

Criminal law – theft and fraud notes essay sample

[Law](#), [Crime](#)



William Blackstone's Commentaries, written in the middle of the eighteenth century, represent one of the first systematic expositions of the common law. His volume on criminal offences included a substantial section on 'offences against private property': William Blackstone, Commentaries on the Laws of England 1765 Vol. IV p. 230 'Simple larceny then is the 'felonious taking, and carrying away, of the personal goods of another'. This offence certainly commenced then, whenever it was, that the bounds of property, or laws of meum and tuum, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt.'

In the next few pages, we shall examine the development of conceptions of theft since Blackstone's time, so as to provide a historical context in which to consider the contemporary law of theft. The history of theft produces a striking illustration of the way in which distinctive logics of legal argumentation may persist notwithstanding legal and social change, whilst also exemplifying a significant shift in the very basis of attributing criminal responsibility. Yet, despite the extensive legislative codification of property offences, many of the problems thrown up by the history of larceny reproduce themselves in a curious way in the modern law of theft. These

traces serve to cast doubt on the extent to which older forms of viewing crime have been entirely displaced by modern conceptions of responsibility and wrongdoing.

Laws against theft (or ‘ larceny’) count among the most historically and geographically pervasive forms of criminal law, yet the form of the offence is bound to be culturally specific: it reflects prevailing ideas of property (Fletcher, 1978: 1-122). Blackstone’s comment neatly captures not only the interaction between prevailing social formations and the form of criminal offences against property, but also the persistent controversy about the shape of those forms within any particular polity. From the seventeenth century on, there was in England a growing body of statutory law which specified many different instances of larceny, grading them as grand or petit, and distributing penalties accordingly.

For example, horse theft, sheep and cattle theft, theft from bleaching grounds, theft from houses and ships, shoplifting and picking pockets were all categories singled out as grand larcenies, reflecting socio-economic structures, the demands of local economies, and (closely related) popular perceptions of the relative seriousness of different kinds of theft (Beattie 1986). Among these distinctions, places or locations, and specific objects, are of particular importance, suggesting a conception of larceny as essentially about the transgression of commonly recognised boundaries. But as the integrity of these boundaries gradually dissolved in more mobile and fragmented modern societies, criminal law increasingly struggled to articulate a determinate conception of theft.

In his extensive analysis of the development of the modern law of theft, Fletcher (1978) distinguishes between three basic kinds of property crime: larceny, embezzlement and false pretences. Larceny, as defined by Blackstone, consists in a felonious taking and carrying away of the personal goods of another: it must be felonious in the sense of being done with an ‘animus furandi’ – theftous spirit or intent (though, as we shall see, this is not really equivalent to contemporary ‘mens rea’/intent); and it is essentially a crime against possession – hence physical taking – which entails that those in possession could not be guilty of larceny. Embezzlement, by contrast, consists in appropriating goods entrusted to the defendant’s possession to her or his own use; and false pretences, deception or fraud in getting possession of goods by means of some pretence or cheating.

If you snatch my wallet and run off with it, you commit theft; if you falsely tell me you are starving so as to persuade me to give it to you, you commit false pretences; if I put my wallet in your hands for safekeeping, but you then decide to abscond with it, you commit embezzlement. Embezzlement and false pretences tend to develop in modern systems as statutory innovations coming much later than larceny. As Fletcher explains, the difference between these three kinds of offence has centrally to do with the nature of the victim’s participation: in larceny, the victim in no way voluntarily participates: in embezzlement the victim agrees to the initial taking but not to the later appropriation; in false pretences, the victim agrees to the transfer, but only because he or she is the victim of a deception. This illustrates the variety of interests or wrongs which criminal

laws on property can express: whilst larceny is fundamentally concerned with possession, embezzlement is concerned rather with trust.

Fletcher's argument is that in the development towards contemporary law, the distinction between these three forms of separate property violation became blurred, and that this blurring not only produced the modern concept of theft, but also expressed a deeper change in the underlying conception of criminality – a change from 'manifest' to 'subjective' patterns of liability. Whilst the accounts provided by writers such as Quinney and Hall (see below) represent these changes as driven by social and economic factors, Fletcher's explanation is rooted in the logic of legal forms themselves. Fletcher rejects both the idea that the development of theft is a question of historical accident and the idea that it is a matter of historical determinism – primarily a product of social and economic conditions. These factors certainly have a place in his story, but his account shows how those broader influences are filtered through a set of legal forms which have their own internal logic. To explore these competing legal and social explanations, and their implications for the modern criminal law, it is worth examining the law of larceny in a little more detail.

In Blackstone's time, as we have seen, the essence of larceny was a taking. In other words, the consent of the owner had to be wanting; and there had to be a taking from possession – someone legally in possession could thus not be a thief. This meant that uncertainties in the law of possession, and in particular about the line between possession and mere use or custody, were of central importance in the law of larceny. For example, was a domestic

servant in possession of cutlery or linen, or did she only have ‘care and oversight’? If the latter, she could be guilty of larceny if she took the goods away; if the former, she could not – it was merely a private or civil matter. Further difficult doctrinal issues had to do with what constituted a carrying away. Blackstone cites the case of a guest stealing goods from an inn, and being caught on his way out: this was thought to be a sufficient taking away.

Of particular interest to modern eyes is the summary way in which Blackstone deals with ‘animus furandi’ – what looks to us like the ‘mens rea’ of larceny. He simply observes that, apart from its role in ‘excusing those who labour under incapacities of mind or will’, it ‘indemnifies also mere trespassers and other petty offenders’. He explains that the paradigm example of ‘animus furandi’ is that of the person found taking ‘clandestinely’ – though he goes on to say, not entirely helpfully, that ‘this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or animus furandi; wherefore they must be left to the due and attentive consideration of the court and jury’ (Blackstone 1765: 232). As we shall see, the contrast between the eighteenth century conception of ‘animus furandi’ and contemporary conceptions of ‘mens rea’ plays a central role in grounding Fletcher’s argument that the early common law’s conception of larceny was based on a very different pattern of criminality from the modern law of theft.

Fletcher points out that the basic idea of larceny as a felonious taking from possession created a number of problem cases which arose regularly but which were outside the definition: examples include the person who comes into possession with a felonious purpose unknown to the owner; the person who finds goods which he later appropriates; the person to whom goods are mistakenly delivered, and who then appropriates them; and the person to whom goods are delivered by a third party and who appropriates them rather than passing them on to the owner. Each of these cases posed a problem for common law larceny, because each encountered the barrier of possessorial immunity: i. e. in each case the putative thief has got possession, and hence cannot become a thief by his or her later appropriation. As Quinney observes in the following passage, these problems began to be resolved in *Carrier's Case* (Star Chamber, 1473):

R. Quinney, *The Social Reality of Crime*, Little, Brown & Company, 1970, 70-3: 'The creation of a particular criminal law must have its conception in some concrete setting of time and place. The development of the law of theft demonstrates that necessity. For prior to the fifteenth century there was no legal conception of theft as we know it today. It was during the fifteenth century in England that the modern law of theft was officially formulated into criminal law. The law of theft was shaped by changing social conditions, and especially by pressing social interests of the time. The definition of theft as a crime was a solution to a legal problem that arose within a particular social framework.'

‘ The decision that resulted in the legal concept of theft occurred in England in 1473, in what is known as the Carrier’s Case. The case has been documented and interpreted by Jerome Hall in his book *Theft, Law and Society* (Hall, 1952). The facts of the case are these: the defendant was hired to carry bales to Southampton. Instead of fulfilling his obligation, he carried the goods to another place, broke open the bales, and took the contents. The man was apprehended and charged with felony.

‘ The most illustrious judges of the time discussed the case at length. While the defendant was finally held guilty by a majority of the judges, a legal problem of considerable portent developed during the proceedings. Before the case arose, the common law recognized no criminality in a person who came legally into possession and converted it to his own use. The reasoning of the common law had been that the owner of transported goods was responsible for protecting himself by employing trustworthy persons....

‘ Until the Carrier’s Case it had been agreed that while trespass (the taking of property from one who is in possession of it) was an essential element of larceny, a person in possession of property could not commit a trespass upon that property. Therefore, since a bailee (an employee who is trusted with property) had possession, larceny could not technically be committed by such an employee. The judges, however, departed from precedent by introducing a new concept which could neither be found among the existing legal rules nor logically derived from them. For the judges held that “breaking bulk” terminated the bailment, that such property at once reverted to the possession of the bailor, and that the removal of it from the bales

supplied the trespass. Hall thus observes: " By this refinement the door was opened to admit into the law of larceny a whole series of acts which had up to that time been purely civil wrongs." (Hall 1952 p. 10)...

' An important question arises as to the forces that were active in the creation of a new legal concept. In his analysis of the case, Hall outlines the changes that were occurring in fifteenth century England. These changes coupled with the social conditions and institutions of the period made convenient a change in the law of theft. To begin with, in the political realm, the courts were subservient to the wishes of Edward IV. This meant that the special interests of the Crown were protected by the courts. Among the interests of the king that received the favour of the courts were the royal commercial activities, including trade with merchants on the Continent. Edward himself was a merchant who carried on many private ventures.

' The economic conditions of the period were especially important for the decision reached in the Carrier's Case. During this phase of the Renaissance a commercial revolution was taking place in England and Europe. The old feudal structure resting on an agricultural economy was giving way to a new order based on industry and trade.... Hall.... argues that the complainant was a foreign merchant... whose trade was desired by the Crown. Such foreign merchants were subject to special risks: there was naturally hostility by local merchants toward foreign trade. Moreover, foreign merchants were handicapped in the transport of goods because of the uncertainty of finding trustworthy carriers who would not abscond with the goods. The king attempted to relieve the situation somewhat, issuing covenants of safe

conduct through the country...The merchandise taken by the bailee of the Carrier's Case was probably wool or cloth, or both. Such goods were usually transported in bales... All these deductions mean that " the interests of the most important industry in England were involved in the case." (Hall 1952 p. 31).

' The Carrier's Case of 1473 vividly demonstrates the way in which changing social conditions and emerging social interests may bring about the formulation of a criminal law. The decision of the Carrier's Case provided the framework for the further development of the law of theft. Eventually, with the growth in banking and the use of paper currency, the law was expanded to include the act of embezzlement by clerks, officers and the like. A Whig Parliament in the eighteenth century passed an embezzlement statute in order to protect mercantile interests. The legal protection of property has always been to the interest of the propertied segments of society.'

Through the ingenious means of Lord Chokke's argument that the carrier's ' breaking bulk' constituted a trespass, and therefore a felony, the Carrier's Case therefore overcame the barrier presented by the doctrine of possessorial immunity. This idea of breaking bulk remained the major exception to that doctrine until the mid-nineteenth century. By this time, fraud and embezzlement had encompassed such behaviour, and the common law had developed an array of other techniques for avoiding the doctrine's effect – for example by arguing that certain kinds of bailees did not get possession in the first place.

What explains the decision in the Carrier's Case? On the face of it, the rule about possessorial immunity may seem an obscure technicality, and the argument about breaking bulk a clever judicial fiction designed to get around it. But this explanation of the case begs the question of why the judges would have wanted to get round it from the late fifteenth century on. As Quinney notes, Jerome Hall argued that the decision was driven by the imperatives of commerce and the desire in particular to protect foreign merchants so as to encourage trade. Fletcher points out, however, that this is not a convincing argument, because the contrary decision on the point would have protected the merchant just as well: the merchant's difficulty in recovering the goods actually derived from the fact they were argued to have reverted to the King, through the law of waif, as being the products of a felony. Thus the Star Chamber's decision that the bulk-breaking did indeed constitute a felony necessitated the further innovation, to protect merchants, that the ordinary law of waif would not apply to goods of foreign merchants. But even if Hall's explanation were convincing, it begs a further question: what was the rationale for the original rule, and why did this apparently rather technical modification of it – along with the other ways the common law found around problem cases – survive for so long?

Fletcher's argument is that the original form of larceny reflected a framework of 'manifest' criminality – the idea that criminal liability should be based on actions manifestly dangerous to the community – and that the subsequent modifications were designed (though with increasing dilution) to retain the law of larceny within that framework:

George Fletcher, *Rethinking Criminal Law* (1978) pp. 115-120 ‘ The metamorphosis of larceny permits us to abstract two general patterns of criminality that find expression in a variety of crimes in addition to larceny. The common law of larceny up to the time of Blackstone reflected what we may call the pattern of manifest criminality; the modern law of larceny, emerging in the late eighteenth century, stands for a pattern of subjective criminality.... The tension between the pattern of manifest criminality and the pattern of subjective criminality is one that pervades a wide field of the criminal law... The critical feature of [the manifest] pattern of liability is that the commission of the crime be objectively discernible at the time that it occurs. The assumption is that a neutral third-party observer could recognize the activity as criminal even if he had no special knowledge about the offender’s intention.....

Two important features of crimes follow from this distinguishing mark of manifest criminality. First there is a sense in which the crime itself crystallizes as the product of community experience, rather than being imposed on the community by an act of legislative will. The contours of what we perceive to be larceny spring from a shared experience with thieves. It is incorporated in our language as well as our legal judgments... There is no doubt that this way of looking at crime and criminals is foreign to the modern view that the criminal law is imposed on the community by the courts or the legislature....

The second feature born of the principle of manifest criminality is the subsidiary position of intent in the analysis of liability. The issue of non-intent

arises primarily as a challenge to the authenticity of appearances, rather than as a basis for inculcating the actor. It is only after the manifestly criminal quality of the act is established that intent can conceivably become an issue. In this way of thinking the required intent is linked conceptually to the commission of certain acts. It is not thought of as some mysterious inner dimension of experience that exists independently from acting in the external world.

The pattern of manifest criminality may be understood as a theory about the appropriate jurisdiction of the criminal courts. The premise is that the courts should stay their hand until the actor manifests discernible danger to the community. Thus the criteria for judicial intervention resemble the ground for the private execution of thieves in ancient legal systems. ...

The contrasting [subjective] pattern of liability begins with the radically different assumption that the core of criminal conduct is the intention to violate a legally protected interest. A crime in this pattern may presuppose the occurrence of a particular event, such as the “taking from possession” required by larceny. But this result is often not incriminating, as indicated by the cases of finders and those who receive a chattel by mistaken delivery. The function of the criminal act is to demonstrate the firmness rather than the content of the actor’s intent....

This pattern of liability presupposes a notion of intending that treats intent as a dimension of experience totally distinct from external behaviour.

Intending is conceived as an event of consciousness, known to the person with the intent but not to others. Thus the relationship of intending to action

is dualistic rather than monistic. The intent exists in the realm of the mind, the act in the realm of the body.

This dualistic way of thinking about intent has undergone philosophical criticism in recent years [see Chapter 1. II. b. and c.]; yet it retains a powerful grip on the way lawyers think about the criminal law. Its power derives in part from its dovetailing with an appealing theory of criminality. The criminal law should begin, this theory holds, by identifying interests that are worthy of protection. The next step should be preventing conduct that threatens those interests. The reasons that humans sometimes threaten those interests is either that they intend to do so or that they take risks that subject the protected interests to danger. Therefore the purpose of the criminal law should be to prevent people from embarking on courses of behaviour that threaten these worthy interests...The only reason we require that offenders act on their intention is to make sure that the intention is firm and not merely fantasy...

One key concept in understanding the difference between the patterns of manifest and subjective criminality is the distinction between substantive and evidentiary rules. Manifest criminality requires, as a substantive rule of law, that the act betoken danger to the community. The subjective criminality of intending harm invites a variety of means of proving the required intent, and one of these may be an act manifesting danger. In a particular case of manifestly criminal, punishable conduct, it may be impossible to determine whether the fact fulfills a substantive requirement or whether it functions merely as evidence of intent. The distinction has a

concrete impact only in cases where the conduct of the accused is outwardly unincriminating. If manifest criminality is a substantive requirement, no surrogate proof of intent will suffice; if, in contrast, it fulfills an evidentiary function, the absence of manifestly criminal conduct may be corrected with surrogate proof of a criminal intent.

‘ Thus the difference between the two patterns may be simply stated as turning on whether a manifestly criminal act is a substantive requirement. In the pattern of manifest criminality it is; in the theory of subjective criminality, it is not. ‘ These two patterns of liability – the manifest and the subjective- interweave in contemporary thinking about criminal law. Yet they remain camouflaged by a common stock of legal maxims that create an image of unity in criminal theory. It is generally said that criminal liability presupposes (1) an act, (2) an intent, (3) a union of act and intent. In addition, it might be asserted that (4) danger to the community, and (5) an intrusion upon the public sphere are general features of criminal conduct. Though the requirement of these elements is nominally common to both patterns of criminality, the concepts of act, intention, union, danger and public sphere acquire different meanings and significance, as they are interpreted in one pattern of liability or the other.’

Fletcher’s account denies that the common law of larceny was merely chaotic and beset by procedural technicalities. His argument allows us to perceive criteria of order and coherence which related to the specific social conditions of the time. Essentially, Fletcher diagnoses in the early common law of larceny a throwback to early conceptions of *furtum manifestum* from

Roman law, under which manifest theft – catching a thief red-handed, as it were – entailed the immediate right of justified killing on the part of the discoverer. This contrasted sharply with non-manifest theft, which was treated as a matter pertaining to compensation. Fletcher suggests that the doctrine of possessorial immunity in common law was doing much the same thing: it was identifying the line between those relationships which were properly within the ambit of the criminal as opposed to the civil courts. Domestic servants' appropriations were not criminal, unless manifest, even after the Carrier's case, because they took place within the ambit of ongoing relationships which provided a framework of social control in relation to property: it was up to a master to see that his servants did not misappropriate his property. Commercial relationships between strangers, by contrast, were gradually moved into the public sphere and regulated by criminal as well as civil law.

What Fletcher identifies here is therefore a particular conception of the nature of the private and of the proper line to be drawn between criminal and civil law. The assumption of the pattern of manifest criminality is that criminal law should not intervene until there is an unequivocal manifestation of danger to the community. This gradually gave way to a subjective pattern, in which the essence of crime was individual intent or responsibility. Fletcher does not elaborate any general explanation of the shift from the manifest pattern to a subjective pattern, but it seems plausible that this had to do with changing conceptions of the nature of human agency, and of the relationship between the individual and the state. In the relatively static social order of the early common law, the idea of crime as something

immediately identifiable as threatening to community interests made sense. But as society became more fragmented, the criminal law more extensive, and criminal law's functions more diverse, the emerging conception of individual, subjective responsibility began to replace the increasingly untenable conception of crime as manifest, generally identifiable wrongdoing (cf. Farmer (1996), quoted in Chapter 1. I. a.).

Within the framework of manifest criminality, 'animus furandi' does not operate to underpin the need for social protection or to justify the ascription of culpability, as intent or 'mens rea' within a subjective framework would. Rather, in so far as 'states of mind' are relevant to manifest criminality, they function merely as evidence, bolstering the interpretation of an equivocally criminal act as indeed criminal (see Lacey 2001b, and Chapter 1. II. b). Unlike the modern, dualistic analysis, the pattern of manifest criminality engaged in an integrated reading of an action as one which could be recognised by any observer as a crime. Hence 'animus furandi' spoke to the perceived limits of criminal law and the nature of crime.

By contrast, in the emerging subjective pattern, the intent of the offender to violate a legally established and socially recognised interest is the foundation for the attribution of liability, and this brings with it a focus on the conceptual distinction between 'mens rea' and 'actus reus', an elaboration of excuses, and a movement towards inchoate offences such as attempt (see section d below). In the specific area of property law, it entails the gradual blurring of the boundaries between the later offences of embezzlement and false pretences and the original conception of larceny – a blurring which was

already evident in the Larceny Act 1916, and which, as we shall see, reaches its zenith in the Theft Act 1968. We shall now move on to consider the modern law of theft and to examine the ways in which it replays the technical problems identified by Fletcher and, in doing so, echoes conceptions of criminality often regarded as having been transcended by modern, subjectivist criminal law doctrine.