The Metamorphosis of Larceny

George P. Fletcher

Columbia Law School, gpfrecht@gmail.com

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Criminal Law Commons

Recommended Citation

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1022

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
THE METAMORPHOSIS OF LARCENY

George P. Fletcher *

To the modern lawyer, the rules of common law theft offenses do not seem ordered by any coherent principle. In this Article, however, Professor Fletcher shows that the common law of larceny can be understood in terms of two structural principles, possessorial immunity and manifest criminality. In the eighteenth and nineteenth centuries, as the modern style of legal thought evolved, first commentators and then courts lost their ability to understand these principles and came to rely on intent as the central element of criminal liability. As a result of this transformation, Professor Fletcher argues, the range of circumstances that can provoke prosecutorial scrutiny has greatly expanded and the nature of such inquiry has grown more intrusive. Our interest in privacy, Professor Fletcher suggests, should lead us to reconsider the system of common law larceny; if we cannot revive it, we must at least remember the values, now lost, which were once implicit in it.

The common law of theft strikes most contemporary observ-ers as a maze of arbitrary distinctions. Virtually all the academic writing in the field expresses impatience with the distinctions among larceny, embezzlement, larceny by trick, and obtaining property by false pretenses. Justice Cardozo thought the

© 1976 by George P. Fletcher.

* Professor of Law, University of California at Los Angeles. B.A., University of California at Berkeley, 1960; J.D., University of Chicago, 1964; M. Comp. L., University of Chicago, 1965: The process of writing this Article, which is part of a broader inquiry into the foundations of modern criminal theory, has generated many hours of enjoyable and provocative discussion with students and colleagues. I am particularly indebted for comments and encouragement to Gary Bellow, Alan Dershowitz, John Hart Ely, Morton Horwitz, William McGovern, Herbert Morris, and Charles Nesson.

1 Readers not familiar with theft offenses might find it useful to work with hornbook definitions. Common law larceny is typically defined as the "trespassory taking and carrying away of the personal property of another with intent to steal it." W. LaFave & A. Scott, Jr., HANDBOOK ON CRIMINAL LAW 622 (1972) [hereinafter cited as LaFave & Scott]; R. Perkins, CRIMINAL LAW 190 (1957).

Since embezzlement is a statutory offense, its elements vary considerably. Uniting contemporary variations of the crime are (x) an act of acquiring possession or of being entrusted with an object, (2) a subsequent act of deprivation, usually termed "conversion" or "fraudulent appropriation," and (3) a possible limitation of the punishment to persons occupying particular statuses, such as clerks, servants, brokers, agents, etc. The generative English statute, 39 Geo. 3,
central distinction between larceny and embezzlement failed to "correspond to an essential difference in the character of the acts;" 2 the technical rules differentiating these two offenses so puzzled Holmes that he dismissed them as the product of "historical accidents." 3 The thrust of the law for the last two centuries has been toward transcendence of these historical "accidents" and the creation of a unified law of theft offenses.4

c. 85 (1799), was limited to servants and clerks who, having "receive[d] or take[n] into possession" an itemized list of chattels, "fraudulently embezzle, secret or make away with the same." The contemporary California statute covers all persons "fraudulently appropriat[ing] property which has been entrusted to [them]." CAL. PENAL CODE § 484 (West 1970). See generally LaFave & Scott, supra at 644-54.

The crime of larceny by trick is a common law variation of larceny. It is typically thought to date from The King v. Pear, 168 Eng. Rep. 208 (1779), which held Pear guilty of larceny for hiring a horse with fraudulent intent and subsequently selling it. The elements of the offense are fraudulent acquisition and subsequent conversion. Yet there is considerable disagreement, whether the conversion is necessary and whether the crime is committed at the time of initial acquisition or at the time of conversion, compare CAL. PENAL CODE § 484 (West 1970) (committed at the time of acquisition), with State v. Coombs, 55 Me. 477 (1867) (interpreting Pear as involving a crime committed at the time of conversion).

Obtaining property by false pretenses is a statutory offense, originating in 33 Hen. 8, c. 1 (1541) and in 30 Geo. 2, c. 24 (1757). It is typically committed by someone who (1) knowingly (2) makes a material misrepresentation about a concrete fact and (3) thereby (4) induces the victim to convey title to chattels or land to the defendant. See generally LaFave & Scott, supra at 655-70.

2 Commonwealth v. Ryan, 155 Mass. 523, 527, 30 N.E. 364, 364 (1892). The rule in question was that employees who deliver objects received from third persons into their employer's domain and then take them are guilty of larceny, while those who take such objects without delivering them to the employer, are guilty of embezzlement. For discussion of this rule, see pp. 489-90 infra.

The American literature, in contrast, appears to be oriented more toward historical studies, with a muted interest in legislative reform. See, e.g., J. Hall, Theft, Law and Society (2d ed. 1952); Beale, The Borderland of Larceny, 6
This drive for consistency has generated a continuous expansion of criminal liability for dishonest acquisitions. Embezzlement has grown from an offense applicable to selected relationships of trust to a general offense applicable to everyone who has been entrusted with property, and the current tendency is to unite larceny and embezzlement in one overarching offense committed by anyone "who dishonestly appropriates the property of another." False pretenses, which formerly required a verifiable misrepresentation of external fact, now includes obtaining property by false promises as well. Even the fundamental idea that stealing presupposes the acquisition of a concrete asset, that mere breach of contract is not enough, is now in question. The draftsmen of the Model Penal Code maintain that there is no essential difference between misappropriating an entrusted asset and failing to perform a promise to pay over a sum equivalent to an amount received for that purpose. With all these traditional distinctions in doubt, the impulse toward consistency and expansion of li-

---


§ See 39 Geo. 3, c. 85 (1799) (limited to servants and clerks). Coverage was later extended to bankers, merchants, brokers, attorneys, and "agents of any description whatsoever," see 52 Geo. 3, c. 63 (1812), to trustees, see 20 & 21 Vict., c. 54 (1857), and to partners stealing or embezzling property held jointly, see 31 & 32 Vict., c. 116 (1868).


7 Theft Act 1968, c. 60, § 1(1) ("A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it . . . . "). This statute serves as a model for legislative revision in other Commonwealth countries. See the Crimes (Theft) Act 1973, 1973 Acts of Parliament (Victoria, Austl.) 231 (No. 8425), which came into force in October, 1974. For a good discussion of problems that have arisen under the English revision, see Elliott, Three Problems in the Law of Theft, 9 Melb. Univ. L. Rev. 448 (1974).

8 See pp. 523-24, note 230.


10 Model Penal Code § 223.8 (Proposed Official Draft 1962). The commentary makes it clear that the draftsmen were skeptical about the distinction between converting a physical object and breaching an obligation. See Model Penal Code § 206.4, Comment, at 81 (Tent. Draft No. 2, 1954). The rule was designed to abrogate the result in cases like Commonwealth v. Mitchneck, 130 Pa. Super. 433, 198 A. 463 (1938) (payroll officer, pocketing moneys deducted from salary checks ostensibly for direct payment of employees' debts, held not guilty of embezzlement, because he did not have possession of moneys belonging to employees).

11 Another architectonic common law rule in ever-decreasing favor is that passage of title distinguishes offenses based on fraud from offenses deriving from larceny (i.e., embezzlement and larceny by trick). The former category pre-
ability brooks little restraint. The end in sight is the criminalization of all cases of dishonest self-enrichment.

Modern lawyers have obviously lost touch with the style of thought that underlay the rules and distinctions that crystallized prior to the end of the eighteenth century. Peering through new conceptual lenses, nineteenth century lawyers found their tradition to be a jumble of technical rules. What made sense to Coke, Hale, and Blackstone was explained away as historical happenstance or the response to immediate social needs. What we fail to see today is that the way lawyers looked at larceny prior to the end of the eighteenth century represented a coherent system of legal thought. In this paper I shall attempt to explicate that system of thought and show that it expressed a way of looking at legality and criminal justice that incorporated important substantive values as well as a characteristic style of legal reasoning.

The traditional approach to larceny was built on two structural principles which expressed the distinction between a public sphere of criminal conduct and a private sphere subject at most to regulation by the rules of private law. One of these structural principles, possessorial immunity, was the explicit rule of the courts that transferring possession of an object conferred immunity from the criminal law on the party receiving possession, for subsequent misuse or misappropriation of the entrusted object. This rule was fundamental in defining the contours of larceny as well as the boundary between larceny and the newer offenses that developed in the eighteenth and nineteenth centuries.

supposes that one acquired title, or at least a property interest, by way of deception. See Nelson v. United States, 227 F.2d 21 (D.C. Cir. 1955) (applying rule to acquisition subject to a chattel mortgage); People v. Noblett, 244 N.Y. 355, 355 N.E. 670 (1927) (title to money held to have passed); LAFAYE & SCOTT, supra note 1, at 660. If the defendant did not acquire title to the goods or money, the required charge was larceny by trick rather than false pretenses. See Graham v. United States, 187 F.2d 87 (D.C. Cir. 1950), cert. denied, 341 U.S. 920 (1951); The Queen v. Russett, 2 Q.B. 312 (1892). The current legislative pattern is to acknowledge the difference between theft by appropriation and theft by deception, see Theft Act 1968, c. 60, § 1, 16; MODEL PENAL CODE §§ 223.2, 223.3 (Proposed Official Draft 1962), but in Great Britain, in particular, the definitions of both offenses have become so vague that they seem to have consumed each other. Compare Theft Act 1968, c. 60, § 1 (“dishonestly appropriat[ing] property [of] another”), with id. § 16 (obtaining a pecuniary advantage by deception); see Lawrence v. Metropolitan Police Comm'r, [1971] 3 W.L.R. 225 (H.L.) (offenses overlap); Elliott, supra note 7, at 451-56.

12 See generally E. COKE, THIRD INSTITUTE *107-10; J M. HALE, HISTORY OF THE PLEAS OF THE CROWN 503-17 (1683); 4 W. BLACKSTONE, COMMENTARIES *229-50.

13 To R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND *13-14 (G. Hall ed. 1965) (“Clearly he is not guilty of theft, because he initially had possession from the owner of the thing.”).
The second structural principle of the common law was the implicit rule that criminal liability should attach to all conduct conforming to a collective image of acting like a thief and only to such conduct. In its expansive aspect, this principle meant that acting like a thief created a prima facie case of liability. In its limiting aspect, the rule meant that objectively unincriminating conduct was not subject to criminal sanctions. Thus, if the actor's intent to steal did not manifest itself in an externally identifiable act of stealing, no larceny could be committed, and, therefore, alternative proof of the actor's criminal intent would be irrelevant.

The premise of the traditional approach to larceny was that it was possible to perceive thievery directly as an event in the world and that the courts should rely on this unanalyzed perception in framing the law of theft. Modern legal theory rejects unanalyzed perceptions as a proper source of law. Today we are inclined to analyze the phenomenon of theft into the twin elements of harm and intent. The harm is the unlicensed acquisition of another's property; the intent is defined derivatively as the intent to effect this harm. The implication of so analyzing the crime of theft is that no particular conduct is necessary in order to prove the required intent. Intent may be established by a variety of means, including confessions, admissions, past criminal conduct, and other circumstantial evidence, all of which presuppose an intrusive and open-ended investigation into the life of the accused.

These two approaches to the law of larceny merit our detailed attention, for they signal two clashing conceptions of the proper scope of the criminal law. The traditional approach reflected a deep commitment to working out the realm of public harms, subject to criminal prosecution, and the realm of private harms, subject only to redress by means of private actions. The view that some harms do not meet the threshold of potentially criminal events remains one of the background assumptions of the legal system. The private nature of at least some harms is a consequence of the relationship in which they occur. This is reflected in our taking for granted that cheating in the university should not be a crime. The principle of possessorial immunity analogously expressed the privacy of harms that occurred in the context of relationships in which one party entrusted an object to another. Further, the limitation of liability to conduct that appeared manifestly to be thievery exempted another set of deprivations from the scope of the criminal law. These deprivations were private in the sense that the process of acquisition was not a public or socially disturbing event. Rejecting both possessorial immunity and the principle of objective criminality, the modern law of theft
offenses verges on treating every deprivation of property as a public harm.

It is important to realize that an act of thieving might endanger a range of interests other than wealth. In the traditional view, the thief upset the social order not only by threatening property, but by violating the general sense of security and well-being of the community; in this broader sense, theft was feared as a socially unnerving event. Similarly, the harm in improper acquisitions by employees, later punished as embezzlement, was traditionally thought to be a breach of trust. Thus, the harm in both larceny and embezzlement was primarily relational: The thief endangered the established order of the community; the embezzler breached a particular relationship of confidence with his employer. The transition to the modern conception of theft witnessed the dissolution of these relational aspects of larceny and embezzlement. Both crimes came to be seen primarily as offenses against property interests. The modern vision of the criminal law seems to be that the proper allocation of each item of property enjoys the full concern of the community; the dishonest displacement of wealth from one person to another therefore becomes a public harm. This transition in the concept of harm and in the nature of theft as a crime lay behind the nineteenth century misunderstanding of the distinctions worked out in the traditional approach to larceny.

The critical period in the metamorphosis of larceny is the late eighteenth and early nineteenth centuries. We shall later describe this transition in abundant detail, but first we need to develop the common law approach to larceny more fully and illustrate how a proper interpretation of the past can assist us in understanding the technical rules of the crime.

14 In the course of the eighteenth century, the German conception of larceny shifted in nature from a crime of “breaking possession” to a crime against property. See H. Mayer, Die Untreue 25-32 (1926). Feuerbach’s textbook was one of the first systematic efforts at classifying larceny as a crime against property. See A. Feuerbach, Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts §§ 312, 315 (1801). Blackstone was apparently the first of the great common law writers to classify larceny as a crime against property. 4 W. Blackstone, supra note 12, at 229.

15 For the implications of this view of criminality, see p. 498 infra.

16 Prior to criminalization of embezzlement, the term “breach of trust” was used to refer to misappropriations that were subject at most to civil remedies. See The King v. Pear, 168 Eng. Rep. 208, 209 (1779); cf. The King v. Bazeley, 168 Eng. Rep. 517, 521-22 (1799) (argument by counsel). Though the German analogue to embezzlement (Unterschlagung) dates back to Constitutio Carolina Criminalis § 170 (1532), the crime changed focus in the late eighteenth century; it shifted from a crime of disloyalty (Untreue) to a crime against property. See H. Mayer, supra note 14, at 20.
I. THE TRADITIONAL APPROACH TO LARCENY

A. Possessorial Immunity

The rule of possessorial immunity meant that those who acquired possession over chattels were not subject to criminal liability for subsequent misappropriation. This immunity was conferred by the act of transferring legal possession, and it terminated when the recipient, usually a bailee, either returned possession to the owner or delivered the goods to another party. It is striking that the rule of possessorial immunity emerged in all major Western legal systems. That this phenomenon occurred suggests that possessorial immunity expressed a shared Western sense for the kinds of relationships that ought to be exempt from the criminal law.

The transferring of possession was presumably taken to be an important means of private ordering, a way of establishing a privately structured understanding about the management of money, tools, animals, and other chattels. If that relationship should miscarry in a dishonest misappropriation, the harm was apparently felt to be private rather than public. It was an injury compensable, to be sure, under the common law writs of detinue and later trover, but it was not a matter for the criminal courts.

Even before the eighteenth century, the rule of possessorial immunity underwent substantial modifications. Parliament intervened in 1529 to deny servants immunity as to articles received directly from their masters. Tenants of rooms similarly lost protection of the rule in the late seventeenth century. Yet pos-

17 In French, German and Russian law, one in possession of goods does not commit larceny by misappropriating them to his advantage. See L. LAMBERT, TRAITÉ DE DROIT PÉNAL SPÉCIAL 214-15 (1968) (French law); A. SCHÖNKE & H. SCHROEDER, STRAFGESETZBUCH 1261-62 (17th ed. 1974) (German law); H. WELZEL, DAS DEUTSCHE STRAFRECHT 347-48 (11th ed. 1969) (German law); KURS SOVETSKOGO OGOLOVNOGO PRAVA: CHAST' OSOBNENNAJA [TEXT ON SOVIET CRIMINAL LAW: THE SPECIAL PART] 429 (M. Shargorodskij ed. 1973) (Russian law) (discussing possession as a condition for the crime of embezzlement of socialist property).

The Western convergence on the principle of possessor immunity is all the more remarkable in view of the apparent absence of the rule from both Roman, see H. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 169 n.2 (1972); T. MOMMSEN, RÖMISCHES STRAFRECHT 735 n.5 (1899); and Biblical jurisprudence, see Exodus 22:7. See generally 2 B. COHEN, JEWISH AND ROMAN LAW: A COMPARATIVE STUDY 409-32 (1966).

18 F. MAITLAND, EQUITY; AND THE FORMS OF ACTION AT COMMON LAW 356-57 (1913).

19 Id. at 365 (trover supplanted detinue in actions against bailees).

20 See 21 Hen. 8, c. 7 (1529). Possessorial immunity continued to apply to servants handling goods received from third parties. See pp. 489-90 infra.

21 See 3 & 4 W. & M., c. 7 (1692).
sessorial immunity continued to govern the vast field of transactions between bailors and bailees until well into the nineteenth century.\textsuperscript{22}

\textbf{B. The Principle of Objective Criminality}

The principle of objective criminality informs the development of the law of larceny as an implicit guideline rather than as an explicit norm of the system. In the traditional approach toward larceny the judges and treatise writers responded to their intuitive sense of stealing as a recognizable event in the physical world. The premise was that only those takings conforming to their shared image of stealing could be punished for larceny.

The principle of objective criminality did not, however, render the actor’s intent irrelevant. From the earliest description in Bracton\textsuperscript{23} to the current cases on larceny, \textit{animus furandi} has always been an unquestioned requirement of larceny. Yet the traditional approach to larceny took the issue of \textit{animus} to be a subsidiary question, dependent upon a preliminary finding of a manifestly incriminating act. Because the required act provided presumptive evidence of intent, the issue was seldom, if ever, litigated. If the issue of intent was called into question, it was because appearances were deceptive. Someone might have looked like a thief without having been one in fact. Like the early use of the fault concept in torts,\textsuperscript{24} the issue of non-intent functioned as an excuse that could defeat the normal inference from appearances.

In the next section of the article, we shall examine how the principle of objective criminality influenced the common law judges’ fashioning of substantive rules of larceny. As a preliminary matter, however, we should establish that it is plausible to suppose that judges relied upon an intuitive understanding of thieving in deciding cases. To show that the hypothesis is plausible, we shall argue that a shared image of the thief runs through Western legal history.

The argument takes as its point of departure the distinction between manifest and non-manifest thieves, between those whose thievery is witnessed and those whose thievery is inferred from a suspect relationship to stolen goods. This distinction is a rudimentary principle of Western legal thought.\textsuperscript{25} In ancient

\begin{itemize}
  \item \textsuperscript{22}Larceny by a bailee was rendered punishable by 20 & 21 Vict., c. 54 (1857).
  \item \textsuperscript{23}H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 425 (S. Thorne ed. 1968). Bracton substituted the phrase \textit{animus furandi} for the Roman phrase \textit{lucri faciendi causa}. \textit{See} I. J. STEPHEN, supra note 4, at 33-34.
  \item \textsuperscript{24}See Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 557-56 (1972).
  \item \textsuperscript{25}Professor Calvert Watkins traces the practice of spontaneously executing
\end{itemize}
legal systems, only manifest thievery was subject to capital punishment; the person found with stolen goods was subject at most to the payment of multiple damages. The most striking feature of Roman law and other early systems is that the execution of manifest thieves was in private rather than public hands. According to the Twelve Tables, the *fur manifestus* — the nighttime thief caught *in flagrante* — was subject to immediate execution. It is important to note that this was not a form of self-defense, but a right to kill with impunity. The exercise of this right meant that the slain man's kin did not treat the killing as an occasion for revenge, but rather as a rightful execution.

According to one exhaustive comparative study, it appears that this manner of punishing *fur tum manifestum* was a prototypical Indo-European legal form. Yet as evidenced by Biblical legal rules, the private execution of manifest thieves was also a feature of ancient Middle-Eastern legal thought. The Covenant Code in Exodus recognizes the same distinction between the nighttime thief caught in the deed and the person caught selling manifest thieves to Hindu and Greek, as well as Roman law. See Watkins, *Studies in Indo-European Legal Language, Institutions, and Mythology*, in *INDO-EUROPEAN AND INDO-EUROPEANS* 321, 342-45 (G. Cardona ed. 1970); cf. Plato, *The Laws* § 874 ("He that slays a thief entering the house by night with intent of robbery shall be guiltless."). Watkins' thesis, substantiated by linguistic as well as legal analysis, is that there is a prototypical form of Indo-European larceny. For comparative discussions of the similarities of Biblical and Roman approaches to manifest thievery, see generally D. Daube, *Studies in Biblical Law* 235-305 (1947).


27 According to The Twelve Tables, all cases of "theft . . . [where] the thief is [not] caught in the act . . . " were subject to a penalty of double damages. Table VIII, § 16, in 2 *Ancient Roman Statutes* 11 (A. Johnson, et al. ed. 1961). If it was a case of "detected" theft, the judgment was for triple damages; apparently, this form of liability presupposed finding the goods on the accused's premises after a search with witnesses. See H. Jolowicz & B. Nicholas, *supra* note 17, at 167. Gaius notes that at a later stage the penalty for *fur tum manifestum* became fourfold damages in cases of *rapina* (robbery). See 3 Gaius, *supra* note 26, at § 209. For the use of multiple damages in the Biblical approach to theft, see note 35 *infra*.


30 Table VIII, § 12, in 2 *Ancient Roman Statutes* 11 (A. Johnson, et al. ed. 1961) (thief is killed "lawfully").


32 *Exodus* 22:2. That this is a penal provision rather than a rule of self-defense is suggested by its being located among rules pertaining to theft and by punishment by multiple damages. There is some dispute whether this provision
ing, slaughtering, or possessing a stolen animal.\textsuperscript{33} The former could be killed without blood guilt;\textsuperscript{34} the latter was subject at most to the payment of monetary damages.\textsuperscript{35}

The primordial forms of larceny bore two features that continued to mark the law of larceny in its Western European development. First, the thief had to steal from an enclosure.\textsuperscript{36} The Bible refers to the thief as "one digging under."\textsuperscript{37} Second, the concept of \textit{furtum manifestum} presupposed that when the thief did attack another's enclosure, some peculiar form of conduct became manifest. This assumption was implicit in the institution of private execution. There could be no private killing with impunity if there were doubts in the community whether the slain man was a thief. If there were not to be a blood feud, the facts on which the slayer relied to vindicate the deed had to be highly public — either visible to others or readily invoked. That the thief was slain in another's enclosure was doubtlessly important, but it seems also to have been critical that people could readily agree on when persons breaking the close were acting like

\textsuperscript{33} \textit{Exodus} 21:37 (killing or selling an ox or sheep); \textit{id.} 22:3 (defendant found in possession of stolen ox, ass, or sheep).

\textsuperscript{34} \textit{Exodus} 22:1. There is some disagreement whether this provision confers a right of private execution comparable to the right to execute the \textit{fur manifestus}. Jackson argues that the right described in \textit{Exodus} 22:1 is a form of self-defense, not a right to punish. See B. Jackson, \textit{Theft in Early Jewish Law} 206 (1972) (arguing against interpolation).

\textsuperscript{35} \textit{Exodus} 21:37 (fivefold for stealing and then killing or selling an ox; fourfold for doing the same to a sheep); \textit{id.} 22:3 (double damages if the stolen animal is found alive in the defendant's possession).

\textsuperscript{36} Watkins claims that according to Roman law, the thief had to be caught inside the enclosure. See Watkins, \textit{supra} note 25, at 338. This view is supported by Gaius, who lists the various interpretations of \textit{furtum manifestum} and expresses a preference for the view that the thief is a \textit{fur manifestus} if caught inside the place the deed occurred. See 3 Gaius, \textit{supra} note 26, at 184.

\textsuperscript{37} \textit{Exodus} 22:1 (\textit{ganav bamahteret}). This feature of breaking the victim's perimeter may well be the source of possessorial immunity in the later Western law of theft. Though ancient law did not recognize possessorial immunity, it did acknowledge the significance of perimeters. Watkins considers perimeters or enclosures to have been a structural form in the prototypical Indo-European forms of larceny. The same underlying form is expressed (1) in the rule requiring the thief to be caught in an enclosure and (2) in the rule holding that finding the object in the suspect's house after a formal search \textit{cum lance et licio} rendered the suspect a \textit{fur manifestus}. See Watkins, \textit{supra} note 25, at 336. This deeper form may be the basis for the almost magical boundary signified by acquiring possession over an object.
thieves. A system of private execution is not one that can tolerate mistakes.

If there was a characteristic form of thieving, 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. Larceny at common law presupposed a trespass, and trespasses were done vi et armis. In most legal systems, however, forcible takings from the person eventually crystallized as the separate offense of rapina, or robbery. Yet forcible seizures in the absence of the owner continued to be seen as part of the composite image of manifest thievery.

The transition from the Twelve Tables to the medieval law of larceny should be seen as a series of efforts to convert the right of private execution into the formalized public trial that we know

---

38 It is clear that according to Roman law the jurtum manifestum was conceived of as a natural fact; it was not subject to definition by the positive law. Gaius replied to those who claimed, in effect, that a manifest theft was whatever the law said it was: "[S]tatute can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who is neither the one nor the other." 3 GAIUS, supra note 26, at 194. It is also of some interest, though of uncertain probative significance, that prior to the twentieth century, statutes and cases typically referred to thieves without ever bothering to define what they were; other scholars have been struck by this pattern in Western legislation. See 3 J. STEPHEN, supra note 4, at 129; K. DICKEL, DER TATBESTAND DES DIEBSTAHLS NACH DEUTSchem ReCHT 16 (1877).

39 The word "furtive" derives from "fur," meaning thief in Latin. 4 OXFORD ENGLISH DICTIONARY 620 (1933). The word "stealth" derives from the same root as "steal." See id. at 884, 887.

40 According to the law of the Twelve Tables, the concept of furtum apparently included larceny coupled with violence. See T. MOMMSEN, supra note 17, at 737 n.6. Gaius notes that the praetor introduced a new action for fourfold damages against those who rob—i.e., commit theft by violence. See 3 GAuS supra note 26, at § 209.

41 Prior to the Constitutio Carolina Criminalis § 157 (1532), the major distinction in German law of theft was between a secret taking and a open taking; Raub was the latter. See K. DICKEL, supra note 38, at 16 (1877); R. ECKARDT, CONTROVERSEN IN DER LEHRE VOM DIEBSTAHL 35 (1899). After the Carolina, Raub became the offense of taking from a person with force or the threat of force. See K. DICKEL, supra at 16; see StGB § 249 (Lachner 1975).

42 In the early common law, robbery was an open taking; theft, a secret taking. See 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 494 (1911). By the time of Coke, the felony had received its present definition. See E. COKE, supra note 12, at *67. The distinction between secret and open theft is retained in the current codes in the Soviet Union. R.S.F.S.R. [1961] UCOl. KOD. § 144 (defining krasha as the "secret taking of the personal property of another"); id. § 145 (defining grabjesh as the "open taking of personal property of another"); id. § 146 (Soviet analog to robbery).
today. One of the early steps in this development was the qualification of private execution by the preliminary duty of the outcry.\textsuperscript{43} The function of the outcry was to communicate the impending execution to the rest of the community; it provided assurance that the slayer was not going to be treated as a criminal.\textsuperscript{44} In Roman law, the institution of the outcry functioned to broaden the concept of \textit{fur manifestus} to include daytime thieves who offered resistance.\textsuperscript{45}

Medieval English common law carried forth the concept of the \textit{fur manifestus}, but with gradual recognition that a trial had to precede execution. By the time of the thirteenth century the right of private execution had become a public right of execution after a summary trial in the field.\textsuperscript{46} Eventually, the private right of execution became a species of the right of self-defense. By the early sixteenth century, killing thieves and robbers was taken to be a form of justifiable homicide, regulated by statute,\textsuperscript{47} rather than a private act of justice.\textsuperscript{48}

Obviously important changes in larceny occurred as the criminal courts displaced private authority to punish thieves.\textsuperscript{49} Yet the core of larceny remained the execution of manifest thieves. The thief no longer had to be caught in the act, but his deed, as reconstructed from the evidence, had to conform to the same image of the thief that underlay the law of \textit{furtum manifestum}.\textsuperscript{50} The principle of objective criminality is simply the


\textsuperscript{44}H. Jolowicz & B. Nicholas, \textit{supra} note 17, at 169 n.9 (distinguishing between two distinct functions of the outcry: (1) a call to neighbors to witness the act and (2) a declaration that the defender was prepared to justify his act).

\textsuperscript{45}Table VIII, § 13, in \textit{2 Ancient Roman Statutes} 11 (A. Johnson et al., ed. 1965).

\textsuperscript{46}See \textit{1 Britton, On the Laws of England} 56 (F. Nichols tran. 1865 ed.).

\textsuperscript{47}24 Hen. 8, c. 5 (1532). The statute recognizes the right to use deadly force against evil-doers attempting "to murder, rob or burgaily to break mansion-houses."

\textsuperscript{48}The tendency in both Roman and Biblical law had also been to domesticate the private right of execution as a right of self-defense. See notes 29 & 34 \textit{supra}.

\textsuperscript{49}The basic changes were (1) the disappearance of the rule that the thief had to take from the owner's enclosure, see note 36 \textit{supra}, (2) the emergence of possessorial immunity, see p. 472 \textit{supra}, and (3) the elimination of \textit{furtum nec manifestum} as a basis for punitive damages. The assumption implicit in the text is that these three changes are related. On the relationship between the first two, see note 37 \textit{supra}.

\textsuperscript{50}Note Bracton's description of how larceny was to be alleged in an appeal of larceny: "that he took the said property feloniously and stealthily and larcenously and against the king's peace and thievishly bore it away." 2 H. Bracton, \textit{supra} note 23, at 426.
II. INTERPRETING THE COMMON LAW

In this section we turn to three enigmas of the common law of larceny. The first is the rule of "breaking bulk" which provided an exception to the principle of possessorial immunity. The second is the complex of rules defining the contours of possession for purposes of possessorial immunity. The third is a relatively recent line of cases reversing convictions of would-be thieves whose taking is committed in a prearranged trap. Analysis of the first two problems will help us understand the interplay between possessorial immunity and objective criminality in structuring common law larceny. Investigating the third problem will be important for two reasons. First, these cases reversing the convictions of those who clearly intend to steal demonstrate the survival of objective criminality after the early nineteenth century metamorphosis of larceny. Second, these puzzling cases provide an occasion for assaying some of the theoretical quandaries implicit in the principle of objective criminality.

A. The Carrier's Case

The Carrier's Case,51 decided in the Star Chamber in 1473, represents the first major judicial extension of the medieval common law of larceny. A carrier had made a bargain with a merchant to carry some bales of dyer's weed to Southampton; instead he took them to another place, broke open the bales and took the contents.52 All or part of the goods thus taken appear to have fallen into the hands of the Sheriff of London, who was sued by the original owner—an alien merchant who had come with a royal safe conduct covering his goods—for the return of his property.53 The Sheriff's defense was that the goods were forfeit to the King as waif, because the taking had been a felony.54

The impediment to treating the taking as a felony was the rule of possessorial immunity. Chief Justice Bryan took this rule to be decisive: The bailee, having lawfully acquired possession

51 Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473), 64 Selden Soc'y 30 (1945) [cited hereinafter to the Selden Society reprint and translation].
52 See id. at 30 (reporter's note).
53 See id. at 34 (reporter's note).
54 Id. (reporter's note). Waifed goods are those feloniously taken and then abandoned; these are normally forfeited to the Crown. See 1 W. Blackstone, supra note 12, at *296–97 (explaining the rule as an inducement to owners to pursue thieves and recapture stolen goods before they are abandoned).
of the goods, could not take them *vi et armis* and therefore the taking could not be said to be felony or trespass. Yet in the end the judges were of the opinion that the taking had been a felony. They could not concur on a rationale, but Lord Chokke’s opinion developed the argument that eventually became the rule of the case. Chokke argued that

\[T\]he things which were in the bale were not given [to the bailee], but the bales as chose entire . . . , in which case if he had given away the bales or sold them, it would not be felony, but when he broke open [the bales] and took out of [them] what was inside, he did this without warrant [and it is felony].

This is the language that generated the rule of “breaking bulk,” which remained a prominent exception to possessorial immunity until the mid-nineteenth century. In the final stages of the

---

64 Selden Soc’y at 30-31 (opinion of Bryan, C.J.C.P.).

The various justices advanced several theories on which the bailee’s taking could be considered a larceny. Huse, for example, thought that a felony was committed when the carrier “claim[ed] the goods feloniously without cause from the party with intent to defraud him to whom the property belongs . . .” Id. at 31. The Chancellor and Molyneux also seem to have held this position. Vavasour and Laken sought to distinguish between a bailment, in which there is actual delivery and possession in the bailee, and a bargain to carry, which was thought to give only a limited warrant to take the goods. Thus, if the carrier by his conversion revealed an intent not to comply with the terms of the warrant, his initial taking was felonious. See id. at 31 (Vavasour), 33 (Laken, J.K.B.). Nedeham took this argument a step further and maintained that possession determined when the carrier went outside the purpose for which he had been given the bales. See id. at 33 (Nedeham, J.K.B.). This analysis would have assimilated the case to those in which the taker had custody merely, and not possession. See pp. 486-87 infra.

65 See E. Coke, supra note 12, at *107; M. Dalton, The Country Justice 324 (1655); 1 M. Hale, supra note 12, at 504-05; 4 W. Blackstone, supra note 12, at *230.

66 Selden Soc’y at 32. This principle does not appear to have been without precedent. Chokke gives an example: “[I]f a man is given a tun of wine to carry, if he sells the tun, it is not felony or trespass, but if he took out twenty pints it is a felony, for the twenty pints were not given to him . . .” Id.; cf. Rattlesdene v. Gruneston, Y.B. Pasch. 10 Edw. 2, pl. 37 (1317), 54 Selden Soc’y 140 (1935).

67 See E. Coke, supra note 12, at *107; M. Dalton, The Country Justice 324 (1655); 1 M. Hale, supra note 12, at 504-05; 4 W. Blackstone, supra note 12, at *230. In the second set of circumstances, the carrier, having received the pack and “carr[ied] it to the place appointed . . . take[s] the whole pack *animus furandi* . . .?” E. Coke, supra note 12, at *107. See 64 Selden Soc’y at 33 (opinion of Nedeham, J.K.B.); M.
metamorphosis of larceny, Parliament eliminated possessorial immunity in 1857 and brought all defalcating bailees within the bounds of the criminal law.60

No one in the last century, so far as I know, has uttered a kind word for the rationale of The Carrier’s Case.61 Assuming that the rule of “breaking bulk” was an arbitrary manipulation of the law, most commentators have sought to explain the decision—to find felony and yet to return the alien merchant’s goods on the basis of his royal safe conduct—as a concession to royal policy62 or to the economic imperatives of the age.63 These sociological arguments are a good example of the way in which legal theorists go astray when they assume that the forms of the law always respond to social and political forces.64

Dalton, supra note 57, at 324; 1 M. Hale, supra note 12, at 505; 4 W. Blackstone, supra note 12, at *230. It is important to note that from the beginning, the rationale for this second rule stemming from The Carrier’s Case was that upon the carrier’s delivery of the goods to their destination, “his possession is determined,” 64 Selden Soc’y at 33 (opinion of Nedeham, J.K.B.), E. Coke, supra at *107-08 (“for the delivery had taken his [sic] effect, and the privity of the bailment is determined”); accord, e.g., 1 M. Hale, supra note 12, at 505; 4 W. Blackstone, supra note 12, at *230.

60 20 & 21 Vict., c. 54, § 4 (1857). Regarding similar American legislative revisions of the rule of “breaking bulk,” see 2 J. Bishop, Criminal Law 479 (6th ed. 1877).


62 Stephen explained the decision as a compromise between the Chancellor, seeking on behalf of the King to protect the alien merchant, and the judges, seeking to maintain the established doctrine. See 3 J. Stephen, supra note 4, at 139; accord, T. Plucknett, supra note 61, at 424.

63 See J. Hall, supra note 4, at 14-33. Hall argues that the most powerful forces of the time—the political interest of the King in allying himself with the rising commercial classes, the business interest of merchants in need of a secure carrying trade, the influence of the Italian merchants who dominated the English wool trade—pressed the court to hold the carrier’s conduct felonious. See id. at 33. Hall assumes that subjection of the carrier to criminal liability was in the interest of the alien merchant, see id. at 31-32, but this assumption is clearly wrong in the actual case.

64 The subject of larceny seems to invite reliance on sociological arguments. Another fashionable claim is that the law failed to expand prior to nineteenth century because of “unwillingness on the part of the judges to enlarge the limits of a capital offense.” Commonwealth v. Ryan, 155 Mass. 523, 527, 30 N.E. 364, 364-65 (1892); see J. Hall, supra note 4, at 118-33. This is a highly speculative claim. It is true that in 1691 Parliament declared many forms of larceny to be nonclergyable and therefore subject in principle to the death penalty. 3 W. & M., c. 9, § 1 (1691). Yet Stephen notes that in the eighteenth century “[i]n practice the punishment of death was inflicted in only a small portion of the cases in which the sentence was passed.” 1 J. Stephen, supra note 4, at 471. Though
If the judges had been interested only in returning the goods to the alien merchant, it would have been far easier to reach that result simply by concluding that the taking was not felonious. The goods would then have been returned to the merchant as his property. Holding that the taking was felonious meant that they were waif, which in turn meant that they were forfeited to the King and therefore properly retained by the Sheriff of London. Holding that the goods were waif, therefore, required an additional legal innovation, namely the principle that the ordinary law of waif would not apply in the case of an alien merchant who had been given a safe conduct by the King.

The disagreement among the judges in the Star Chamber provided a variety of rules that could have been drawn from the decision in *The Carrier's Case*. Subsequent commentators could have agreed with the Chancellor that felony was according to intent regardless of possession or with Vavasour that felonious intent negated the carrier's authority to take the bales and prevented him from acquiring the kind of possession that would have conferred possessorial immunity. But in the tradition emanating from the case, courts and commentators balked at these rationalia; they tied the finding of felony to the one fact that most clearly manifested the actor's felonious design, the fact that he opened the bales.

The rule of "breaking bulk" reveals the principle of objective criminality at work. One characteristic of the thief was his

the death penalty often was ordered, it was typically commuted into a sentence of transportation to the colonies. *Id.* Therefore, it is difficult to argue that aversion to the death penalty, by itself, accounts for acquittals in cases like The King v. Bazeley, 168 Eng. Rep. 517 (1799), and The King v. Waite, 168 Eng. Rep. 117 (1743), discussed at note 83 infra.

65 See note 54 supra. The doctrine of waif poses an additional difficulty for Jerome Hall's interpretation of *The Carrier's Case*. Hall assumes that subjecting carriers to criminal liability for misappropriating the contents of packages entrusted to them would generally promote the interests of the merchant class. See J. Hall, *supra* note 4, at 31. Yet the immediate impact of the decision to hold such misappropriations felony was to subject merchants to the risk that their goods would be forfeit to the King as waif; only aliens under safe conduct would be exempt from such forfeiture. With the merchant's interest amply protected by civil remedies, see *id.* at 32, it may fairly be doubted that the decision in *The Carrier's Case* actually promoted the interests of the rising commercial class.

66 See note 56 supra.

67 See *id.*

68 Blackstone was apparently the first commentator to explicate the rule of "breaking bulk" as an instance of manifest criminality. See 4 W. Blackstone, *supra* note 12, at 230:

But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, these are larcenies; for here the *animus furandi* is manifest; since [in this case] he had otherwise no inducement to open the goods.
taking swiftly and violently. That aspect of thieving is captured in the moment of breaking bulk. The thief breaking bulk could be caught in the deed, in flagrante. Lawyers of the time could perceive thieving in the act of breaking open the bales; they were less likely to sense thievery in the acts of selling or giving away the bales. Consequently, these other forms of misappropriation remained within the protection of possessorial immunity. The exception of breaking bulk was one that proved the rule: Conduct that at no point featured behavior characteristic of thieving remained immune from the jurisdiction of the criminal courts.

This interpretation of The Carrier’s Case builds on the assumption that in the fifteenth century the doctrine of furtum manifestum continued to shape the course of the English law. This assumption is more than an interpretative lens for perceiving what others have regarded as obscure. The opinion of Nedeham refers explicitly to the principle of objective criminality and thus corroborates the ongoing force of manifest thievery in the law of the time. In his reported words:

[I]t has been held that a man can take his own goods feloniously. For instance, if I give goods to a man to take care of, and I come secretly like a felon because I want to recover damages against him by writ of detinue, and I take the goods secretly like a felon, it is felony.

The critical factor in this example is the manner of taking, and in the case of the carrier who broke bulk it is the same. In the former situation, the taking is secret; in the latter, forcible. But in both cases the taking conforms to the shared image of a felonious taking.

The significance of The Carrier’s Case is that it was received in the tradition as holding that objective criminality should prevail over the principle of possessorial immunity. The ancient

---

69 It is heuristically useful to ask whether the culprit could be “caught in the deed.” Only those whose conduct was manifestly criminal could be identified and caught as thieves while they were in the act of thieving. Compare the execution of adulterous lovers. See Deuteronomy 22:22.

70 See Selden Soc’y at 33 (emphasis added).

The question whether an owner could steal his own goods was resolved in the common law by developing the notion of special property in bailees and others who held property by license of the owner. E. Coke, supra note 12, at *110; 2 E. East, Pleas of the Crown at 654 (1803). A conflicting theory was that the owner’s liability derived from his intent to hold the bailee liable in detinue. See 1 M. Hale, supra note 12, at 513. The latter view treated the owner as someone who could be liable only because he intended fraudulently to misuse legal remedies, thus bringing the case within the category of in fraudem legis, see note 123 infra.
notion of the manifest thief proved to be more influential than
the practice of exempting the conduct of bailees from the law of
larceny. Notwithstanding Nedeham’s language in this case, the
principle of objective criminality usually operated covertly in the
common law. Discovering its influence will generally require an
analysis more subtle than is needed to see “breaking bulk” as the
legal embodiment of the shared vision of the thief.

B. The Contours of Possession

Whatever the momentum generated by The Carrier’s Case,
further rending of the possessorial veil was to await the close of
the eighteenth century. Rather than seek new exceptions to the
rule of possessorial immunity, the courts fastened their attention
on determining when the veil of immunity fit and when it did not.
That meant that courts and commentators undertook as one of
their central concerns to determine the boundaries of legal pos-
session.

At early stages of the common law, the concept of possession
coincided roughly with actual dominion over an object. In the
course of the law’s evolution, the courts gradually recognized,
and then widened, a gap between actual control and legal pos-
session. In The Carrier’s Case, it was recognized that a guest in
an inn does not acquire possession of eating utensils or bed
linen. In the fifteenth and sixteenth centuries there was considerable
controversy whether servants enjoyed possessorial immunity for
misappropriation of goods acquired from their masters. After
some vacillation it was settled that a servant’s custody did not
amount to possession as long as the servant was on the master’s
premises or in the master’s company. Parliament intervened in
this development in 1529 with a statute that subjected servants
to the law of larceny as to all valuable property entrusted to them
by their masters. In due course, however, this statute was

\[
71 \text{See pp. 504-07 infra.}
\]
\[
\]
\[
1934).}
\]
\[
73 \text{See 64 Selden Soc'y at 33 (opinion of Nedeham).}
\]
\[
74 \text{Compare Y.B. Mich. 3 Hen. 7 pl. 9 (1488) with Y.B. Hil. 21 Hen. 7 pl. 21}
\]
\[
(1506) translated in C. Kenny, A Selection of Cases Illustrative of the}
\]
\[
English Criminal Law 216 (8th ed. 1935) [hereinafter cited as Kenny]; see}
\]
\[
3 W. Holdsworth, supra note 72, at 363-64.}
\]
\[
75 \text{See Kenny, supra note 74, at 216; 3 W. Holdsworth, supra note 72, at}
\]
\[
365 & n.2.}
\]
\[
76 \text{21 Hen. 8, c. 7 (1529). The statute does not formally alter the concept of}
\]
\[
possession; it provides that servants who “go away” with “caskets, jewels, money,
\]
\[
goods, or chattels” which had been “delivered to them by their master or mistress
\]
\[
. . . to the intent to steal the same . . . shall be deemed and adjudged [to have}
interpreted not to apply to the goods that servants received from third parties.  

In these disputes about the scope of possessorial immunity, the underlying factual transaction is always the same. Someone hands the defendant an object or the defendant picks it up with the owner's permission; the question is whether the acquisition of the physical object is sufficient to acquire legal possession. In the cases of crockery and linen in another's inn, the user would not expect eventually to acquire possession or property in the chattel. The problem is more subtle if the transaction is the sort in which the user normally expects to acquire possession or property. This more difficult variation was posed in the mid-seventeenth century case of *Chisser,* in which the defendant bolted from a store without paying for two cravats the shopkeeper handed him for inspection. The Exchequer found the taking to be felonious; despite the handing over of the cravat, the owner retained legal possession and was therefore protected until actual sale of the ties. In this situation as well as in the cases of the guest and the servant, drawing the line of possession short of physical control meant that one could commit larceny by carrying off an object already in one's hands. Thus the widening of the gap between legal possession and actual control functioned as a way of restricting possessorial immunity.

committed] felony . . . " In time, larceny by servants was molded into the conceptual system by holding that in this class of cases servants did not get possession. See The King v. Bass, 168 Eng. Rep. 228 (1782); 2 E. East, *supra* note 70, at 555-60.

78 83 Eng. Rep. 142 (1678). There are three paragraphs to the report. The first paragraph sets forth the facts (essentially that Anne Charteris handed Chisser two "crevats" and that a few moments later he ran out of the shop) and the question whether it should be adjudged felony; the second paragraph presents the reporter Sir T. Raymond's view that the case could be viewed as a felony according to Chisser's intent when he first received the tie; the third paragraph argues that Chisser was guilty as of the moment he ran from the store, for when Anne Charteris handed him the two cravats "they were not out of her possession by such delivery," *id.* at 142-44. The text relies on the third paragraph. Thomas Leach, see *W. HAWKINS, PLEAS OF THE CROWN* 135 n.1 (6th ed. T. Leach 1787) and Pollock and Wright, see *F. POLLOCK & R. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW* 140 (1888), both read *Chisser* according to the third paragraph. Whether one stresses the second or third paragraph of this opinion is of critical importance in construing The King v. Pear, 168 Eng. Rep. 208 (1779). See pp. 506-07, 513 & note 176 infra.

79 The case law in France, Germany and the Soviet Union is equally sensitive to the problem of restricting possession to some subset of cases of physical control. See, e.g., Judgment of March 6, 1958, [1968] D.S. Jur. 395 (Cass. Crim.) (salesgirl who took home and converted clothes from her shop guilty of larceny); Judgment of June 11, 1965, 1966 GOLDSMARMERS ARCHIV FÜR STRAFRECHT 244 (German Supreme Court) (customer who absconded with clothes after having tried them
At least two factors, the existence of a private agreement to transfer a taken object and the presence of objective criminality, influenced the contours of legal possession, and thus the scope of possessorial immunity. First, the doctrine as it developed responded to the principle of respecting private agreements about the control and use of personal property. Yet it is by no means easy to account for the types of relationships protected under this principle. The explanation is not to be found in the principle of assumption of risk, for it is hard to see why a man should not assume the risk of misappropriation by his servant, whom he knows well, but should in general assume the risk of misappropriation by a carrier whom he knows less well. An alternative view of the impact of this factor is that only by authorizing the removal of goods from his premises does the owner surrender the protection of the criminal law. This explains why the innkeeper retained possession over his crockery, why even before the statute of 1529 the master retained possession over goods used by his servants on his premises or in his presence, and why the shopkeeper retained possession over goods examined in his shop. Yet this perspective fails to provide a rationale for possessorial immunity where it did attach. While an owner might naturally expect that he has not surrendered possession when an object remains in his presence or on his premises, this sentiment does not account for the owner losing the protection of the criminal law just because he authorized the use of an object beyond the limits of his home or shop.

A more plausible rationale for possessorial immunity might be that it should apply only where the relationship between the two parties is defined entirely by an agreement concerning the use of the chattel. The master's supplying tools and the host's

on with the shopkeeper's permission guilty of larceny); UGOLOVNEE PRAVO: CHAST' OSOBNENAD [CRIMINAL LAW: THE SPECIAL PART] 272 (N.I. Zagorodnikova & V. Kirichenko, eds. 1968) (reference to person asked to watch luggage in train station guilty of larceny when he took it). The formal ground of all these decisions was that the degree of control imparted by the owner was insufficient to establish possession (possession, Gewahrsam, vladenie) and that therefore the rule of possessor immunity, recognized in all of these systems, see note 17 supra, did not apply.

Paley attempted to explain such phenomena as bailees' immunity from criminal liability for misappropriation on the principle that "the law will not interpose its sanctions to protect negligence and credulity, or to supply the place of domestic care and prudence." See 2 W. PALEY, WORKS (MORAL PHILOSOPHY) 372 (1825). He considered the refusal of the law to bestow a similar immunity on defalcating servants due to the fact that "no practical vigilance could watch the offender." Id. Why an owner can protect himself against dishonest bailees more easily than against dishonest servants remains a mystery.

See KENNY, supra note 74, at 216.
supplying linen or crockery were incidental to relationships rendered more complex by expectations of continuing interaction, the events occurring under the roof of the owner, or a structure of power and dependency. Possessorial immunity required a relationship defined solely by contract, in which the visible face of the other looks solely upon the chattel that binds the parties together. Though we find the principle of possessorial immunity as early as the thirteenth century, it may be that the institution was well suited for a form of commercial life in which contractual relationships with strangers were seen as private matters subject to autonomous regulation and therefore properly exempt from the jurisdiction of the criminal courts.

This analysis helps us isolate two determinants of the puzzling institution of possessorial immunity in the case of servants. Servants enjoyed possessorial immunity as to goods received from third parties, but not as to goods received from their masters. The anomaly is readily explained if we focus on the owner’s surrendering control over the object. In the case of goods received from third parties, the owner had no protection to surrender until he acquired possession over the goods and, therefore, the principle of retaining goods on the premises could not apply. From this point of view, the immunity of the servant over goods received from third parties arises only from a defect in the owner’s status: He has not yet acquired possession. An alternative account

\[82 \text{ See note 13 supra.} \]

\[83 \text{ Determining when the servant transferred possession to the employer proved to be the most subtle problem of the common law of larceny. It was relatively easy to determine when carriers surrender possession by delivery of the goods to their destination, see note 59 supra; the moment was well-marked, and after delivery the carrier typically had nothing more to do with the goods. The servant’s surrendering possession to his master is not so well-defined; a clerk who transfers funds to his employer’s drawer or safe might still have occasion to deal with the funds in the course of his employment. Compare The King v. Spears, 168 Eng. Rep. 512 (1798) (possession transferred to employer), with The King v. Waite, 168 Eng. Rep. 117 (1743) (possession not transferred). The courts were forced to look for an obscure point of delivery which was invested with great symbolic significance.} \]

**In response to The King v. Bazeley, 168 Eng. Rep. 517 (1799) (clerk who pocketed routinely deposited £100 note before transferring daily case to employer’s drawer not guilty of larceny), Parliament subjected servants who misappropriate goods given them by third parties to criminal liability. See 39 Geo. 3, c. 85 (1799). The question of delivery then became crucial for distinguishing the new, less severe crime of embezzlement from the older crime of larceny, see, e.g., Morgan v. Commonwealth, 242 Ky. 713, 47 S.W.2d 543 (1932) (embezzlement because no transfer had occurred); Commonwealth v. Ryan, 155 Mass. 523, 30 N.E. 364 (1892) (possession not transferred); Rex. v. Sullens, 168 Eng. Rep. 1272 (1826) (possession not transferred). Thus, the complexities introduced by the third party cases were carried forward.**

These complexities need not have arisen in the common law. Though German
emerges if we focus on the kinds of relationships involved. The relationship between the third party and the servant was precisely the kind of limited interaction, defined solely by the transfer of the object, that triggered possessorial immunity. Yet the relationship between master and servant was the paradigm of the more complex, ongoing relationship in which the transfer of the object failed to confer immunity.

We can acquire another perspective on this array of problems by turning to the second factor, that the courts should punish all cases, but only those cases, exhibiting manifest thievry. As the carrier could not be criminally liable for keeping or selling the bales, others who handled goods off the owner's premises acquired immunity from the inevitable ambiguity in their having, using, and even selling the goods. In other situations, the user's scope of control was so limited that his using it in any other way was suspect. The guest's walking out with the host's drinking cup fits this test, as does Chisser's running from the store with a necktie. A plausible way of looking at most cases on the contours of possession is to see them as a medium for bringing the principle of possessorial immunity in line with the judge's image of acting like a thief. By informing decisions on the scope of possession, the law follows the rule of possessorial immunity in distinguishing between larceny and embezzlement, see note 17 supra, the German courts apparently never got embroiled in the mysteries of an employee's symbolically transferring possession to the employer's domain. The rule today is that an employee's misappropriation of goods, whether received from third parties or from the employer, is punished as larceny. See Judgment of May 3, 1897, 30 RGSt. 88. The common law could have taken either of two doctrinal routes to the same conclusion. First, it could have been held that the employee was merely a conduit whereby the employer received possession whenever goods came into the employee's hands. This solution appears to have been unacceptable because of the great force of the implicit rule that possession can only pass when an object changes hands. One might receive custody without possession, but never possession without custody. Second, it could have been held that employer and employee received joint possession over objects received by the latter. The obstacle to adopting this solution was the common law notion of "taking" as acquiring possession and not as depriving another of possession, see 2 E. East, supra note 70, at 558 (one in joint possession of an object does not commit larceny by appropriating it to his exclusive use). Yet there is no reason not to define the required act of taking as the deprivation of possession without regard to the taker's acquisition of possession. This is the view implicit in German law, which was readily assimilated the case of joint possession to the set of cases subject to prosecution for larceny, see A. Schoenke & H. Schroeder, supra note 17, at 1260; R. Maurach, Deutsches Stafrecht: Besonderer Teil 203-04 (5th ed. 1969). By so limiting the principle of possessorial immunity, German law has remained untroubled by the complexities that have led prominent common law jurists to doubt the rationality of the distinction between larceny and embezzlement, see pp. 469-70 supra.

84 It is important to see that there are two different ways of interpreting pos-
principle of manifest criminality expanded criminal liability much as it had done in the Carrier’s Case. But the courts had no need for a dramatic breakthrough like the doctrine of breaking bulk when the concept of possession provided a low visibility device for bringing doctrine into line with the principle that he who acts like a thief ought to be punished as one.

C. Objective Criminality and Staged Larceny

In the foregoing two studies of common law rules, we traced the influence of manifest criminality in generating an expansion of criminal liability. We turn now to a reciprocal phenomenon — a line of predominantly modern cases in which the absence of manifest criminality accounts for the acquittal of obviously dishonest and dangerous people. These cases are of special interest to us, for they illustrate the survival of the principle of objective criminality in the twentieth century.

The cases we shall examine follow a recurrent pattern. The suspect seeks to steal from the owner by enlisting the aid of the latter’s employee. The employee in turn informs the owner, who then instructs his employee to feign cooperation in order to catch the suspect in the act. The owner or the police keep watch as the suspect goes through the motions of stealing; then they apprehend him. There is a surprising number of decisions in this vein of case law,85 and the opinions interweave a number of nearly appropriate doctrines in an attempt to explain why the conviction should be affirmed or reversed. Some sense that the issue is entrapment.86 Yet apart from the trap’s being staged by private parties rather than the police, these are typically cases in which

---

85 See the cases collected in Annot., 10 A.L.R. 3d 1121 (1966). Staging a larceny appears to have precluded liability for the taking at Roman law. See T. Mommsen, supra note 17, at 750 n.74.

86 The issue of entrapment is typically raised and rejected as a defense. See, e.g., Jarrott v. State, 108 Tex. Crim. 427, 1 S.W.2d 619 (1927) (phrasing issue as one of entrapment and rejecting the defense); Low v. State, 44 Fla. 449, 32 So. 956 (1902) (rejecting the defense); Pigg v. State, 43 Tex. 108 (1875) (jury instruction in language of entrapment; conviction reversed on other grounds).
the would-be thief initiates the plan.\textsuperscript{87} Admittedly, entrapment might be a factor in some extreme cases of overbearing inducement.\textsuperscript{88} The more interesting precedents are those that acknowledge that the issue is not the defendant's voluntariness or culpability, but nonetheless struggle with an intuition that something is awry when the crime is acted out on a stage manipulated by the owner of the goods.

To express their intuition that something is amiss, the courts stress the absence of a "trespass" in the staged taking. To understand why "trespass" looms so large in these cases, we shall have to wind our way through a complicated series of doctrinal arguments. The thesis that will emerge is that the nearly appropriate doctrinal gambits in these cases are but a vehicle for expressing the ongoing influence of the principle that nonmanifest takings should not be punished under the criminal law. The challenge in developing this thesis will be to explain the principle of manifest criminality surviving in cases of staged larceny, but not in other areas of the modern common law. The quest for this explanation will require us to probe the link between manifest criminality and the theory of crime as a socially disturbing event.

To analyze the doctrinal rationalia for these decisions, we shall concentrate on the well-reasoned opinion in \textit{Topolewski v. State},\textsuperscript{89} decided by the Wisconsin Supreme Court in 1906. The facts richly illustrate the typical pattern in cases of staged larceny. In an effort to acquire meat products from a packing company, Topolewski sought the cooperation of one Dolan, recently employed by the company and personally indebted to him. Dolan informed the manager of the company of Topolewski's criminal intentions. The manager instructed Dolan to feign cooperation, which he did, in meeting repeatedly with Topolewski. The plan that emerged was that Dolan would arrange to have four barrels of meat placed on the loading dock of the plant and Topolewski would be identified as the party to whom they were consigned. Topolewski arrived in his own truck and, acting like any other customer, he loaded the barrels in his truck and drove off. Though the platform boss apparently did not know of the trap, the com-

\textsuperscript{87} See, e.g., People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962); Rex v. Turvey, [1946] 2 All E.R. 60 (Crim. App.).

\textsuperscript{88} A good example is Love v. People, 160 Ill. 501, 43 N.E. 710 (1896), in which a hired detective had repeatedly plied the defendants with liquor and proposed they together commit a series of burglaries. When the defendants were intoxicated, the detective led them through a burglary that had been arranged in advance with the owner who had hired him. The reversal in this case was rendered easier because the conviction was for burglary rather than larceny. See pp. 495–96 infra.

\textsuperscript{89} 130 Wis. 244, 109 N.W. 1037 (1906).
pany manager had set a watch over the barrels. Topolewski was presumably arrested shortly after he drove off.  

In reversing Topolewski's conviction, the Wisconsin Supreme Court carefully separated out matters that were not in dispute. There was no question about Topolewski's intention to steal the barrels of meat. Nor was there any dispute about whether entrapment provided a rationale for reversing the conviction. The court specifically says that it is wrong to justify reversals in this sort of case on the ground that the owner's deception excused the would-be criminal, or, alternatively, that the owner's improper behavior should preclude a criminal prosecution. The proposition recurs repeatedly in the opinion that regardless of the actor's criminal intent there could be no conviction unless his conduct satisfied the objective elements in larceny. The central objective requirement was a trespass. All of the court's doctrinal arguments were designed to prove that the taking of the barrels with the intent to steal was not sufficient to constitute a trespass.

Three subsidiary arguments emerge to demonstrate the absence of a trespassory taking: first, that the conduct of the manager and the platform boss meant that the company had "consented" to the taking; second, that the transaction at the loading dock amounted to a delivery; and third, that the company had gone too far in facilitating Topolewski's taking of the barrels. Though popular in this line of cases, none of these three arguments provides an adequate ground for reversal.

The doctrine of consent does not fit the facts. At the most there was (1) consent for the purpose of apprehending the suspect and (2) an appearance of consent to passersby. If actual consent precludes harm and therefore criminal liability, giving

---

90 See id. at 246-47, 109 N.W. at 1038.
91 See id. at 247, 109 N.W. at 1038.
92 See id. at 255, 109 N.W. at 1041 ("Some writers . . . give . . . much attention to condemning the deception practiced to facilitate and encourage the commission of a crime . . . as if the deception were sufficient to excuse the would-be criminal . . . and that the wrongful participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offense of larceny. That is wrong.") (emphasis added). It should be noted, however, that in other passages, the court stresses the element of the company's inducement in bringing about the incident. See id. at 253, 255-56, 109 N.W. at 1040, 1041.
93 The issue of trespass is the refrain of the opinion. See id. at 250, 252, 254, 255, 256, 109 N.W. at 1039, 1040, 1041.
94 See id. at 251-55, 109 N.W. at 1039-41.
95 See id.
96 See id. at 255-57, 109 N.W. at 1041.
97 There is an additional problem whether "actual" consent should constitute a defense if the actor believes he is acting without consent. The theoretical aspects
consent for the purposes of a trap the same effect would clearly go too far. It would suggest that any trap, any standing-by and observing the thief perform the deed, would constitute "consent" and preclude a conviction. Yet as evidenced by its treatment of acceptable instances of staged larceny, the court was obviously not inclined to go that far. The appearance of consent raises another set of problems, for Topolewski indisputably assumed that he was taking the barrels contrary to the owner's will. Is it sensible to speak of apparent, uncommunicated consent as a defense? Apparent consent makes sense as a defense only if the defendant reasonably believes that the owner has consented. Yet on the facts of the case, Topolewski was unequivocally culpable in executing his criminal plan. As a result, one is at a loss to see why the appearance of consent should generate a defense on his behalf.

The doctrine of "delivery" appears to add little to the discussion of consent. Yet there was method in the court's maintaining that a delivery precluded a finding of trespass in the taking, for the process of receiving an object by delivery is conceptually linked with the phenomenon of a non-incriminating taking. If A voluntarily transfers an object to B, it is in the nature of the transaction that the taking is not manifestly criminal. Thus one way for courts to express an intuition that an unincriminated taking is not criminal is to affix the label "delivery." Saying that there is a "delivery" is a way of formalizing one's sense that in the situation of the taking, the defendant did not act manifestly like a thief.

The court accepts the result in cases like The King v. Egginton, 168 Eng. Rep. 555 (1801), where the requisite "trespass" appears despite the staging of the offense. See 130 Wis. at 251-52, 109 N.W. at 1039-40. Some comparative authority for this conclusion may be found in a case of staged larceny that came before the German Supreme Court in 1953. A police woman, apparently dressed in plain clothes, left her purse exposed in an effort to tempt a suspected thief. The suspect took it and was convicted of larceny. The Supreme Court reversed, holding that at most he could be convicted of attempted larceny. See Judgment of April 30, 1953, 4 BGHSt. 199. The rationale was that in the case of a trap such as this, the would-be thief did not actually acquire possession. The court rejected the relevance of consent on the ground that "the actor knew nothing," id. at 200, of the alleged consent and "assumed under the circumstances that his act was consummated larceny," id.

The concept of delivery is introduced in the discussion of Regina v. Lawrance, 4 Cox Crim. Cas. 438, 440 (1850), which is cited as a case illustrating the line between consent and nonconsent, see 130 Wis. at 251, 109 N.W. at 1039. It is instructive that the court never says outright that the defendant delivered the barrels to the accused. It says that the conduct amounted "practically" to a delivery, 130 Wis. at 251, 109 N.W. at 1039, or that the victim "substantially..."
That the term "delivery" relates in this way to intuitions of manifest criminality becomes evident when one compares cases of staged larceny where the courts are willing to convict. A good example is *The King v. Egginton*\(^{102}\) where a servant, a putative accomplice, let a band of thieves into his master's house. He stood by as the thieves broke into a large desk and took silver ingots. Though the servant was acting under his master's instructions and though the thieves could not have reached the ingots without the servant's aid, a majority of judges perceived the taking to be trespassory. The Wisconsin Supreme Court endorsed this decision as an illustration of the "trespass" that was missing in *Topolewski*.\(^{103}\) The labels used to express the difference between the two cases are that in *Egginton* there was no consent and no delivery, but in *Topolewski* there was. It is hard to know what one means by these terms unless they express the perception that in *Egginton*, the servant's participation did not undercut the objective manifestation of thievery.\(^{104}\) In *Topolewski*, however, dissembled cooperation converted the taking into one that appeared to be in the ordinary course of business and that was enough to warrant the conclusion that the barrels were delivered to the defendant.

After its opening discussion of consent and delivery and the setting up of *Egginton* as the counterpoint to the facts before it, the court's opinion seeks to develop a systematic account of the difference between permissible and impermissible traps. The general claim is that undue facilitation of the crime undermines the element of trespass. The servant in *Egginton* had not unduly facilitated the theft; but Dolan and the company manager had.\(^{105}\) Undue facilitation occurs when the owner does "acts amounting to the constituents of the crime"\(^{106}\) or does "some act in the transaction essential to the offense."\(^{107}\) This language evokes association with a well-established rationale for denying criminal liability made such delivery," *id.* at 254, 109 N.W. at 1040, or that "the property was in practical effect delivered to the would-be thief," *id.* at 256, 109 N.W. at 1041. This phrasing is a good clue that even Justice Marshall, who wrote for the court, regarded the doctrine of delivery as but an approximation of a deeper issue.


\(^{103}\) 130 Wis. at 251-52, 109 N.W. at 1039-40.

\(^{104}\) The critical fact in *Egginton* was apparently that the servant merely stood by and let the thieves carry out their plan. See *Rex v. Turvey*, [1946] 2 All E.R. 60 (Crim. App.); Regina v. Lawrance, 4 Cox Crim. Cas. 438, 440 (1850) (directing acquittal if the servant handed the would-be thief a deed, but suggesting that conviction would be permissible if the servant laid the deed down on a table and let the would-be thief pick it up).

\(^{105}\) See 130 Wis. at 256-57, 109 N.W. at 1041.

\(^{106}\) *Id.* at 252, 109 N.W. at 1040.

\(^{107}\) *Id.* at 254, 109 N.W. at 1040.
in burglary cases. Suppose one night Dolan, the would-be accomplice, had met Topolewski outside the plant in pursuit of a plan to obtain the barrels by burglary. While the latter kept watch, Dolan climbed through a window, which he and the manager had arranged to leave open. It is well-recognized that the pseudo-burglary by Dolan could not be imputed to Topolewski.\(^{108}\) In speaking of the owner's doing the acts "essential to the crime," the court apparently sought to assimilate Topolewski to this type of case. Yet the meaning of "essential act" is different in the staging at the company's loading dock. Neither Dolan nor the company manager committed the trespass, as the would-be accomplice performed the act of breaking-and-entering by climbing through the window.

What the Wisconsin court had in mind was that the "design to trap a criminal" went a little too far because the company's facilitation prevented "the taking of the property from being characterized by an element of trespass."\(^{109}\) The reference to "essential acts" helps us little in understanding why the "design . . . went a little too far."\(^{110}\) The "essential act" wanting is the trespass and "trespass" in the context of larceny is not an act in the ordinary sense. It is a quality or an attribute of taking property. The difference between a trespass and a mere taking lies in the manner of acquisition. A trespass has to evoke associations with the ancient form of taking \textit{vi et armis}. Thus the focus on undue facilitation and essential acts leads us back to the principle of manifest criminality. The undue facilitation eliminated the quality of trespass by converting the thieving into a taking in the ordinary course of business.\(^{111}\)

The important point to be drawn from Topolewski is that the principle of manifest criminality can still influence the outcome of larceny prosecutions.\(^{112}\) The intuitions that inform the rule of

\(^{108}\) See State v. Hayes, 105 Mo. 76, 16 S.W. 514 (1891) (burglary conviction reversed where the feigned accomplice was the only party to enter the building).

\(^{109}\) 130 Wis. at 254, 109 N.W. at 1040.

\(^{110}\) Id., 109 N.W. at 1040.

\(^{111}\) The close tie between the concept of trespass and the principle of manifest criminality influences the language of the opinion in People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962). The court concedes that a "trespass" is no longer required under New York law, \textit{id.} at 20, 233 N.Y.S.2d at 586, but then finds it necessary to reintroduce the concept of trespass in order to express its conclusion that there is no liability for larceny where the "owner or his authorized agent voluntarily consents to the taking . . . only for the purpose of catching the thief . . . ." \textit{id.} at 21, 233 N.Y.S.2d at 587.

\(^{112}\) For more recent examples of reversal in cases of staged larceny, see People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962) and Rex v. Turvey, [1946] 2 All E.R. 60 (Ct. Crim. App.). However, the principle underlying the defense has also been rejected. See United States v. Bryan, 483 F.2d 88, 90-92
"breaking bulk" and that shape the concept of possession survived the metamorphosis of larceny that began late in the eighteenth century. Yet the shared image of the thief continues to affect the course of the law in but this remote corner of criminal prosecutions. The exclusive survival of manifest criminality in the context of staged larceny suggests that there is a deeper connection between the common law concept of criminality and the practice of designing a trap for a would-be thief. Topolewski invites us to consider what that deeper connection might be.

While we can grasp the concept of manifest larceny there is another element in the classical concept of criminality that is far more elusive. This additional element is expressed by describing crime as a breach of the peace or a socially disturbing event.

An act of larceny is a frightening and unnerving episode in communal life. Yet this account of criminality is problematic, for larceny is not disturbing every time it occurs. The thief might work in secret with no one present. In what sense is that actually unnerving? What one has to say is that thieving is typically or paradigmatically disturbing; and in any event, the thought or anticipation of falling prey to thieves is always disturbing. This

(3d Cir. 1973) (treating the actor's intent as the controlling issue); Smith v. United States, 291 F.2d 220, 221 (9th Cir.), cert. denied, 368 U.S. 834 (1961).

Other efforts to keep the principle of manifest criminality alive have founded. The proposition is occasionally advanced that "where the taking is open and there is no subsequent attempt to conceal the property, . . . a strong presumption arises that there was no felonious intent." Kemp v. State, 146 Fla. 107, 104, 200 So. 368, 369 (1941). But see Pennsylvania v. Becomb, Addison 356, 358 (Pa. County Ct. 5th Cir. 1799) (defendants argued, unsuccessfully, that they should not be guilty of larceny in taking skins owned by Indians because, counsel submitted, the taking was "in open day and avowed"). The United States Supreme Court explicitly disapproved this presumption in Morissette v. United States, 342 U.S. 246, 275 (1952).

The concept of the socially disturbing event has received its most careful elaboration in the field of criminal attempts. According to Jescheck, acts constitute criminal attempts if "the faith of the community in the legal order is thereby shaken and the sense of security under the law could thereby be compromised." H. JESCHECK, LEHRBUCH DES STRAFRECHTS 341 (1969). It is important to distinguish two different ways in which the "faith of the community in the legal order" might be undermined: (1) by the act itself, or (2) by the failure to prosecute and punish the culprit for an act that has evoked the community's concern. Though the text refers to the first of these alternatives, Jescheck recognizes the second as a permissible interpretation of the theory. See id. at 352. Another author takes the idea of the socially disturbing event, presumably limited to the first interpretation, to be a basis for deducing the requirement of manifest criminality. See Meyer, Kritik an der Neuregelung der Versuchsstrafbarkeit, 87 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 598, 611 (1975). The theory of crime as a socially disturbing event has not received much attention in the English-language literature; for one treatment see Becker, Criminal Attempt and the Theory of the Law of Crimes, 3 PHIL. & PUB. AFF. 262 (1974).
aspect of larceny may indeed be essential to the common law conceptualization of larceny as a public rather than a private harm.

If we think of larceny as a socially disturbing event, we might be able to fathom why modern courts are disposed to acquit only in a subset of cases in which the actor's conduct fails to conform with the shared image of the thief. In cases like Topolewski, the additional element of criminality is also wanting. There is nothing unnerving about Topolewski's falling into a rehearsed scene of larceny. Yet owners of goods are obviously disturbed by thieves who manage to improvise a manner of taking that looks perfectly innocent. This would explain why modern courts would convict in the latter cases of non-manifest larceny but balk at convicting in cases of staged larceny. At earlier periods of history there may have been a closer conceptual tie between manifest larceny and socially unnerving conduct. That tie has come unraveled in modern jurisprudence and now it might take the absence of both manifest criminality and socially unnerving conduct to create a convincing case for acquitting a would-be thief.

D. Objective Criminality Over Time

Whether the principle of objective criminality can survive even in its truncated form in the modern law of larceny depends largely on whether the doctrine can be articulated in a manner that makes sense to the critical modern observer. It is important for us to attempt an exposition of the principle, if only to help us understand why it appealed so powerfully to lawyers prior to the end of the eighteenth century.

There is one aspect of the principle that might confound even its most sympathetic critic. It was assumed at common law that the criminality of the deed had to become manifest in a single brief moment of force or stealth. The carrier committed larceny if he broke bulk, but not if he took the entire bale and retained it in his possession. Topolewski was not guilty because his driving away with the barrels was indistinguishable from other pick-ups occurring in the ordinary course of business. Yet if we had observed Topolewski from the moment

---

115 To show the limited nature of the survival, suppose Dolan and Topolewski had actually conspired to steal the barrels of meat and the taking of the barrels had transpired precisely as it did. The appearance of criminality would be exactly the same, yet without the element of staging there is no doubt that both Topolewski and Dolan would have been guilty.

116 See pp. 484–86 supra.

117 See p. 496 supra.
of his initial contact with Dolan, we surely would have enough objective evidence to infer the criminality of his plan. How can one justify limiting the inquiry into objective criminality to the moment the suspect lays his hands on the goods?

The origin of this implicit restriction on objective criminality is presumably the private execution of manifest thieves in ancient legal systems. Thieves were identified as manifest if their thievery was public and potentially visible to all. Conduct could not be visible to all if the inference of criminality derived from observations extending over time. Conduct like Topolewski's would appear objectively criminal only to someone who followed him about and became a party to his private conversations. If we recall the origins of the common law in the private execution of manifest thieves, it is not puzzling that we should insist on larcenous conduct peaking in a single moment of stealth or force.

Of course, we might properly question whether the common law should adhere to a principle of publicity which developed under the special conditions of ancient legal systems. Yet this premise of the common law cannot be assessed in isolation from other structural principles of the criminal law as we know it. One of these assumptions is that crimes occur at an identifiable moment of time. One could certainly imagine a theory of criminal law that ignored this premise, but so far as one can tell, no Western legal system does. The assumption that crimes occur at a single instant of time generates the further proposition that there must be a union of act and intent at the moment the crime occurs. The required union of act and intent is in turn a logical prerequisite of possessorial immunity. If one could acquire possession in one moment and intend to steal at another, no principle of possessorial immunity would be possible.

---

118 See pp. 76-77 supra.

119 The pervasive influence of the principle is expressed in the extraordinary attention paid to the one case that appears to be an exception, namely the situation in which A attempts to kill B and fails, but thinking B dead, decapitates the body or otherwise causes death. The first act is at most an attempt; the second lacks an intent to kill. Nonetheless, the clear tendency is to impose liability in this situation. See, e.g., Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422 (1896), rehearing denied, 100 Ky. 268, 38 S.W. 1081 (1897); Judgment of April 26, 1960, 14 BGHS 193. For critical discussion, see J. Hall, General Principles of Criminal Law 189 (2d ed. 1960); LaFave & Scott, supra note 1, at 241-42; G. Williams, Criminal Law: The General Part 173-75 (2d ed. 1961); A. Schenke & H. Schroeder, supra note 17, at 507-08; Mayer, Das Problem des sogenannten dolus generalis, 11 Juristen Zeitsung 109 (1956).

120 Coke invokes the classic principle actus non facit reum nisi mens sit rea partly to express the principle that, if one forms the intent to steal after acquiring possession, one cannot be guilty of larceny. E. Coke, supra note 12, at *107; cf. L. Lambert, supra note 17, at 243 (stressing the requirement of simultaneity as a structural feature of theft offenses).
If one accepts the premise that crimes must occur at a single moment of time, then it is hard to see how the principle of objective criminality could apply to a series of acts over time. The only relevant act is the one that occurs simultaneously with the intent to steal. Now one might say that any act should be sufficient for this purpose, but this position would be fundamentally inconsistent with the notion that crimes occur at a unique point in time. Further, selecting an act arbitrarily would violate our sense that the act defining the crime must be one that is characteristically disturbing to the community. Thus the principle of manifest criminality, the required union of act and intent, and the premise that acts occur at a single moment of time are all facets of one underlying conception of criminal conduct.

There is no doubt that one could challenge the soundness of this traditional approach to criminality. The metamorphosis of larceny, to which we are about to turn, is precisely a sustained reaction against the limitations implicit in the principle of manifest criminality. Though the modern approach to larceny nominally subscribes to the required union of act and intent at a single moment of time, the act required proves to be any act of dishonest acquisition. Thus the modern approach accommodates the range of objective evidence obtained by scrutinizing Topolewski's conduct over a span of time. The relevance of this evidence is not that it provides proof of objectively criminal conduct, but rather that it tends to establish the required intent at the moment of acquisition.

In the conclusion of this essay I shall attempt to show that the limitations implicit in the traditional approach to larceny expressed an important value of respect for individual privacy.

121 There are some deeper, unanalyzed, issues in this argument. For example, the argument assumes that one has an intent to steal at a particular moment of time, and therefore, that the act manifesting this intent must also occur at a particular moment. Yet why not suppose that the intent occurs over a prolonged period, with the acts manifesting this intent extending over the same range of time? Topolewski, for example, planned his scheme for at least several days, and planning is arguably a sort of intending.

I am inclined to think that intending is significantly different from planning. The distinction is evidenced by the odd ring to: "Topolewski intended his crime for several days" (compare: "he has been willing his crime for several days"). The difference between intending and planning may be like the difference between looking and seeing; one can look at something for hours, but it is not grammatically appropriate to say: "I have seen it for hours." These are but suggestions for a theory of intending that would be relevant to criminal theory. The concept has already drawn a rich philosophical literature. See, e.g., J. MEILAND, THE NATURE OF INTENTION (1970); G. ANSCOMBE, INTENTION (2d ed. 1966).

122 See pp. 525–28 infra. The argument in the conclusion will not dispose
Privacy was assured by restricting the scope of evidence relative to proving that the defendant was a thief. The primary restriction implicit in this approach was that the crime could not be established by surveying the defendant's behavior over a span of time. Its central tenets were that crime occurred at a single moment of time, that the criminality had to be manifest at that moment, and that the manifestation of crime was typically unnerving to the community.

III. The Beginnings of the Metamorphosis

The modern as well as the traditional approach to larceny insists upon intent as a necessary element of liability. Yet the role of *animus furandi* within the traditional conception of the crime was different from intention in the modern approach. The *animus* became an issue only if the state could prove an objectively criminal act. The defendant advanced the absence of *animus furandi* as a way of challenging the authenticity of appearances. One might look like a felon without being one, and the reason would be that one lacked the necessary *animus furandi*. The two-stage ordering of the inquiry into criminal guilt relegated the issue of intention to a subsidiary status. Indeed, it was difficult to disengage the *animus* from a manifestly criminal act and treat it as an abstract issue as we are wont to do today.\(^{123}\)

of all possible alternatives to the principle of manifest criminality. For example, one might imagine a system of objective criminality extending over a series of acts, with the required intent occurring at the time of any one of them. The series of acts, taken together, would provide presumptive evidence of a criminal intent and thus avoid the dangers of relying on character evidence and confessions. It is fair to say that this article is directed primarily to the relative merits of the traditional and modern systems and does not consider all possible variations on the criteria of liability.

\(^{123}\) Intent, it should be noted, was not completely devoid of independent significance. One area in which the defendant's subjective state provided a rationale for conviction was the set of cases in which the defendant fraudulently invoked the legal process in order to acquire the victim's goods. These were called cases of larceny *in fraudem legem*. See *E. Coke*, *supra* note 12, at *108; i M. Hale*, *supra* note 12, at 507. The leading case is *Farr's (Farre's) Case*, reportedly tried at Old Bailey in April, 1665. See 84 Eng. Rep. 1074 (1665). According to the facts found at trial, Farre and his mistress Chadwick fraudulently brought a writ of ejectment against Mrs. Stanyer (Steneer). Having had her ejected and arrested, they then rifled her house, breaking open cup boards and trunks, and carried off a variety of valuable goods. The defendants were convicted of larceny and executed. John Kelyng apparently sat as a judge in this trial and provides us with one report. *Id.* Sir Thomas Raymond was counsel and gives his version in his report of *Chisser*. See 83 Eng. Rep. 142, 142 (1678). The case is also discussed at 2 *E. East*, *supra* note 70, at 660. One could interpret *Farr's Case* as one in which the acts of taking were manifestly criminal and the only issue was whether the defendants could rely on
For modern lawyers, this structure of inquiry is reversed. Intent is the primary issue in prosecuting larceny, at least where the requisite harm has been established; the acts are subsidiary and function as one of the several means of proving intent. At the risk of some oversimplification we could say that the essential difference between the traditional and modern approaches is that the former was oriented toward the *actus reus*, while the latter is oriented toward the *mens rea*. The critical question at this point is: How did this radical reorientation come to pass?

**A. The Withering of Manifest Criminality**

The metamorphosis of larceny began in the intellectual ferment of the late eighteenth century. The times were astir with a new, rationalist and instrumentalist social criticism, and many thinkers, above all Beccaria and Bentham, were attempting to apply this new social criticism to the use of criminal sanctions. Punishing the guilty was not an end in itself, they held, but a means of protecting society and promoting human happiness. No form of punishment could be justified unless it was the cheapest available means for serving these social ends.

The criminal sanction could serve as a means of social pro-...
tection only if the law identified particular social interests worthy of protection and took the necessary measures to protect these interests. The focus on the interests protected by the criminal law led to the conceptualization of larceny as a crime against property. The criminal, it turned out, was rational like the rest of us; he sought wealth and would steal so long as the benefit of theft outweighed the cost of prospective punishment. The analysis of the criminal law into specific interests and the conceptualization of crime as an intrusion against those interests provided the conceptual background for the emerging school of protectionist criminology. At a single stroke, this view of crime generated a theory of criminal motivation and enabled legislators to calculate a rational response to crime by measuring the punishment against the social interest at stake and the strength of the motive inducing criminal behavior.

If the function of the criminal law was to protect social interest, it seemed pointless for the police and the courts to stay their hand until damage occurred. The most socially protective measure was to intervene prior to the occurrence of harm. Thus the late eighteenth century witnessed the first cases recognizing the doctrine of criminal attempts. The advantage of earlier intervention would prove to be one of the major determinants of the metamorphosis of larceny.

Another major influence of the period was the quest for well-defined, rationally consistent rules of criminal liability. Theorists like Montesquieu, Beccaria and Bentham insisted on clear and definite rules as the foundation for a rational system of laws that would provide a well-tooled mechanism for deterring crim-
These ideas were to come to fruition in the early nineteenth century, which in virtually all Western legal systems was a period of intense legislative activity. Legislation imposes demands of generality, definition, and consistency that are hardly satisfied by appeals to a shared image of thievery. The first parliamentary report on the criminal law, published in 1834, takes the law of larceny to be the best illustration of the newly felt chaos of the common law rules. If the criminal law was to come under legislative control, it seemed that there would have to be a new methodology for identifying criminal conduct.

At the same time that the eighteenth century penal theorists were laying the foundations of the modern theory of social control, the judges of the time were beginning to adjust the traditional rules of larceny in ways that would eventually bring the law into line with the values of the time. At the early stages of the metamorphosis of larceny, the issues appeared to be technical and of marginal significance. A good example is the famous case of The King v. Pear, which has come to be seen as the source of the crime of "larceny by trick." The case raised the recurrent eighteenth century phenomenon of theft by someone in nominal possession of a hired chattel. Pear had rented a horse from one Finch; he said he was going to ride to Surrey; in fact he rode to Smithfield and sold the horse. It appeared also that he lied about his residence. In Pear's trial for larceny, the barrier to conviction was that he had acquired the horse by delivery from Finch and thus presumably had acquired possession. There was no "breaking of bulk," and therefore the case did not come under the limited exception of The Carrier's Case.

The problem was an old one: Is an intent to steal sufficient to override the immunity provided by acquiring possession? The
traditional answer, as we have seen, was always negative. Yet Pear was an especially appealing case for moving the law in a new direction. True, Pear's dishonesty did not peak in a moment of manifest thievery. But when there are objective data as incriminating as Pear's lie about his address and his subsequent selling of the horse, why should one insist upon so narrow a view of what it is to act like a thief?

Presumably influenced by reasoning of this sort, Justice Ashhurst instructed the jury that if Pear had the intention of selling the horse at the time he mounted it and rode off, he was guilty of larceny, but if he formed the intent later, he was not guilty. Pear's subsequent conviction generated controversy among the judges. They met several months later and the majority of them confirmed Ashhurst's instructions as sound. If Pear's intention was fraudulent at the outset, they reasoned, he never acquired legal possession. Thus, conversion of the horse (presumably at some moment on the ride to Smithfield or at the time of the sale) became equivalent to the taking and carrying away characteristic of common law larceny.

\[^{138}\] Eng. Rep. at 208. Justice Ashhurst noted that Pear was not akin to cases where according to the original agreement, the bailment was circumscribed in time or in the number of miles that could be ridden. Id. In those cases, when the rider exceeded the number of hours or miles permitted, his possession lapsed and his taking was larceny. The leading precedent for this rule is the conviction of John Tunnard at Old Bailey, 1729. See id. at 209, note (a). Tunnard borrowed a horse to ride three miles, but rode to London and sold it. He was convicted. The reported rationale was that after he exceeded the agreed-upon limit, his privity lapsed and his taking was felony. That theory did not apply in Pear, for Pear sold the horse on the same day and apparently did not breach any well-defined limit as to time or distance.


\[^{140}\] It is important to distinguish between a "fraudulent intent" and animus furandi. The former, but not the latter, would be satisfied by an intent to take temporarily. See State v. Coombs, 55 Me. 47 (1867) (interpreting the rule to require merely a fraudulent or tortious taking). On this view, the relevant moment for the animus furandi is the subsequent conversion, not the initial acquisition of the chattel.

\[^{141}\] The requirement of a conversion led to some acquittals and appellate reversals. See, e.g., Regina v. Brooks, 173 Eng. Rep. 501 (1837) (offering a hired horse for sale insufficient to constitute a conversion); Blackburn v. Commonwealth, 28 Ky. L.R. 96, 89 S.W. 160 (1905) (no conversion of hired horse and buggy if defendant pledged it with the intent to redeem it). The occurrence of the crime at the moment of conversion suggests that Pear stands for an offense more like embezzlement than larceny. If Parliament had legislated in the field of breaches of trust by 1779, rather than beginning in 1799, there would have been no need for a special crime of "larceny by trick." Thinking of Pear and "larceny by trick" as an anticipatory form of embezzlement explains why Western European legal systems have well-defined crimes corresponding to larceny (Diebstahl, vol, krazha), embezzlement (Unterschlagung, abus de confiance, prisvoenie),
The interpretation of *Pear* has generated considerable controversy, largely because there are two published versions of the judge’s opinion. The first report, published in 1789, holds that the crime occurred at the time of the subsequent conversion, and not when *Pear* first mounted and rode off. A second version of the opinion, published in East’s *Pleas of the Crown* in 1803, has the judges saying that the crime occurred at the moment of riding off, which presumably implied that no subsequent conversion was necessary. The latter view was rejected by the Parliamentary report of 1834, which presumably relied upon the first-published opinion in the case. Others who have studied the case have also taken the 1789 opinion as authoritative. Yet East’s opinion, as we shall see,

and false pretenses (*Betrug, escroquerie, obman*), but there is no concept in German, French or Soviet law corresponding to “larceny by trick.”

This is the report of the case reprinted at 168 Eng. Rep. 208, initially published in *Leach* 273 (1779 ed.). This volume of Leach’s Reports contains several other cases in which the judges, addressing themselves to *Pear*, suggested a reading that partially supports the version of the case that appears in 2 E. East, *supra* note 70, at 685–89. In *The King v. Semple*, 168 Eng. Rep. 312 (1785), the court says first that the important part of the opinion in *Pear* was the holding that possession remained in the owner after *Pear* initially rode off with the horse, see id. at 313, yet it goes on to say that the issue of conversion is important only because it bears on the intent in initially acquiring the horse, see id. at 314. In *The King v. Charlewood*, 168 Eng. Rep. 306 (1786), *Pear* is interpreted to be about “intent to steal” at the time of the initial acquisition; yet the focus of the opinion is not on intent as opposed to conversion, but on whether the intent to steal was formed simultaneously with the defendant’s mounting of the horse. On both interpretations of *Pear*, the accused would not be guilty if he first formed a fraudulent intent after getting the horse. Prior to the publication of his first volume of reports, Leach reviewed these cases in his annotation to Hawkins in 1787. He concluded that the correct reading was that fraud at the time of initial acquisition prevented transfer of possession and thus made the subsequent conversion felonious. See 1 W. Hawkins, *supra* note 78, at 135 n.1.

2 E. East, *supra* note 70, at 685–89.

*First Report, supra* note 4, at 23.

*See LaFave & Scott, supra* note 1, at 627 (“At all events, he must, in fact, later convert it”); F. Pollack & R. Wright, *supra* note 78, at 219 (“The principle . . . was once thought to be that the fraud prevented any divesting of the owner’s possession . . .”); 3 J. Stephen, *supra* note 4, at 160 (“the subsequent conversion [is regarded] as theft”); Scourlock, *supra* note 4, at 21 (showing that in *Tunnard*, the intent did not prevent transfer of possession; in *Pear*, it did); Turner, *Middleton’s Case and the Larceny Act, 1916*, 7 Camb. L.J. 331, 339 (1941) (stating directly that *Pear* did not require the offender to have animus furandi at the time of initial acquisition). There is, however, a minority view, which appears to be less well-informed, holding that *Pear* should be read as a case about animus furandi at the time of initial acquisition. *See* R. Perkins, *supra* note 1, at 246; L. Weinreb, *supra* note 61, at 315; H. Packer, *Limits of the Criminal Sanction* 82–83 (1968); Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967, 970–71 (1953).
proved highly influential as an expression of nineteenth century attitudes toward the concept of criminality.

It is important to see how these two versions of Pear affect the determination of when the crime occurred and the moment at which the criminal suspect could be properly arrested. According to East's report and interpretation of Pear, the critical fact is the intent to steal at the moment of mounting the horse. A subsequent conversion of the horse would not be required and Pear presumably could have been arrested as soon as he left the stable. It would also follow that Pear's lie would be an incidental fact in the case. Under this view, a routine act like mounting a horse would be criminal if the actor's mind was visited by the wrong kind of intention. The more conservative reading of the case retains the requirement of a muted manifestation of criminal intent at the time of conversion. Nevertheless, even read conservatively, Pear was a major step in the transition from the pattern of objective criminality to a pattern of larceny by intent. Holding that fraud could defeat the transfer of possession meant that possessorial immunity could no longer be thought of as an objective consequence of the voluntary delivery; henceforth, one would have to think of the rule as a form of protection contingent on the intention and the desert of the recipient.146

Further subjectification of the law of larceny was invited by the move to criminalize improper behavior by finders. According to the traditional texts, finders could not be guilty of larceny.147 The rationale, presumably, was that they did not take from the possession of anyone—a lost object was one un-

---

146 The problem in Pear would be solved today under German law by treating the misappropriation of the horse as embezzlement, see note 141 supra, or as an instance of fraud (the German analogue of obtaining property by false pretenses), see Judgment of January 16, 1963, 18 BGHSt. 221. In this case, the defendant acquired the use of another's car from a garage attendant on the implicit misrepresentation that he was authorized to use the car. Id. at 222. The German Supreme Court reversed the larceny conviction, holding that the crime should have been classified as fraud under StGBl § 263. Id. at 223. Although the defendant did not acquire title when the attendant permitted him to use the car, see note 11 supra, the possessor interest acquired by deception was sufficient to permit prosecution for fraud. Note that the English law of false pretenses has been sufficiently relaxed to permit prosecution in cases like Pear and the 1963 German case. See Theft Act 1968, c. 60, § 16; note 7 supra. Beale's criticism of Pear was that it intruded improperly in the domain that should have been regulated by the law of false pretenses. See Beale, supra note 4, at 253–56.

147 E. Coke, supra note 12, at *107; 1 M. Hale, supra note 12, at 506; 1 W. Hawkins, supra note 59, at 134; F. Pollock & R. Wright, supra note 78, at 172–80. But note that the finding of treasure-trove (valuables found buried in the earth) and the failure to turn the valuables over to the King subjected the finder to a penalty of imprisonment for misprison. 1 W. Blackstone, supra note 12, at *295–96; 4 id. at *121.
possessed. Alternatively, the finder’s immunity may be explained by the objectively ambiguous nature of taking an unpossessed object, a taking not readily recognized as that of a manifest thief. Yet the frontier between taking an unpossessed object and taking from the possession of the owner was not one that could be staked out by appealing to the image of the thief. There were too many ambiguous cases, where possession dissolved into loss of control. Consider the case that Hale devised: “A man hides a purse of money in his corn-mow, his servant finding took part of it.” Is this a taking from the owner’s possession? To determine whether the owner still has possession, one is pulled toward considering the owner’s intention in laying down his purse. Yet if one considers the owner’s state of mind, why not also look to the finder’s understanding of the situation? Thus one is drawn to construing the case as larceny or not, according as the finder knows of the owner’s point in putting the purse in the corn-mow. Hale continues: “[If by circumstances it can appear that he knew his master laid it there, it is felony.” Evidently, in these cases in the borderland of possession, the principle of objective criminality yielded to an inquiry about the special knowledge of the taker, and even ambiguous takings, coupled with an incriminating subjective state in the putative finder, might well support convictions for larceny.

One of the reasons that finding is a special case is that the finder’s wrong typically has little to do with the act of acquiring physical control over the object. His wrong is failing to take proper steps to locate the owner and return the object. Picking up a wallet lying in the middle of the street is a responsible act—hardly a basis for a capital offense. Yet if the finder’s behavior should thereafter fall short of community expectations, one might have a sound reason for blaming and punishing him as a criminal.

Though the two sets of problems were of a different order, early nineteenth century commentators had little difficulty assimilating the case of finding and improper keeping to the cases of forcible and other felonious takings. With little authority other than Hale’s comments in the late seventeenth century, the case that helped shape the new doctrine of larceny by finders was The King v. Wynne, 168 Eng. Rep. 308 (1786), in which a coachman was convicted of larceny for unwrapping a box that a passenger left behind and selling the contents. The problem was that the defendant apparently obtained possession without fraud on his part, id. at 309; therefore Pear would not apply. According to Leach, the trial judge instructed the jury that it was felony only if the coachman “uncorded the box, not merely from natural though idle curiosity, but with an intention to embezzle any part of its contents.” Id. The holding

148 1 M. Hale, supra note 12, at 507.
149 Id.
150 The case that helped shape the new doctrine of larceny by finders was The King v. Wynne, 168 Eng. Rep. 308 (1786), in which a coachman was convicted of larceny for unwrapping a box that a passenger left behind and selling the contents. The problem was that the defendant apparently obtained possession without fraud on his part, id. at 309; therefore Pear would not apply. According to Leach, the trial judge instructed the jury that it was felony only if the coachman “uncorded the box, not merely from natural though idle curiosity, but with an intention to embezzle any part of its contents.” Id. The holding
East, Chitty, and Russell, writing from 1803 to 1819, developed the doctrine that a finder could be guilty of larceny if he failed to exercise due care to locate the owner and return the object. These facts occurring after the taking were assimilated to the traditional analysis of larceny on the theory that they tended to prove felonious intent at the time of the initial receipt.

This revision of the law of finder’s liability for larceny was part of a much broader reassessment of the entire common law of larceny. The early nineteenth century writers were taking another look at the rules of the common law and critical events in its evolution, such as The Carrier’s Case and Chisser. Instead of seeing defendants looking and acting manifestly like thieves, what they found in the past was primarily an inquiry about felonious intent.

Two of the particular rules that received reinterpretation were the rules pertaining to temporary takings and takings under a color of right. The traditional text writers concurred that in the common law, as distinguished from Roman law, a temporary taking was not felonious. As Blackstone put it, “if a neighbor takes another’s plow that is left in the field and uses it upon his own land and then returns it...[cases like this] are misdemeanors and trespasses but no felonies.” When Archbold returns to this hypothetical case in 1812, in the first edition of his influential manual on criminal evidence, it is apparent to him that the issue is not whether the goods are in fact returned, but whether at the time of the taking there was an intent to return.

makes little sense except as an application of the principle of “breaking bulk.” The court did not treat the problem as an instance of liability of finders.

East discusses The King v. Wynne, 168 Eng. Rep. 308 (1786), as a finders case and repeats Hale’s example of the “purse-in-the-corn-mow,” stressing that even in that case the circumstances must be pregnant in order to establish the finder’s felonious intent. 2 E. East, supra note 70, at 664.

Chitty, A Practical Treatise on Criminal Law 920 (1816) (discussing Wynne as an example of liability by a finder).

Russell cites The King v. Wynne, 168 Eng. Rep. 308 (1786), as showing “that the taking animo furandi of goods which have been found by the party may amount to larceny.” 2 W. Russell, supra note 134, at 1042 (emphasis in original).

For a discussion of furtum usus, see T. Mommsen, supra note 27, at 735 nn.2, 3. Comparing the common law of larceny with furtum nec manifestum is questionable, for the latter is a civil wrong, subject to the payment of double, triple or sometimes quadruple damages. See notes 27, 35 supra.

4 W. Blackstone, supra note 12, at *232.

J. Archbold, A Summary of the Law Relating to Pleading and Evidence in Criminal Cases 119 (1822 ed.), relying on 1 M. Hale, supra note 12, at 509 (selling horse instead of returning it “is declarative of his first taking to be felonious.”)
The relevant act of returning or not is seen as evidence of the intent at the time of the antecedent event of taking.\footnote{157}

Another issue that accreted to the nineteenth century preoccupation with intent was the phenomenon of taking under color of right. As that doctrine developed in the common law texts, the issue of color of right speaks to the problem of convicting someone whose taking is rendered ambiguous by a dispute between the parties arising from objective circumstances, such as "color of arrear of rent,"\footnote{158} that would raise in the mind of a third party observer a question of who had the better right to possession. Hale insists on a "pretense of title,"\footnote{160} and the examples he gives indicate concern about prosecuting someone who takes goods "openly in the presence of the owner, or of other persons that are known to the owner."\footnote{160} The doctrine was one readily implied by the requirement of a manifestly criminal taking.\footnote{161}

When nineteenth century writers begin to discuss the issue, they gravitate to the phrase "claim of right" as an equivalent to "color of right."\footnote{162} Though the earlier writers of the century, like East, are careful to explain that by "claim of right" they mean a "fair pretense of property or right in the prisoner,"\footnote{163} the view slowly takes hold that any claim of right will prevent a

\footnote{157} Focusing on the intent at the time of taking rather than the fact of the subsequent return generated the possibility of acquitting someone who had not in fact returned the thing taken. Several acquittals and reversals are recorded in cases in which the defendant took a horse and later abandoned it. See, e.g., Rex v. Crump, 171 Eng. Rep. 1357 (1825) (acquittal on charge of horse stealing); Dove v. State, 37 Ark. 261 (1881); 2 E. East, supra note 70, at 662 (discussion of Case of Phillips and Strong, apparently decided in 1801); 2 W. Russell, supra note 334, at 1037 (discussion of Case of Phillips and Strong); cf. People v. Brown, 105 Cal. 66, 38 P. 518 (1894) (defendant took bicycle in spat with playmate). Yet as the case law developed, it became difficult for the defendant to avoid conviction in cases of abandonment. See State v. David, 38 N.J.L. 176 (1875); State v. Ward, 9 Nev. 297, 10 P. 133 (1886); cf. Rex v. Treibelcock, 7 Cox C.C. 408 (1858) (convicting where defendant impermissibly took an object and pawned it, allegedly with the intent to redeem and return it).

\footnote{158} 4 W. Blackstone supra note 12, at *232. The doctrine appears not to have been discussed by Coke and Hawkins.

\footnote{159} 1 M. Hale, supra note 12, at 509.

\footnote{160} Id.

\footnote{161} Yet in Hale's analysis, \textit{id.}, it is fair to say that doctrine was thought of as a basis for presuming an innocent intention, rather than a criterion of an objectively criminal act. Hale continues: "... yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." \textit{Id.}

\footnote{162} 2 J. Bishop, supra note 60, at 474; H. Roscoe, A Digest of the Law of Evidence \textit{in Criminal Cases} 537 (2d American ed. 1840). This is the phrase used in the Larceny Act 1926, 6 & 7 Geo., c. 50, § 1(1).

\footnote{163} 2 E. East, supra note 70, at 659.
conviction for larceny. Thus Chitty claims in 1816 that any claim of right will do, "however unfounded." Later in the century one finds Bishop summing up the doctrine as one that would be available to the defendant "however puerile or mistaken the claim may in fact be." Yet framing the issue as a "claim" rather than "color" of right furthered the tendency to conceptualize the issues of larceny as subjective rather than objective. It brought the issue into the same medium of analysis as East's version of Peer, Archbold's theory of temporary takings, and the emergent theory of liability by finders.

The Carrier's Case became a focal point in the process of reinterpreting the common law tradition. So far as Blackstone reflects the sentiment of his time, lawyers in the 1760's still found the received interpretation of the case coherent and plausible. This was no longer true in the early nineteenth century. Beginning primarily with East in 1803, one finds two new readings of the case, both of which ignore the traditional understanding that breaking bulk was important because at that moment, as Blackstone put it, the "animus furandi is manifest." One new interpretation of the case was that breaking bulk "determined" the bailment and thus caused the possession in the contents to spring back to the bailor. This reading of the case reflected a preference for mystifying "breaking bulk" and thinking of the rule as an elaborate fiction. The theory that possession in the contents sprang back to the bailor had little to do with the traditional notions of determining the bailment according to the terms of the original agreement. There was no longer an

---

164 T. CHITTY, supra note 152, at 920.
165 J. BISHOP, supra note 60, at 474. This formulation of the defense found its way into the case law in People v. Hillhouse, 80 Mich. 580, 45 N.W. 484 (1890). Compare the equally extreme, but stylistically different statements of the rule in State v. Sawyer, 95 Conn. 34, 110 A. 461 (1920) and People v. Eastman, 77 Cal. 171, 19 P. 266 (1888).
166 See note 68 supra.
167 2 E. EAST, supra note 70, at 697.
168 2 W. BLACKSTONE, supra note 12, at *230.
169 See J. ARCHBOLD, supra note 156, at 124; 2 E. EAST, supra note 70, at 697; 2 W. RUSSELL, supra note 134, at 1093; First Report, supra note 4, at 7; accord, Commonwealth v. James, 18 Mass. (1 Pick.) 385 (1823); Regina v. Cornish, 169 Eng. Rep. 425 (1854). It was apparently East who devised this argument, supposedly on the authority of Hale's having argued that "the privity of contract is determined by the act of breaking the package . . ." 2 E. EAST, supra at 697. In fact, Hale invoked the notion of possession's being "determined" exclusively to explain the distinct rule emerging from The Carrier's Case that if the carrier carries the bales "to the place, and delivers or lays them down . . . and then takes the bales, he is guilty of larceny." 1 M. HALE, supra note 12, at 505.
170 By the end of the eighteenth century, there were two types of case in which the bailment was thought to be "determined." The first was by delivery
effort to see the case as an expression of a plausible conception of larceny. Treating the case as rooted in fiction was an important phase in the process leading to skepticism about the rule of breaking bulk and the eventual decision, in 1857, to extend larceny to all conversions by bailees.\footnote{171}

More important for our present purposes was the simultaneous tendency to read The Carrier's Case as a holding about intent at the time of initially acquiring the bales.\footnote{172} This view derived from Kelyng's argument, antedating Blackstone, that "breaking bulk" was significant only as evidence of the intent at the time of receipt of the bales\footnote{173} rather than as a manifestation of thievery at the moment of breaking. Though this view was ignored by Blackstone and later dismissed by Holmes as an argument that can "hardly be accepted,"\footnote{174} it reflected a view of larceny whose time, in the early nineteenth century, had clearly come.\footnote{175} The view, generally, was that the manifestation of thievery or dishonesty should not be seen as a crime, but merely as evidence of a crime occurring earlier at the time of initial acquisition. The shift in emphasis from the later to earlier event was the core of the systematic reinterpretation of the law of

to destination in accordance with the agreement. \textit{See} 4 W. BLACKSTONE, \textit{supra} note 72, at *230; E. COXE, \textit{supra} note 12, at *108; I M. HALE, \textit{supra} note 12, at 505. The second was by reading an express limitation on the duration of the bailee's possession or the distance he was permitted to take the bailed object. The latter category emerged in the early eighteenth century. The leading case is \textit{Tunnard's Case}, discussed at 168 Eng. Rep. 209, note (a). According to this note, Tunnard was convicted in 1729 at Old Bailey. He borrowed a horse on the understanding that he would ride to a point three miles distant. Instead he rode it up to London and sold it. The critical feature of the case was apparently the explicitly contractual limitation. This second means of terminating a bailment, which permitted termination prior to delivery, encountered criticism. \textit{See} Rex v. Banks, 168 Eng. Rep. 887 (1821).

\footnote{171}{20 & 21 Vict., c. 54.}

\footnote{172}{The primary advocates of this view were East and Russell. \textit{See} 2 E. EAST, \textit{supra} note 70, at 606-97; 2 W. RUSSELL, \textit{supra} note 134, at 1093. Both acknowledged the difficulty that prompted other authorities to reject this view.}

\footnote{173}{\textit{See} J. Kel. 82-83 (1789 ed.).}

\footnote{174}{Commonwealth v. Rubin, 165 Mass. 453, 455, 43 N.E. 200, 201 (1896). For earlier rejections of Kelyng's argument, see State v. Fairclough, 29 Conn. 47 (1865); \textit{First Report}, \textit{supra} note 4, at 7. The primary difficulty with Kelyng's view, as history, is that it fails to explain why taking the entire bale did not provide as much evidence of the antecedent intent as breaking it open and removing the contents.}

\footnote{175}{To be fair to the early nineteenth century writers, one should see their work not as history but as an effort to write a "more rational" law of larceny. The inconsistency that prompted Holmes to reject Kelyng as bad history prompted the reformers to urge the principle in the hope that the inconsistencies would be eliminated.}
larceny. It affected the reading of *Chisser* and *Pear* as well as the interpretation of *The Carrier's Case*. Further, it linked the newly cast law of finders with the reinterpretation of the older cases. These connections become apparent in the following diagram:

<table>
<thead>
<tr>
<th>Initial Acquisition</th>
<th>Manifestation of Thievery or Dishonesty</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Carrier</em></td>
<td>laying hands on the bales</td>
</tr>
<tr>
<td></td>
<td>breaking open the bales</td>
</tr>
<tr>
<td><em>Chisser</em></td>
<td>laying hands on the tie</td>
</tr>
<tr>
<td></td>
<td>bolting from the store</td>
</tr>
<tr>
<td><em>Pear</em></td>
<td>mounting the horse</td>
</tr>
<tr>
<td></td>
<td>selling the horse in Smithfield</td>
</tr>
<tr>
<td>Cases of Finders</td>
<td>picking up the object</td>
</tr>
<tr>
<td></td>
<td>failing to take adequate steps to locate the owner and return object</td>
</tr>
</tbody>
</table>

---

176 The reported opinion in *Chisser*, 83 Eng. Rep. 142 (1678), suggests in the second paragraph that Chisser's guilt was based on his supposed felonious intent when he received the tie; it suggests in the third paragraph that the conviction rested on Chisser's failure to acquire possessorial immunity over the tie. *See* note 78 *supra*. The rereading of the case turned on shifting attention from the third paragraph to the second. East ascribed the latter reading of *Chisser* to the judges in *Pear's* case. *See* 2 E. East, *supra* note 70, at 687. For another opinion, on similar facts, that similarly confused the issues of antecedent intent and the objective sufficiency of the delivery, see King v. Sharpless, 168 Eng. Rep. 148 (1772). Chitty interprets the latter case as a conviction where a “pretended purchaser absconds with [goods shown to him] and from the first, his intention was to defraud. . . .” 3 T. Chitty, *supra* note 152, at 922; *cf.* 2 W. Russell, *supra* note 134, at 1069 (noting that in *Sharpless* both rationales were present).

177 The revisionist reading of *Pear* stemmed from East's report, published in 1803, of the judges' opinion, *see* 2 E. East, *supra* note 70, at 685–87, rather than Leach's report, which was first published in 1789. Which of these reports is more accurate is open to debate. For the division of authorities, *see* note 145 *supra*. The bulk of authority supports the view that *Pear* should be read as a case about larceny at the time of the subsequent conversion, not at the time of the initial taking. Good nineteenth century authority for this view may be found in Regina v. Brooks, 173 Eng. Rep. 501 (1837), holding that the doctrine of *Pear* did not apply in the absence of a conversion by the fraudulent bailee. The proponents of the new view of larceny vehemently attacked Brooks. *See* 2 Russell *on Crimes* 54 n.r (6th American from 3d London ed., C. Greaves, ed. 1850) (the editors strenuously advance the view that intent at the time of receipt is the overriding issue in cases of larceny by trick).
It is clear that according to the traditional interpretation of all these cases, the significant event occurred at the later time although in every situation there might be some hint of a crime at the moment of initial acquisition. What was merely a hint prior to the end of the eighteenth century became the norm in the early nineteenth. The view that prevails in East, Chitty, and Russell is that all these crimes occur at the moment of initial taking. By the time that His Majesty's Commissioners began advocating a systematic view of the crime, older rules, like the rule of "breaking bulk" had come to be seen as historical incrustations, to be discarded as soon as possible. Without yet embracing these new theories, the courts had decided cases like *Pear*, which called into question the traditional common law concepts. By the middle of the century, with the support of a body of critical literature, the courts were ready for a major expansion of criminal liability.

**B. The Criminalization of Outwardly Innocent Takings**

The move to integrate the problem of finders liability into the law of larceny provided the first occasion for judicial reception of the new theory of liability. In *Regina v. Thurborn* 178 the defendant had come across a note that had been accidentally dropped on the highway; he picked it up, allegedly with the intent to keep it. 179 At that time there was no indication who the owner was or that the owner might be able to find it again. 180 The following day, however, Thurborn was informed of the owner's identity. 181 Though he apparently believed this information, Thurborn changed and converted the note. 182 The court ruled on these facts Thurborn could not be guilty of larceny. 183

What is interesting for our purposes is Baron Parke's analysis of the question whether the initial taking of the note was larcenous. The gist of the problem, according to Baron Parke, was to determine the circumstances as they appeared to the prisoner at the time of the taking. 184 The judge's statement of

---

179 Id. at 293.
180 Id.
181 Id.
182 Id.
183 Id. The court saw two questions, whether Thurborn had committed larceny by picking the note up and whether he had committed larceny by converting it subsequently, knowing who the owner was. The case is a leading one on the basis of Baron Parke's treatment of the first question, which is analyzed in text. However, Thurborn's acquittal depended on a negative answer to the second question as well. Here the court held that, since Thurborn had lawfully obtained possession, he was protected by possessorial immunity. See id. at 297.
184 Id. at 293.
the rule that should govern finder’s liability reflects the new conception of larceny: 185

[I]f a man find[s] goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

Though Thurborn was not guilty under this rule, the case provided a theory for integrating the liability of finders in the law of larceny. Although English judges initially responded skeptically to Baron Parke’s dictum, 186 his statement of the rule guided subsequent litigation both in England 187 and the United States. 188

The evolving law of finder’s criminal liability provided a precedent for thinking of outwardly innocent takings as criminal if they should be accompanied by a prohibited state of mind. Yet the problem of finders could be thought of as a separate branch of the law, artificially engrafted onto the central trunk of larceny. For the centrality of intent to displace the requirement of objective criminality in an ordinary case of stealing, one had to await the outcome of a line of cases centering around the liability of persons receiving goods by mistake. The critical case, *The Queen v. Middleton,* 189 decided in 1873, posed a paradigmatic instance of outwardly innocent taking. The accused, one Middleton, maintained a savings account at the post office; he submitted an application to withdraw ten shillings from his account. When he presented himself at the clerk’s window for payment, the clerk mistakenly remitted the wrong amount, overpaying the accused by about eight pounds. Middleton, obviously knowing of the mistake, left the post office with the excess and kept it. The case was more difficult than that of finding and keeping, for here the clerk’s handing the money to Middleton bears all the earmarks of a delivery — a surrender of possession,

185 *Id.* at 296 (emphasis added).
187 The rule in *Thurborn* was eventually incorporated in the English Larceny Act, 1916. *Larceny Act 1916,* 6 & 7 Geo. 5, c. 50, § 1(2)(i)(d) (finder takes goods “where at the time of the finding the finder believes the owner can be discovered by taking reasonable steps”).
188 See, e.g., *State v. Levy,* 23 Minn. 104, 110 (1876) (citing *Thurborn* approvingly in a case where the defendant apparently saw the owner leave the goods behind).
189 The *Queen v. Middleton,* L.R. 2 Cr. Cas. Res. 38 (1873).
if not title; and thus one is hard-pressed to see the case as a felonious taking. Nonetheless, the court could have approached the problem on analogy to *Pear* and reasoned that Middleton acquired only custody over the excess payment and therefore his subsequent conversion constituted a criminal taking.

Without adverting to the limited egress offered by *Pear*, the judges of the time opted for a radical extension of the law of larceny. Eleven of the fifteen judges hearing the case concluded that Middleton was guilty of common law larceny. Their reasoning was simply that Middleton took the surplus with the intent to keep it and that was all that was required to convict of larceny.

Justices Martin and, in particular, Bramwell sensed that there was something fundamentally wrong about convicting for larceny in the absence of a manifest act of thievery. Yet they had few doctrinal gambits with which to mount an attack on the majority view. They insisted, as did the Wisconsin Supreme Court in *Topolewski*, that larceny requires a “trespass” and not merely a taking and further that there could not be a trespass if the victim consented to delivery. Yet these arguments meant little to judges who failed to respond to Bramwell’s claim that larceny should be limited to a “privy (i.e., clandestine) or forcible taking.” That was the central issue and it was one that went unnoticed by the majority of the judges, who saw little impediment, in policy or principle, to affixing criminal liability to routine and unincriminating acts that became criminal only by virtue of the actor’s intent at the time.

---

100 The major dispute in the opinions was whether the post office clerk transferred title to the excess funds. Compare the opinion of Justice Brett, *id.* at 59-66 (arguing that there was a transfer of both title and possession), with that of Justices Bovil and Keating, *id.* at 46-49 (contending that because the clerk lacked authority to convey title to the authorized funds, there was no transfer).

101 For a harbinger of this extension, see *Regina v. Mucklow*, 168 Eng. Rep. 1225 (1827) (recognizing the possibility of convicting in a case of acquisition by mistake where there is *animus furandi* at the time of initial receipt).

102 L.R. 2 Cr. Cas. Res. at 41, 48, 49 (1873).

103 Id. at 53, 58 (Martin, J.)

104 The thrust of Bramwell’s opinion was that the taking was not *invito domino* — against the will of the owner. As in *Topolewski*, one finds an interweaving of the concepts of trespass and the absence of consent, *see* pp. 493–94 supra. Bramwell offers no account of why he favors a broad view of “consent” — one that would imply that the clerk “consented” because he “intended to do the act he did.” L.R. 2 Cr. Cas. Res. at 55. It was not important to Bramwell that the clerk made a mistake in intending to part with the money. Bramwell’s reasons include the claim that if the defendant “was led into temptation[,] the prosecutor [i.e. victim] has very much himself to blame. . . .” *Id.* at 56.

105 L.R. 2 Cr. Cas. Res. at 56.

106 Bramwell clearly realized the broader implications of rejecting the require-
If *Middleton* was a landmark case in the growing influence of the new theory of larceny, it was nonetheless a case that retained the requirement of a taking as an objective phenomenon. Twelve years later in *The Queen v. Ashwell*[^197] that requirement, too, would come to be seen through the lens of a subjective theory of larceny. In *Ashwell* the accused had borrowed a coin from a compatriot; both initially thought that the coin was a shilling while in fact it was a sovereign. Upon discovering the mistake, Ashwell appropriated the coin. Even under the newer cases—*Pear*, *Thurborn*, and *Middleton*—the accused should have been protected by the rule of possessorial immunity. He had no felonious intent at the time of acquisition, and it was hard to see why he did not acquire full legal possession over the coin. Nonetheless, seven of the fourteen judges (enough to affirm the conviction) held that Ashwell did not get possession until he discovered the mistake and therefore, at that moment, “took” the coin from the owner’s possession[^198]. Some courts later reacted against hitching the phenomenon of taking to the actor’s subjective state.[^199] But now that takings which to all appearances were innocent could be punished, there seemed to be no good reason for insisting that the “taking” be an objective rather than a subjective phenomenon. From the perspective of a theory of larceny based on subjective states, it seemed picayune to insist that the felonious intent crystallized exactly at the moment that the actor first touched the object he later stole. As a result, the subjectification of “taking” eventually prevailed in English law.[^200] Under the Theft Act of 1968, there seems to be little dispute that someone doing what Ashwell did would be guilty of

[^197]: 16 Q.B.D. 190 (1885).
[^198]: Id. at 59.
[^199]: See *id.* at 203 (opinion of Cave, J.) (“Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign.”). But see *id.* at 206 (Stephen, J., dissenting in a careful and scholarly opinion).
theft “by dishonestly appropriating” the property of another.201

American courts adhered closely to the pattern of subjectification that occurred in England. At about the same time that Middleton was decided, the New York Court of Appeals had little difficulty reaching the same result on similar facts.202 Though American courts have not followed the development marked by Ashwell,203 they have concurred since the end of the nineteenth century that an outwardly innocent taking could be felonious if the intent at the time was one prohibited by law.204

The metamorphosis of larceny began as a concrete expression of the emerging theory of criminal law as a means for protecting particular interests. It received its theoretical exposition in the scholarly writing and judicial reformulations of the early nineteenth century, and in the latter half of the century the new conception of larceny became the orthodox mode of judicial analysis. By 1916, the English Larceny Act, the first systematic statement of the crime, could boldly declare that all of the objectively neutral takings we have discussed — takings by trick, mistake, finding — were larceny if accompanied by a felonious intent.205 Though it survived in the crevice of staged larceny, manifest criminality had clearly withered and died in the core cases of the crime.

C. The Demise of Possession as a Relevant Boundary

The boundary represented by possession suffered an agonizingly slow demise. The rule of possessorial immunity received a fatal blow in nineteenth century statutes penalizing conduct that had previously been protected by the rule. Yet the significance of possession lived on as the organizing principle for distinguishing larceny from the newer statutory offenses of embezzlement and larceny by a bailee.206 The final effort to bury possession as a feature of larceny has come in our own time. The impulse of Anglo-American legislative reform today is to unify the offenses into one all-encompassing offense of theft by

---

201 See Theft Act 1968, c. 60, § 15(4).
202 Wolfstein v. People, 6 Hun 121 (N.Y. Gen. 1875).
203 See, e.g., Mitchell v. State, 78 Tex. Crim. 79, 180 S.W. 115 (1915) (holding that there is no larceny if the recipient discovers the mistake after physically receiving a mistakenly drawn check); Cooper v. Commonwealth, 110 Ky. 123, 60 S.W. 938 (1901). For American criticism of Ashwell, see W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 849 & n.69 (7th ed. M. Barnes 1967); R. PERKINS, supra note 1, at 216 n.91.
204 This is assumed by the draftsmen of the Model Penal Code. See notes 9, supra.
205 Larceny Act 1916, 6 & 7 Geo. 5, c. 50, § 1(2)(i).
206 See note 1 supra.
misappropriation. This newly defined offense represents a final break with the ancient significance attached to breaking another person's protected perimeter. It relegates to history the elements of entrustment and breach of trust that have been distinguishing marks of embezzlement for nearly two centuries.

The total collapse of possession as a relevant boundary could not have occurred without a conceptual reorientation of both larceny and embezzlement. The metamorphosis of larceny shifted the core of the crime from stealthful or forcible conduct to the intentional acquisition of another's property. Embezzlement has shifted over time from a crime thought of primarily as a breach of trust to a crime with the same core as larceny. If the element perceived to be essential to both crimes is the dishonest acquisition of the assets of another, there is no apparent reason why the two should not be unified in one offense under one standard of punishment.

This conceptual reorientation reflects the nineteenth century preference for classifying all crimes as intrusions against specific socially protected interests. Crimes were thought to be intrusions against interests like life, personal security, governmental security, or property. Moral evils like the betrayal of a friend or employer no longer seemed to be significant in assaying the criminality of conduct.

The metamorphosis of larceny brought every item of property into focus as an interest worthy of protection under the criminal law. The loss of possessorial immunity meant that particular relationships no longer stood in the way of protecting property. The withering of objective criminality meant that the property could be protected against every intentional acquisition. This reorientation of the criminal law was not a response to the "felt necessities of the time." It was a revolution in social thought

---

207 See note 1 supra.
208 For comments on the symbolic significance of perimeters and enclosures in the ancient law of larceny, see note 37 supra.
209 See note 16 supra.
210 This thesis as it applies to the evolution of German law is developed brilliantly by H. Mayer, supra note 14, at 20.
211 This way of looking at the criminal law is well developed in O. Holmes, The Common Law 70–75 (1881), which argued that punishable larceny was merely an attempt to cause the ultimate harm of permanent deprivation of another's property, id. at 72, and in 2 J. Bishop, supra note 60, at 472–73, which argued in these words against the relevance of motives in defining larceny:

[It is immaterial to the person injured what species of base motive moved the wrong-doer. And the wrong to society is the same, whatever the nature of the baseness which prompted it.]

The premise of this argument appears to be that criminal wrongs are measured by the extent of actual deprivation.
212 O. Holmes, supra note 211, at 1. For pitfalls of explaining legal change
that shaped the nineteenth century sense for the range of problems that could appropriately be solved under the criminal law. It was less a response to a problem than a determinant of our sense for what the problem was.

IV. Conclusion

A. The Significance of the Metamorphosis

The metamorphosis of larceny illustrates a fundamental pattern in the historical development of Anglo-American criminal law. The area that most clearly conforms to the larceny pattern is the field of criminal attempts. Although the crime of attempt

by appealing to social forces, see pp. 483–84 & note 64 supra (discussion of scholarly readings of The Carrier’s Case).

213 The overt act requirement in treason, though it reminds us of the principle of manifest criminality, actually reflects a different concern. Treason, in at least one of its branches, begins with the criminality of a state of mind: compassing the death of the King. See Statute of Treason, 25 Edw. 3, c. 2 (1351). This state of mind had to be made manifest by some overt act, however, see E. Coke, supra note 4, at 3–8; M. Hale, supra note 12, at 110, so that the critical issue was what kind of act would be sufficient to make out the offense. At stake was a fundamental libertarian concern; for the essence of the position taken by men like Coke, Hale, and Foster, was that speech alone could not constitute “compassing the death of the King.” See E. Coke, supra note 4, at 3–8; M. Foster, A REPORT OF SOME PROCEEDINGS OF THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURREY AND OF OTHER CROWN CASES 200 (1762); M. Hale, supra note 12, at 110.

The significance of the interpretation of the overt act requirement becomes clear in the context of Crohagan’s Case, 79 Eng. Rep. 891 (1634). An Irish priest had declared abroad, in great heat of speech, “I will kill the King, if I may come upon him.” The priest came to England two years later, allegedly to carry out his design, and was apprehended and convicted of treason. For Hale the overt act was Crohagan’s coming to England. See M. Hale, supra note 12, at 116. Although this was conceded “an act indifferent in itself,” id., the alternative was to hold Crohagan’s outburst sufficient alone to ground a conviction, and Hale presumably wished to avoid such a result.

For the royalist Kelyng, in contrast, the coming to England was only important insofar as it tended to prove that Crohagan had had the prohibited state of mind when he spoke; speech alone therefore could be a sufficient overt act for treason. See 83 Eng. Rep. 1059, J. Kel. 13. Kelyng, indeed, was prepared to say that even approving silence could be treason, id. at 1063–64, J. Kel. at 21: the essential question was the state of mind betrayed by the defendant’s behavior. This merger of royalist sentiment and subjectivist criminal theory corresponds to Kelyng’s views on The Carrier’s Case. See p. 512 supra.

Foster was highly critical of Kelyng’s willingness to subject mere speech to the accusation of treason and, in reaction, stressed the distinction between regarding an act as evidence of intent and treating it as a substantive element of the offense. See M. Foster, supra, at 202–04. The latter position obviously resembles the principle of manifest criminality; it is, however, rooted in a different and more fundamental concern.
was first recognized in the eighteenth century, when the threads of objective criminality were beginning to unravel, the history of the law of attempts recapitulates the evolution we have observed in the field of larceny. We shall briefly trace these developments here, both as corroboration of our analysis of larceny and as an illustration of its broader significance.

The effort to construct a crime of attempt has repeatedly encountered problems in establishing that the punishable event is something more than criminal intent itself. Larceny at least retains an external element of harm: the deprivation of property. Attempts, by definition, lack the element of harm, and consequently the external element of the crime, if any, must be found in the act of attempting. This has led some theorists to insist that the act of attempting is important for reasons that go beyond the demonstration of firmness of resolve or the corroboration of an intent proven by extrinsic means.

The quest for a substantive act of attempting led nineteenth and early twentieth century theorists to rely upon objective criteria to account for the difference between a nonpunishable preparation and a punishable attempt. Salmond’s efforts in this direction incorporated a principle of objective criminality; his view, which was the law of New Zealand for a time, was that the act standing alone had to bespeak a criminal purpose. The focus on the act as a distinct element also generated the theory of impossible attempts that has so confounded the commentators.

---

214 See note 217 infra.
216 Holmes argued that the line between preparation and attempt should be drawn with a view to “the nearness of the danger, the greatness of the harm, and the degree of apprehension felt.” O. Holmes, supra note 211, at 68; see Horn, Der Versuch, 20 Zeitschrift für die gesamte Strafrechtswissenschaft 309 (1900). For a revival of these theoretical efforts in Germany, see Spendel, Zur Neubegründung der objektiven Versuchstheorie in Festschrift für Ulrich Stock 89 (1966).
Putting sugar in an intended victim's tea was not criminal, but putting in a non-lethal dosage of poison was. Shooting a tree stump could not be criminal, whatever the intent; but firing at an intended victim's bed was, even though the intended victim was not there at the time. Though there never was a crystallized image of attempting akin to the shared image of the thief, the principle of manifest criminality can help us understand these efforts to conceptualize the act of attempting as an independent and objective dimension of liability. The act itself had to bespeak danger, as do the acts of putting poison in someone's coffee or shooting at someone's bed. If the act itself did not signify danger, if it was not a socially disturbing event, then the theory of manifest criminality required that it be exempt from punishment.

The same factors that shape the modern law of larceny facilitated the emergence of intent as the core of the crime of attempting and the relegation of the act to one of many sources of evidence of the required intent. Even if there had been an impulse to codify the act as an independent, substantive element of attempting, the issues might have proved too subtle for the legislative craft of Anglo-American jurisdictions. So far as one can tell, there has been no serious legislative effort to define the difference between preparation and attempt and to codify the case law on impossible attempts. Instead contemporary legislative revisions have gravitated toward the position of the Model Penal Code, that intent is the central element of attempting; the act is important only so far as it corroborates or tends to prove the required intent. Though some recent decisions have kept the doctrine of impossible attempts alive, contemporary Anglo-American legislative efforts

219 Cf. State v. Clarissa, 11 Ala. 57 (1847) (defendant, a slave, tried to kill her master with Jamestown weed; attempt conviction reversed on the ground that there was no proof that Jamestown weed was a deadly poison).


221 O. Holmes, supra note 211, at 69.

222 State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902).


224 See Regina v. Smith, [1973] 2 All E.R. 896 (C.A.) (defense of impossi-
METAMORPHOSIS OF LARCENY

typically have sought to resolve the issue by treating the circumstances as the defendant conceives them to be.\(^2\)\(^2\)\(^5\) If the defendant thinks that sugar is poison and puts it in an intended victim's teacup, his perception of the circumstances would be sufficient to render the act an attempt.

Like the parallel transformation of larceny, the subjectification of attempts facilitates earlier intervention in criminal plans. There is no need to wait until the act itself bespeaks criminality.\(^2\)\(^2\)\(^6\) The availability of this early intervention is particularly attractive as against suspects whose intent can be readily inferred from prior conduct and admissions. The criminality of intending finds support in the argument that the purpose of the criminal law is to isolate dangerous persons and the best available index of dangerous propensities is someone's acting on a criminal intent.\(^2\)\(^2\)\(^7\)

The criminality of intending has become so firmly entrenched that legislatures now enact new crimes punishing acts innocent in themselves like crossing a state line\(^2\)\(^2\)\(^8\) or entering a building;\(^2\)\(^2\)\(^9\) the essence of these new offenses is the intent to commit a criminal offense at the time of the "crossing" or "entering." The coming center stage of intent is evident as well in a quiet drama being played out in the law of false pretenses. This offense traditionally required that the actor induce the victim to transfer property by a deception about the external world\(^2\)\(^3\)\(^0\) — about,
say, the defendant's credit status or the quality of goods offered for sale. In the 1954 case of *People v. Ashley*, the California Supreme Court boldly swept aside the requirement of an objective misrepresentation and held that a misrepresentation about one's intention could be a false pretense. That precedent has not garnered a following in other courts. But the trend of contemporary legislation is to drop the traditional requirement of an objective, documentable lie and embrace the potential punishability of routine business transactions. It is now becoming the law in more and more jurisdictions that borrowing money with the alleged intent not to repay can subject a debtor to prosecutorial scrutiny and potential criminal liability.

It might seem odd that an issue like intent could become so prominent in the thinking of lawyers when it hardly lends itself to ready application in concrete cases. There are few issues as inaccessible to proof as the actor's intent at the time he enters a building or crossing a state line. Yet as compared with the concept of objective criminality, the standard of intentionality offers a singular advantage. The modern lawyer faces two difficulties in comprehending the theory of objective criminality. He has difficulty in applying the standard—knowing precisely what counts as "acting like a thief." Further, he might have doubts about the coherence of a standard that so persistently eludes his grasp. After all, what does the standard amount to if we can never be sure about who is acting like a thief and who is not? The issue of intent is different. While we may never be sure about a person's unmanifested intent, we are not likely to question the standard itself. Our own experiences of intending are sufficient to render
the standard coherent even though in many cases we may not be able to apply it to the conduct of others.

In addition to its intuitive plausibility, the standard of intent has important political significance in generating a widely acceptable theory of criminal sanctions. Unlike the issues of harm and objective criminality, the concept of intent appeals both to protectionists, whose central concern is identifying dangerous persons, and retributivists, whose focus is punishing the blameworthy. Although some protectionists might prefer to go beyond the traditional forms of the criminal law in their quest to identify dangerous people,234 intent appears to be a better indicator of dangerousness than any other traditional element of criminal liability.235

More significantly, neither retributivists nor traditionalists have seen a reason to criticize the ascendancy of intent, precisely because it seems so closely related to moral blameworthiness. As the common denominator of contemporary theory, the concept of criminal intent provides a foundation for the ideologically fragile system of criminal justice to enjoy wide support.

B. The Perils of a Criminality of Intentions

In the total matrix of legal rules that we have today, the emphasis on intending as the core of criminal conduct raises a serious paradox. In view of recent trends restricting the admissibility of confessions, it seems odd to expand criminal liability to include many instances of outwardly innocent conduct in which the suspect's confession of intent is the most desirable form of evidence. When there is no close evidentiary link between the act and the proscribed intent, the prosecution is forced to rely on the prospects of securing a confession or testimony of the defendant's incriminating admissions. When these forms of evidence are unavailable, proof of the defendant's unmanifested intent is likely to turn on even more questionable forms of evidence. If the issue is crossing a state line with the intent to incite a political riot, the accused's political associations become critical.236

If, as in Ashley, the issue is intent to defraud, the prosecution's case is likely to be

234 A radical protectionist position might dispense with the requirements of intent and culpability altogether. See B. Wootton, Crime and the Criminal Law (1963), criticized in Hart, Book Review, 74 Yale L.J. 1225, 1229–31 (1965); Kadish, The Decline of Innocence, 26 Camb. L.J. 273, 285–90 (1968). Another line of protectionist thought would be to eliminate the requirement of an act as well as intent and to rely exclusively on predictive indices, thus merging the criminal law with the institution of civil commitment.

235 See Wechsler, Jones & Korn, supra note 218, at 577.

enhanced by evidence of extrinsic acts of untoward behavior toward the victims, such as the testimony in Ashley that the defendant threatened one of the victims with a gun and haggled with the other close to "the edge of a sheer slope." This kind of evidence arguably should not be admitted, but when it does pass the test of relevance, it invariably influences the jury in assessing whether the defendant is the type of person who would have acted with the prohibited intent.

While the substantive law encourages the use of confessions and character evidence, the law of evidence discourages it. One way to resolve this apparent paradox is to see the law of evidence as performing tasks once performed by the substantive rules. If the principle of objective criminality formerly inhibited efforts to infer criminality from confessions and from character evidence, that value must now be realized in working out the rules of admissibility at trial.

There are two serious shortcomings in relying on the law of evidence as a surrogate for substantive rules. First, rules restricting the admissibility of evidence are notoriously subject to technical circumvention. Virtually anything comes in by way of impeaching the defendant's testimony; and if the defendant refuses to testify, a catalog of other exceptions comes to play.

A more significant reason why the law of evidence cannot provide a substitute for substantive rules is that the inadmissibility of incriminating evidence does not inhibit police and prosecutorial investigation. If the law requires a manifestly incriminating act, and there is none in fact, no amount of investigation and interrogation can generate a functional equivalent. Yet if outwardly innocent conduct can constitute larceny or false pretenses, the police and prosecutorial staff face a far wider range of cases in which effective investigation and interrogation might yield sufficient evidence to convict. In the field of false pretenses, for example, the pool of potential suspects encompasses everyone who receives property in return for a promise and later defaults on the

promise. To direct their resources within a pool of this scope, police and prosecutors must rely on the subsidiary criteria of suspected dangerousness to the community. In making these judgments of projected dangerousness, factors of reputations, ethnicity, and class probably matter more than we should like to admit. Thus we see that the emergence of intention as the core of criminality is linked with the progressive legitimation of prosecutorial discretion and the shift in emphasis in the criminal process from assessing acts at trial to assessing actors prior to trial.

In the idiom of evidence, the principle of objective criminality holds that an incriminating act is an indispensable form of evidence in the proof of criminal intent. Unlike other items of evidence, incriminating conduct is not fungible with other offers of proof tending to prove the same ultimate fact. The significance of a form of evidence that is necessary to establish guilt is that its absence is sufficient to assure an acquittal. Thus the principle of objective criminality protects suspects against prosecutorial inquiry by providing a rule sufficient to establish innocence under the law. The same rule of sufficiency protects suspects against judicial inquiry into their character, states of mind, and private feelings of guilt. According to the principle of objective criminality, no one is subject to investigation, accusation, or conviction unless his conduct meets a threshold of publicly incriminating acts.

C. Reviving Objective Criminality

If the principle of objective criminality guarantees privacy from intrusive inquiries into character and other personal matters, then we might be tempted to advocate its revival. The value of privacy speaks to us in compelling tones. Privacy in its many forms has become a central value in both constitutional

241 The protection of privacy by the principle of objective criminality was the "result of human action, but not of human design." F. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 96–105 (1967); it was a consequence of a system premised on public and visible incidents of criminal conduct. If we recall the origins of objective criminality in the private right to execute manifest thieves, we find that the principle is rooted in the self-interest of property owners fearful of the community's misinterpreting the slaying of a suspected thief. If the slayer was not to be regarded as a criminal himself, he had to rely on unambiguous signs of the slain man's criminality.

As the private right to execute thieves became domesticated in the courts, it generated a principle of legality, that the courts should observe the same restraints that had disciplined the use of force by private citizens. Even though not grounded in the self-interest of judges and prosecutors, this principle survived until the metamorphosis as a form of institutional discipline, assuring that criminal convictions would be based upon publicly incriminating facts.

and tort theory, and we may still readily concur with Holmes in suspecting legal rules that focus on the hearts and minds of individual citizens. We have good reason to feel uneasy about enthroning intent as the core of criminality and inferring intent from confessions and character evidence. If privacy does command our loyalty, then we should consider returning to the pattern of the common law that prevailed prior to the metamorphosis of larceny.

Is it too late to think about reversing the historical trend and stimulating a counter-metamorphosis of larceny and other offenses? Possessorial immunity may be rent beyond recall, but the principle of objective criminality still weaves its way through the cases of staged larceny and impossible attempts. A deliberate revival of objective criminality would lead to the decriminalization of conduct that is objectively neutral and unincriminating. Acquisition by the mistake of another would be subject at most to civil remedies. The Ashley rule would be reversed: obtaining property by false pretenses would require an objectively incriminating misrepresentation. An extreme counter-metamorphosis could take us back to the state of the law in the late eighteenth century, prior to Pear and the first general embezzlement statute. Yet many of these late eighteenth century developments could be brought into harmony with the principle of objective criminality. Pear could easily be solved, as it would be under German law, by a more flexible view of the elements of obtaining property by false pretenses. There is no compelling reason why obtaining use of the horse should not be treated as the acquisition of a sufficient property interest. Many cases of embezzlement could also satisfy the test of objective criminality; the doctrinal problem would be shifting the standard of conversion from the issue of harm to the characteristic instances of embezzling as a form of behavior.

Though much of the current law could be salvaged under the principle of objective criminality, there is no doubt that its revival

244 O. Holmes, supra note 211, at 50.
245 See note 146 supra.
246 Cf. Theft Act 1968, c. 60, § 15(2) (liberalizing the common law definition of “obtaining property” to include “obtain[ing] ownership, possession or control . . .”). The Model Penal Code, in contrast, appears to have retained the limited common law concept of “obtaining property.” See Model Penal Code § 233.0(5)–.0(6) (Proposed Official Draft 1962).
247 The tendency in German law is to treat the act of conversion as a form of manifest criminality. See R. Maurach, supra note 83, at 241; Bockelmann, Book Review, 65 Zeitschrift für die gesamte Rechtswissenschaft 569, 586–89 (1953).
would lead to substantial decriminalization of dishonest acquisitions. The decriminalization to which we might be led by a counter-metamorphosis, however, would leave other sanctions in its wake: The principle of objective criminality requires only that the criminal law withdraw from the field, not that all sanctions should be removed from dishonest but objectively unincriminating conduct.

There is nevertheless a theoretical objection to reviving the principle of objective criminality that, in the context of this paper, is more telling than the practical difficulties. The argument would be that the standard of looking-like-a-thief deviates too much from the contemporary style of legal thought to warrant serious consideration. Some judges may talk about knowing obscenity when they see it, but we would hardly want them to convict a thief by seeing one in a set of reconstructed facts. The standards of objective criminality are appealing substantive guides, but they come clothed in a style of reasoning that we now find too difficult to accept. This is the tension in modern legal thought between historic substantive principles and contemporary styles of rhetoric.

Yet this tension might not be insuperable. One can distinguish between solving particular cases and formulating general rules. So far as we look at the solving of particular cases, it does seem implausible to expect judges to reason from a standard of looking-like-a-thief. Yet if we focus instead on formulating rules, which in turn are grounded in the principle of objective criminality, we might be able to translate the values behind the principle into administrable judicial standards. If the historical account of this paper is correct, it appears that the courts in fact responded to the principle of objective criminality in working out the substantive rules of breaking bulk, the contours of possession, and the doctrines of consent and delivery in cases of staged larceny. An analogous standard is at work in the cases on impossibility as a defense in attempt prosecutions. Admittedly, rules of this sort require finer distinctions that those geared to the concept of criminal intent. Their interpretation and application tend toward a formal style of legal reasoning that is readily criticized as unresponsive to policy considerations. What one has to see in order to vindicate rules based on the principle of objective criminality is that the rules themselves respond to an important value, even though application of the rules in particular cases might appear to be formalistic.

249 The difficulty here runs parallel to the problem, discussed in an earlier paper, of applying the standard of nonreciprocal risktaking in resolving concrete disputes in tort. See Fletcher, supra note 24, at 571–73.
For our purposes, the point of studying the history of larceny has not so much been to urge a reversal of this historical trend, but rather to discover and elaborate substantive values in the history of larceny. We may decide in the end to reject the values implicit in our tradition, but that is a decision we should make with a sense of the richness and the sophistication of legal practices all too often scorned or ignored. If there is much to be learned in formulating policies for the future, there is also much to be learned from the tradition that made us what we are.