Crimes against property and net wealth in the Colombian Penal Code

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Abstract 1

This essay strives to answer three questions still open to the Colombian legal doctrine of criminal law concerning larceny (*hurto*), robbery (*hurto calificado por violencia sobre las personas*) and extortion (*extorsión*). From this starting point, it seeks to organise the category of crimes against property and net wealth by elucidating its basic structure. To this structure belongs the understanding of property and net wealth as different objects protected by criminal law, which makes it possible to identify legal differences between larceny and extortion, as well as between embezzlement (*abuso de confianza*) and fraud (*estafa*).

I. Introduction

The legal recognition of owning private property, along with a variety of associated rights, extends back to the earliest stages of legal thought in all Western legal systems.[1] Roman law developed a complex set of laws to protect owners and recognised a number of crimes to punish those illicitly taking, using or damaging private property—a process that was continued over the centuries by common law judges and, since the French Revolution, by legislators.[2] However, it is worth noting that as private property ownership evolved so did the need to define and address new private-property related crimes where, in effect, 'each of these crimes was created at a different point in time to fill a gap in the existing law'[3]. For that reason, there is considerable pressure to bring such crimes within the ambit of one group or category. Thus, to fully understand the crimes addressed in this essay they must be defined and organised as a conceptually related group or 2

1 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 4.
2 Matthew Lippman, *Contemporary Criminal Law* (2nd edn, Sage 2010) 447.
3 ibid.

category to avoid overlaps and gaps as well as to grasp the rationale behind the law which applies to these crimes.[4]

3 In the Colombian legal system, courts interpret the law but generally do not satisfactorily explain why the illegal act at the centre of the respective case was determined as a particular type of crime nor do they explain the rationale that led to this determination. For example, in 1987 the Supreme Court of Justice decided a case whose facts were the following: A and B entered the house of a minor drug dealer and, pointing a gun at him, demanded money in exchange for not reporting him to the police. The court concluded that A and B were responsible for the crime of extortion, not robbery because '[i]n robbery the victim is stripped of his property against his will, while in extortion he voluntarily surrenders the thing, although with his broken will by fear or the threat of future damage'[5]. However, on an earlier occasion, the court decided that a crime be defined as robbery when the victim voluntarily surrendered a watch to a person who pointed a gun at her.[6] It does not seem that the difference between robbery and extortion lies in the victim's will. Where does the difference lie then?

4 Another problem associated with the crime involving the drug dealer cited above is that, prior to 1980, under Colombian criminal law the criminalization of both robbery and extortion were measures to protect property. However, after that date, the law's terminology changed so that net wealth rather than property was the object of protection.[7] This is despite the fact that, according to Colombian civil law, any object obtained through crime cannot be considered a part of an individual's net wealth.[8] If the criminalization of extortion is now meant to protect one's net wealth, there was no extortion in the above drug dealer case since the money demanded came from a crime. Likewise, there would be no robbery if someone takes the money of a thief. However, do robbery and extortion actually refer to the same object of protection? While robbery is always of an existing asset or property, sometimes extortion affects future gains or potential gains, which pertain to net wealth but not existing private property. This distinction seems relevant but the court has said nothing about it.

4 Urs Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (Nomos 2018) 19.
5 [1987] CLXXXIX GJ 466, 470.
6 [1982] CLXX GJ 610, 612.
7 The concept "net wealth" tries to translate the German concept *Vermögen*; cf. Fletcher (n 1) 52, who defines net wealth as the sum of legal interests minus obligations. Thus, net wealth and *Vermögen* correspond to what in Spanish is designated as *patrimonio*.
8 See articles 669, 1519 and 1524 of the Colombian Civil Code.

This question brings into focus a subtle difference. If the object of protection of robbery were defined as net wealth when measured in economic terms, then robbery and larceny would be crimes against an economic loss that results from thievery as opposed to a loss that results only from the permanent deprivation of an object. Such subtleties have often been lost on the Supreme Court of Justice of Colombia, as can be seen in its acquittal of a defendant who stole many bills of exchange from his creditor. In this case, it was obvious that the defendant caused economic injury to the creditor, however, the court thought that the critical issue was that the defendant did not cash the bills of exchange.[9] The court took this view despite the fact that on an earlier occasion it had said that larceny is committed when a defendant's act constitutes a trespassory taking[10], that is when the defendant not only takes the goods but breaks the possession of the owner.[11] 5

As the final arbiter of the law, the coherence of the decisions of the Supreme Court of Justice of Colombia should serve as an essential tool for sharpening legal concepts and ensuring justice for all Colombians, however, the current state of affairs seems to indicate there is some confusion in this regard. At least one factor has inhibited the refinement of Colombian jurisprudence: Colombian legal doctrine has predominantly focused on general concepts instead of developing a culture in which the courts are well-equipped to resolve concrete cases. Adding to this situation is that these general concepts lack coherence, an issue that flows into Colombian jurisprudence. For example, Lisandro Martínez Zúñiga contemplates the possibility that crimes against net wealth only make sense in a capitalist frame of reference.[12] Accordingly, he argues that the point of these crimes is to inflict an economic loss on another.[13] But Martínez cannot explain why he offers a legal instead of an economic interpretation of net wealth[14] nor why he defines larceny as trespassory taking.[15] 6

9 [1994] CCXXX GJ 487, 500.

10 The concept "trespassory taking" tries to translate the Colombian concept *apoderamiento*. Trespassory taking and *apoderamiento* correspond to what in German is designated as *Wegnahme*.

11 [1996] CCXXVII GJ 23, 29. Defendant took the chattel and walked a few meters but was watched by the police and captured without breaking the possession.

12 Lisandro Martínez Z, *Introducción al estudio de los delitos contra el patrimonio económico* (2nd edn, Temis 1985) 7.

13 ibid 18 and 46.

14 ibid 19–26.

15 ibid 68.

7 Prior to this, Jorge Enrique Gutiérrez Anzola tried to explain these crimes from a socialist perspective,[16] however, he fails to harmonise this socialist background with his interpretation based on Roman law.[17] For example, Gutiérrez uses the Roman distinction between taking and forcibly taking[18] to stress the status of robbery as a crime disturbing to the entire community.[19] Although the danger thieves posed to the social order could be a common interest for Romans and socialists the distinction between *furtum* and *rapina* has never seemed to be backed by socialist arguments.[20]

8 In more recent years Alberto Suárez Sánchez, Álvaro Orlando Pérez Pinzón and Fernando Velásquez Velásquez have faced the problem of defining the boundaries of net wealth. They carry forth the German argument that distinguishes between a legal, an economic and a personal understanding of net wealth.[21] Suárez, who knows the German concept of net wealth through Spanish writers and does not quote Colombian books, seems to defend a legal-economic conception of net wealth[22] and, nonetheless, he defines net wealth as the legal possession of an object.[23] The problem with Suárez's view is that crimes against net wealth require taking possession of goods, which cannot necessarily be reconciled with his legal-economic understanding of net wealth, because he avers that the crime is measured by the victim's economic loss. For example, if someone takes an object against the owner's will and leaves the fair market value in its place, should that be classed as larceny?

9 Pérez Pinzón, who also knows the German concept of net wealth through Spanish and Italian writers, answers the last question by denying

16 Jorge Enrique Gutiérrez Anzola, *Delitos contra la propiedad* (Litografía Colombia 1944) 12.

17 ibid 22.

18 Fletcher explains the distinction in the following terms: 'If there was a characteristic form of thieving [in Roman law], what was it? There is no doubt that the dominant motif was furtive or stealthful conduct, as the etymology of these adjectives suggests. Yet the image of furtive conduct was blended in some cases with an element of force … [F]orcible takings from the person eventually crystallized as the separate offense of *rapina*'; Fletcher (n 1) 80.

19 Gutiérrez (n 16) 75 and 111.

20 Fletcher (n 1) 35 and 80.

21 Alberto Suárez Sánchez, *Delitos contra el patrimonio económico* (2nd edn, Universidad Externado de Colombia 2013) 56–61; Álvaro Orlando Pérez Pinzón, *Delitos contra el patrimonio económico* (2nd edn, Temis 2019) 5–8; Fernando Velásquez Velásquez, *Delitos contra el patrimonio económico* (Tirant lo Blanch 2020) 22–32.

22 Suárez (n 21) 63.

23 ibid 65.

that someone who leaves the fair market value has committed larceny.[24] But if someone takes an old horse, which is in no way saleable and could even be viewed as a liability, against the owner's will, should that be classed as larceny? Later in his somewhat 'shallow' and 'plainly-written'[25] book, Pérez Pinzón holds that larceny is committed when the defendant's act constitutes a trespassory taking.[26] If the deprivation of possession is sufficient, then the taking of an old horse should be larceny regardless of whether there is an economic loss or not. In this respect, the argument presented here agrees with Velásquez, who believes that there is too little attention to the problem of defining net wealth in the Colombian legal doctrine.[27] Comfort can also be drawn from Velásquez's words when he writes that property and net wealth should play a role in the organization of the crimes in the special part of the PC.[28] This is an idea that Humberto Barrera Domínguez had already tested by distinguishing between a general object of protection, present in any crime against property and net wealth, and a specific object of protection to be found in each of these crimes.[29] This is not the precise distinction I wish to make, but at least it shows that a distinction can be made among objects of protection.

I want, then, to focus on one way in which the group or category of 10
crimes against property and net wealth could be structured. This structure should help courts to produce coherent results when deciding on largely similar cases. Ironically perhaps, I am also interested in a general theme. Here, however, the similarity with the Colombian legal doctrine ends. For my starting point is not a general, but a particular one. It seems to me that close attention to one distinction that the current Colombian criminal law misuses, namely the distinction between robbery and extortion, and one that is absent in the Colombian debate about the definition of larceny, namely the distinction between permanent deprivation of an object and economic loss, can throw light on the question of whether there is just one, or two objects protected by criminalising larceny, robbery and extortion—a question that the Colombian legal doctrine has not even formulated. In

24 Pérez Pinzón (n 21) 8.
25 ibid IX: '*La obra no es un tratado profundo ... Se trata de un breve trabajo "que en lenguaje fácil" ...*'.
26 ibid 32.
27 Velásquez (n 21) 31.
28 ibid 33.
29 Humberto Barrera Domínguez, *Delitos contra los intereses económicos particulares* (Publicaciones Cultural 1984) 16.

contrast, both distinctions are roughly accurate in the German and the Anglo-American legal systems, from which there is much to learn.

11 My interest is the Colombian legal system, a system that has had multiple influences from Europe. Although it is a commonplace to say that the Colombian PC has a strong French influence on the regulation of crimes against property and net wealth[30], my purpose is to show that the German doctrine provides a better interpretation of the specific crimes against property and net wealth in the PC than the French doctrine which is so embedded in Colombian law. It is beyond the scope of this essay to document French influence in detail and, as such, the focus below will be on the German doctrine.

12 Two methodological guidelines shape the argument of this essay. First, the method of analysis is comparative, with primary attention to German law. The German approach to the special part of the criminal law suggests alternatives to the Colombian approach because the German approach consciously groups crimes around the object of legal protection.[31] The second methodological premise reveals a commitment to the legality principle, namely that if crimes are contained only in the special part of the PC, these crimes are the only ones from which a general proposition about the object protected by criminal law can emerge.[32] This premise has well-developed and extensively written about in German literature.

II. Three Basic Organising Distinctions of Crimes against Property and Net Wealth

13 This section will not address all of the crimes against property and net wealth covered by the Colombian PC, rather, the objective is to focus on three questions still open to discussion in the Colombian doctrine. In answering these questions, the goal is to elicit the basic structure of crimes against property and net wealth. The more general question is whether there are one or two objects protected by criminalising larceny, robbery and extortion. Since the Age of Enlightenment, the entire structure of the special part of criminal law has been based on the nature of the protected object. However, determining this issue is a critical aspect of the analysis,

30 Gutiérrez (n 16) 109; Luis Carlos Pérez, *Derecho penal*, vol 5 (2nd edn, Temis 1991) 419; both detailing the French influence in Colombia's embezzlement laws.

31 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 16.

32 Paul H Robinson, *Criminal Law* (2nd edn, Wolters Kluwer 2008) 40.

because Colombian scholars have never considered an explanation of the object of protection derived from the existing PC. Instead, they apply their preconceived idea of the object of protection to interpret the law.

14 In the Anglo-American legal doctrine, George P Fletcher holds that 'we are accustomed to thinking about particular offences as governmental efforts to protect identifiable interests'[33]. Similarly, in the development of the German legal doctrine, the effort to explain the structure of the law is captured in the concept of *Rechtsgut*.[34] In Spanish, *Rechtsgut* is translated as *bien jurídico*, but there is no single English equivalent that corresponds to this concept and therefore the term "object of protection" has been used here. Nonetheless, Andrew von Hirsch thinks that the English concept "Harm Principle" has the same function as the German concept *Rechtsgut*: both serve as moral limits of the criminal law.[35] While Von Hirsch may be right, there is a point of divergence where the German legal system differs from the Anglo-American: in the Anglo-American legal system, the law is derived from a process of judicial development[36], whereas in the German legal system, the law is derived from a process of democratic creation.[37]

15 In the continental European tradition after the French Revolution, it is understood that the special part of criminal law has a fragmentary character.[38] This means that property and net wealth are only protected against the crimes described in the special part of the PC. In Colombian criminal law, these crimes receive their legal definition in Title VII of the special part of the PC. Yet according to my commitment to the legality principle I begin by embracing the details of the positive law. That is, the concrete and "technical" details about the distinction between robbery and extortion as well as the distinction between the permanent deprivation of an object and economic loss in larceny. It is from these details that the general proposition about the object protected by larceny, robbery and extortion should emerge.

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33 Fletcher (n 1) 30.

34 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 398–402.

35 Andrew von Hirsch, 'Der Rechtsgutsbegriff und das „Harm Principle"' in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds), *Die Rechtsgutstheorie* (Nomos 2003) 14. Concurring Kai Ambos, 'Bien jurídico y Harm Principle' in Alex van Weezel (ed), *Humanizar y renovar el derecho penal. Estudios en memoria de Enrique Cury* (Carolina Aguilera tr, Thomson Reuters 2013) 453–458.

36 Robinson (n 32) 38.

37 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 11.

38 Urs Kindhäuser, *Strafrecht Besonderer Teil*, vol 2 (9th edn, Nomos 2017) 34.

16 The legal definition of robbery[39] is contained in the second paragraph of Article 240 of the Colombian PC. Under this definition, robbery occurs when an object is taken from another by force. Article 240 is preceded by Article 239, which defines larceny as trespassory taking, and only distinguishes robbery with the addition of the use of force. Extortion[40] is defined in Article 244 of the Colombian PC. Under this definition, extortion requires coercion to do or refrain from doing something, using force against a person. The use of force against a person is the common element in the distinct crimes of robbery and extortion. Colombian courts[41] and scholars[42] recognise two kinds of force, namely physical and psychological. There seems to be consensus that psychological force should be understood as *vis compulsiva*, or resistible force[43] where the leading example is a threat.[44]

17 If a psychological force, or *vis compulsiva*, or a threat can be resisted, there is no reason to say that in robbery the victim's will is overpowered through threat, as the Colombian Supreme Court did in the case of the minor drug dealer mentioned above.[45] As highlighted above regarding this case, two people entered the house of a third person and, pointing a gun at him, demanded money. The court did not convict the two for robbery because it determined that the force used was resistible. Although the court had reason to hold that the force was resistible, it is problematic to define robbery as committed only through irresistible force or *vis absoluta*. Indeed, Colombian courts and scholars have never seriously discussed this view. For example, in the second decision mentioned above, the Supreme Court decided a case to be robbery where the victim voluntarily surrendered a

39 The concept robbery tries to translate the Colombian concept of *hurto calificado por violencia contra las personas*. Robbery and *hurto calificado por violencia contra las personas* correspond to the German concept *Raub*; Fletcher (n 1) 81.

40 The concept extortion tries to translate the Colombian concept of *extorsión*. Extortion and *extorsión* correspond to the German concept *Erpressung*.

41 [1948] LXV GJ 78, 83. A lawyer demands from his client an increased fee by threat of criminal charges.

42 Gutiérrez (n 16) 54 and 64; Pedro Pacheco Osorio, *Derecho penal especial*, vol 4 (Temis 1975) 88; Barrera (n 29) 64 and 118; Martínez (n 12) 58; Pérez (n 30) 335 and 370; Luis Fernando Tocora, *Derecho penal especial* (11th edn, Librería Ediciones del Profesional 2009) 134; Suárez (n 21) 171; Pérez Pinzón (n 21) 47 and 90; Velásquez (n 21) 82 and 178.

43 Gutiérrez (n 16) 54; Pacheco (n 42) 89; Barrera (n 29) 71; Pérez (n 30) 335; Tocora (n 42) 134; Suárez (n 21) 172; Pérez Pinzón (n 21) 47; Velásquez (n 21) 83.

44 ibid.

45 Text to n 5.

watch to a person who pointed a gun at her.[46] And Pérez Pinzón uses as an example of robbery a scenario in which the thief slaps the victim.[47] These are clearly cases of resistible force.

Nevertheless, the example developed by Pérez Pinzón leads to confusion 18
because he wrongly equates a slap, or implicitly any kind of physical violence, to *vis absoluta* or irresistible force. The same example is used by Gutiérrez[48], Pedro Pacheco Osorio[49] and Suárez[50] without equating the slap to *vis absoluta*. The problem with this example is that physical force and its phenotypic form can easily be confused.[51] Therefore, a slap would always be physical, never psychological force, despite the fact that a light slap is clearly being used to motivate the victim through fear, i.e. psychological force. It seems clear that physical force can be used as *vis compulsiva*, as well as *vis absoluta*. The German doctrine provides a good explanation of the differentiated use of the two kinds of force: the distinction between instrumental and strategic force. The idea underlying this distinction is that the use of force either affects the "first order capacity" to build and fulfil the intention to do something or the person's "second order capacity" to want to have certain intentions to do something. Physical force understood as *vis absoluta* is instrumental because it suppresses the action-capacity, while psychological force understood as *vis compulsiva* is strategic because it introduces external reasons in the process of caring about one's own will.[52]

If a thief slaps a victim before a trespassory taking the force used is 19
psychological and that means strategic: the implicit threat is another slap or more violence.[53] Of course, one can maintain that the victim cannot be fairly expected to resist the threat, but this does not turn the threat into an irresistible force or *vis absoluta*. The key to understanding the argument is also offered by the German doctrine and consists in recognising the use of two different concepts of force in the PC.[54] The first is an ascriptive concept

46 Text to n 6.
47 Pérez Pinzón (n 21) 47.
48 Gutiérrez (n 16) 54.
49 Pacheco (n 42) 89 and 152.
50 Suárez (n 21) 171.
51 Juan Pablo Mañalich, *Nötigung und Verantwortung* (Nomos 2009) 216.
52 ibid 217.
53 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 141; Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 102.
54 Mañalich, *Nötigung und Verantwortung* (n 51) 179.

used in the general part of a PC, for example in Article 32.8 of the Colombian PC that regulates a specific kind of duress.[55] The regulation of force in this article indicates we should understand the freedom in a positive sense, in other words as a complex condition of personal responsibility.[56] The second concept of force is a prescriptive one used in the special part, for example, in the second paragraph of Article 240 and in Article 244 of the Colombian PC that regulate robbery and extortion respectively. The regulation of force in these articles indicates that the freedom should be understood in a negative sense, that is as the prohibition of the use of force.[57]

20 A victim of psychological force can be excused from any wrongdoing according to Article 32.8 PC because he acted under coercion. Although the victim was unable to resist, their action-capacity was not suppressed.[58] Yet the distinction between robbery and extortion in the Colombian legal system rests precisely on the assumption that the force used by robbery suppresses the action-capacity of the victim. Distinguish between robbery and extortion based on the time that elapses between the formulation of the threat and the supposed occurrence of the threatened harm was first suggested by the well-known Italian legal scholar Francesco Carrara in the early 1900s and is an approach that Colombian courts[59] and scholars[60] still employ today. Similarly, in the Anglo-American legal doctrine, this criterion is also known and discussed in the literature where, broadly speaking, robbery involves a threat of immediate harm, extortion involves a threat of future harm.[61]

21 The critical issue seems to be the opportunity to resist the threat, which is present in extortion and absent in robbery. Therefore, the difference would serve the interest of the victim, whose freedom is temporarily in-

55 The concept "duress" tries to translate the Colombian concept *insuperable coacción ajena*. Duress and *insuperable coacción ajena* correspond to what in German is designated as *entschuldigender Notstand*; Fletcher (n 1) 831.

56 Mañalich, *Nötigung und Verantwortung* (n 51) 184.

57 ibid.

58 Robinson (n 32) 635; Mañalich, *Nötigung und Verantwortung* (n 51) 244.

59 Text to n 41.

60 Gutiérrez (n 16) 64; Pacheco (n 42) 152; Barrera (n 29) 74; Pérez (n 30) 368; Suárez (n 21) 173; Pérez Pinzón (n 21) 94; Velásquez (n 21) 179. Tocora also rest on the assumption that the force used by robbery suppresses the action-capacity of the victim, but he downplays Carrara's time theory; Tocora (n 42) 157.

61 Lippman (n 2) 490.

creased by extortion and decreased by robbery.[62] I am skeptical about this criterion because, according to the Colombian PC, the force used in robbery and extortion can be *vis absoluta*, for example, if someone ties up the victim with a rope to take his money or to avoid being sued. The second alternative in the example is a case of extortion, since Article 244 defines extortion not only as the coercion to do something, but also the coercion to not do something. In neither of the two alternatives of the example does the victim have a temporarily decreased freedom or an increased one. Rather, their action-capacity is suppressed.

Colombian developments of the distinction between robbery and extor- 22
tion have concentrated on an issue that ignores the legal possibility of committing robbery and extortion by *vis absoluta*. It is possible, however, to draw the distinction in a different manner. The German approach to this does not help because most German scholars think that robbery is a kind of extortion[63], but a good account can be found in Chilean literature.[64] The problem to be solved is whether the voluntary surrender of chattels to a person who threatens harm is an instance of robbery or extortion. It seems that it could not be robbery for there is a surrender of the chattel instead of a taking. To refute this conclusion Juan Pablo Mañalich proposes two additional examples. In the first example, the person who threatens harm takes the chattel and in the second example, he demands that the chattel be left on a table from which he takes it.[65]

In these descriptions there are no relevant differences between the three 23
cases, being that the last two cases are clear instances of robbery. So Mañalich concludes that the phenomenology of "surrender" and "taking" is irrelevant.[66] The key concept is custody, understood as a control relationship between the person and the chattel. The difference between robbery and extortion then lies in that the use of force in robbery dissolves the custody while in extortion it does not.[67] Mañalich points out that with this understanding the structure of robbery is preserved as a compound

62 Pacheco (n 42) 153; Barrera (n 29) 120; Pérez (n 30) 370; Tocora (n 42) 152; Suárez (n 21) 173; Pérez Pinzón (n 21) 93.
63 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 186.
64 Juan Pablo Mañalich, *Estudios sobre la parte especial del derecho penal chileno* (Thomson Reuters 2020) 277–283.
65 ibid 280 and 282.
66 ibid 281.
67 ibid 283.

of larceny and coercion.[68] But I am interested in highlighting that robbery involves a trespassory taking, which can be understood as the dissolution of custody or the breaking of factual possession[69], while extortion entails a displacement of value from one person to another with correlative enrichment and impoverishment. Thus, robbery constitutes a crime of appropriation while extortion constitutes a crime of displacement.

24 In turning now to the distinction between permanent deprivation of an object and economic loss in larceny, the overall, if somewhat tacit stance, taken in the Colombian legal doctrine seems to be that only chattels are subject to the law of larceny.[70] As Fletcher said, 'there is surprisingly little attention to the question whether it is the interest in holding the object or in the value of the object that we seek to secure by punishing thieves'[71]. The lack of attention to the topic in Anglo-American law is not surprising as intangible property, that is property that represents something of value such as cheques and money orders, are not subject to larceny[72], therefore there is no reason to be concerned with the value of the chattel. However, in contrast to the Anglo-American legal system, since 1980 Colombian scholars[73] are supposedly concerned about the value of the chattel because since that date, the object of protection of larceny is net wealth, which is specifically understood as economic net wealth. Thus, the problem to be resolved is whether the value of the chattel is subject to the law of larceny or exempt from the law's scope.

25 Colombian scholars have never attempted to offer a solution to this problem, although it was present in Colombian jurisprudence.[74] At this point, again, there is much to learn from German law as German theorists have developed two relevant theories. The first is known as the *Substanztheorie*, or theory of substance according to which, 'the point of the law

68 ibid. See also Lippman (n 2) 481.

69 As Fletcher puts it: 'It may be some consolation to know that all leading Western legal systems have struggled with the metaphysics of custody and possession'; Fletcher (n 1) 6.

70 The concept "chattel" tries to translate the German concept *Sache*; Fletcher (n 1) 8. Chattel and *Sache* correspond to the Spanish concept *cosa*. The difference between *cosa* and *bien* is mentioned in the Colombian legal doctrine without any systematic consequence; Pacheco (n 42) 19; Barrera (n 29) 46; Martínez (n 12) 35; Pérez (n 30) 324.

71 Fletcher (n 1) 39.

72 Lippman (n 2) 449.

73 Barrera (n 29) 46; Pérez (n 30) 324; Pérez Pinzón (n 21) 34; Velásquez (n 21) 47.

74 Text to n 9.

of larceny is to protect the holding of the object, and in particular, to protect it against permanent deprivation'[75]. So, larceny is committed by taking the "substance" of the chattel.[76] The second theory is known as the *Sachwerttheorie*, or theory of value. According to this theory, 'the law of larceny should protect owners from the economic loss that results from thievery'[77]. So, larceny is committed by taking the "value" of the chattel.[78]

26 In one of the cases mentioned in the introduction to this essay, the defendant took some bills of exchange from his creditor.[79] When the Colombian Supreme Court absolved the defendant of the charge of larceny they applied, in effect, the theory of value by holding that the defendant did not take the value assigned to the bills of exchange since he never cashed them in. However, the theory of value—designed to supplement rather than replace the theory of substance, incorporating both into a more general *Vereinigungstheorie* or theory of union[80]—does not reflect the intention of a law that criminalises larceny, as defined by Article 239 of the Colombian PC which states that larceny is the trespassory taking of a chattel, similar to §242 of the German PC.[81]

27 Setting aside the need for further refinement, the preference expressed here for the theory of substance seems to fit the conclusion reached by analysing the distinction between robbery and extortion. This conclusion is that robbery constitutes a crime of appropriation while extortion constitutes a crime of displacement. So long as the theory of value does not interpret larceny as the appropriation of a chattel, but as enrichment, it fails to identify the object of protection of larceny. Not to say that it equates larceny with extortion. The criminalisation of larceny protects property, regardless of the economic value of the chattel.[82] Thus, in the bills of exchange case recently mentioned, the Supreme Court was right when it said that the defendant did not take the value embodied in the bills, for there was no displacement of value from one person to another with correlative enrichment and impoverishment. However, it was wrong to acquit the defendant because larceny is a crime against possession.

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75 Fletcher (n 1) 42.
76 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 27.
77 Fletcher (n 1) 42.
78 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 27.
79 Text to n 9.
80 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 26.
81 ibid 27.
82 ibid 28.

28 At this point, I abandon the search for a complete answer to the second question and turn to the third question of whether there are one or two objects of protection by criminalising larceny, robbery and extortion. In the Colombian legal doctrine prior to 1980, the dominant view was that the object of protection is property.[83] After that date, the dominant view has been that the object of protection is net wealth.[84] It is somewhat surprising, given the paths other legal doctrines have followed, that the Colombian discussion is decidedly monist in that the object of protection must be either property or net wealth but not both. In the German legal doctrine, neither the economic nor the legal-economic understanding of net wealth can by themselves explain the object of protection of larceny, robbery and extortion.[85] This is because it is broadly accepted that larceny and robbery are not crimes against net wealth but property.[86]

29 On the contrary, the legal understanding of net wealth could by itself explain the object of protection of larceny, robbery and extortion. The problem here is that the legal understanding of net wealth leaves out of the scope of protection, in particular against fraud and extortion, certain expectations that are the object of transactions in economic life. As it is broadly accepted that fraud and extortion are not crimes against property but net wealth[87], it seems to be the better alternative to hold that there are two objects of protection: property and a legal-economic understanding of net wealth. Another reason is that the distinction between property and net wealth is well-known in the continental tradition. This also reflects the well-known distinction between chattels and any economic expectation.

30 One consequence of this dualistic understanding is that no extortion was involved in the case of the minor drug dealer mentioned at the very beginning of this essay. This is because the criminalisation of extortion protects net wealth and the money demanded came from a crime meaning, as such, that it was not legally a part of the net wealth of the minor drug dealer. Nevertheless, someone who takes money from a thief, irrespective of how that money came to the thief, is committing larceny since the

83 Gutiérrez (n 16) 8, although questioning the legal definition; Pacheco (n 42) 4.
84 Text to n 12, 21 and 29.
85 The analysis of net wealth understood as economic net wealth proceeds on the basis of economic realities. The analysis of net wealth understood as legal net wealth proceeds on the basis of legal rights and duties; Fletcher (n 1) 55.
86 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 22.
87 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 215 and 167.

criminalisation of larceny protects property, which is understood as custody or factual possession.

III. The Basic Structure of Crimes Against Property and Net Wealth

The purpose of this essay is to focus on three questions regarding crimes against property and net wealth still open to discussion in the Colombian doctrine. Although it is, for reasons of scope, not possible to elicit in detail the basic structure of the crimes against property and net wealth, it can be seen that there are crimes of appropriation and crimes of displacement that fall within this focus. Furthermore, it has also been highlighted that the criminalisation of larceny protects property while the criminalization of extortion protects net wealth, a starting point that allows a process of broader systematisation to be implemented. 31

The first distinction of the relevant crimes would see each one fall into a category where the result is either deprivation or appropriation. The criminalisation of both kinds of crimes protects property. Article 265 of the Colombian PC defines criminal mischief (*daño en bien ajeno*) and must be understood as a crime of deprivation. Articles 249 and 239 respectively define embezzlement and larceny, which must be understood as crimes of appropriation. Article 249 also details a crime of appropriation without breaking possession while Article 239 provides for a crime of appropriation in which possession is broken. The second distinction is between crimes that impoverish and crimes that provide enrichment. The criminalisation of both of these kinds of crimes protects net wealth. Article 253 describes a special form of fraud against creditors called bankruptcy fraud[88] (*alzamiento de bienes*) and must be understood as an impoverishment crime, while Articles 246 and 244 define fraud and extortion and must be understood as enrichment crimes. While both fraud and extortion are crimes of displacement, they differ in that fraud brings about displacement through deception while extortion achieves the same through the use of force. 32

These distinctions are crucial in the systematic interpretation of Title VII of the special part of the Colombian PC. Although they do not offer a detailed set of criteria defining all of the crimes against property and net 33

88 The concept "bankruptcy fraud" tries to translate the German concept *Bankrott*. Bankruptcy fraud and *Bankrott* correspond to the Spanish concept *alzamiento de bienes*; Klaus Tiedemann, Wirtschaftsstrafrecht (5th edn, Vahlen 2017) 468.

wealth covered by the Colombian PC, they provide a starting point for further elaboration.

Further Reading

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