Here is a selection of typical responses for you to consider. Using past papers, scenarios are set out and followed by the individual questions, mark scheme and typical answers. Commentaries on each answer are grouped together at the end of each topic. These can be used to give examples of answers with strengths and weaknesses identified, so that your students can look for improvements and refine their techniques. All of the answers are extracts from longer answers, and so consider only some of the issues raised by the scenario and accompanying question but, in each case, there are at least two answers to compare and contrast. In one instance, there are five examples of attempts to explain and apply one aspect of the elements of an offence (blackmail).

Note that answers are reproduced exactly as written, including grammar and spelling.
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Criminal Law (Offences against Property)

Scenario 1

Tom was employed as a gardener by Enrique, a famous opera singer with a reputation for 'clean living'. On his return to work after a lunch break in which he had drunk several vodkas at a local pub, Tom found a letter which had fallen from Enrique's pocket onto the garden lawn. The letter revealed that Enrique had been convicted many years previously of the rape of a young girl. Seeing Enrique in the garden, Tom waved the letter at him and told Enrique that if he did not pay £10000 for the return of the letter, Tom would sell it to a national newspaper.

Discuss Tom's possible criminal liability for property offences arising out of his taking of the letter and what he said to Enrique. [25 marks]

Potential Content

(A) **Theft issues in relation to the letter.** Actus reus – appropriation, property, belonging to another. Mens rea – intention to permanently deprive (s6 'intention to treat the thing as his own to dispose of'), dishonesty (Ghosh). In relation to the contents of the letters – no liability (Oxford v Moss).

(B) **Blackmail issues.** Demand, menaces, with a view to gain or intent to cause loss. Unwarranted demand – consideration of Tom’s belief as to reasonable grounds for making the demand and that the use of menaces was a proper means of reinforcing it.
Student answers for consideration

Answer 1 (part – theft issues)

Theft is defined in s1 of the Theft Act as dishonest appropriation of property, belonging to another, with the intention to permanently deprive. s3 defines appropriation as the assumption of any of the rights of the owner over the property. This can be seen in R v Morris where the D change the price of the hams, he had assumed the right of the supermarket to change the price-tag. Here by taking the letter Tom has assumed the right of possession from Enrique ...

s2 does not define dishonesty but gives three examples of where D is not dishonest. s2(1)(c) may be applicable as D found the letter on the floor. However, Tom knew the property was Enrique’s and so he could have taken reasonable steps to return it.

s6 defines intention to permanently deprive as treating the property as your own to dispose of regardless of the owner. This can be seen in DPP v Lavender where the D treated the council house door as his own. In this case, Tom has intended to keep the letter to use as his own.

An extension of dishonesty is the Ghosh test. The D actions must be seen as unreasonable by the ordinary person and the D must be aware that an ordinary person would consider his actions dishonest. In this case an ordinary person would see that Tom has taken property that does not belong to him. Therefore Tom would be dishonest.
Answer 2 (part – theft issues)

To appropriate property D must assume the right of the owner, as defined in Morris. As Tom finds the letter on the lawn his appropriation may be innocent, but s3(2) says that innocently receiving property can turn to appropriation when D later assumes any rights of the owner, and as Tom opens and reads the letter he has clearly appropriated it ...The mens rea of theft includes dishonesty, the Ghosh test shows that a reasonable and honest person would consider D's actions dishonest and D would know these standards. Stealing a letter of this importance and seriousness would be considered dishonest as it is very personal, and given Enriques famous status the consequences would be severe. D would most likely be aware of this. None of the s2(1) exclusions would apply as they have only just met and Enrique would not want him looking at the letter. Lastly, s6 says D must intend to permanently deprive V of the property. This means to treat the property as ones own. By reading the letter, Tom has acted as though the letter is addressed to him. Section 6(2) says borrowing can turn to theft if the value or goodness or virtue has been removed and because the letter is no longer confidential then D may have still committed theft. Easom says that conditional intent is not enough for theft so if Tom can prove he was only seeing if there was anything useful in there to take, he may not be guilty.
Answers 3a-3e (part – blackmail issues)

3a. The demand must be unwarranted unless 1) the D had reasonable grounds to make the demand. Here it is unreasonable for Tom to demand money in return for the letter 2) the menace was reasonable to enforce the demand. Harvey states that disproportionate menace is never lawful. Here Tom wants £10000 for a letter, this would definitely be unlawful.

3b. It is also required that this demand is unwarranted. There is no evidence that Tom believes he has any reasonable grounds for making the demand, or that the use of menaces was a necessary way of reinforcing the demand so it is therefore unwarranted.

3c. To be able to use a lawful excuse D must think the demand was warranted and that he was reasonable in making the demand and the menaces used where proper in the circumstances. Tom is unlikely to think he had a right to make the demand as he had just stolen the letter and the fact he asked for such a large amount of money means he’s unlikely to think it was proper.

3d. The demand should also be unwarranted. This has a two part test which must be satisfied, the first is was the warrant a reasonable way of making the demand and was the menace a proper way of making the demand. Applying this to the scenario, the demand made by Tom was not reasonable and the menace used by Tom for the demand was not the proper way of reinforcing the demand. Therefore the test is satisfied.

3e. The actus reus is making an unwarranted demand with menaces … The next element is unwarranted demand. This was explained to be a two stage test in which the jury may consider ‘if D had felt he had a justifiable reason to make that demand’. In the scenario it is likely that Tom’s demand is unwarranted, as he does not have a justifiable reason for making his demand and his use of threats was an improper means of reinforcing that demand.
Scenario 2

Dave received a leaflet from Jake stating that anyone aged over 60 could get their windows cleaned by him for half his usual price. Dave asked Jake for the ‘over 60’s service’ although he was aged 57. Having cleaned Dave’s windows, Jake charged him the reduced price.

Discuss Dave’s possible criminal liability for property offences in connection with … his dealings with Jake. [25 marks]

Potential Content

(B) Dave’s possible criminal liability in relation to Jake. Fraud by false representation. Implied representation, falsity. Dishonesty, intention to make a gain and/or cause a loss.
Student answers for consideration

Answer 4 (part – fraud by false representation)

Dave could be criminally liable for fraud by false representation in connection with his dealings with Jake. Fraud by false representation is defined in the Fraud Act 2006 s1 as the defendant making a representation which he knows to be false to intend to make a gain for himself or cause another loss. The first element of the AR is that there must be a representation made. In a case it was held that D could have said nothing at all, the fact he was dressed as an Oxford University student was a false representation. In the scenario Jake asked Dave for the over 60’s window services and so has made a representation. The representation must be false this means D must know it to be untrue. Dave knows he is not 60 and so creates a false representation. D must make a gain or cause loss. A gain is to get something you do not have or keep what you do have. Dave has gained cheaper window cleaning services. D must intend to gain or create a loss. In Bevans D demanded morphine to treat his pain. This created a gain for him and a loss for the doctor. Dave knows he is not 60 and so intends to gain for himself by getting a cheaper service and cause a loss for Jake who has been paid less than what he should. As relevant areas of the offence of fraud by false representation have been satisfied Dave is found liable and could face a prison sentence.
**Answer 5 (part – fraud by false representation)**

D has also committed fraud by false representation under s2 Fraud Act. D has done this by making a representation. s2(a) says this can be as a statement of mind, fact or law. s2(4) says the representation can be express or implied. As in R v Barnard, the representation was implied as he asked for the service but didn’t directly lie about his age. The representation D makes must be false. s2(2) defines this as untrue/misleading and the consultation paper says it means ‘not wholly true and capable of misinterpretation’. The representation D has made is capable of the misinterpretation that he is over 60. The mens rea D must have is dishonesty, the test coming from R v Ghosh – would the honest person with ordinary standards consider D dishonest? Yes, because he is trying to obtain a discount by lying about his age. The second part asks whether D realises he would be considered dishonest. D realises this because he is lying about fact just to obtain a discount on a service. The fact he had to lie implies he knows he is dishonest. D must also have knowledge the representation is/might be false. D knows the representation is false because he knows he is 57 and not 60 or over. D must also have the view (intent) to make a gain/expose another to a risk of loss. s5 defines gain as ‘getting what one has not or keeping what one already has; it defines loss as parting with what one already has or not getting what one might otherwise get. D’s gaining for himself of keeping his money, the equivalent of the discount, and causing a loss to Jake because he might not get the money equivalent of the discount. Therefore D could be guilty under s2 of the Fraud Act.
Commentaries

Comment on Answer 1

(A) This is an extract from the full answer to the question, and includes only the discussion of appropriation, dishonesty and intention permanently to deprive. The answer explains ‘appropriation’ accurately, relying on the case of Morris as an example, and also explains the notion of dishonesty by reference both to the provisions of s2(1) and to the Ghosh test. However, the quality of the application suffers a little from the failure to recognise that the moment at which Tom becomes dishonest bears on the point at which the relevant appropriation takes place, since the appropriation must be ‘dishonest’. The answer identifies the ‘taking’ of the letter as the relevant appropriation, though it is unlikely that Tom was dishonest when he first picked it up, so that the relevant appropriation would be at a later point when Tom decided to make use of it. The answer recognises the need to prove that Tom had an intention permanently to deprive and refers briefly to s6, supporting the explanation by citing DPP v Lavender. However, the application is not developed – this is essentially the ‘ransom’ situation, which could have been clearly related to the precise terms of s6.

(A) Clear

Comment on Answer 2

(A) This is an extract from the full answer to the question, and includes only the discussion of appropriation, dishonesty and intention permanently to deprive. The answer perceptively recognises that the initial finding of the letter, though it may amount to an appropriation, is not dishonest. It then recognises the possible significance of s3(2) but, unfortunately, does not apply it accurately (the waving of the letter accompanied by the demand is likely to be the point of dishonest appropriation, rather than the earlier reading of the letter). However, even if the precise point at which dishonesty arises is incorrectly identified, the analysis of dishonesty is good. The discussion of intention permanently to deprive is rather weaker. There is no clear explanation of the basic requirement and its relationship with the definition supplied by s6. The answer does recognise an aspect of the extension of the definition supplied by s6 (the ‘virtue’ principle) but it would be a rather difficult one to establish on the facts of the scenario. In identifying this aspect, the answer misses the much more clearly applicable ‘ransom’ principle.

(A) Clear

Comment on Answers 3a-3e

These are attempts drawn from five different answers to deal with the ‘unwarranted’ aspect of the definition of blackmail. Not one of the answers correctly states that the demand with menaces will be unwarranted unless D believes (1) that he has reasonable grounds for making the demand; and (2) that the use of the menaces is a proper means of reinforcing the demand. Because the answers do not accurately state the two-part test, application is correspondingly confused. None of the answers make it clear that failure to believe either will mean that the demand with menaces is ‘unwarranted’. Two of the scripts (3a and 3d) do not recognise that the test is subjective (D’s belief). Two (3a and 3b) do not identify the second part of the test as couched in terms of ‘proper’ though, ironically, only script 3a gives any indication of the meaning of ‘proper’ as suggested by the case of Harvey and others. Script 3c mentions ‘proper’ but does not specifically relate it to the menaces, rather than to the demand. Though there is some slight variation between the answers in the quality of the assessment of whether Tom believed he had reasonable grounds for making the demand, essentially the answers tend to assert that he did not have reasonable grounds to make the demand without attempting to explain what that could mean and how, on the facts, Tom could (or could not) believe it. Similarly, with the exception of script 3a, the answers display no understanding of the meaning of ‘proper’ in this.
context and so are unable to explain (rather than baldly assert) why Tom would be likely (or unlikely) to be able to claim that the menaces were a proper means of reinforcing the demand.

Comment on Answer 4

(B) The answer identifies most of the elements of the offence of fraud by false representation without ever quite setting out a clear framework. A very notable omission is that of dishonesty in the making of the false representation. The explanation of the elements is reasonably accurate as far as it goes, though generally is not comprehensive. For example, ‘representation’ is not fully defined, though the example of an implied representation is of some relevance, and nor is the notion of ‘false’. Similarly, though the initial explanation of gain and loss indicates that this is a matter of mens rea, this is later confused by the statement that D must make a gain or cause a loss. Application is generally accurate but could have been developed a little more precisely in relation to the facts. For example, in considering the nature of the representation and its falsity, the answer could have demonstrated the relevance of the example much more clearly.

(B) Weak Clear

Comment on Answer 5

(B) The answer presents excellent explanation and perceptive application of all the elements of the offence of fraud by false representation, fully meriting the classification of sound.

(B) Sound