stuart, a freegan and author, in Skidelsky, above n 4.
[19] It should be noted at this point that there is a specific offence of interfering with waste receptacles under the Environmental Protection Act 1990, s 60. However, as the focus of this article is the assessment of whether a freegan bin-diver commits the offence of theft, the s 60 offence can be disregarded for the sake of economy and clarity. It is worth noting though that the existence of a regulatory offence of this nature does not demonstrate that the environmental justifications for bin-

Bin-diving may be objectionable on the grounds of privacy. In *Williams v Phillips*,[20] the defendant was a refuse collector who had taken for himself an object he had found in a rubbish bin, and he was convicted of larceny. This case is discussed in depth below,[21] but it is worth noting at this point as Ormerod and Williams have argued that that decision could be justified on the grounds of privacy. 'The availability of theft charges in such circumstances is important in dealing with those who rummage through the refuse of celebrities for information to sell to tabloid newspapers, and those who appropriate confidential industrial or financial information from refuse.'[22] Yet this argument may well only cover cases of bin-diving from individuals' bins, as it is highly unlikely that a supermarket or restaurant will be disposing of information in the same bins they disposes of waste foodstuffs. If there is a disposal of information, by accident or design, it is difficult to translate the aims of freegan bin-diving – the acquisition and reuse of viable goods – into an urge to acquire confidential information. So even if a freegan acquired an obsolete computer which still contained data, it is the goods' inherent "use-value" which attracts the freegan, and the data would be an irrelevance. The clear gulf between information and tangible goods means that the privacy argument cannot apply to cases of freegan bin-diving.

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diving put forward by freegans are in any way incorrect. It is, as is implied by the text accompanying this footnote, a question of balance.

[20] (1957) 41 Cr App R 5.

[21] See text following n 103.

[22] D Ormerod and D H Williams *Smith's Law of Theft* (Oxford: OUP, 9th edn, 2007) (hereafter '*Smith's Law of Theft*') [2.186] fn 312. For an interesting discussion of this act of 'garbology' (a portmanteau of archaeology and garbage), see Scanlan, above n 7, pp 142-153.

The privacy argument against taking rubbish from bins has been dealt with by the Supreme Court of the United States of America, in *California v Greenwood*.[23] That case involved an unwarranted search of Greenwood's rubbish, which had been wrapped in a plastic bag and deposited on the side of the street for collection by the relevant authority. Giving the opinion of the majority (by six to two, with one abstention) Justice White held that there was no need for a warrant to search rubbish left in such a case. He further stated that 'It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.'[24] It is intuitive – a 'gut feeling' – that even though property has been placed in receptacles with the final aim of disposal by authorities charged with such a task, such property has essentially been abandoned by the original owner. As Hudson clearly puts it:

> 'The great advantage of recognising divesting abandonment, a point clearly appreciated by the Roman jurists, is that the law more closely coincides with the ordinary person's realistic appreciation of the types of situation which bring it into play and, especially in criminal law, it avoids the need to contort the law by providing devious explanations for non-liability in situations which could more straightforwardly be called cases of divesting abandonment.'[25]

In a recent article in the Southern Daily Echo,[26] two freegans based in the South of England were interviewed. Paul, one of the freegans, provided an illuminating

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[23] (1988) 486 US 35.
[24] *California v Greenwood* 486 US 35, 40 (1988).
[25] Hudson, 'Abandonment', above n 12, p 613.
[26] Available at http://www.dailyecho.co.uk/news/features/living/3961963.Freeganism___making_use_of_things_shops_throw_away/.

evaluation of the freegan position: 'The way we see it is if you put something in the bin, you don't want it any more. You have relinquished your responsibility for it.'[27]

It may be argued, as Dixon CJ has done so, that '[i]ntuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuition.'[28] Yet it is submitted that the intuitive feeling, that goods disposed of as rubbish are abandoned, is highly persuasive. Furthermore, the effect of such feelings is of particular importance for the question at the heart of this article: do freegans commit theft? As will be shown,[29] the effect of the current law on dishonesty is such that the intuitive feelings of jury members, and of freegan bin-divers themselves, can be determining factors in assessing whether a bin-diver is dishonest and thus whether he is guilty of theft. As Hudson put it, the 'ordinary person's realistic appreciation' is extremely significant when considering the (dis)honesty a freegan accused of stealing goods from a bin.

3. FREEGANISM AND THEFT

Freeganism does not involve a transaction, such as a sale, between a freegan and the person throwing out the rubbish.[30] Therefore, questions over the ownership of the goods concerned can quickly arise. Because theft takes 'takes ownership, and its

[27] A similar approach can be seen in a comment to an article on freeganism on the Telegraph website (http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/2793564/Dumpster-diving-with-the-freegans-Why-pay-for-food.html) which states this 'what's the problem with Freeganism? If you throw something away, you give up your right to call it yours, If someone else can use it, good luck to them'. (Page screenshot saved by author, available on request.)

[28] *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, 572 (Dixon CJ), cited in D W Elliott 'Dishonesty in Theft: A dispensable concept' [1982] Crim LR 395, p 401.

[29] 3(b) Dishonesty.

[30] There cannot be a sale, which requires 'money consideration, called the price': Sale of Goods Act 1979, s 2(1). More fundamentally, there is no contract between the relevant parties.

facets, as an axiom',[31] it is arguable that a freegan may be susceptible to a conviction for theft. On the frequently asked questions page of the UK based freegan website, freegan.org.uk, the following is stated:

> 'Raiding bins from the back of supermarkets is a legally grey area. If supermarkets want to be difficult, they could charge you with trespassing, or even with stealing, in certain cases. It is ironic to hear a store manager claim "Hey, you can't steal our rubbish!" We have heard that, legally-speaking, if you take something which someone does not value then it is not stealing. It makes sense that if we throw something away, we relinquish ownership of it. It should then become automatically available for anyone to make use of. … To our knowledge no one has ever been charged in the UK with stealing rubbish. It is likely that this is because supermarkets realise that prosecuting someone for recycling waste would open up an ethical can of worms'.[32]

This statement illustrates the confusion, particularly for freegans, over the legality of bin-diving. It is the purpose of this article to shed some light on the criminal status of freegans who bin-dive.

The offence of theft,[33] defined in the Theft Act 1968, s 1(1), has five elements which have been broadly interpreted, such that '[t]he offence of theft is so wide, well

[31] A P Simester and G R Sullivan *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 3rd edn, 2007) (hereafter '*Simester and Sullivan*') 441.
[32] http://freegan.org.uk/pages/faq.php#11.
[33] See generally A T H Smith *Property Offences: the protection of property through the criminal law* (London: Sweet & Maxwell, 1994); E Griew *The Theft Acts 1968 & 1978* (London: Sweet & Maxwell, 7th edn, 1995) (hereafter '*Griew*'); *Smith's Law of Theft*. See also *Simester and Sullivan*, pp 441 et seq; D Ormerod *Smith and Hogan: Criminal Law* (Oxford: OUP, 12th edn, 2008) (hereafter '*Smith and Hogan*') chs 19-29.

established and so uncontroversial in practice that very few issues now arise on appeal.'[34] There must be property that is capable of being stolen – it is clear that bin-diving will involve property.[35] The concept of appropriation is 'astoundingly wide',[36] and there is no doubt that freegans 'appropriate' goods they take from a bin.[37] Freegans will also intend to permanently deprive, in the sense that they will eat the food they find, or use the non-organic goods until they are no longer usable. However, it is suggested that bin-diving might well be one of the 'very few issues' that might need appellate determination. Two problems arise. First, do the goods taken by the freegan, ie rubbish, belong to another? This requires analysis of the law on abandonment. Second, and perhaps more importantly, is a freegan dishonest? This article discusses these issues in depth.

At this juncture there is value in drawing the boundaries of this article. The analysis of abandonment is dealt with initially in order to demonstrate the basic rule, that abandoned goods cannot be stolen. It will be shown that abandonment depends on various factors, and that these factors effectively limit the freegan's ability to show that the goods have been abandoned. Furthermore, it will be shown that the issues of abandonment and dishonesty dovetail together in cases such as bin-diving. This moves the focus onto the issue of dishonesty, where it will be shown that a freegan has a better chance of avoiding a theft conviction by claiming he was not being dishonest.

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[34] *Smith's Law of Theft* [1.48]. This statement is clearly made in the context of whether the Fraud Act 2006 will have an impact on the law of theft, but I believe it is an accurate description of theft.
[35] It is assumed for the sake of economy that the goods taken by freegans constitute property that can be stolen under the provisions of the Theft Act 1968.
[36] *Simester and Sullivan*, p 471. See generally *Lawrence v Metropolitan Police Commissioner* [1972] AC 626, 632; *R v Morris* [1984] AC 320; *R v Gomez* [1993] AC 442, 464; *R v Hinks* [2001] 2 AC 241; R Williams 'Reining in the Concept of Appropriation in Theft' (2003) 29 Monash U L Rev 261; *Smith and Hogan*, pp 733 et seq; *Simester and Sullivan*, pp 469-483; *Smith's Law of Theft*, [2.08] et seq.
[37] Cf Scanlan, above n 7, p 13: 'Appropriation is the mother of garbage.'

(a) Theft and Abandonment[38]

The Theft Act 1968, s 5(1) states that 'property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest'. From this abandonment can be defined: V has abandoned his goods when he no longer has possession or control over them, or any proprietary right or interest in them.

The '*very purpose* of criminalising theft' is to protect the owner of goods from the harm that results from a thief interfering with property rights and interests.[39] This is a vital point. If goods are abandoned, there is no possibility of a theft conviction.[40] If the 'thief' is the only person with any interest in the goods then he could not have stolen them.[41] Instead the common-law rules of property acquisition will determine the ownership of the abandoned goods: the goods will become the property of the person who first repossesses them, ie the first person to reduce the goods to his control.[42]

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[38] For some reason it appears that there is an exponential growth in the literature on abandonment. See generally Hudson 'Is Divesting Abandonment Possible at Common Law?' and 'Abandonment', above n 12; R Hickey 'Stealing Abandoned Goods: Possessory Title in Proceedings for Theft' (2006) 26 LS 584; J Griffiths-Baker 'Divesting Abandonment: An Unnecessary Concept?' (2007) 36 CLWR 16; L J Strahilevitz 'The Right to Abandon' John M Olin Law & Economics Working Paper No 455 (February 2009, available at http://ssrn.com/abstract=1348211). There is also a useful overview in K Gray and S F Gray *Elements of Land Law* (Oxford: OUP, 5th edn, 2009) [1.2.69]-[1.2.79]. However, the issue of freeganism, and bin-diving in particular, is not dealt with in any depth in the literature.

[39] *Simester and Sullivan*, p 452. For the argument that the purpose of theft is actually to prohibit *dishonest* interferences and not interferences per se, see text accompanying n 174 – n 177.

[40] *Ellerman's Wilson Line Limited v Webster* [1952] 1 Lloyd's Rep 179; *R v White* (1912) 107 LT 528; *R v Peters* (1843) 1 Car & K 245; 174 ER 795; *R v Reed* (1842) Car & M 306; 174 ER 519.

[41] See eg *Buckley v Gross* (1863) 3 B & S 566, 122 ER 213; *Daniel v Rogers* [1918] 2 KB 228, 234; *Parker v British Airways Board* [1989] QB 1004, 1009; *Costello v Chief Constable of Derbyshire* [2001] 1 All ER 150; *R v Meredith* [1973] Crim LR 253; cf *R v Turner (No 2)* [1971] 2 All ER 441; *R v Hinks* [2001] 2 AC 241.

[42] *Armory v Delamirie* (1722) 1 Str 505; 93 ER 664. See generally, C M Rose 'Possession as the Origin of Property' (1985) 52 U Chi L Rev 73; R A Epstein 'Possession as the Root of Title' (1979) 13 Ga L Rev 1221; D R Harris 'Possession' in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford: OUP, 1961); F Pollock and R S Wright *An Essay on Possession in the Common Law* (Oxford: OUP, 1888).

So, although it has been said that 'the *actus reus* of theft [has] reduced to vanishing point',[43] there is still one aspect of the *actus* of theft which has not past the event horizon. Whether the goods actually belong to another person is essential to an assessment of the criminal nature of freeganism. As abandoned goods cannot be stolen, analysis of the abandonment concept is necessary.[44]

Allusions to the impossibility of abandonment exist,[45] and abandonment can be described as 'controverted'.[46] Nevertheless, there is a fundamental rational basis for the existence of a concept of abandonment. Penner argues that it must be part of the owner's right to determine the use of a thing for the owner to determine that the thing has no use (it may of course be of use to a freegan), otherwise one is 'saddled with a relationship to a thing that one does not want.'[47] Strahilevitz takes Penner's argument further, noting that it is related to the right to destroy,[48] and that the right to abandon is an example of State-backed guarantee along these lines: 'we will allow you to rid yourself of a resource regardless of what anyone else has to say about the matter.'[49] Furthermore, it is clear that there is there is sufficient guidance from the case-law that abandonment is possible.[50] Thus it is taken as granted that abandonment is possible.

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[43] *Smith's Law of Theft* [2.11]. See also *Griew* [2.88]. That the *actus reus* of theft has disappeared is the consequence of the decisions of the House of Lords in *R v Morris* [1984] AC 320; *R v Gomez* [1993] AC 442, 464; *R v Hinks* [2001] 2 AC 241.

[44] The necessity of analysing the common law rules concerning abandonment is clearly illustrated in Hickey, above n 38.

[45] See eg Pollock and Wright, above n 42, p 124 (acquisition of goods can 'perhaps' occur following abandonment); Griffiths-Baker, above n 38.

[46] A P Bell *The Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989) p 36 fn 1. *R v Reed* (1842) Car & M 306, 308; 174 ER 519, 520 (Coleridge J): 'a subject of which many people are ignorant.'

[47] J E Penner *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) p 79.

[48] See eg L J Strahilevitz 'The Right to Destroy' (2005) 114 Yale LJ 781.

[49] L J Strahilevitz , above n 38, p 12, text following fn 49.

[50] Hudson has persuasively shown that it is in fact decisions from the sphere of criminal law, rather than those of the civil courts, which prove that abandonment is possible in English common law: A H Hudson 'Is Divesting Abandonment Possible at Common Law?', above n 12.

The real issue is whether abandonment has actually occurred in the particular situation. In the next section the various factors that affect whether goods are abandoned will be considered.[51] These are the value of the goods, the owner's intention, the location of the goods, and the finder's intention. The final factor discussed, the finder's intention, is important as it illustrates the dovetailing relationship between the abandonment concept and the dishonesty element of the offence of theft, and more importantly, it will provide evidence for the argument that a freegan's chances of avoiding a theft conviction depends more on his (dis)honesty than whether the goods are abandoned. Following that is a close analysis of the effect of abandonment by disposal as rubbish,[52] because the disposal of goods as rubbish is probably the fact-situation closest to the freeganist bin-diving scenario.

(i) Abandonment

As Lord Goddard CJ has said, 'you cannot be charged with stealing abandoned property',[53] but goods that are merely lost can be the subject of theft.[54] Finding the boundary between abandonment and loss can be difficult not only in practice but also at a theoretical level, because various factors can determine the location of the boundary between abandonment and loss. They are the value of the goods, the owner's intention, the location of the goods, and the finder's intention, and they shall be considered in turn.

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[51] 3(a)(i) Abandonment.
[52] 3(a)(ii) Abandonment by disposal as rubbish.
[53] *Ellerman's Wilson Line Limited v Webster* [1952] 1 Lloyd's Rep 179, 180.
[54] On loss generally see eg -- 'Possession of "Lost" Goods' (1920) 20 Col L Rev 780-787; R W Aigler 'Rights of Finders' (1923) 21 Mich L Rev 664; D Reisman 'Possession and the Law of Finders' (1939) 52 Harv L Rev 1105; M J Boyle and M Hecht 'The Return of Lost Property According to Jewish & Common Law: A Comparison' (1995-1996) 12 J Law and Religion 225.

Pollock and Wright describe abandonment as 'the case of a person quitting possession without any specific intention of putting another person in his place (a case naturally exceptional with things of value)'.[55] The words in parentheses are important. The difficulties regarding abandonment are in proportion to the value of the thing in question: it is much less likely that there can be an abandonment of a valuable thing than of a less valuable thing.[56]

There is considerable strength in the "value of the goods" approach to abandonment.[57] In *R v Peters*,[58] a case concerning the abandonment of jewellery, Rolfe B was willing to hold that the likelihood of abandonment of something is relative to the value of the thing abandoned: 'If I had an apple, and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is, that I do not mean to abandon it.'[59] Over a century later, in a civil case the Court of Appeal had to consider, in *Bentinck Ltd v Cromwell Engineering Co*,[60] whether a car had been abandoned. The car had been acquired on hire-purchase, with the plaintiffs as financiers, and the defendants (the employers of the person who acquired the car) had signed an indemnity agreement. The car was damaged in a crash, and then taken to a garage, where it was left. The hirer, a Mr Faulkner, then disappeared. Lord Denning MR held that the car had been abandoned. He said the following:

> 'the abandonment, to entitle the finance company to retake possession, must be abandonment of all rights in the car so as to evince quite clearly that the

[55] Pollock and Wright, above n 42, p 44.
[56] Ibid, p 44, p 183.
[57] See also Strahilevitz, above n 38, pp 5-6. Strahilevitz takes into account the subjective value of the goods as well as the market value.
[58] (1843) 1 Car & K 245, 247; 174 ER 795.
[59] Ibid, 247; 795.
[60] [1971] 1 QB 324.

> hirer no longer has any interest in it. The judge has so found in this case … That seems to me to be a reasonable inference from the facts of this case. *Here was a car with all the costs running up. Mr. Faulkner would not want to shoulder the liability.* He disappeared altogether.'[61]

This statement is a revealing one. It could be argued that the fact that Mr Faulkner had taken it upon himself to disappear was the true basis for finding that the property was abandoned. However, in much the same way that an individual can be the owner of goods even if he does not know of their immediate existence,[62] then an individual's disappearance does not necessarily mean that all of that person's property is abandoned. From a practical perspective, the opposite position would create a nightmare with regard to goods owned by people who disappear. The italicised words clearly indicate the strongest grounds for the conclusion that the property had been abandoned: the value of the car had rapidly decreased compared to the costs of owning the car.

There is further support for this approach to understanding abandonment from the recent decision of the Saskatchewan Court of Queen's Bench in *Stewart v Gustafson*, where Klebuc J stated that 'an intention to abandon can be inferred from the very

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[61] Ibid, 328-329 (emphasis added). The other judges, Fenton Atkinson LJ, and Cairns LJ, both agreed with Lord Denning MR (at 329 of the report). The Court of Appeal decision in *Dee Conservancy Board v McConnell* [1928] 2 KB 159 appears at first sight to provide a very strict standard for the reasoning adopted by Lord Denning MR. In the earlier case Scrutton LJ (at 163-164) said that if he crashed his car onto someone's lawn thus blocking their drive, because of his negligent driving, '[i]t will be no answer to the claim by that person for the damage done to his lawn and the blocking of his drive, and for the expense incurred by him in removing the motor car which I had not removed, for me to say: "I abandon the car."' However, the *Dee Conservancy Board* case concerned the law of wreck (which as Hudson has twice noted (see above n 12) provides an idiosyncratic set of rules on abandonment), and so can be distinguished. Furthermore, the situation in *Bentinck* was substantially different as the abandoned car had not caused loss to a third party nor was it causing further loss.

[62] See below, text accompanying n 72 – n 74.

nature of a chattel.'[63] In that case, there was a quantity of lumber under dispute. The lumber was 'worthless', and Klebuc J held that the finder was 'entitled to infer that [the owner] had abandoned these chattels because of their character.'[64]

This approach has substantial significance for freegans, and in particular those freegans who engage in bin-diving for foodstuffs outside shops and restaurants. Such goods are disposed of into bins by their owners because they have no economic value – if the goods have reached their sell-by date then their economic value has essentially reduced down to zero because they cannot be sold. Bin-diving for foodstuffs is not the sole occupation of a freegan,[65] but there is no reason why non-foodstuffs cannot also be subject to this "value of the goods" approach. If the goods concerned are no longer economically viable, say through technological obsolescence, it is that basic fact which leads to their abandonment. It is further suggested that the value of the goods approach is in accordance with the intuitive feeling that people can have with regard to goods thrown away into bins – that rubbish has no value.[66]

Nevertheless, problems can arise for the bin-diver as the value of the goods approach does not cover all possible bin-diving scenarios. What if the disputed goods are not completely economically worthless? What if they are worthless, but retain some other (sentimental) value? What if the goods have been disposed of by accident?

[63] [1999] 4 WWR 696 [38].
[64] Ibid. See also, at [21]: 'As the practical or monetary value of a chattel increases, so in my view does the difficulty of inferring abandonment'. See also *Fidelity-Philadelphia Trust Co v Lehigh Valley Coal Co* 143 A 474 (Penn 1928).
[65] See above, text following n 6.
[66] See above, text following n 23.

These questions can be dealt with by considering the intention of the owner. If an owner intends to abandon the problems seem to dissipate, but if there is no such intention, and the owner merely regards the goods as lost, then the goods will not be considered abandoned. The following definition of abandonment given by Simester and Sullivan is particularly helpful here: 'Abandonment of ownership requires a giving up of the owner's physical control of an item, *accompanied by the cessation of any intention to possess that item and of any intention to exclude other persons from its possession* – ie a deliberate relinquishing of all rights over the item.'[67] This accords with the negative interpretation of the concept of 'belonging to another', noted above.[68] Generally the loss of possession will be relatively easy to demonstrate. However, proving the owner had the necessary intention to give up the rights in the goods is a far more difficult task, particularly bearing in mind that it has not been determined with any certainty whether this intention is assessed subjectively or objectively.[69]

In *R v Woodman*,[70] a company owned a site and the contents of that site. They left the site, and gave the Bird group of companies the right to remove metal from the site. The Bird group did so, but left behind some metal it deemed uneconomic to remove. The company then secured the site with fencing, and put up a notice prohibiting trespassers. The defendant then came along some two years later, entered the site, and took the remaining metal. He was convicted of theft, and appealed on the basis that the company which had run the site could not be said to be in control of the

[67] *Simester and Sullivan*, pp 457 (emphasis added). See also *Smith's Law of Theft* [2.186]: 'If [the owner] intends to exclude others from [the goods], he does not abandon it, though it may be clear that he intends to make no further use of it himself.'
[68] See above, text following n 38.
[69] K Gray and S F Gray *Elements of Land Law* (Oxford: OUP, 5th edn, 2009) [1.2.78].
[70] [1974] QB 754.

property as they had been under the impression it had all been removed by the Bird group. The Court of Appeal disagreed, holding that the control of the site sufficed to show that goods on the site belonged to the company, notwithstanding the company's ignorance of their existence.[71]

This is not particularly controversial: it is a longstanding principle of property law that a person can own property that he does not know of.[72] As Pollock states: 'though an occupier may have no conscious specific intention concerning all the chattels in his house, or on his land, it is certainly his general intention that unauthorized persons shall not meddle with them.'[73] What the *Woodman* decision demonstrates is that whilst an owner can abandon the physical possession without maintaining the intention to retain ownership, and this retained intention will remain overriding: 'The fact that it could not be shown that [the owners of the site] were conscious of the existence of this or any particular scrap iron does not destroy the general principle that control of a site by excluding others from it is prima facie control of articles on the site as well.'[74]

An owner of land can have the necessary intent to control goods on said land, so as to prevent the finding of abandonment, but the nature of the owner's control of the land is an important factor in assessing whether the land owner has the necessary intent to control goods. Two situations can be disposed of quickly. Those goods that are

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[71] Ibid, 758.
[72] See eg O W Holmes, *The Common Law* (Boston: Little Brown, 1881) pp 216 et seq; Pollock and Wright, above n 42, pp 38-39; *R v William Rowe* (1859) Bell 93; 169 ER 1180; *Elwes v Brigg Gas Co* (1886) 33 Ch D 562; *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 (on which see further A L Goodhart 'Three Cases on Possession' in *Essays in Jurisprudence and the Common Law* (Cambridge: Cambridge University Press, 1931) pp 75-90); *Hibbert v McKiernan* [1948] 2 KB 142.
[73] Pollock and Wright, above n 42, p 39.
[74] *R v Woodman* [1974] QB 754, 758 (Lord Widgery CJ). See also *Ellerman's Wilson Line Limited v Webster* [1952] 1 Lloyd's Rep 179, 180 (Lord Goddard CJ): in order for abandonment to be found it has to be shown that the owner had 'definitely abandoned it and did not intend to retrieve it'.

found on the employer's property by an employee come into the possession of the employer.[75] Furthermore, if goods are somehow attached to land, then they belong to the landowner.[76] This leaves those cases where the goods are lying unattached to the land. In such cases the landowner has two options. They can restrict public access to the land: obviously if no-one can access the land, then the goods cannot be reduced into the possession of another.[77] *Parker v British Airways Board* provides the other option for landowners: express a manifest intention to exclude others.[78] So whether or not the land on which the goods lay is open to public access will determine the strength of the claim of the occupier; if there is public access then the occupier has to display a manifest intention to possess all goods on the land.

The clarity of this approach to determining ownership masks an underlying conflict of principles. A balance must be drawn between the principle that the owner of land intends to own all the goods on that land, and the principle that property in goods is initially deemed to lie with the finder. The problem of finding an appropriate balance between these principles is illustrated by the different approaches in *R v William Rowe*,[79] and *R v William White*.[80] In *Rowe* it was held that a canal company had property in iron that had lain on the bottom of the canal for some time, on the basis of the general principle that land owners own all goods on their land. Over fifty years later, in *William White*, there were similar facts. The Court of Criminal Appeal quashed a conviction for stealing pig iron, which had been found on the side of a

[75] See eg *South Staffordshire Water Co v Sharman* [1896] 2 QB 44; *The Title of the Finder* (1899) 33 ILT 225; *Wiley v Synan* (1937) 57 CLR 200; *Grafstein v Holme* [1958] 12 DLR (2d) 727.
[76] See eg *Elwes v Brigg Gas Company* (1886) 33 ChD 562; *South Staffordshire Water Co v Sharman* [1896] 2 QB 44; *City of London Corporation v Appleyard* [1963] 2 All RE 834; *Moffatt v Kazana* [1969] 2 QB 152; *Waverley BC v Fletcher* [1996] QB 334; Gray and Gray, above n 69, [1.2.70]-[1.2.71].
[77] See eg *R v Woodman* [1974] QB 754; *Simester and Sullivan*, p 458.
[78] [1982] QB 1004. See also *Munday v Australian Capital Territory* (1998) 146 FLR 17.
[79] (1859) Bell 93; 169 ER 1180.
[80] (1912) 7 Cr App R 266.

canal. It was said that if the iron 'had been at some time in the bed of the canal it may well have been abandoned by the owner'.[81] Lord Alverstone CJ acknowledged the challenge that courts face: that fact that goods are simply lying on the ground as much demonstrates that such goods are abandoned as it demonstrates their mere loss.[82] The distinctions between the cases extend, importantly, to the grounds for appeal in either case. In *Rowe* the task for the Court was to determine whether the canal company had a sufficient interest in the goods to maintain an indictment for larceny, whereas in *William White* the focus was on whether the finder had sufficient intention to be convicted.[83] Thus in *William White* it was said that if 'the property had been abandoned, the person charged has a right to have the jury directed that if he took it really believing that it was abandoned, he is not guilty of larceny.'[84] This illustrates that the real problem for finders charged with theft is not necessarily whether the property is abandoned. Rather, the issue is whether or not the finder is honest, based on his actual belief.

The importance of a finder's belief or honesty is evident in the decisions in *Hibbert v McKiernan*,[85] and *R v Rostron*.[86] In *Hibbert* the defendant had been arrested at a golf club and was found to be in possession of eight golf balls, which he had picked up on the course. One of the balls had a distinctive mark which corresponded to a ball lost by a member of the club three days previously. The defendant was charged with theft contrary to section 2 of the Larceny Act 1916. In the Divisional Court the defendant's

[81] Ibid, 268.
[82] Ibid.
[83] Cf *Hibbert v McKiernan* [1948] 2 KB 142, 150 (Lord Goddard CJ) for a distinction on the grounds *William White* was merely a case where the conviction was quashed because the trial judge's summing up failed to explain the law of stealing by finding.
[84] (1912) 7 Cr App R 266, 268.
[85] [1948] 2 KB 142.
[86] [2003] EWCA Crim 2206. See generally R Hickey 'Stealing abandoned goods: possessory title in proceedings for theft' (2006) 26 LS 584.

conviction was upheld. Lord Goddard CJ stated that the Court 'need not be troubled with nice questions' relating to ownership.[87] Hickey rightly argues that such an approach is mistaken, and that the best interpretation of this case is the simplest one: that the members of the club had sufficient possessory interest to maintain a charge of larceny.[88] However, the facts of this case and the tenor of the judgements of Lord Goddard CJ and Humphreys J also indicate the importance of the defendant's intention, with particular reference to the absence of claim of right on the part of the defendant. In the headnote to the King's Bench Reports, it is stated that the defendant 'stated that he knew he had no right to take them'.[89] Lord Goddard CJ said that the Court was

> 'dealing with … a thief who took the balls animo furandi; not with a honest man … Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, *not under a claim of right, but with a felonious intent*.'[90]

Humphreys J provided a similar rationale:

> 'the appellant, after giving a false name and address and denying that he was in possession of any golf balls, had when found in possession of eight of them admitted that *he knew he had no right to take them.* He therefore, as the

[87] [1948] 2 KB 142, 149.
[88] Hickey, above n 86, pp 589-593. This was evidenced by the club employing a police constable to monitor the course to ward off trespassers and those who would take lost balls: [1948] 2 KB 142, 144.
[89] [1948] 2 KB 142, 143.
[90] Ibid, 149-50 (emphasis added).

> justices found, acted fraudulently, *without any claim of right* and with the intention of permanently depriving the owners of their property.'[91]

In *Rostron*, the defendants had been caught by the police, dressed in scuba diving gear, with a bag of 'very wet golf balls.'[92] They had used their diving experience to collect golf balls that had been lost into water hazards, apparently earning up to £30,000 a year from selling such balls.[93] As Hickey has noted, the Court of Appeal in *Rostron* failed to take into account certain material differences of fact between the case before them and *Hibbert* (which they took as governing the situation).[94] That analysis is not disputed. However, it is further suggested that as with *Hibbert* the defendants in *Rostron* had their convictions upheld as much by reference to their dishonesty as by reference to the proprietary status of the balls. The defendants claimed the golf balls they had were in fact taken from a golf course in Lancashire (rather than the one they were at, in Leicester),[95] clearly demonstrating an evasive attitude on the defendants' part, if not outright dishonesty. Mantell LJ (giving the sole judgement of the Court) considered the issue of honesty. He stated it was sufficient (indeed, 'more favourable than it needed to be') to tell the jury (as the trial judge had)

> 'that the prosecution had to prove that the defendant whose case was being considered knew that he was not entitled to go on to the golf course and remove golf balls. If that was established, then the necessary element of dishonesty had been proved, and, of course, if that were the case it would matter not what other people might think, because he could not in such

[91] Ibid, 151 (emphasis added).
[92] [2003] EWCA Crim 2206 [1] (Mantell LJ).
[93] Noted in *Smith's Law of Theft* [2.206].
[94] Hickey, above n 86, pp 598-600.
[95] [2003] EWCA Crim 2206 [3].

circumstances have had an honest belief that he was entitled to do what he did.'[96]

Hooper and Ormeord have noted that the fact the defendant in *Rostron* had 'knowledge that he had no "right" (and no permission) to act in this way merely meant he had no possible defence under' sections 2(1)(a) and 2(1)(b) [ie those relating to a claim of right].' Indeed, the fact the defendant 'also argued that he saw no harm in fishing for the balls, given that nobody else seemed interested in recovering them, and this surely entitled him to a *Ghosh* direction, especially since his case appears to have elicited considerable public sympathy at the time.'[97] In commenting on *Hibbert v McKiernan*, Griew noted that 'Such a scavenger no doubt steals under the present law. But the club's "control" of the balls within the meaning of section 5(1) can hardly depend on the fact of trespass.'[98] Yet for Mantell LJ the fact of trespass appears to have been conclusive of the issue. The fact of trespass (in addition to the misleading statements by the defendants at the time of their arrest) meant that the defendants' belief about the abandoned nature of the golf balls was not an honest one. Thus it becomes clear that in assessing whether theft has occurred, the issue of abandonment can go as much to the intention element of the offence as it does to any other. This is of particular importance for freegan bin-divers, as it begins to illustrate the effect of their *belief* about the proprietary status of the goods they find in bins. This issue of dishonesty is analysed further below.[99]

[96] Ibid, [19].
[97] Lord Justice Hooper and D Ormerod (Gen Eds) *Blackstone's Criminal Practice 2008* (Oxford: OUP, 18th edn, 2007) [B4.37].
[98] *Griew* [2.29].
[99] 3(b) Dishonesty.

(ii) Abandonment by disposal as rubbish

In *R v Edwards and Stacey*,[100] three pigs had been bitten by a mad dog and in order to prevent the pork entering the food chain the owner of the pigs ordered two of his employees to bury the pigs. However, they later dug up the carcasses and disposed of them for their own profit. It was held that the pigs had not been abandoned, and so they were convicted of larceny. The rationale behind this conclusion appears to have two elements. First, the owner demonstrated an intention to retain control over the goods, and second, the public policy ground of preventing risks to public health.[101] These aspects of the case separate it from freegan bin-diving, as owners of rubbish generally do not demonstrate an intention to retain control over the goods, and the risks to public health from bin-diving are minimal.[102]

In *Williams v Phillips*,[103] the defendants were refuse-collectors working for the local authority. They appropriated property that had been placed in bins as rubbish for collection by the authority. Their conviction for larceny was upheld. According to the Court of Appeal, the owners had put the rubbish in the bins with the specific intention of transferring the property in the rubbish to the authority (presumably upon collection by the authority). That was the only allowable interference with the rubbish, thus the goods were not abandoned. Lord Goddard CJ stated that putting rubbish out for collection was not abandonment. His speech is worth referring to in full:

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[100] (1877) 13 Cox CC 384; 466 LT 30; 41 JP 212.
[101] See eg A H Hudson, 'Is Divesting Abandonment Possible at Common Law?' (1984) 100 LQR 110, 115 fn 42, noted above n 12.
[102] See above, text accompanying n 10.
[103] (1957) 41 Cr App R 5.

> ‘If I put refuse in my dustbin outside my house, I am not abandoning it in the sense that I am leaving it for anybody to take it away. I am putting it out so that it may be collected and taken away by the local authority, and until it has been taken away by the local authority it is my property. It is my property and I can take it back and prevent anybody else from taking it away. It is simply put there for the Corporation or the local authority, as the case may be, to come and clear it away. Once the Corporation come and clear it away, it seems to me that because I intended it to pass from myself to them, it becomes their property. Therefore, there is no ground for saying that this is abandoned property. As long as the property remains on the owner’s premises, it cannot be abandoned property. It is a wholly untenable proposition to say that refuse which a householder puts out to be taken away is abandoned. Very likely he does not want it himself and that is why he puts it in the dustbin. He puts it in the dustbin, not so that anybody can come along and take it, but so that the Corporation can come along and take it.’[104]

Thus Reed and Fitzpatrick state that

> ‘where householders throw rubbish into a dustbin for collection by the corporation, they have in a sense abandoned the property; but not for the purposes of theft. This does not give the public the right to rummage through the bin to see if there is anything worth taking. Thus even in a situation where the householder is expected to place his dustbin in the street outside his house

[104] Ibid, 8.

> for collection, if X, a passerby, or even the dustman, takes anything from the bin there is a prima facie case of theft from the householder.'[105]

Hudson provides an even broader interpretation, arguing that when someone puts rubbish in a bin the rubbish 'is intended for the local authority and the householder can take it back and prevent anyone else taking it away.'[106] This certainly it locks in the notion that abandonment is not something to be 'lightly inferred'.[107] Furthermore, it is arguable that the functional similarity between freegan bin-diving and the actions of the defendant in *Williams v Phillips* is so great (greater than the similarity with *Edwards and Stacey*) that by reason of analogy freegans must be guilty of theft. It is suggested though that such an argument is mistaken.

As was noted at the outset of this article,[108] the arguments on environmental or privacy grounds fail to properly cover freegan bin-diving. Thus, like with *Edwards and Stacey*, *Williams v Phillips* does not provide satisfactory grounds for convicting freegan bin-divers of theft if the decision is predicated on privacy concerns. Perhaps more importantly, in both cases the decisions appeared to be predicated on the particular status of the defendants as employees. In *Edwards and Stacey* they were specifically ordered by their employer *not* to dig up the pig carcass. In *Williams v Phillips* the defendants were contracted (via an agreement between the union of which they were members and the employing authority) to give up any items found in the rubbish to their employer to be divided equally between the employer and employees.

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[105] A Reed and B Fitzpatrick *Criminal Law* (London: Sweet & Maxwell, 3rd edn, 2006) 444. In *Williams v Phillips*, although the householder had not abandoned property by throwing out the rubbish, the basis of the conviction was that there was a theft against the employer (ie the local authority that collected the rubbish) and not against the householder.
[106] A H Hudson 'Is Divesting Abandonment Possible at Common Law?' (1984) 100 LQR 110, 115.
[107] *Smith and Hogan*, p 778.
[108] See above, text following n 12.

They were also informed that failure to follow this condition would lead to criminal prosecution. So in doing the particular acts the defendants in both cases were deliberately and knowingly going outside their authority and breaching expressly-stated conditions set out by their employers.[109] However, freeganism appears to rest on a different set of circumstances. A freegan will be obtaining property that he believes is abandoned; he has not been specifically told that he cannot take the property as his own. It is arguable that neither case provides conclusive guidance as to the criminal liability of a freegan.

It could thus be suggested that if someone wishes to avoid their rubbish being seen as abandoned and then taken by a freegan, they should simply imposes clear notices (perhaps following Lord Denning's 'red hand' test[110]) that the goods in the bins is not in fact abandoned and that no one (apart from the collection agency) has a right to the goods. In such cases there will be a sufficiently manifested intention to exclude others as to show that there is no abandonment. Yet a freegan may still have difficulty in proving the goods were abandoned in the absence of such labelling. Although there are strong arguments in favour of allowing bin-diving, and the arguments in favour criminalising of bin-diving are based on factors that are either not present or are irrelevant to the case of a freegan bin-diver, the case law on abandonment is too opaque to allow for a clear assessment of the criminal status of a freegan bin-diver. If a freegan takes goods out of bin that is found at the back of a building, regardless of whether the building contains a supermarket, restaurant, private house or offices, it is possible that the goods have not been abandoned. The

[109] This links in to the principle that property found by an employee belongs to the employer. See above, n 75 and accompanying text.
[110] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 170: 'In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling.'

decisions in *Edwards and Stacey*, *Williams v Phillips*, *Woodman*, and *Parker v British Airways Board*, *Hibbert v McKiernan* and *Rostron* all seem to suggest (for various reasons) that a bin-diver would be liable for theft in such a situation. However, the fact the goods have been thrown out as rubbish may bring in the powerful argument about value, illustrated in cases such as *Peters*, *Bentinck Ltd v Cromwell Engineering Co* and *Stewart v Gustafson*. Most importantly though, the conflict between the decisions in *Rowe* and *William White*, seen in the light of *Hibbert v McKiernan* and *Rostron*, indicates that the fundamental issue is the freegan's intention; his honest belief. It seems that the best approach for a freegan bin-diver is to cast doubt on his dishonesty, rather than attempt the conceptually and practically difficult task of proving the goods were actually abandoned.

(b) Dishonesty[111]

Although the concept of dishonesty has a major role in determining whether theft has been committed,[112] it is 'peculiarly difficult to define'.[113] The Theft Act 1968 only provides examples of what is *not* dishonest. Section 2 of that Act provides that an act is not dishonest if there is (1) appropriation in the belief that you have in law the right to deprive the owner of the goods, (2) appropriation in the belief that the owner would consent if he knew of the appropriation and the surrounding circumstances, and (3)

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[111] See eg *Smith's Law of Theft* [2.269] et seq; *Simester and Sullivan*, p 489 et seq; *Smith and Hogan*, p 779 et seq; A Halpin *Definition in the Criminal Law* (Oxford: Hart Publishing, 2004) pp 149 et seq; Law Commission 'Fraud' (Law Com No 276, 2002) part V: The Role of Dishonesty in the Criminal Law; *Griew* [2.120]-[2.142]; E Griew 'Dishonesty: The Objections to Feely and Ghosh' [1985] Crim LR 341; D W Elliott 'Dishonesty in Theft: A dispensable concept' [1982] Crim LR 395.

[112] Law Commission 'Legislating the Criminal Code: Fraud and Deception' (Law Com No 155, 1999) part III, [3.24]: it is the 'principal determinant of criminality'. See also Criminal Law Revisions Committee, *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966) [33]. There is considerable strength in the argument that, following *R v Hinks* [2001] 2 AC 241, theft has become to a large degree a 'thought crime': A T H Smith 'Theft or Sharp Practice: Who Cares Now?' [2001] CLJ 21, 22; see also E Melissaris 'The Concept of Appropriation and The Offence of Theft' (2007)70 MLR 581.

[113] A Reed and B Fitzpatrick *Criminal Law* (London: Sweet & Maxwell, 3rd edn, 2006) p 451.

appropriation in the belief that the owner cannot be discovered by reasonable steps. Beyond this the courts have provided some help, primarily the provision of the two part *Ghosh* test that provides for both a subjective and an objective assessment of the defendant's state of mind.

Recognition that a theft conviction will turn on the alleged thief's (dis)honesty raises this deceptively simple question: are freegans dishonest? This question assumes greater significance in the light of the difficulties faced by a freegan who claims merely that the goods were abandoned. So although 'the immunity accorded to the pure finder appears to rest upon the ground of reasonable and probable cause of belief',[114] particular problems arise from the awkward fact that whilst a freegan's *conduct* may provide inferences about his level of honesty, it is the freegan's *state of mind* upon which his level of honesty must rest.[115] Furthermore this assessment of the freegan's state of mind is affected by the operation of dishonesty as a 'concept describing the wrong done (requiring a moral evaluation from the jury)'.[116] Nevertheless, it is suggested that a careful analysis of freeganism and the jurisprudence on dishonesty indicates that freegans are not dishonest.

The following discussion will consider the specific situation of a freegan bin-diver. There is an assessment of whether a freegan can protect himself by setting up a claim of right, which requires a discussion of the potential effects of a moral claim as opposed to a legal claim of right.[117] Next there is consideration of whether a freegan

[114] F Pollock and R S Wright *An Essay on Possession in the Common Law* (Oxford: OUP) p 183.
[115] *Smith's Law of Theft* [2.271].
[116] Ibid, [2.273].
[117] 3(b)(i) Belief in the right to deprive.

bin-diver can argue that he had an honest belief that he had the owner's consent.[118] This element of the discussion will be shown to be strongly correlated to the presence of a belief in whether the goods have been abandoned. There will be a brief analysis of the potential of a claim that the owner of goods cannot be discovered, which will necessarily be focused on freegan bin-diving of public bins.[119] The final aspect of the discussion will consider the implications of the *Ghosh* test for dishonesty,[120] where it will be shown that the *Ghosh* test provides a valuable method by which a freegan can avoid a theft conviction. It will be shown that in the context of a freegan bin-diver, many of the doubts about the *Ghosh* test famously raised by Edward Griew are ultimately not objectionable, and that the strongest conclusion is that freegan bin-divers are neither objectively nor subjectively dishonest.

(i) Belief in the right to deprive

If a defendant in a theft case has appropriated the goods 'in the belief that he has in law the right to deprive the other of it', it is not a dishonest appropriation.[121] As stated, the right must be a legal right,[122] not just a moral one.[123] The need for a belief in a legal right appears to derive from the general principle that taking property without consent is unjustifiable even if done to prevent starvation.[124] The belief in a legal right does not have to be reasonable or even exist though;[125] an honest belief

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[118] 3(b)(ii) Belief that the owner consents.
[119] 3(b)(iii) Belief that the owner cannot be found using reasonable means.
[120] 3(b)(iv) The *Ghosh* test.
[121] Theft Act 1968, s 2(1)(a).
[122] Any right in law (and presumably in equity also) will do, not just property rights: *Wood* [1999] Crim L R 564.
[123] *Harris v Harrison* [1963] Crim LR 497.
[124] See eg M Hale *History of the Pleas of the Crown* (London, 1800) vol I, p 54; *Southwark London Borough Council v Williams* [1971] Ch 734, 744 (Lord Denning MR).
[125] See eg *Bernhard* [1938] 2 KB 264; *Terry* [2001] EWCA Crim 2979. Cf *Gott v Measures* [1948] 1 KB 234. See *Griew* [2.125]: if the defendant has an honest belief in the right to deprive there is no

will suffice (and this is so for the other two "belief" defences discussed below), although it must be accepted that the reasonableness of the belief could impact upon the honesty of the belief.[126]

It is suggested that a freegan could argue (for example) that the United Kingdom's international treaty obligations concerning environmental protection give them the right to reduce the impact of waste. In September 2008 a number of Greenpeace protestors were charged with causing criminal damage by painting on a chimney stack in protest at the Prime Minister's alleged failure to deal with environmental issues.[127] In that case the issue was whether the protestors had a 'lawful excuse' as per the Criminal Damage Act 1971, s 1(1), rather than whether they were dishonest. Nevertheless, there appears to be a functional similarity between the two defences, and the acquittal of the Greenpeace protestors raises the possibility that a jury may be swayed by a freegan claiming that his bin-diving activities were in fact based on a legal right to prevent environmental harm.

Other claims of a right to deprive the owner of the goods may arise, yet they may just be moral rights. Will such claims have any effect? For one, a freegan may claim that he has a right to take the goods on general environmental grounds (as opposed to the specific legal obligations as noted above). The environmentalist rationale for freeganism would appear to bear this out as a strong possibility.[128] Alternatively, as Hudson has argued, where 'an owner who has for all practical purposes abandoned his property [and] then [changes] his mind and [seeks] to recover it "when he will", [there

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dishonesty, even if the claim of right is unknown to the law (citing G Williams *Criminal Law: The General Part* (London: Stevens & Son, 2nd edn, 1961) pp 321-325).

[126] *R v Wood* [2002] EWCA Crim 832 [25], following *R v Small* [1987] Crim LR 777.

[127] See http://news.bbc.co.uk/1/hi/england/kent/7608054.stm.

[128] See above, text following n 12.

is an infliction of] injustice on occupants who might have had very good reason to suppose that the property was abandoned and good moral right to treat it as theirs.'[129] Clearly the strict statutory restriction of such claims to legal rights would appear to make either claim irrelevant. Yet common sense strongly suggests that a freegan making a moral claim should not automatically be deemed dishonest. Arguments as to belief in moral rights may well become important if the freegan bin-diver claims that he honestly believed that what he was doing was not dishonest *because of* those beliefs in moral rights. Such a dispute would be solved by recourse to the *Ghosh* test for dishonesty, discussed below.[130] Thus it is arguable that a belief in a mere moral right is 'not *necessarily*' excluded,[131] because the use of juries to determine dishonesty. Jurors may well be swayed by the effect of such honest beliefs, and thus belief in a moral right may achieve the same status as a belief in a legal right, but via a different test for (dis)honesty.[132]

(ii) Belief that the owner consents

If a freegan were to take goods 'in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it', then he would not be dishonest.[133] The aim of this provision is to preclude 'silly prosecutions', such as where someone takes their flatmate's milk for a cup of tea.[134] It seems obvious that someone who throws out rubbish will not care about whether it is picked up by

[129] A H Hudson 'Abandonment' in N Palmer and E MacKendrick (eds) *Interests in Goods* (London: LLP, 2nd edn, 1998) pp 613-614.
[130] 3(b)(iv) The *Ghosh* test.
[131] *Smith's Law of Theft* [2.277].
[132] Ibid, [2.276]-[2.277].
[133] Theft Act 1968, s 2(1)(b).
[134] *Smith's Law of Theft* [2.280].

someone else.[135] A freegan bin-diver may believe that since the original owner has disposed of the goods as rubbish, then that owner would consent to anyone (thus including the freegan) taking the goods away. Ease of access to the bin, and the ease of entry into the bin, will be determining factors in the assessment of whether the belief is a genuine one, in the sense that a freegan who sees a bin with a big red cross and a sign saying 'keep out' will have difficulty in developing the necessary genuine belief in consent. What this illustrates is a connection between the tests for ownership and dishonesty in the offence of theft: those factors which determine whether or not goods are considered abandoned will also help determine the presence of dishonesty.

An interesting problem may arise if a freegan claims the benefit of this defence on the grounds that the owner of the goods in the bin (say, a supermarket) stated that whilst it would consent to its waste goods being taken by a freegan, it would not consent to a freegan taking them from the bin itself. This claim by the owner may well be justifiable as an expression of a risk-management policy with regard to liability should a freegan get injured in the course of the bin-diving. This situation may present an insurmountable challenge for a freegan, as his practical experience as a bin-diver will no doubt have demonstrated to him at least the potential for injury, and thus a jury may conclude that this amount of knowledge would suffice to show that his belief that the owner would consent was not an honest belief.

[135] See above, text accompanying n 23. The owner may have concerns if the rubbish contained confidential information, though as noted earlier (see above, text accompanying n 20) this issue will not arise in the case of a freegan bin-diver.

(iii) Belief that the owner cannot be found using reasonable means

If a freegan 'appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps' then he will be not be dishonest.[136] An honest belief will suffice: it does not need to be reasonable.[137] This defence will, prima facie, be of little use for a freegan who obtains goods by bin-diving. In such cases, whether the bin belongs to an individual or a commercial organisation, it seems implausible that unreasonable means would be required to find the owner of property placed in such bins. An individual's bin, with a house number on it for example, or a supermarket's bin, located on the premises, will clearly signal the identity of the person who put the goods in the bin. Really in such cases a freegan claiming that he is not dishonest will be best placed to found his argument on a different aspect of the law on dishonesty.

However, when the situation involves 'unidentifiable' goods a freegan may well be able to effectively bring up this defence. This may well be the case with regard to rubbish found in a public bin (or rubbish found lying on land). To find out who the 'owner' is in such cases may well involve unreasonable means. As Ormerod and Williams have noted, the application and interpretation of this provision depends heavily on the particular circumstances of the case.[138] Certainly, in the old case of *R v Thurborn*, where the issue concerned the reasonableness of the finder's belief that the owner of a bank note could be found, 'evidence of [the finder's] previous

[136] Theft Act 1968, s 2(1)(c).
[137] *Smith's Law of Theft* [2.284].
[138] *Smith's Law of Theft* [2.282], [2.284].

acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it' would be in point.[139] Although the modern law imposes merely an honesty test on the belief, such factors would affect whether the finding of the owner would require unreasonable means. The presence of identifying marks would suggest that identification of the owner could be reasonably achieved. However, it could be argued that the idea of the finders 'previous acquaintance with the ownership' of the goods can be interpreted as allowing a freegan to argue that because he had an honest belief that the goods were abandoned, he also honestly believed that identification of the owner would be unreasonable. This argument could rest on the "value of the goods" approach to determining whether goods are abandoned,[140] as the reasonableness of means used to find the owner will be inversely related to the value of the goods. Thus a freegan could argue that the presence of the goods in the bin demonstrates their low value, and the difference between the low value of the goods and the high cost of finding an owner would make such action unreasonable.

(iv) The *Ghosh* test

In *Feely*,[141] the Court of Appeal held that if the accused acted in a way which offended the sensibilities of the ordinary decent person,[142] he would be dishonest. This test was expanded by the Court of Appeal in *Ghosh*:[143] in addition to the *Feely* test, if the accused honestly believed that his actions were not dishonest according to

[139] (1848) 1 Den 387, 396; 169 ER 293, 297 (Parke B).
[140] See above, text following n 55.
[141] [1973] QB 530.
[142] In doing so there was a move away from the notion that dishonesty was a legal concept (see eg *Potger* (1970) 55 Cr App R 42; *Halstead v Patel* [1972] 1 WLR 661). The subjective nature of the *Feely* test, whereby the defendant's own judgement was the critical one, was described as an 'alarming proposition': D W Elliott 'Dishonesty in Theft: A dispensable concept' [1982] Crim LR 395, 397.
[143] [1982] QB 1053.

the standards of ordinary decent people, then there was no dishonesty. The full test can be set out like this:[144] (1) 'was what was done dishonest according to the ordinary standards of reasonable and honest people?' (2) 'Must the defendant have realised that what he was doing was dishonest according to those standards?' This test should only be put to the jury if the defendant himself raises the possibility that he did not consider his conduct to be dishonest according to the ordinary standards of reasonable and honest people.[145]

Assessing whether something is dishonest according to the ordinary standards of reasonable and honesty people will obviously depend upon the facts of the case. It may be argued that a freegan who goes bin-diving in the dead of night is by his behaviour being dishonest. A lay person (and, indeed, a lawyer) may well ask with all reasonableness, 'If he was honest, why does he not go and bin-dive in the middle of the day?' Certainly, if someone takes goods in a blatant and open manner in the daytime, as in *R v Wood*, then there is strong evidence of an absence of dishonesty.[146] The advice for freegans would seem to be that they should be open about their behaviour.[147] Yet such is the nature of British seasons, there may well be total

[144] This is the formulation used by Griew: E Griew 'Dishonesty: The Objections to Feely and Ghosh' [1985] Crim LR 341, 341-342. It derives from the following passage of Lord Lane CJ's judgement in *R v Ghosh* [1982] QB 1053, 1064: 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.' See also *Simester and Sullivan* p 493; *Smith and Hogan* p 783; *Smith's Law of Theft* [2.295]; A Halpin *Definition in the Criminal Law* (Oxford: Hart Publishing 2004) ch 4.

[145] *R v Roberts* (1985) 84 Cr App R 177; *R v Price* (1989) 90 Cr App R 409. See also *Smith's Law of Theft* [2.279] suggesting that the statutory provisions on dishonesty should be preferred to the *Ghosh* test if claims of right are made (see n 131).

[146] [2002] EWCA Crim 832.

[147] See also P Gerstenblith 'The Adverse Possession of Personal Property' (1988-1989) 37 Buff L Rev 119, 128, noting that with regard to the law concerning the acquisition of good title to personal property by adverse possession, there is some considerable importance attached to adverse possession

darkness at three o'clock in the afternoon (in mid-winter), or it may not get dark until gone eleven at night (in mid-summer). Thus it can be seen that bin-diving may well occur in the dark, but for reasons that have little to do with dishonesty. The failure to retain a distinction between offences that occur at different points in the day in the Theft Act 1968, when there was such a distinction in the previous law,[148] strongly suggests that such facts should not impact upon the dishonesty test.[149] Yet it does appear that the timing of the taking can have a significant impact on determining the level of honesty. A clear comparison can be made between *Rostron*,[150] where the defendants were collecting golf balls in the middle of the night and were found to have been dishonest, and *Wood*, which involved a taking in the middle of the day.

It appears that the purpose of testing an individual's dishonesty against the ordinary standards of reasonable and honest people is to provide a solution to a problem of fair labelling – should there be criminalisation of people who commit acts that are technically thefts, but the nature of the act is such that ordinary people would not consider them to be a "thief"? In *Feely* Lawton LJ stated that 'a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968.'[151] His Lordship followed with this: 'We find it impossible to accept that a conviction for stealing, whether it be called larceny or theft, can reveal no moral obloquy. A man so convicted would have difficulty in persuading his friends and neighbours that his reputation had not been gravely damaged. He would be bound to be lowered in the estimation of right thinking

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in an 'open and notorious' manner (citing *Burroughs Adding Machine Co v Bivens-Corhn Co* (1941) 189 Okla 616, 617; 119 P2d 58, 59).

[148] There used to be separate offence for burglary depending on the timing of the act: see eg *Smith's Law of Theft* [8.01].

[149] It may well go to sentencing though: *R v Saw et al* [2009] EWCA Crim 1 [22].

[150] [2003] EWCA Crim 2206.

[151] [1973] QB 530, 539.

people.'[152] This approach thus gives rise to the following question: is there a sufficient moral obloquy about freeganism to justify a theft conviction?[153]

In his famous denunciation of the dishonesty test formulated following *Feely* and *Ghosh*,[154] Griew objected to the potential increase in the volume, the difficulty and the length of jury trials.[155] However, if the issue that is to be determined is whether a defendant is dishonest, then there seems to be nothing wrong with requiring jury members to make that determination. This is particularly so with regard to freegans. If it is accepted that there are at least strong doubts over the value of pursuing a theft conviction for behaviour, such as freeganism, that may attract minimal, if any, 'moral obloquy',[156] then there cannot be serious problems with letting a jury determine whether an individual's conduct indicates, to use Griew's own words, 'a temperamental flaw but not a moral one'.[157] The real problem is whether the jury will see a temperamental flaw, such as the willingness to obtain food for consumption from bins, and believe they have evidence of 'moral obloquy' because of their level of disgust. The possibility of this occurring can be presumed on the basis of comments to an article on freeganism on the BBC News website. The following are three different comments made which clearly indicate a negative view of freeganism which is founded primarily on the notions of disgust:

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[152] Ibid, 541.
[153] See also S P Green *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford: OUP 2006) p 1: 'penal sanctions ... should be reserved for conduct that is truly and unambiguously blameworthy.'
[154] Griew, above n 144. The *Ghosh* test does not appear to have many friends, with Halpin going so far as to claim it is 'unworkable': Halpin, above n 144, p 150. See also K Campbell 'The Test of Dishonesty in *R v Ghosh*' (1984) 43 CLJ 349, demonstrating the faulty reasoning applied in *Ghosh*.
[155] Griew, above n 144, pp 343-344.
[156] Cf *Feely* [1973] QB 530, 541 (Lawton LJ).
[157] Griew, above n 144, p 343.

> ‘Freegans are such hypocrits. You can afford to buy the food yet choose not to, so it's thrown out, then you scrub through a bin for it. You may as well be stealing it from the shop. You’re causing the waste by not buying the food in the first place. Sounds like a poor excuse for being tight fisted to me, not a protest against supermarkets.’
>
> ‘Scroungers. Why don’t they go in to the store and look for the reduced items that will end up in the bin and BUY IT! Strewth everybody wants something for nothing. I bet if this lot hurt themselves whilst getting the food they'll sue the supermarkets!’
>
> ‘You can justify it all you like. You can sugar coat it. But it’s EATING FROM A BIN.’[158]

The level of disgust one might feel about eating food from a bin is clearly linked into the conceptualisation of rubbish and waste as a bad thing. In her excellent analysis of the American approach to rubbish Strasser noted the turn from viewing scavengers in 19th century America in a sympathetic light to seeing them as being closely connected to criminal activity.[159] Likewise the development of various social, charitable and governmental provisions in 19th century America was accompanied by commentators reporting their disgust at children picking over rubbish for salvageable goods,[160] with particular emphasis on the link between poverty and squalor as opposed to the developing sanitation and hygiene regime.[161] Thus began the

[158] http://news.bbc.co.uk/1/hi/magazine/6933744.stm.
[159] S Strasser *Waste and Want: A Social History of Trash* (New York: Henry Holt 2000) pp 114-117.
[160] Ibid, pp 111-159, and especially pp 138-139.
[161] Ibid, pp 161-181.

depersonalisation and the industrialisation of waste disposal, and arguably the crystallisation of the link between disgust and rubbish.[162] Yet the whole point of freegan bin-diving for food is that this notion of disgust is essentially a societal creation resting on the goods' status as waste, rather than their actual condition: 'At first the new scavenger is filled with disgust and self-loathing … That stage passes with experience ... He beings to understand: People throw away perfectly good stuff, a lot of perfectly good stuff.'[163] It can only be supposed that ingrained notions of disgust will inevitably feed through to the conceptually different notion of dishonesty.

The possibility of inconsistent decisions,[164] accompanying the obvious fiction of community norms of honesty,[165] means a freegan will not be able to determine with any certainty whether a jury will find his actions honest. Certainly there is the risk that the jury will consist of people for whom there is little distinction between disgust and dishonesty. Nevertheless, the 'great assumption' that there is a singular concept of dishonesty,[166] may not provide a fatal blow to a freegan's chances of success. Because 'we can no longer confidently assert that every juror will have access to a uniform body of standards when interpreting dishonesty',[167] the possibility that jury members will consider bin-diving honest must also be accepted. Indeed, there is a growing body of empirical evidence which suggests that jury members may well consider bin-diving to be an act which does not have sufficient moral obloquy to be

[162] See generally J Scanlan *On Garbage* (London: Reaktion Books 2005).
[163] L Eighner *Travels with Lizbeth* (New York: St Martin's 1993) pp 118-119 (a memoir of American homelessness, describing bin-diving), cited in Strasser, above n 159, p 3.
[164] Griew, above n 144, p 344. See also D W Elliott 'Dishonesty in Theft: A dispensable concept' [1982] Crim LR 395, 406; S Parsons 'Dishonest Appropriation after *Gomez* and *Hinks*' (2004) 68 J Crim L 520, 528-529.
[165] Griew, above n 144, p 344. It appears that this essentially the same objection as one Griew later raises in the same article (p 346); the problem of the ordinary *dishonest* jury.
[166] A Halpin 'The Test for Dishonesty' [1996] Crim LR 283, 286.
[167] Halpin, above n 144, p 155.

considered a criminal act. In a recent paper by Green and Kugler,[168] the views of first year law students at Rutgers School of Law (in Newark, New Jersey, USA) about the blameworthiness of different types of theftous conduct were assessed. The students seemed to draw substantial differences between different types of theftous conduct. Unfortunately the students were not asked about freegan bin-diving, but the evidence demonstrated that they were willing to grade crimes according to their seriousness, with armed robbery the most serious, embezzlement n the middle, and failing to give up lost or mis-delivered goods as the least serious. This does suggest that a jury faced with a bin-diving situation case might not consider such behaviour dishonest.

In an ongoing online experiment, Fafinski and Finch are assessing people's responses to certain scenarios in order to provide evidence as to the provenance of a community notion of dishonesty.[169] Preliminary results from the experiment indicate that honesty is a diverse standard, with evidence of different conceptions of dishonesty depending on age and gender. Furthermore, 'there are a number of scenarios where the respondent says, "This person is being dishonest, but I would not convict them". Presumably they are refusing to convict because they don't think what the person has done is "that bad".'[170] It is suggested that if such views do prevail, then freeganism is just the sort of practice which would attract opprobrium, but only to the maximum extent of being considered "dishonest" without having sufficient moral obloquy to be considered criminal.

[168] S P Green and M B Kugler 'Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation' (January 6, 2009). Available at SSRN: http://ssrn.com/abstract=1323833.
[169] See http://www.honestylab.com/index.php?id=1.
[170] S Fafinski, interview in G Rubin 'Online 'confessions' of dishonesty reveal what sways a jury's verdict' *The Observer* (London 19 July 2009) News 17.

If a freegan fails to convince a jury of their own subjective honesty then the objective element of the *Ghosh* test becomes relevant, and this gives rise to a problem over the potential validity (or the moral obloquy) of a "Robin Hood" defence. In *Ghosh*, Lord Lane CJ stated that it would be dishonest for a defendant to act in a way he knows ordinary persons would consider dishonest, even if he honestly believes he is acting correctly (the two examples his Lordship gave were Robin Hood and an anti-vivisectionist), 'because they know that ordinary people would consider these actions to be dishonest.'[171] However, as Elliott noted, this would be ignoring the fact that it would still be a jury question; and that a jury may well decide in favour of Robin Hood.[172] This was also one of Griew's objections to *Ghosh*: 'Robin Hood must be a thief even if he thinks the whole of the right-thinking world is on his side.'[173] Yet is this actually the case?

If theft is rationalised by reference to a broad conception of the harm principle operating as a mechanism for protecting a property right regime,[174] then the odious nature of allowing a Robin Hood defence becomes clear. So as Steel has noted, '[a]lthough defendants might raise a lack of dishonesty to avoid conviction, the general community interest in maintaining the property regime means it is likely that such claims are viewed sceptically by juries'.[175] On the other hand, there is considerable strength in Steel's thesis that such an approach overstates the importance of regime protection, and understates the necessity of some sort of felonious thought

[171] [1982] QB 1053, 1064.
[172] D W Elliott 'Dishonesty in Theft: A dispensable concept' [1982] Crim LR 395, 398.
[173] Griew, above n 144, p 353.
[174] See eg A P Simester and G R Sullivan ''On the Nature and Rationale of Property Offences' in R A Duff and S P Green (eds) *Defining Crimes: Essays on the Special Part of Criminal Law* (Oxford: OUP 2005) ch 8.
[175] A Steel 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 University of New South Wales Law Journal 712, 734.

on the part of the thief, ie dishonesty.[176] On this foundation a Robin Hood defence becomes intelligible, if not actually legitimate. The same logic would also hold with freeganism at a basic level, and it is at least arguable that there is even greater validity in defining freeganism as a non-theftous action because in contradistinction to 'Robin Hood' cases, freegans are taking goods that have been disposed of as rubbish (and not gold coins and crowns).[177]

(c) The interaction between abandonment and dishonesty

In dealing with cases involving (potentially) abandoned goods, the courts have generally failed to deal with the interconnections between abandonment and dishonesty (either in terms of the claim of right defences or the effect of the two-stage test for dishonesty developed in *Feely* and *Ghosh*). At best this failure creates a considerable area of uncertainty in this part of the law. At worst, it demonstrates an unwelcome disconnection of the *actus reus* of theft ie the taking of goods *belonging to another*, from the *mens rea* issue of honesty. It is an important aspect of the dishonesty test that the alleged thief has his *state of mind* tested; this can be inferred from his conduct but conduct alone, without reference to the state of mind, cannot prove dishonesty.[178] So the fact that a freegan has taken goods out of a bin should not, of itself, prove dishonesty. Further to this it is arguable that if a freegan takes

[176] Ibid, especially p 732: 'It is the element of dishonesty that separates criminal from tortious interferences with property; theft from conversion.'
[177] Simester and Sullivan, above n 174, pp 172-174 argue that there is an offence where D takes V's old shirt, even though V has no use for the old shirt and will throw it away whereas D can put the shirt to good use, on the basis that use-value justifications must be subservient to the protection of a property rights regime. Steel correctly notes that this argument fails to take into account the possibility that D can himself claim the protection of the property rights regime on the grounds of his possessory interest in the shirt (Steel, above n 175, p 729). Furthermore, it could be argued that if the shirt is in fact being thrown out, then it is being abandoned, and that the property rights regime no longer provides protection for V (and thus D's possessory interest takes precedence).
[178] See eg *Smith's Law of Theft* [2.271] fn 453 and accompanying text, citing inter alia *Small* [1987] Crim LR 777.

goods in the belief (whether correct or not) that they have been abandoned he is operating under an honest belief.[179]

The unwillingness of the courts to deal with this interaction between belief as to the provenance of the goods, and the level of honesty on the part of the accused, is clear in the golf balls cases. To some extent the absence of discussion of the honesty issue in *Hibbert v McKiernan* is excusable as that case involved the offence of larceny, and the current law provides broader honesty-based defences for those accused of theft. This makes the decision of the Court of Appeal in *Rostron* somewhat less defensible though. There the Court did consider the dishonesty issue, but in a rather desultory fashion consisting of only two paragraphs of analysis, based on the issue of a failure of the trial judge to provide a *Ghosh* direction. The Court decided that the trial judge's direction was fair to the defendants, in that it asked whether they had taken the golf balls knowing that they were not entitled to go onto the golf course and take balls. In this narrow sense this is probably correct. But it really is a side-step from the issue of honesty, rather than taking the issue on. The paucity of judicial guidance on the conflation of claims of abandonment and honest taking surely required some consideration of this matter.

In spite of the confusion shown by the decisions in *Hibbert v McKiernan* and *Rostron*, it does appear that a freegan bin-diver may be able to show he is not dishonest, because of his honest belief that the goods are abandoned. In *R v Small*,[180] D had come across a car. It had been in the same place for a fortnight. It was unlocked, there was no fuel and the battery was flat. After getting the car working again, D

[179] Cf *Griew* [2.101]: an honest belief that goods were abandoned can negative the "intention to permanently deprive" requirement of the theft offence.
[180] [1987] Crim LR 777; (1988) 86 Cr App R 170.

drove off in it. He was arrested and charged with theft. The car had been stolen, but D honestly believed the car had been 'dumped'.[181] The Court of Appeal quashed his conviction. It was held that the effect of *William White*,[182] and *Ellerman's Wilson Line Limited v Webster*,[183] was that 'an honest belief that property was abandoned is a defence',[184] and that this honest belief need not be a reasonable one.

More recently, the Court of Appeal decided the case of *R v Wood*.[185] There the defendant was convicted of theft. He had taken the entire contents of a fabric shop. The shop had been operating until February 2000, when the two active partners had returned to Pakistan. From that point on the shop did not operate. The stock and other goods remained in the shop, and the third partner in the business occasionally checked the shop, but as a silent partner with a full-time occupation outside of this business the checking process was a minimal one.

> 'It was in these circumstances that this appellant and his friend went to the shop on the evening of 15th August. They cleared the entire shop, leaving nothing behind. This was at least the fourth visit which the appellant had made there, because in earlier days, during daylight and on foot by himself with a shopping trolley, he had removed odd rolls of fabric from the shop and taken them home. He admitted that he was a trespasser in the shop but said that he genuinely believed that everything in the shop had been abandoned property and that he was therefore not dishonest when he helped himself to it. He prayed in aid previous expeditions with the shopping trolley in broad

[181] (1988) 86 Cr App R 170, 171.
[182] (1912) 7 Cr App R 266.
[183] [1952] 1 Lloyd's Rep 179.
[184] (1988) 86 Cr App R 170, 172.
[185] [2002] EWCA Crim 832.

daylight without any interference as confirming him in the honesty of his belief.'[186]

The Court held that a simple *Ghosh* direction was inappropriate, and that this type of case needed a direction that if the defendant had or might have had an honest belief that the goods were abandoned, then the jury would have to acquit.[187] Application of the *Ghosh* test is 'best left' to those cases where there is a conflict as to what is considered honest; the presence of an honest belief means *Ghosh* may be unhelpful.[188] So for a freegan bin-diver, provided he has an honest belief that the goods in a bin have been abandoned, based on the fact they are in the bin, the presence of such a belief may well provide a defence.

4. CONCLUSION

In this article it has been established that freegans could have two defences to claims that they commit theft by bin-diving. The first, that the goods are abandoned, has considerable intuitive value.[189] It is difficult to see goods that have been disposed of as rubbish, as waste, as *anything other than abandoned*. This is particularly so if an 'economic value' approach, as expressed by Rolfe B, Pollock and Wright, and Lord Denning MR, is taken to assessing the possibility of abandonment.[190] It is also important to acknowledge that the fact that property appears abandoned may well be evidence that it actually has been abandoned: courts must not fall into the trap of assuming that property cannot have been abandoned. This point is illustrated by the

[186] Ibid, [3].
[187] Ibid, [24].
[188] Ibid, [26]. See also *Smith's Law of Theft*, [2.279].
[189] See above, text following n 24.
[190] See above, text accompanying n 55 – n 66.

different approaches taken in *Rowe* and *William White*.[191] Furthermore, those cases dealing directly with waste, *Edwards and Stacey* and *Williams v Phillips*, should be treated with care, and can probably be restricted by virtue of the defendants' employment by the 'victims'.[192] However, there are awkward problems with the law relating to abandonment. Whilst it may be intuitive that rubbish is abandoned, the specific circumstances of each situation will be determinative of the issue of abandonment. As Professor John Smith said in commenting on the *Ghosh* case, '[t]he involvement of the law of theft with property concepts provides a fruitful source of fine and subtle distinctions, with plenty of scope for legitimate differences of opinion.'[193] However, this contextualism creates problems of certainty for freegans.

The analysis of the case-law on abandonment, and in particular the decisions in *Hibbert v McKiernan* and *Rostron*,[194] indicates that a significant determining factor in finding situations is the (dis)honesty of the finder. It is submitted that a freegan will have a greater chance of defending himself against a charge of theft on the grounds he is not dishonest. This may be counter-intuitive, as at first sight it is arguable that a freegan is acting dishonestly. However, as has been shown, a more rational approach is to view freeganism as something that is not dishonest, either subjectively or objectively. The impact of *Ghosh*, and the definition of dishonesty in the Theft Act 1968, provides various opportunities for freegans to show that they are not dishonest, and are thus not thieves.

[191] See above, text accompanying n 79 – n 84.
[192] See above, text following n 100.
[193] J C Smith '*R v Ghosh* – Case Commentary' [1982] Crim LR 608, 610.
[194] See above, text accompanying n 85 – n 98.

It is important to avoid putting words (or purposes) into the law of theft which do not belong there: according to Bridge LJ the courts should 'shun the temptation which sometimes presses on the mind of the judiciary to suppose that because a particular course of conduct ... was anti-social and undesirable, it can necessarily be fitted into some convenient criminal pigeon-hole'.[195] I think it is probably unlikely that Bridge LJ had the concept of freeganism at the top of his mind when he made this statement, but the applicability of the general principle it enunciates cannot be doubted. Freeganism covers behaviour, such as bin-diving, which portions of society may well find disgusting, possibly even anti-social. Yet for those reasons alone certain behaviour cannot be criminalised. There must surely be some *harm* involved. And that is the crux of the matter. Freegans cannot be understood as *harming* anyone. They are disposing of property that has already been deemed unworthy of retention or "appropriate" commercial disposition. To the extent that freegans reduce the potential costs of disposal of waste as landfill, or by incineration, it could well be argued that their behaviour is in fact *harm-reducing*, and as such should be lauded and not criminalised.

The final point concerns the decision of the Court of Appeal in *Wood*.[196] There the decision was clear: the defendant, who was essentially acting as a freegan, was not acting dishonestly. It is submitted that when faced with instances of freeganism of abandoned goods (whether apparently or in actuality), the approach in *Wood* is far more appropriate than the approach taken in *Rostron*.

[195] *Charles* [1976] 1 All ER 659, 666. See also *Griew* [2.122]-[2.123] arguing that the vagueness of dishonesty means that the issue is determined by ex post facto reasoning based on subjective notions of wickedness, which is an 'objectionable principle'.
[196] See above, text accompanying n 185 – n 188.