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The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis

Kathleen F. Brickey*

I. INTRODUCTION

The principle of harm is an essential component of criminal jurisprudence.¹ It is important as both an element of crime² and a measure of appropriate punishment.³ In a general sense harm implies infringement or destruction of cognizable interests,⁴ but the concept must be given more specific content if it is to assume a functional role in the development of coherent theory. As the notions of harm and protected interests are interdependent, definition of the harm perceived to result from criminal conduct ultimately rests on determination of the legal interest sought to be

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1. See generally J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 213 (2d ed. 1960) [hereinafter cited as *GENERAL PRINCIPLES*]; J. HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 247-52 (1958); Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 *Duq. U.L. Rev.* 345 (1965-66); Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 *IND. L.J.* 206, 220-22 (1959).

2. *GENERAL PRINCIPLES*, *supra* note 1, at 213; Eser, *supra* note 1, at 346. Conduct that is not harmful cannot justly be punished. *Id.* at 363. See J.S. MILL, *On Liberty* in *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 8 (R. McCallum ed. 1948). Compare Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *U.C.L.A. L. Rev.* 266 (1975) with Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 *U.C.L.A. L. Rev.* 293 (1975).

3. If punishment is to be just, it must be proportioned to the harm inflicted. Trivial harms should not be punished more severely than harms of graver consequence. *GENERAL PRINCIPLES*, *supra* note 1, at 216-17; 1 H. WASHINGTON, *THE WRITINGS OF THOMAS JEFFERSON*, "A Bill for proportioning Crimes and Punishments, in cases heretofore Capital" 147 app. (1861); Eser, *supra* note 1, at 346. *But see* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 *U. PA. L. Rev.* 1497 (1974); J.C. Smith, *The Element of Chance in Criminal Liability*, 1971 *CRIM. L. Rev.* 63. See generally H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 160-73 (1968); A. VON HIRSCH, *DOING JUSTICE* 79-81 (1976).

4. *GENERAL PRINCIPLES*, *supra* note 1, at 213, 216-17.

protected.⁵ The legal theorist must therefore inquire, harm to what interests?

Pursuit of an inquiry into protected interests may occur on three levels of abstraction: formal harm, harm to general interests, and harm to specific interests.⁶ Formal harm, or harm to the sovereign, is that which every disobedience of the law is said to involve. Its origins lie in a "peculiarly English" phenomenon,⁷ expansion of the king's peace to cover his entire realm and all of his subjects.⁸ Originally, king's peace had a specialized meaning—protection of the king, his family, and his immediate household.⁹ To breach the king's peace was to commit an act of personal disobedience against him and to become subject to his justice.¹⁰ The mantle of protection against violent acts gradually extended to persons and places other than those directly associated with the king as the crown assumed general criminal jurisdiction.

Assertion of royal jurisdiction over crimes, which accordingly became pleas of the crown,¹¹ laid the foundation for the fictive notion¹² that the harm in criminal conduct was the breach of the king's peace.¹³ That conception of harm obscured what should have been manifest, that the very essence of early criminal law was protection of specific interests of individuals.¹⁴ Felony prosecutions were instituted to redress injury to persons and property, not just to punish a breach of the law.¹⁵ Only with expansion of the king's peace did the interests of the sovereign overshadow the rights of his subjects and thrust the perception of crime into the realm of

5. Eser, *supra* note 1, at 411.

6. The tri-level abstraction was developed by Professor Mueller. See Mueller, *supra* note 1, at 220-21.

7. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 45 (2d ed. reprinted 1968).

8. See generally Pollock, *The King's Peace in the Middle Ages*, 13 HARV. L. REV. 177 (1899). From an early time continental law recognized the king as protector of both the general peace and the special peaces he granted. 1 F. POLLOCK & F. MAITLAND, *supra* note 7, at 45.

9. 1 F. POLLOCK & F. MAITLAND, *supra* note 7, at 45.

10. *Id.* at 576-77.

11. *Id.* The assumption of criminal jurisdiction also provided fiscal advantage to the crown. 2 *id.* at 453. See text accompanying notes 115-19, 140-43 *infra*.

12. Seney, "A Pond as Deep as Hell"—Harm, Danger, and Dangerousness in our Criminal Law, 17 WAYNE L. REV. 1095, 1104 (1971).

13. Eser, *supra* note 1, at 349-50.

14. *Id.* at 380. Common-law crimes proscribed only serious infringements of life, liberty, and property, see G. WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* 592 (2d ed. 1961), and the presence of individual harm was obvious. Eser, *supra* note 1, at 347.

15. Eser, *supra* note 1, at 350. See text accompanying notes 80-107 *infra*.

public rather than private wrongs.¹⁶ Formal harm became the focal point of existing theory, and little development of a conceptual basis of substantive criminal law occurred even though the scope of that body of law expanded dramatically.¹⁷

Refinement of the theory of harm came late in the day and at a second level of abstraction, harms to general interests. The product of that mode of inquiry is an organizational construct for a more sophisticated legal system,¹⁸ but as an analytical framework it is lacking. Consigning to one category all harms of a general nature, such as harms to property, fails to provide a basis for distinguishing those harms and ordering them according to their relative gravity. Arson, burglary, and larceny all may be said to impair interests in property, but it does not appear that each impairs an identical proprietary right. Conversely, one would assume that robbery and larceny harm identical interests, for common-law robbery is a species of larceny.¹⁹ Yet the punishment for each is different.²⁰ The variance is unaccountable within this analytical framework, which furthers the classification of offenses according to their likenesses but neglects the task of clarifying the relevant points of disparity.

To refine the analysis, it is necessary to examine the corporeal injury the common law sought to prevent. That mode of inquiry occurs within the analytical framework of a third level of abstraction, harms to specific interests. Apart from the threat it posed to an important social institution, theft infringed specific property interests owned by individuals, and impairment of those interests formed the substantive basis for defining the crime of larceny.

When the contours of common-law felonies were emerging,

16. Eser, *supra* note 1, at 351.

17. See, e.g., 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 626-702 (London 1736).

18. The principal applications of this analysis were classification and organization of crimes in penal codes and treatises as offenses against persons, offenses against property, and the like. See, e.g., MacDonald, *The Classification of Crimes*, 18 CORNELL L.Q. 524, 538-42 (1933); 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *205, *220, *229. This system was more coherent than alphabetical arrangement of penal provisions, see MacDonald, *supra* at 542, and explications of criminal law apparently presented "in the order in which [the author] ran upon it in his foragings in the books." R. POUND, *CRIMINAL JUSTICE IN AMERICA* 101 (1930) (remarking on Lord Coke's *THIRD INSTITUTE*).

19. E. COKE, *THIRD INSTITUTE* *68-69; 1 M. HALE, *supra* note 17, at 503; 1 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 95-97 (London 1716).

20. All robbery was punishable by death. Only grand larceny was punished capitally. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 511. See 1 M. HALE, *supra* note 17, at 503-04, 530, 532.

what we now know as prosecution of crime was a private action initiated to redress a tangible injury to objective interests. The individual, in whose hands were placed the functions of policing and prosecuting larceny, pursued the matter to remedy a wrong to his property.²¹ Consider the ancient action of theft. One whose goods were stolen raised hue and cry and pursued the thief with his neighbors' help.²² If the trail led them to one possessed of the stolen goods, he was presumed to be the thief and was dealt with summarily.²³ The owner thereupon recovered the chattel.²⁴ Ascribing guilt to one who might or might not be a thief in order to justify retaking a stolen chattel hardly suggests overwhelming concern with bringing wrongdoers to justice.

We shall speak more of the ancient procedures in a later section. It is now sufficient to observe that these rudimentary beginnings of formal criminal process were embodied in the laws of the early English kings.²⁵ When the need for a more regular procedure became apparent, the law intervened and prescribed new forms of control.²⁶ Through those evolving forms the individual's personal interest in freedom from interference with his chattels gradually became a protected legal interest in his property.

The law was then too primitive to conceptualize that interest. Medieval theory must have gone no further than this: "We are entitled to keep what we lawfully acquire. No thief should deprive us of it. If we capture the thief, we will rightfully regain what has been stolen from us." It would be centuries before the doctrines of

21. See Eser, *supra* note 1, at 379, and text accompanying notes 80-107 *infra*.

22. VI Aethelstan c.4, c.5, c.8 § 4, c.8 § 5, in *THE LAWS OF THE EARLIEST ENGLISH KINGS*, at 31, 43, 159-61, 165 (F. Attenborough trans. reprinted 1963) [hereinafter cited as *ATTENBOROUGH*]; I Edgar c.2, II Canute c.29, William I c.4, in *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, at 17, 189, 255 (A. Robertson ed. & trans. 1925) [hereinafter cited as *ROBERTSON*]. Neglect of the duty to pursue thieves might result in a fine or forfeiture of goods.

23. BRITTON 48, 150 (F. Nichols trans. 1901 ed.); J. AMES, *LECTURES ON LEGAL HISTORY* 40 (1913) [hereinafter cited as *AMES, LECTURES*]; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 157; J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 328 (1898); Ames, *The History of Trover*, 11 *HARV. L. REV.* 277, 278 & n.3 (1897) [hereinafter cited as *History of Trover*]; II Aethelred c.7, II Canute c.76, in *ROBERTSON, supra* note 22, at 61, 213. The practice of denying any defense to one who, soon after the theft, was caught in possession of the stolen goods was confirmed as late as 1176. Pollock, *supra* note 8, at 182. The inescapable logic of the practice is, of course, that innocent men were proven thieves.

24. See, e.g., II Canute c.76, in *ROBERTSON, supra* note 22, at 213. This aspect of the procedure is discussed in detail in text accompanying notes 80-107 *infra*.

25. See, e.g., authorities cited in note 22 *supra*.

26. See generally H. MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS* 265-66 (7th ed. 1914).

possession and ownership became coherent parts of an established body of property law.²⁷ By that time the role of procedure in defining the contours of substantive law would long be forgotten. A more mature jurisprudence would neglect to reconstruct the evolution of the rule of law before conceptualizing the property interest it protected.

This Article tenders such a reconstruction and develops the theory that ownership, rather than possession, was the legal interest protected by common-law larceny. The theory is derived from analysis of the content of early theft law and the procedural forms through which property rights were vindicated.

II. THE CONTENT OF THEFT LAW

A. *The Act*

Medieval sources spoke little of the substance of theft law. The act of stealing seemed so well understood that no formal definition was thought necessary. What was apparently essential was an approved response to the offending act and a commitment to suppress it. The codes of the early English kings provided set procedures for pursuing, capturing, and punishing thieves,²⁸ and solemn oaths to be taken by young men—pledges that they would become neither thieves nor accomplices of thieves.²⁹ The codes attached considerable importance to the trail, which pointed to the wrongdoer and the location of the stolen chattel. The trail leading off the owner's land was evidence that his cattle were gone. It was followed onto the land of another, who was required to show where it led from his premises. If he could not, the trail stood as an oath of accusation.³⁰

27. See generally 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 152-83; 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 78-79 (3d ed. 1923); F. POLLOCK & R. WRIGHT, *AN ESSAY ON POSSESSION IN THE COMMON LAW* 122 (1888).

28. See, e.g., the provisions cited in note 22 *supra* and note 57 *infra*. The punishment was apt to be visited on the families of thieves as well.

§ 1. If [anyone] steals with the cognizance of all his household, they shall all go into slavery.

§ 2. A ten year old child can be [regarded as] accessory to a theft.

Ine c.7, in ATTENBOROUGH, *supra* note 22, at 39.

See also VI Aetbelstan c.1 (goods of one found guilty of theft to be divided, one-third to be distributed to the innocent wife, one-third to the king, and one-third to the associates of the thief), and Ine c.57 (wife who declares she has not partaken of meat stolen by husband may retain her third of the household property), in *id.* at 157, 155-57.

29. II Canute c.21, in ROBERTSON, *supra* note 22, at 185.

30. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 157; V Aethelstan c.2, in ATTENBOROUGH, *supra* note 22, at 155.

The underlying notion of theft that is consistent with the procedures for apprehending the thief and proving the event is that of carrying away chattels contrary to the will of the owner.³¹ An act of dispossession is implied, and that is entirely logical. Most medieval chattels were valuable to the owner primarily as objects of possession and use.³² It is unlikely that one would routinely lend his household furnishings, his weapons, his beasts of burden, or his store of food. Practically, the only way they could ordinarily be stolen would be by physically taking them from the owner's possession.³³

When an owner had occasion to let his goods leave his possession, borrowing or safekeeping them would have been risky if an accusation of dispossession had been unnecessary. Possession of recently stolen goods was conclusive proof that the possessor was a thief.³⁴ A bailee accused of stealing by failing to return goods in accordance with the terms of the bailment could have been executed upon an uncontested assertion of ordinary commercial default. It is hard to believe that even the medieval mind would have invented such an unjust rule, and the point under consideration militates against it.

One caught "seized in the act" was not to be spared.³⁵ The Anglo-Saxons felt no need to define theft because they relied on what they observed—an act objectively identifiable as stealing.³⁶ In the case of one who obtained possession of the goods with the consent of the owner, there would be no objective act to which the term "stealing" could be easily applied.³⁷ The act of dispossession, on the other hand, was unambiguous to the external world.

The writers of the twelfth and thirteenth centuries confirmed that dispossession was the core of early theft law. The words of accusation were that in felony and against the peace the accused wickedly took and led away my horse;³⁸ he took it "feloniously and stealthily and larcenously and against the king's peace and thiev-

31. "If anyone carries stolen goods home to his cottage and is detected, the law is that he (the owner) shall have what he has tracked." II Canute c.76, in ROBERTSON, *supra* note 22, at 213.

32. See J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 49-51 (1863).

33. *Id.*

34. See note 23 *supra*.

35. II Aethelstan c.1, in ATTENBOROUGH, *supra* note 22, at 127.

36. For a thorough treatment of the theory of manifest criminality, see Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976).

37. *Id.* See also J. STEPHEN, *supra* note 32, at 51.

38. BRITTON, *supra* note 23, at 96-97.

ishly bore it away."³⁹ In Glanvill's view, a wrongdoing borrower "clearly . . . is not guilty of theft because he initially had possession from the owner of the thing."⁴⁰

Jurists only gradually articulated the elements of larceny with the formality befitting a maturing legal system, but by the time of Coke and Hale it seemed settled that larceny was the felonious taking and carrying away of the goods of another.⁴¹ There must be a trespass in the taking.⁴² Throughout, dispossession was the focal point.

The importance of the act of dispossession during the early history of larceny is so evident that an interest analysis of the crime logically begins with its consideration, for it suggests a working hypothesis: the legal interest protected by common-law larceny is the right of undisturbed possession of chattels.⁴³ Four illustrations of the operation of common-law principles may be offered in support of that proposition:

- (1) An owner who wrongfully retakes his goods from a bailee for a term commits larceny.⁴⁴
- (2) A bailee who purloins his bailor's goods does not commit larceny.⁴⁵
- (3) A bailee from whom bailed goods are stolen may prosecute the thief, claiming the goods to be his.⁴⁶

39. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 426 (S. Thorne trans. 1968). Fleta's language is almost identical. 1 FLETA c.36, 72 SELDON Soc'y 90 (1955).

40. R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 128-29 (G. Hall trans. 1965). Glanvill raises this point in his discussion of the action of debt.

41. E. COKE, *supra* note 19, at *107; 1 M. HALE, *supra* note 17, at 504.

42. E. COKE, *supra* note 19, at *108; 1 M. HALE, *supra* note 17, at 504-08. *See also* Beale, *The Borderland of Larceny*, 6 HARV. L. REV. 244, 245 (1892).

43. *See, e.g.*, R. PERKINS, CRIMINAL LAW 238-39 (2d ed. 1969); F. POLLOCK & R. WRIGHT, *supra* note 27, at 118. *But see* G. FLETCHER, RETHINKING CRIMINAL LAW 35 (1978); O. W. HOLMES, THE COMMON LAW 58 (M. Howe ed. 1963).

44. E. COKE, *supra* note 19, at *110; 2 E. EAST, PLEAS OF THE CROWN 654 (London 1803); 1 M. HALE, *supra* note 17, at 513; 1 W. HAWKINS, *supra* note 19, at 94; F. PULTON, DE PACE REGIS ET REGNI 130 (London 1609). Hale, Hawkins, and Pulton give as an example an owner who retakes his goods from the bailee intending to make the bailee answerable for them.

45. E. COKE, *supra* note 19, at *107; R. GLANVILL, *supra* note 40, at 128-29; 1 M. HALE, *supra* note 17, at 504; 1 W. HAWKINS, *supra* note 19, at 89. Imposition of criminal liability on bailees whose conduct amounted to "breaking the bales" first occurred in the fifteenth century. Y.B. Pasch. 13 Edw. 4, pl. 5 (1473), *reprinted in* 2 SELECT CASES IN THE EXCHEQUER CHAMBER, 64 SELDEN Soc'y 30 (1945).

By the time of Coke it was also settled that a bailee who carried the goods to the appointed destination and then misappropriated the unbroken container was guilty of larceny. E. COKE, *supra* note 19, at *107; 1 M. HALE, *supra* note 17, at 505. *See generally* J. HALL, THEFT, LAW AND SOCIETY 3-79 (2d ed. 1952); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 362-66 (5th ed. 1942); Fletcher, *supra* note 36, at 481-86.

46. 1 M. HALE, *supra* note 17, at 513; 1 W. HAWKINS, *supra* note 19, at 94; F. PULTON, *supra* note 44, at 130. *See also* 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 169-72; 3 W.

(4) A thief who takes stolen goods from another thief may be charged as having stolen the goods of that thief.⁴⁷

Each of the examples seems to demonstrate that disturbance of peaceable possession is the gist of the offense. In the first the owner, who undoubtedly retains a general property in the goods, nevertheless is criminally liable for stealing them. The bailee's special property, consisting of present possession and a limited right to continued possession, is infringed by the owner's act of dispossession.⁴⁸ The second illustrates the simple proposition that one cannot commit a trespass against himself. The bailee, having exclusive possession of the goods, does not take them from the possession of another by his act of misappropriation. Hence, he commits no larceny. In the third and fourth examples, the dispossessed parties have a superior right to possession against all but the true owner. Since possession is exclusive, when the owner loses possession (by voluntary relinquishment in the case of bailment or by trespass in the case of theft), no subsequent trespass can be committed against him. It is the bailee and the thief, having present possession, who are wronged by the acts of dispossession in the last illustrations.

If the act element alone were to serve as the vehicle of analysis, the working hypothesis might well be adopted as concrete the-

HOLDSWORTH, *supra* note 45, at 339-41. In early times the bailee could proceed by way of appeal of larceny, a procedure discussed in text accompanying notes 98-129 and 148-58 *infra*.

47. In such a case the thief is a felon in relation to both the original wrongdoer and the true owner. 2 E. EAST, *supra* note 44, at 654; 1 M. HALE, *supra* note 17, at 507. *But see* 1 W. HAWKINS, *supra* note 19, at 90 ("[H]e who steals my goods from J.S. who had stol[e]n them before, may be indicted or appealed, as having stol[e]n them from me; because in judgment of law, *the possession* as well as *the property* always continued in me.") [emphasis added]. *Accord*, F. PULTON, *supra* note 44, at 130, and 4 M. BACON, A NEW ABRIDGEMENT OF THE LAW 184 (Philadelphia 1852). Since the owner had no action of trespass against the second thief, some historians found this result to be curious. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 166 n.2 and 167-68.

48. As a consequence of this principle it is occasionally said that larceny is a taking with intent to deprive the owner or possessor of his interest. 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 413 (3d ed. Boston 1865); R. ANDERSON, 2 WHARTON'S CRIMINAL LAW AND PROCEDURE 80 (1957). Although the generalization works where an owner takes from his bailee, it is inaccurate in other cases. An owner voluntarily relinquishes a property right to his bailee. As between the two, the bailee's present possessory interest is superior to that of the owner to possess at some time in the future. That is not the case when the party in possession is a thief or a finder. It is the owner who has legally recognized property in the goods, 2 W. BLACKSTONE, *supra* note 18, at *9, 3 *id.* at *153, and his taking of his goods under those circumstances would not constitute larceny at common law. F. POLLOCK & R. WRIGHT, *supra* note 27, at 187; E. COKE, *supra* note 19, at *134; 1 M. HALE, *supra* note 17, at 546. *See generally id.* at 512-15. *See also* F. PULTON, *supra* note 44, at 131.

ory. The preceding examples make a convincing case for identifying present possession as the protected legal interest. The common law viewed the party with present possession as one who was wronged by the act of stealing. On the other hand, a conclusion that dispossession was a necessary element does not support an assumption that it was a sufficient element. In order to explore the relevant distinction between mere dispossession and stealing, we must consider the mental element and its effect on our inquiry.

B. *The Mental Element*

As we have seen with the act requirement, medieval law yields little in the way of definition.⁴⁹ So it is with the mental element. We must rely on the efforts of Bracton, Britton, and Fleta to provide a clear account of the crime of larceny. They insisted that the act must be done wickedly and feloniously and thievishly.⁵⁰ It must be done "with the intention of stealing."⁵¹ When later writers define larceny as a felonious taking and carrying away,⁵² the requirement that the taking be felonious conforms with an earlier common understanding of what stealing meant. A thief takes another's goods with the purpose of keeping them.⁵³ The mental element is intent to accomplish a permanent deprivation.

The requirement of intent to deprive compels the conclusion that although every theft includes a trespass, not every trespass constitutes theft. This conclusion requires reassessment of the working hypothesis. Although wrongful taking of the goods of another for temporary use disturbs peaceable possession in the same manner as stealing, unauthorized borrowing never was included in the reach of common-law larceny.⁵⁴ The offense requires a trespassory taking from possession with intent to deprive the owner of his

49. See text accompanying notes 28-37 *supra*.

50. See notes 38-40 *supra* and accompanying text.

51. 2 H. BRACTON, *supra* note 39, at 425; 1 FLETA, *supra* note 39, at c.36, 72 SELDEN Soc'y at 90. "[W]ithout the *animus furandi* it is not committed." 2 H. BRACTON, *supra* note 39, at 425.

52. See text accompanying notes 41-42 *supra*.

53. 4 W. BLACKSTONE, *supra* note 18, at *232; 2 E. EAST, *supra* note 44, at 553; 1 M. HALE, *supra* note 17, at 508-09; F. PULTON, *supra* note 44, at 129.

54. 1 M. HALE, *supra* note 17, at 509; 4 W. BLACKSTONE, *supra* note 18, at *232. See generally 2 J. BISHOP, *supra* note 48, at 462-63. In this respect the common law was more restrictive than Roman Law. See W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 577-78 (2d ed. 1950); W. BUCKLAND & A. MCNAIR, ROMAN LAW & COMMON LAW 353-54 (2d ed. 1952); 3 P. COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW 206-08 (London 1854); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 31 (1883); J. THOMAS, THE INSTITUTES OF JUSTINIAN 258-65 (1975).

whole interest in the property. That intended temporary deprivations were treated differently from theft suggests that deprivation of ownership, rather than mere dispossession, was the harm sought to be avoided. If that were the case, however, why was taking from possession the focal point of theft law?

Therein lies the dilemma. From an interest analysis based on the content of early theft law, two conflicting theories of the protected legal interest emerge—one the right of undisturbed possession, the other the right of ownership. Neither is yet fully explicable. To advance the analysis, we must consider the relation between possession and ownership when the content of theft law was solidifying.

C. *Property in Chattels*

The origins of larceny are rooted in an age when personal property holdings were limited in form and number, but the rudimentary nature of the medieval chattel did not diminish its importance. Products of human labor were scarce and jealously guarded.⁵⁵ The laws of the early English kings were replete with provisions to regulate the transfer of chattels⁵⁶ and to suppress stealing.⁵⁷ It is not surprising, however, that the fundamental concept on which property was founded was as yet unarticulated.⁵⁸ It

55. When the land that could be cultivated was more than sufficient, immovables were valued less than scarce movables. H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 347 (1886).

56. See, e.g., Hlothhere and Eadric c.16, I Edward c.1, II Aethelstan c.10, c.12, in *ATTENBOROUGH*, *supra* note 22, at 23, 115, 133, 135.

57. See, e.g., Whitred c.26, c.27, Ine, c.12, c.16, c.17, c.20, c.22, c.72, c.73, c.75; Alfred c.16; II Edward c.6; II Aethelstan c.1, c.3; IV Aethelstan c.6; VI Aethelstan c.1; in *ATTENBOROUGH*, *supra* note 22, at 29, 31, 41, 43, 59, 61, 73, 121, 127, 129, 149, 157.

It is clear that theft was regarded as a serious problem.

And if we are willing to act thus in all things we may trust . . . that everybody's property will be safer from theft than it has been. But if we are negligent in attending to the regulations for the public security, . . . we may anticipate—and indeed know for certainty—that the thieves of whom we were speaking will tyrannize over us still more than they have done in the past.

VI Aethelstan c.8 § 9, in *id.* at 167. Theft was one of the most common offenses in early times. 1 M. HALE, *supra* note 17, at 13; Hudson, *Introduction to LEET JURISDICTION IN NORWICH*, 5 *SELDEN Soc'y* at xxxv (1891); 1 F. POLLOCK & F. MAITLAND, *supra* note 7, at 55; 3 J. STEPHEN, *supra* note 54, at 121.

58. From an historical perspective we have gotten ahead of our story. While the verb "to own" can be traced to much earlier usage, the earliest known example of the use of the word "owner" is reported to be in 1340. The term "ownership" cannot be found until 1583. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 153 n.1. The effect of these discoveries is quite unremarkable, however. "Early law does not trouble itself with complicated theories as to the nature and meaning of ownership and possession. The law must have been peaceably

was sufficient that there existed a common understanding of the difference between what is "mine" and what is "yours." Implicit in that understanding is the relational concept that is inherent in the notion of property. Property is both the aggregate of interests in an object and the source of rights of individuals to deal with it.⁵⁹

When a claimant said the object is "mine" he asserted ownership, which consisted of all of the rights of property.⁶⁰ The earliest method of establishing such a claim was to reduce an object to possession.⁶¹ When, as in the case of a wild animal, there was no previous owner, one could become the original owner by capturing it. Other natural material and objects could be possessed, and consequently owned, by appropriating or collecting, or by severing from the soil or from a plant attached to the soil. Property was thus originally acquired by the first taker, whose taking amounted to a declaration that he intended to appropriate the thing to his own use.⁶² Once acquired, the property remained in the taker until he performed some act manifesting an intent to abandon it absolutely,⁶³ or to relinquish his rights to another.⁶⁴

Possession, then, was a fundamental element of ownership while property remained in a relatively primitive state.⁶⁵ Regardless of the amount of labor a prospective owner performed with the intention of acquiring something, he had no rights in or to it until his acts were sufficient to bring the object into his possession.⁶⁶ An interloper who took advantage of another's efforts to obtain an object and who himself reduced it to possession acquired original ownership.⁶⁷ He took nothing from the other, because the other

administered for many years before the materials for such theories are collected." 2 W. HOLDSWORTH, *supra* note 27, at 78. Whether ownership or possession was protected "is too abstract a question for the comprehension of a primitive system of law." *Id.* at 79. See also T. PLUCKNETT, *EDWARD I AND CRIMINAL LAW* 3-4 (1960).

59. See F. LAWSON, *INTRODUCTION TO THE LAW OF PROPERTY* 1 (1958); J. STEPHEN, *supra* note 32, at 127.

60. F. LAWSON, *supra* note 59, at 6; J. STEPHEN, *supra* note 32, at 127-28.

61. See generally F. POLLOCK & R. WRIGHT, *supra* note 27, at 124-26; 2 W. BLACKSTONE, *supra* note 18, at *3-10; 2 H. BRACON, *supra* note 39, at 42-43; AMES, *LECTURES*, *supra* note 23, at 193-94.

62. 2 W. BLACKSTONE, *supra* note 18, at *8-9; 2 H. BRACON, *supra* note 39, at 121-22; R. LEFÈVRE, *THE PHILOSOPHY OF OWNERSHIP* 54-55 (1966).

63. 2 W. BLACKSTONE, *supra* note 18, at *8-9.

64. See generally F. POLLOCK & R. WRIGHT, *supra* note 27, at 129-40.

65. See text accompanying notes 32-33 *supra*.

66. The possession must have been sufficient to support an action of trespass. See C. KENNY, *OUTLINES OF CRIMINAL LAW* 219 n.5 (15th ed. 1936).

67. It is not pursuit alone that makes a thing mine, for though I have wounded a wild beast so severely that it may be captured, it nevertheless is not mine unless I

had nothing but an expectation of acquiring something. Possession was the root of title.

At minimum, then, the element of taking from possession distinguishes privileged from unprivileged modes of property acquisition. Only those forms that unjustifiably interfere with an existing right are wrongful. When there is no previous possession, acquisition by occupation cannot be wrongful because there exist no proprietary rights with which the occupier can interfere. He takes possession, but not from the possession of another.

Having gained lawful possession of an object with the purpose of making it his own, the possessor's exclusive retention of it⁶⁸ is based on a claim of ownership.⁶⁹ An owner is *prima facie* entitled to possession,⁷⁰ for ownership is the whole interest in the property.⁷¹ But what if the owner parts with the chattel? To be meaningful and practical, ownership must have some permanence beyond immediate contact with the object.⁷² There must be some method of conceiving ownership without possession.

Suppose goods are bailed or stolen. Once having relinquished or having been deprived of possession, what does the owner have left? It is certain that he still has property. He, not the bailee or the thief, is said to be the owner.⁷³ In the case of bailment, the

capture it; rather it will belong to the one who next takes it, for much may happen to prevent my capture of it.

2 H. BRACON, *supra* note 39, at 42. See also 3 FLETA c.2, 89 SELDEN Soc'y at 2 (1972). The rule was long lived. See, e.g., *Young v. Hichens*, 115 Eng. Rep. 228 (Q.B. 1844) (Plaintiff had drawn his fishing net partially around the fish in question. A space of about seven fathoms was left open, where he had two boats stationed for the purpose of splashing the water and frightening the fish from escaping the net through the opening. Before plaintiff could completely close the opening, defendant rowed his boat to it, threw his net within and took the fish. Notwithstanding a jury verdict for plaintiff, the Court of Queen's Bench held he had not reduced the fish to possession and therefore was not entitled to damages for trespass).

68. Coupled with his present possession is the exclusive right of possession. O.W. HOLMES, *supra* note 43, at 193; F. POLLOCK & R. WRIGHT, *supra* note 27, at 16; 3 J. STEPHEN, *supra* note 54, at 122.

69. R. LEFEVRE, *supra* note 62, at 54-55. See also 2 W. BLACKSTONE, *supra* note 18, at *8-9.

70. F. POLLOCK & R. WRIGHT, *supra* note 27, at 25.

71. Ownership includes the rights to possess, use, consume, sell, destroy, give away, pledge, lease, and the like. It implies authority to exercise absolute dominion and control over an object. See F. POLLOCK & R. WRIGHT, *supra* note 27, at 120; J. STEPHEN, *supra* note 32, at 127-28; F. LAWSON, *supra* note 59, at 6.

72. R. LEFEVRE, *supra* note 62, at 56-57. For a discussion of the distinction between possession in fact and possession in law, see F. POLLOCK & R. WRIGHT, *supra* note 27, at 11-20.

73. M. BACON, *supra* note 47, at 75; 2 E. EAST, *supra* note 44, at 654; 1 M. HALE, *supra* note 17, at 507; 1 W. HAWKINS, *supra* note 19, at 90; 3 W. HOLDSWORTH, *supra* note 45, at 339; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 156, 176-77.

owner temporarily relinquishes the right of possession, but he retains the right to possess upon expiration of the term.⁷⁴ Similarly, a wrongful taking of possession does not deprive the owner of the right to possess.⁷⁵ Possession and the right of possession are fractional interests⁷⁶ that may be separated from other property interests without extinguishing them. Possession was essential to acquisition, but not retention, of chattel ownership in the middle ages.⁷⁷

III. THE PROCEDURAL FORMS

A. Recovery of Chattels

It is one thing to examine rights of ownership and interests in property that survive dispossession. It is quite another to explore the process by which infringements of possessory interests are remedied. Through examination of the legal posture of an owner who does not have possession we will pick up the thread of the interest analysis, for it is procedure that shaped the contours of substantive law.⁷⁸ In what we now perceive as adjective law we find the roots of a doctrine of protected legal interests in property.

Possession and the right of possession are elements of complete ownership. One who is dispossessed is deprived of a fractional element of ownership, but not of ownership and not even of the right to possess. It stands to reason, then, that recognition of the right to recover possession would be essential to recognition of complete property. Yet it has been said:

The Common Law never had any . . . process at all in the case of goods, for the vindication of ownership pure and simple. So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that Possession largely usurped not only the sub-

74. R. GLANVILL, *supra* note 40, at 132. See generally Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158 (1897).

75. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 153-56; F. POLLOCK & R. WRIGHT, *supra* note 27, at 2. As will be seen, this was in many respects a right without a remedy.

76. Each right encompassed by ownership constitutes a fractional interest in property. When all of the rights are contemporaneously in the owner, he holds all of the parts comprising the sum—that is, all of the fractional interests. See generally C. NOYES, *THE INSTITUTION OF PROPERTY* 287-311 (1936).

77. This principle was not confined to original ownership. Transfer of ownership also required a transfer of possession. 2 H. BRACON, *supra* note 39, at 121, 128; 7 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 455-56 (1926); 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 180-81.

78. See O.W. HOLMES, *supra* note 43, at 63-64; H. MAINE, *supra* note 26, at 252; F. POLLOCK & R. WRIGHT, *supra* note 27, at 4-5; F. POLLOCK, *THE LAW OF TORTS* 13-14 (12th ed. 1923).

stance but the name of Property. . . .⁷⁹

It is true that the common law was slow to develop an adequate system of possessory remedies, but we would be guilty of oversight if we were to assume that none existed during the middle ages. Before the law began to draw distinctions between crime and tort, common lawyers had devised a procedure for obtaining specific restitution. As those distinctions began to be drawn and purely "civil remedies" created, the procedure lost its prominence and eventually fell into disuse. We cannot forget it altogether, though, for what later was perceived as a criminal procedure helped mold property law during the middle ages.

B. *The Action of Theft*

Larceny was the last of the "great crimes" to be brought under the pleas of the crown by expansion of the king's peace.⁸⁰ Before Henry II introduced public prosecution of crime, theft was a private wrong to be remedied by private action. The Anglo-Saxon action of theft, which matured into the appeal of larceny, provided a mechanism for complete vindication of ownership rights. The action was recuperative as well as punitive, for it permitted the dispossessed owner to recover his goods from anyone in whose hands they were found.

The action of theft was a formal and ritualized mode of self-help.⁸¹ Upon discovery of a theft the owner was obliged to raise hue and cry and enlist his neighbors' help.⁸² One who was captured in flight and seized of the stolen goods was described as "hand-having" or "back-bearing."⁸³ To be caught in the act or with the mainour shortly after the act occurred was to be caught "seized of the theft."⁸⁴ The citizens could not be bothered with presumably

79. F. POLLOCK & R. WRIGHT, *supra* note 27, at 5. Indeed, Wright noted that early writers and cases in the Year Books used the terms interchangeably. The term "property" frequently signified possession. *Id.* at 122.

80. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 495.

81. *Id.* at 157-58, 494-95, and 578-79; 2 W. HOLDSWORTH, *supra* note 27, at 101-02. Informal self-help was limited by many factors, not the least of which was the risk of being mistaken for a thief oneself. 3 W. BLACKSTONE, *supra* note 18, at *4-5; 3 W. HOLDSWORTH, *supra* note 45, at 279-80; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 168-69; F. POLLOCK & R. WRIGHT, *supra* note 27, at 114-15.

82. See authorities cited in note 22 *supra*.

83. 2 H. BRACON, *supra* note 39, at 425; BRITTON, *supra* note 23, at 150; 1 FLETA, *supra* note 39, at c.36, 72 SELDEN Soc'y at 90.

84. Pollock, *supra* note 8, at 182. Under Salic law, a thief caught with the stolen goods within three days was *flagrante delicto*. AMES, LECTURES, *supra* note 23, at 40.

perjured explanations.⁸⁵ Anyone who acted like a thief deserved to be treated like one, and that meant harshly. He would be lucky to escape execution.⁸⁶ Lest the punitive aspects of the proceeding seem overwhelming, note that finding (or more accurately, presuming) the guilt of the condemned man was not the end of the matter. The owner also recovered his chattel.⁸⁷

It might appear that recovery of the chattel was an afterthought were it not that the action took on a much different character if the thief were not caught *in flagrante*. One taken after the fact was entitled to a hearing at which he was permitted to raise several defenses.⁸⁸ The accused might claim that he owned the chattel by right of production.⁸⁹ If he could produce witnesses who substantiated that claim he was acquitted, and the accuser paid a fine for his false accusation.⁹⁰ Of far more interest are the remaining two defenses.

Voucher of warranty was a technical and time consuming defense.⁹¹ The defendant claimed he acquired the chattel from another person, whom he named as his warrantor.⁹² The warrantor

85. Such crimes were thought too manifest to require formal proof. The theft was undeniable. Pollock, *supra* note 8, at 182. If the accuser and two witnesses swore to the theft and the arrest of the accused, that was proof enough. AMES, LECTURES, *supra* note 23, at 40. See also authorities cited in note 23 *supra*.

86. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 160; Pollock, *supra* note 8, at 183. See generally Fletcher, *supra* note 36, at 476-78. The accuser, anciently called the sakeber, might enjoy the privilege of decapitating the condemned man. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 160. See generally Kaye, *The Sacrabar*, 83 ENG. HIST. REV. 744 (1968).

87. AMES, LECTURES, *supra* note 23, at 40; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 160; II Canute c.76, in ROBERTSON, *supra* note 22, at 213.

88. See generally AMES, LECTURES, *supra* note 23, at 40; 2 W. HOLDSWORTH, *supra* note 27, at 111-14; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 157-58.

89. Ownership by right of production means that his was original and continuing ownership. Why the ownership must be original will become clear in the discussion of the other defenses.

90. AMES, LECTURES, *supra* note 23, at 40; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 158.

91. II Aethelred c.8-9, in ROBERTSON, *supra* note 22, at 61-63; 2 W. HOLDSWORTH, *supra* note 27, at 112-14. In addition to the time needed to prepare this elaborate defense were delays caused by the necessity of travel. In early times one who was named a warrantor was required to be vouched at his own court. When the accused vouched a warrantor in another county, the court would adjourn for a number of weeks corresponding to the number of counties that must be traveled through. If the defendant could not name the county where his warrantor could be found, he was entitled to adjournment for whatever time was needed for the purpose. II Aethelred c.8 § 1, § 3, in ROBERTSON, *supra* note 22, at 61. See also 2 W. HOLDSWORTH, *supra* note 27, at 113-14.

92. It was possible to clear oneself by vouching a dead man who had no heir who could answer the charge. If the accused produced witnesses to the justness of his action in naming the deceased as his warrantor, "[t]hen the dead man will be held guilty, unless he have friends who will clear him according to the law, as he himself would have been obliged to do,

was then summoned to court, and the chattel was handed over to him.⁹³ He was then required to take up the defense. He was in possession of the stolen goods, and the owner could name no other thief than him. He in turn might name as his warrantor the person from whom he acquired the goods, in which case the process was repeated. Presumably, the stolen chattel passed from hand to hand until the guilty party was traced and convicted of the theft.⁹⁴

As was true when the accused was taken seized of the theft, this was not the end of the matter. We must remember the original defendant. He retired from the proceeding at an early stage, innocent of the theft. He vanished from the scene, however, poorer for the experience, for he left without the chattel. When it was finally placed in the hands of the responsible party, the owner recovered it from him.⁹⁵

It might be tempting to consider this evidence of the recuperative element lightly. After all, it was only right to reward the accuser for his persistence in tracking down the thief. Remaining doubt should be easily resolved by consideration of the third available defense, that of open purchase. It is quite straightforward. If the accused were not fortunate enough to be able to name a warrantor, he might nevertheless prove he purchased the chattel at an open market or fair.⁹⁶ This claim of an innocent purchase in the presence of witnesses, if credible, proved he was not the thief, and he was acquitted. What, then, happened to the chattel? It should come as no surprise that the owner recovered it.⁹⁷

had he been able or had he been alive." II Aethelred c.9 § 2, in ROBERTSON, *supra* note 22, at 63. If the dead man's friends answered the charge, the voucher of warrantor failed as it would if he had proved his own denial. *Id.* at c.9 § 3, in ROBERTSON, *supra* note 22, at 63.

93. If the warrantor denied selling the chattel to the accused the latter was convicted of theft, "because denial is always stronger than accusation." II Aethelred c.9 § 3, in ROBERTSON, *supra* note 22, at 63. That axiom apparently did not apply when the accusing fact was possession of the goods.

94. AMES, LECTURES, *supra* note 23, at 40; 2 W. HOLDSWORTH, *supra* note 27, at 113; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 158. By the time of Canute the process was expedited. The number of warrantors who could be vouched was limited to three. The third warrantor, who was the fourth person to be accused of stealing the chattel he now held, must either prove his ownership or "give it back to its rightful owner." II Canute c.24 § 2, in ROBERTSON, *supra* note 22, at 187.

95. II Canute c.24 § 2, in ROBERTSON, *supra* note 22, at 187.

96. 2 W. HOLDSWORTH, *supra* note 27, at 111-12; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 158. See also Ine c.25 § 1, in ATTENBOROUGH, *supra* note 22, at 45; AMES, LECTURES, *supra* note 23, at 40.

97. AMES, LECTURES, *supra* note 23, at 40; 2 W. HOLDSWORTH, *supra* note 27, at 111; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 158. In "curious anticipation of the later rule of market overt," Kentish law permitted one who purchased the chattel openly in London to

The defenses that could be raised against an accusation of stealing reveal much about the action of theft. It was not a purely penal proceeding. Successful prosecution of the action need not result in either identification or conviction of a thief. The action began with an accusation of theft, but an innocent party who could only prove good faith purchase surrendered the goods to the owner and the proceeding was at an end. The recuperative element was as prominent as the penal. Not only were innocent possessors of stolen goods apt to be accused of theft; they were, curiously, proper parties defendant. The dispossessed owner could recover the chattel from anyone found in possession of it. The action of theft was an *in rem* proceeding. The owner's claim to his chattel was good against all the world.

C. *The Appeal of Larceny*

By the last quarter of the twelfth century, the Anglo-Saxon actions were evolving into Anglo-Norman procedures. Serious offenses now were called felonies,⁹⁸ and they were prosecuted by a procedure known as an appeal of felony.⁹⁹ During Bracton's time this innovation was transforming the action of theft into the appeal of larceny.¹⁰⁰

Like its progenitor, the appeal was a private action that bore marks of both criminal and civil process.¹⁰¹ The dispossessed own-

keep it. 2 W. HOLDSWORTH, *supra* note 27, at 112. See, e.g., Hlothhere and Eadric c.16, in ATTENBOROUGH, *supra* note 22, at 23.

98. Pollock, *supra* note 8, at 178. Glanvill uses the term "felony" in his discussion of criminal pleas. R. GLANVILL, *supra* note 40, at 171. At this time, only murder, wounding, mayhem, false imprisonment, rape, arson, burglary, robbery, larceny, and perhaps suicide, were felonies. Treason was a separate classification of serious offense. Other wrongs, minor by comparison, were punished as civil or semi-criminal wrongs. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 466-522.

99. Pollock, *supra* note 8, at 178. The term "appeal" meant accusation. *Id.* at 179. This, too, was a cumbersome procedure. "[H]e that will sue any appeal, must sue in proper person, which suit is long and costly, that it maketh the party appellat weary to sue." Stat. 3 Hen. VII, c.1 (12) (1487).

100. 2 H. BRACON, *supra* note 39, at 425-26. Compare 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 159-62 with 3 W. HOLDSWORTH, *supra* note 45, at 320.

101. See generally AMES, LECTURES, *supra* note 23, at 47-55; 4 W. BLACKSTONE, *supra* note 18, at *312-17; 3 W. HOLDSWORTH, *supra* note 45, at 319-23; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 159-66. Cf. 2 H. BRACON, *supra* note 39, at 425-27; BRITTON, *supra* note 23, at 81-91, 96-102. See also 1 M. HALE, *supra* note 17, at 538-41; 2 W. HAWKINS, *supra* note 19, at 166-70.

As the appeal was a private suit, the king had no power to pardon one who was convicted by this mode of prosecution. T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 99 (7th ed. 1911).

er, the appeller, initiated the action by raising hue and cry and pursuing the thief with his neighbors' help.¹⁰² He accused another of taking his goods "feloniously and stealthily and larcenously and against the king's peace."¹⁰³ If the owner caught the accused with the mainour freshly after the fact, he could be hanged without trial.¹⁰⁴ If taken later, he could raise the three established defenses of original ownership, voucher of warrantor, and open purchase.¹⁰⁵

The right of specific restitution seemed settled. As of old, the owner recovered his goods from anyone in whose hands they were found.¹⁰⁶ If they happened to be found in the hands of the malefactor, he was punished. The scope of the appeal was thus twofold: "to deraign the ownership of the chattels and to convict the thief of the felony."¹⁰⁷

102. All men between the ages of fifteen and sixty were ranked by the value of their holdings and were sworn to provide themselves with arms proper to their class in order to join hue and cry whenever required. T. TASWELL-LANGMEAD, *supra* note 101, at 154. This was the full extent of police organization, and it made difficult the apprehension of criminals even when their identities were known. Though they would be fined for neglect of their duties, those who joined the search party would eventually return home to tend to their business. F. MAITLAND & F. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 66-67 (1915).

To secure the appearance of the perpetrator who was not captured, a proclamation calling for his appearance was made at five successive county courts. If he failed to appear at the fifth, he was outlawed. *Id.* at 67-68; J. Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, in 2 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 443, 480-81 (1908) [hereinafter cited as 2 *SELECT ESSAYS*]. If the accused were subsequently apprehended, he was condemned to death without trial. The mere fact of his outlawry warranted the sentence. F. MAITLAND & F. MONTAGUE, *supra* at 68.

103. 2 H. BRACON, *supra* note 39, at 426. The owner could pursue the appeal as a purely civil action by omitting the words of felony from the count. In that case he alleged that the goods had been lost and demanded that the appellee return them. If the appellee refused to give them up, the appeal could be upgraded by adding an allegation that he acquired them feloniously. Only by the latter route could the owner compel restoration of the goods from a recalcitrant possessor. *Id.* at 425-26.

104. AMES, *LECTURES*, *supra* note 23, at 50; BRITTON, *supra* note 23, at 47-49; Pollock, *supra* note 8, at 182-83. See also 2 H. BRACON, *supra* note 39, at 386; F. MAITLAND, *The Seisin of Chattels*, in 1 *COLLECTED PAPERS* 329, 333-34 (1911); J. THAYER, *supra* note 23, at 71-72. To take one freshly upon the fact may have meant the same day as the theft in Britton's time. BRITTON, *supra* note 23, at 49 n.1. It was confirmed as late as 1176 that such summary proceedings were approved. Pollock, *supra* note 8, at 182. It seems likely that they continued well into the thirteenth century. J. THAYER, *supra* note 23, at 71-72.

105. See authorities cited in note 101 *supra*. For an example of a case in which several of these defenses are touched upon, see 1 *SELECT PLEAS OF THE CROWN* no. 92 (1220), 1 *SELDEN Soc'y* 123-27 (1887).

106. That was the law through the thirteenth century. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 164-65. Changes in the procedure for trying appeals and development of the common law doctrine of market overt profoundly affected the rule. See text accompanying notes 130-39 *infra*.

107. Y.B. Hil. 12 Edw. 2, no. 45 (1319), 70 *SELDEN Soc'y* 92 (1951).

Although the appeal retained these now familiar features until the middle of the thirteenth century, the dispossessed owner was far more vulnerable than before. The owner prosecuted an appeal at considerable risk,¹⁰⁸ for the Norman influence injected a new element into English procedure, that of trial by battle.¹⁰⁹ The accusation of theft now carried with it the offer to wage battle to prove the truth of the accusation.¹¹⁰ The appellee who could not avail himself of the set defenses and who could only make a simple denial of the theft, defended the charge by his body.¹¹¹ Accuser and accused were required to fight in person if not under legal disability.¹¹² Only if the accused were vanquished would the accuser recover his goods.¹¹³ A vanquished accuser was subject to imprison-

108. For this reason, Britton recommended forbearance. BRITTON, *supra* note 23, at 103-04.

109. J. THAYER, *supra* note 23, at 39-40; M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND FROM THE NORMAN CONQUEST 327 (1972). A number of towns, including London, were exempt from this procedure. *Id.* at 296.

110. For elaboration of the challenge, preparation, and procedure for trial by battle, see Y.B. 1 Henry 4, no. 29, 50 SELDEN Soc'y 95, 96 (1933). See also 2 H. BRACTON, *supra* note 39, at 432; BRITTON, *supra* note 23, at 89-90; F. MAITLAND & F. MONTAGUE, *supra* note 102, at 49-50.

111. It seems that by the beginning of the fourteenth century, the practice of denying any defense to one caught with the mainour had been replaced by the practice of denying him the privilege of defending an appeal by wager of battle. He must put himself upon the jury, for the purpose of the appeal was twofold—to convict the thief and recover the chattel. The appellee might vanquish the appellor by the strength of his body, even though guilty, and thus have the chattel without cause. Compare 1 SELECT PLEAS OF THE CROWN no. 106 (1212), 1 SELDEN Soc'y 62, 63 (1887) (battle ordered unwaged because no one testified that the appellee was taken with the stolen chattel) with Y.B. Hil. 12 Edw. 2, no. 45 (1319), 70 SELDEN Soc'y 92 (1951) (one taken with the mainour may not wage battle).

112. M. BIGELOW, *supra* note 109, at 297; 2 H. BRACTON, *supra* note 39, at 403; BRITTON, *supra* note 23, at 83, 87; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 162 n.4. Disabilities that would excuse one from doing battle included age, maiming, and gender. M. BIGELOW, *supra* note 109, at 297. When battle could not be waged the proper procedure seemed to be either a trial at which the accused disproved the charge or, in a proper case, purging by ordeal. M. BIGELOW, *supra* note 109, at 297; 2 H. BRACTON, *supra* note 39, at 403; BRITTON, *supra* note 23, at 83, 87; R. GLANVILL, *supra* note 40, at 173-75. Trial by ordeal disappeared sometime after 1215, when the Fourth Lateran Council forbade the clergy from participating in the rites. M. BIGELOW, *supra* note 109, at 323; F. MAITLAND & F. MONTAGUE, *supra* note 102, at 59. Trial by battle remained a constitutional procedure centuries afterward. See note 146 *infra*.

113. The combatants fought from sunrise to star-rising. The object of the battle seemed not so much the killing of one's opponent as to make him cry "craven." F. MAITLAND & F. MONTAGUE, *supra* note 102, at 50; T. TASWELL-LANGMEAD, *supra* note 101, at 99-100; Stephen, 2 SELECT ESSAYS, *supra* note 102, at 481. See also R. GLANVILL, *supra* note 40, at 25 (whose account indicates that battle was an authorized mode of trying title to land). When the appellee was vanquished, he was hanged or mutilated. 2 H. BRACTON, *supra* note 39, at 386; BRITTON, *supra* note 23, at 90; F. MAITLAND & F. MONTAGUE, *supra* note 102, at 50.

ment and to payment of a grievous fine for his false appeal.¹¹⁴

Other innovations emerged during the twelfth and thirteenth centuries as the appeal took on the character of a criminal prosecution.¹¹⁵ No longer was the action viewed purely as an approved form of private vengeance and compensation for wrongs. Stealing constituted a breach of the king's peace,¹¹⁶ and the crown must also be appeased.¹¹⁷ One manifestation of this shifting emphasis was the practice of making criminal prosecutions a source of revenue to the crown.¹¹⁸ Conviction of felony resulted in forfeiture of the felon's goods and disherison of his heirs.¹¹⁹ It was but a short step to encroachment on the rights of the dispossessed owner through procedural refinements.

Successful prosecution of an appeal required meticulous adherence to procedural detail. Failure to comply in any respect might cause the appeal to be quashed, with consequent loss of the restitutionary remedy.¹²⁰ Proper words of appeal identified the specific injury of which the appellor complained. The law required that he describe with particularity the chattels that had been stolen from him and the time and place at which the incident occurred.¹²¹ Appeals could be abated for use of the wrong words.¹²²

114. 2 H. BRACTON, *supra* note 39, at 386; BRITTON, *supra* note 23, at 90; F. MAITLAND & F. MONTAGUE, *supra* note 102, at 50; Stat. of Westm. 2, 13 Edw. 1, c.12 (1285).

115. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 165; S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 11 (2d ed. 1970); Pollock, *supra* note 8, at 179.

116. The words of appeal made this principle clear. See text accompanying note 103 *supra*.

117. Pollock, *supra* note 8, at 179.

118. It has been said the year books demonstrate that crown pleas served "to fill the King's coffers and not to maintain his peace." Bolland, *Introduction to 1 EYRE OF KENT 6 & 7 Edw. 2 (1313-14)*, 24 SELDEN Soc'y at xliii (1909). So intense was the king's interest in confiscating chattels that it was not uncommon for one who had previously been acquitted after trial (except at a hearing in King's Bench) to be arraigned in Eyre for the same crime. The courts were not in the habit of recording acquittals, but a judgment that one should be hanged would be recorded. The court was concerned "that the King's way to the confiscation of a felon's chattels was not obstructed, but it was not its particular business to assist a prisoner who was entitled to plead *autrefois acquit*." Bolland, *Introduction to 3 EYRE OF KENT 6 & 7 Edw. 2 (1313-14)*, 29 SELDEN Soc'y at xlvi (1913).

119. 2 H. BRACTON, *supra* note 39, at 362-64, 374; BRITTON, *supra* note 23, at 90; R. GLANVILL, *supra* note 40, at 173.

120. The crown could then proceed against the appellee by indictment, but there was no common-law right to restitution upon conviction following such a procedure. See text accompanying notes 140-47 *infra*.

121. 2 H. BRACTON, *supra* note 39, at 394. Depending on the type of chattel involved, the description must include such attributes as value, quantity, weight and color. *Id.*

122. *Id.*; BRITTON, *supra* note 5, at 85-86; Gross, *Introduction to SELECT CASES FROM THE CORONERS' ROLLS*, 9 SELDEN Soc'y at xli & n.11 (1895). Seventeenth and eighteenth century commentators stated that variance between the pleading and proof was fatal insofar

Of equal significance was the requirement of fresh suit. Hue and cry had to be raised at once, and the perpetrator pursued without delay.¹²³ In addition, suit must have been brought by the party claiming property in the chattels. If a felon were attainted at the suit of another, the goods were forfeited to the crown notwithstanding evidence that they belonged to a claimant other than the prosecutor or the felon.¹²⁴

By degrees the criminal aspect of the prosecution began to overshadow the remedial side, with profound effect on the protection of ownership rights. The action of theft and the early appeal of larceny were actions by the dispossessed against the possessor. The accusation was that "he who is seised of the property is a thief or can name the thief."¹²⁵ As the appeal came to be seen as a criminal prosecution, it was strictly an action against an accused wrongdoer, who might or might not be a possessor.¹²⁶ The defenses of voucher of warrantor and open purchase gave way to a trial in

as the recuperative component of the appeal was concerned. Chattels omitted from the accusation were forfeited. E. COKE, *supra* note 19, at *227; 1 M. HALE, *supra* note 17, at 538; 2 W. HAWKINS, *supra* note 19, at 171. Bracton and Britton treated the matter purely in terms of whether suit was properly brought or should be abated altogether.

The appellee might also plead another *exceptio*, that the appeal was brought out of spite and hatred. With this allegation he could procure a writ *de odio et atia*, directing an inquest on this point. The sole purpose of the inquest was to determine whether the appeal was prosecuted in good faith. The plea was not a denial of guilt. If it were found that the prosecutor acted out of malice, the appeal was quashed and the prisoner released. He might subsequently be arraigned at the suit of the king. If the appeal were found to be bona fide, the appellee could still defend himself in hattle. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 587-88. For an example of such a case, see 1 SELECT PLEAS OF THE CROWN, pl. 91, 92 & 93 (1205), 1 SELDEN Soc'y 49-50 (1887). For examples of the writ, see EARLY REGISTERS OF WRITS, CC 109, R 357 (1318-20), 87 SELDEN Soc'y 66, 190 (1970).

123. 2 H. BRACON, *supra* note 39, at 394. This requirement later yielded to a more relaxed rule as courts began to use their discretion to decide whether the appellor used reasonable diligence to bring the felon to justice. 2 E. EAST, *supra* note 44, at 787; 1 M. HALE, *supra* note 17, at 540. Ultimately a prosecutor would be denied restitution only upon a finding of gross neglect of duty. 2 W. HAWKINS, *supra* note 19, at 169. Cf. Roper's Case, 74 Eng. Rep. 398 (1588).

124. See, e.g., Y.B. 30 & 31 Edw. 1, 508 (1302) (R.S.); 1 EYRE OF KENT 6 & 7 Edw. 2 (1313-14), 24 SELDEN Soc'y 84, 108-09, 142 (1909). See also Y.B. Trin. 12 Edw. 2 (1319), 81 SELDEN Soc'y 122 (1964), wherein plaintiff's stolen chattel was forfeited for his nonsuit.

125. 2 H. BRACON, *supra* note 39, at 426.

Then Philip . . . came and produced Edward his warrantor, and Edward took up the warranty of the mare. And when Haino saw [Edward] seised of the mare, he counted against him by the same words that he had used before, adding that he knew no other thief than Edward, whom he saw there in seisin and who had taken on himself to warrant the mare. . . .

1 SELECT PLEAS OF THE CROWN pl. 192 (1220), 1 SELDEN Soc'y 123, 124 (1887).

126. The fact that the accused had relinquished possession of the goods did not necessarily bar restitution of them to the owner. See text accompanying notes 134-39 *infra*.

which the appellee could put his whole case to the jury.¹²⁷ Ascertaining the guilt or innocence of the accused became an essential function of the trial. If the appellor's proof failed, so did his case for restoration of the goods. Conviction, therefore, became a prerequisite to the issuance of a writ of restitution.¹²⁸

Transformation of the action of theft into a plea of the crown had two visible effects on the protection of ownership rights. The interest of the crown in appropriating stolen property for its own account occasionally deprived a dispossessed owner of the ability to recover his goods, and stolen property could no longer be recovered by accusing an innocent possessor of theft. The only way the owner could obtain restoration of his chattel was by prompt and successful prosecution of the thief. Despite these impediments, the appeal of larceny remained a viable remedy for dispossession.¹²⁹ Equally important, it exerted a continuing influence on other legal doctrines.

D. *The Spheres of Influence*

1. Market Overt

Evidence of local practice favoring bona fide purchasers in open markets existed as early as the fifth century.¹³⁰ As the number of established markets and fairs increased at an accelerated

127. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 165.

128. By some accounts, inability to obtain a conviction because of the suicide or abjuration of the thief precluded restoration of the goods and resulted in their forfeiture to the crown. See 3 W. HOLDSWORTH, *supra* note 45, at 323; *History of Trover*, *supra* note 23, at 281. This statement of the law should not suggest universal accord on the matter. See 2 E. EAST, *supra* note 44, at 787; 1 M. HALE, *supra* note 17, at 540. Compare Y.B. 30 & 31 Edw. 1 526 (1302) (R.S.) (coroner who delivered goods to O, after thief abjured, brought to judgment before the justices in Eyre), with Y.B. Hil. 12 Edw. 2, no. 45 (f) (1319), 70 SELDEN Soc'y 93 (1951) and EARLY REGISTERS OF WRITS R. 409 (1318-20), 87 SELDEN Soc'y 206 (1970). See also NORTHAMPTONSHIRE SESSION ROLLS no. G58, 11 NORTHAMPTONSHIRE REC. Soc'y 73 (1940) (appellor who captured thief with stolen goods allowed to recover them even though thief died in prison before trial).

129. Although appeals of larceny were not common after the thirteenth century, neither were they obsolete. See, e.g., 1 EYRE OF KENT 6 & 7 Edw. 2 (1313-14), 24 SELDEN Soc'y 108-09 (1909); Y.B. Hil. 12 Edw. 2, no. 45 (1319), 70 SELDEN Soc'y 92 (1951); 1 EYRE OF LONDON 14 Edw. 2 (1321), 85 SELDEN Soc'y 85 (1968); 6 SELECT CASES IN THE COURT OF KING'S BENCH (Edw. 3) pl. 107 (1369), 82 SELDEN Soc'y 158 (1965); SELECT CORONER'S ROLLS (1265-1413), 9 SELDEN Soc'y 107 (1382), 108 (1384), (1895); 2 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, Roll Alb (1329), at 50 (Cambridge Press, 1926); NORTHAMPTONSHIRE SESSION ROLLS nos. G11, G45, G53, G56 (1314-16), 11 NORTHAMPTONSHIRE REC. Soc'y 59, 69, 71, 72 (1940).

130. Bateson, *Introduction to 2 BOROUGH CUSTOMS*, 21 SELDEN Soc'y lxxvi-lxxix (1906); Pease, *Market Overt in the City of London*, 31 LAW Q. REV. 270, 275 (1915) [hereinafter cited as *Market Overt*].

pace from the thirteenth through the fifteenth centuries,¹³¹ this practice became established mercantile custom¹³² and then was incorporated into the common law.¹³³

As common-law doctrine, market overt was an exception to the rule that one may convey only such property in a chattel as he himself possesses.¹³⁴ If *A* sells his own goods to *B*, *A* transfers title to *B*. If *A* sells the goods of another to *B* without authority, title does not pass to *B* because *A* has none to transfer.¹³⁵ The market overt rule created an exception to this principle by enabling a seller with defective or nonexistent title to transfer good title to a bona fide purchaser for value when the sale occurred in an open market.¹³⁶

Granting the good faith purchaser preference over a defrauded owner was consistent with the growth of commerce, but the preference existed only as long as equity was on the purchaser's side. The sale must have been made in the open and during the daytime.¹³⁷ If it occurred in a back room or other place where business was not ordinarily conducted within public scrutiny, it was not a sale in market overt. Nor was it a protected transaction if no valuable consideration was given for the purchase, or if the buyer was aware of the seller's wrongful conduct. The sale must have been conducted in accordance with rules consistent with honest, public transactions.

As we consider the respective rights of owners and innocent purchasers of stolen goods, it should be recalled that purchase at an open market was a recognized defense to the action of theft and the early appeal of larceny. The innocent purchaser who succeeded in establishing the defense escaped punishment for the theft, but

131. Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COLUM. L. REV. 375, 378 (1908) [hereinafter cited as *Change of Property*].

132. This had occurred by the late thirteenth century. See, e.g., 1 SELECT CASES ON THE LAW MERCHANT, 23 SELDEN Soc'y 48-49 (1908); 2 SELECT CASES ON THE LAW MERCHANT, 46 SELDEN Soc'y 111 (1929).

133. *Market Overt*, supra note 130, at 275.

134. *Change of Property*, supra note 131, at 375.

135. "It is a fundamental doctrine of the law of property that no one can give what he has not." 2 S. WILLISTON, SALES § 311, at 241 (rev. ed. 1948).

136. See generally *Market Overt*, supra note 130. The definition of what constituted an "open market" purchase in early times varied from place to place. In London, for example, a sale of goods in a shop that customarily sold goods of that type was considered a sale in market overt. In the country, it was standard to restrict the protection to certain markets and fairs. See generally *id.* at 270-75; 2 W. BLACKSTONE, supra note 18, at *449; E. COKE, SECOND INSTITUTE *713-14; Case of Market-Overt, 77 Eng. Rep. 180 (K.B. 1597).

137. E. COKE, SECOND INSTITUTE *713-14.

was required to surrender the goods to the owner. It would seem that with the disappearance of this defense and the establishment of the doctrine of market overt, the interests of the dispossessed owner became subordinate to those of the bona fide purchaser. That is an accurate portrayal of the state of affairs with one qualification. Accompanying these two developments was yet a third, recognition of an exception to the doctrine of market overt.

A sale in market overt vested indefeasible title in the buyer with this exception: if an owner of goods freshly pursued the thief who stole them and successfully prosecuted an appeal of larceny, he could obtain restitution notwithstanding their intermediate sale in market overt.¹³⁸ Title reverted in the true owner upon conviction of the thief.¹³⁹ As of old, the dispossessed owner prevailed over the innocent purchaser. The development of this exception demonstrates the continuity of concept and practice throughout the Middle Ages. One whose goods were stolen had a right to recover them, and the action for vindicating the theft was also the action for vindicating the right of ownership.

2. Prosecution by Indictment

The rise of a new mode of criminal prosecution paralleled the development of the market overt rule. The indictment procedure, which emerged during the reign of Henry II,¹⁴⁰ represented the introduction of public prosecution of crime.¹⁴¹ Unlike the appeal,

138. 1 M. HALE, *supra* note 17, at 544-46; E. COKE, SECOND INSTITUTE *714; 2 E. EAST, *supra* note 44, at 787-90; 4 W. BLACKSTONE, *supra* note 18, at *363; 2 W. HAWKINS, *supra* note 19, at 170; 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 819 (1816). *But see* M. DALTON, THE COUNTRY JUSTICE c.111, 368-69 (London 1661); F. BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND 74 (London 1630).

139. There is rich diversity of opinion on the question whether sale in market overt actually transferred title to the bona fide purchaser in this situation. *See, e.g., Change of Property, supra* note 131, at 381 (it is "strictly a reversioning of property"); 2 E. EAST, *supra* note 44, at 789-90 (conviction or attainder of the thief is a condition of restitution "only when the property is changed by some intermediate act; as by . . . a sale in market overt"); 4 W. BLACKSTONE, *supra* note 18, at *363 (the appellor shall have restitution "notwithstanding the property of them is endeavored to be altered by the sale in market overt"); E. COKE, SECOND INSTITUTE *714 (fresh suit protects the owner's property so that it "cannot be altered by sale in market overt"); Y.B. 4 Hen. 7, 5b, *translated in* F. POLLOCK & R. WRIGHT, *supra* note 27, at 156 ("appeal is for recovery of one's goods and affirms property continually in the party").

140. The procedure was instituted in the second half of the twelfth century by the Assize of Clarendon. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 495. *See generally id.* at 641-56; M. BIGELOW, *supra* note 109, at 99-103, 292-93; 1 L. PIKE, A HISTORY OF CRIME IN ENGLAND 120-21, 207-10, 289-90 (1873).

141. M. BIGELOW, *supra* note 109, at 292; J. THAYER, *supra* note 109, at 65.

prosecution initiated by indictment was at the king's suit,¹⁴² and it was strictly penal. The function of the prosecution was to bring the offender to justice for breaking the king's peace. Forfeiture of the felon's goods was a major consequence of conviction. If stolen goods were among them, they too were confiscated.¹⁴³ An aggrieved party who wanted his chattel restored should have come forward and prosecuted an appeal.

Institution of prosecution by indictment served to emphasize that crimes were considered offenses against the state, almost to the exclusion of consideration of the injury done to the victim.¹⁴⁴ The appeal process nevertheless continued to influence the direction of criminal procedure. The two forms of prosecution coexisted for several centuries,¹⁴⁵ and the appeal of larceny retained practical utility as a remedy for dispossession until 1529, when Parliament provided an alternative means for obtaining restoration of stolen goods.¹⁴⁶ In cases of larceny prosecuted by indictment, the crown

142. E. COKE, *supra* note 19, at *242; A. CARTER, A HISTORY OF THE ENGLISH COURTS 129 (7th ed. 1944).

143. [I]f a man do steal goods at divers times from several men, and he is after attainted at the sute of the others; by this attainder the Felon shall forfeit to the King not only his own goods, but also the goods stolln from those other, at whose sute he was not attainted . . . and the property of the goods which remaineth in the right owner in this case is forfeited (by the owner) to the King, for default of the owners pursuing the felon.

M. DALTON, *supra* note 138, c.111 at 368. In short, the convicted thief forfeited both what he had and what he seemed to have. T. PLUCKNETT, *supra* note 58, at 81.

144. See generally S. SCHAFER, *supra* note 115, at 8, 11.

145. See AMES, LECTURES, *supra* note 23, at 49-55; 2 W. HOLDSWORTH, *supra* note 27, at 361-64; E. JENKS, A SHORT HISTORY OF ENGLISH LAW 42, 43 (2d ed. 1922); Pollock, *supra* note 8, at 177-84. By some accounts, the older procedure took precedence over the new. Victims of crime were entitled to the satisfaction of avenging wrongs done to them, and the crown's right to prosecute was suspended until the period for bringing an appeal had elapsed. AMES, LECTURES, *supra* note 23, at 49, 54; 1 J. CHITTY, *supra* note 138, at 817; 3 W. HOLDSWORTH, *supra* note 45, at 329; E. JENKS, *supra*, at 155.

These authorities are inconclusive, however. The Statute of Gloucester provided that an appeal of murder could not be abated for want of fresh suit until a year and a day after the homicide. 6 Edw. 1, c.9(5) (1278). The statute led to the practice of suspending prosecution by indictment for the year and day, which in turn led to compromise and intolerable laxity.

It is used, that within the year and a day after any death or murder had or done, the felony should not be determined at the King's suit, for saving of the party's suit, wherein the party is oftentimes slow, and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder.

3 Hen. 7, c.1(11) (1487). The practice was therefore abolished by statute. *Id.* at c.1(14). It is not clear that the statute of Gloucester had a similar effect on the prosecution of other felonies.

146. This innovation removed any remaining incentive to prosecute an appeal of larceny. 2 W. HOLDSWORTH, *supra* note 27, at 361; E. JENKS, *supra* note 145, at 155-56. Despite a general lack of utility by then, it was not until the nineteenth century that appeals of

could issue a writ of restitution upon conviction "in like manner as though . . . such felon . . . were attainted at the suit of the party in appeal."¹⁴⁷ Like the ancient procedure, the new form of prosecution incorporated a recuperative element. The indictment procedure could vindicate ownership rights just as the private mode of prosecution had for centuries.

E. *The Bailee's Action*

Thus far the analysis of procedural forms has considered the protection of ownership without possession. Before proceeding to the relation between criminal process and other remedial forms, it is necessary to consider briefly the involvement of possession without ownership. From the time of Bracton and Britton, a bailee could prosecute a thief who stole the bailor's chattels from him.¹⁴⁸ At first glance this is puzzling. If ownership were the protected interest, why would a bailee ever be permitted to prosecute an ap-

felony were officially declared to be oppressive procedures and were abolished altogether. 59 Geo. 3, c.46 (1819). This belated parliamentary action was precipitated by a revival of the appeal of murder and wager of battle the preceding year in an embarrassment known as Thornton's case. *Ashford v. Thornton*, 106 Eng. Rep. 149 (K.B. 1818). See E. JENKS, *supra* note 145, at 156, and F. MAITLAND & F. MONTAGUE, *supra* note 102, 62-63.

147. Stat. 21 Hen. 8, c.11 (1529).

148. 2 H. BRACTON, *supra* note 39, at 413; 1 BRITTON, *supra* note 23, at 48. Although these early commentators wrote that the owner or one from whose custody the goods were stolen may bring an appeal of larceny, they were ambiguous on the question whether the granting of the action to the bailee precludes prosecution by the bailor. Modern historians have expressed varying degrees of certainty regarding the exclusiveness of the bailee's action. See, e.g., Bordwell, *Property in Chattels* (pt.2), 29 HARV. L. REV. 501, 510 (1916) (the accounts are "brief and unsatisfactory . . . and leave us to speculate" whether the bailor had an action for the goods); 3 W. HOLDSWORTH, *supra* note 45, at 339-40 ("it is probable that both Bracton, and Britton considered that either the bailor . . . or the bailee . . . had the right to bring these appeals"); 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 170 ("having thus given the action to the bailee, we must in all probability deny it to the bailor"); AMES, LECTURES, *supra* note 23, at 58 ("[t]he bailor could not maintain an appeal"). The uncertainty is undoubtedly compounded by two other developments. By mid-fourteenth century, the bailor could bring an action of trespass against one who took the goods from the bailee. 3 W. HOLDSWORTH, *supra* note 45, at 348. Later cases limited this right of action to cases where the bailment was determinable at will. Compare 3 W. HOLDSWORTH, *supra* note 45, at 348, with AMES, LECTURES, *supra* note 23, at 58.

The second development that casts doubt on the status of the bailor's action is recognition in the fifteenth century that if *A* steals goods from *B*, a thief who had stolen them before, *A* is a felon both in relation to *B* and the original owner. 2 E. EAST, *supra* note 44, at 654; 1 M. HALE, *supra* note 17, at 507; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 166 n.2. According to some authorities, *A* is a felon only in relation to the true owner. 4 M. BACON, *supra* note 47, at 184; 1 W. HAWKINS, *supra* note 19, at 90; F. PULTON, *supra* note 44, at 130. Since *A* has committed no trespass against the true owner, some historians regarded the rule allowing the appeal as a curiosity. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 166 n.2.

peal of larceny and recover the goods?

Recall that the element of taking from possession was essential to the shared image of thieving.¹⁴⁹ When the content of early theft law was formulated, the chief concern was objective events in the external world.¹⁵⁰ One who wrongfully dispossessed another of his goods committed an act that was manifestly criminal. Paralleling this perception is the notion of ownership of medieval chattels. Obtaining possession was essential to obtaining ownership.¹⁵¹ Possession was *prima facie* evidence of ownership.¹⁵² As the themes intersect, taking from one who is in peaceable possession is taking from one who is the apparent owner. It would be logical to bestow the right to pursue the thief upon one who, to all appearances, was the owner. It would be illogical to require lengthy inquiry into ownership of the chattels while one who thievishly bore them away escaped apprehension.

The logic of the rule is more compelling when it is considered in light of the procedural requirements for bringing an appeal.¹⁵³ Successful prosecution required fresh pursuit of the thief.¹⁵⁴ The bailee, being the party in possession of the goods, would likely be the first to discover their disappearance. The bailor might not learn of the theft until the trail was obliterated or the evidence stale. If the process were to have meaning when goods had been bailed, it was essential to permit bailees to prosecute thieves.

Of equal importance are the words of appeal used by bailees in the thirteenth century. The bailee charged that the accused had stolen goods in his *custodia*.¹⁵⁵ That the bailee alleged that he was a custodian brought into the picture his legal relationship with the bailor. The bailee had goods of another in his keeping, and he was liable to the bailor for any loss or damage that occurred.¹⁵⁶ In Bracton's words, the bailee could appeal another of robbery for having taken from him "so much of his own chattels and so much

149. Fletcher, *supra* note 36, at 476.

150. See text accompanying notes 28-42 *supra*.

151. See text accompanying notes 60-72 *supra*.

152. 2 W. BLACKSTONE, *supra* note 18, at *196; F. POLLOCK & R. WRIGHT, *supra* note 27, at 25.

153. See 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 170.

154. See text accompanying notes 120-23 *supra*.

155. 3 W. HOLDSWORTH, *supra* note 27, at 339.

156. R. GLANVILL, *supra* note 40, at 128; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 170-71; 7 W. HOLDSWORTH, *supra* note 77, at 451-52. For divergent views on whether the bailee has the action against the trespasser because he is liable to the bailor or whether he is liable to the bailor because he has the action, compare 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 170-72, with O.W. HOLMES, *supra* note 43, at 130-36.

of the goods belonging to his lord, for which he was responsible," and he must establish his accountability to the bailor.¹⁵⁷ The bailee's action both preserved the owner's rights in the goods and protected the bailee from incurring liability for their value if he could recover them.¹⁵⁸

F. Preliminary Conclusion

The historical development of the forms of action by which thieves were prosecuted is instructive. The Anglo-Saxons understood that one whose goods were stolen ought to have them back, and their criminal process took on the character of a real action for the recovery of movable goods. Instead of abolishing that ancient institution, the crown created an alternative and strictly penal procedure. The indictment procedure eventually replaced that of the appeal, but not until new ideas yielded to the old and restitution could be obtained upon conviction at the king's suit. The evolution of the larceny prosecution is marked by continuity. The law of theft provided a mechanism for rather complete vindication of ownership rights.

Before settling on a theory of the role that criminal law played in protecting property interests, it is essential to consider the development of civil remedies for infringement of those interests. Pursuit of this inquiry will clarify the importance of the remedial aspect of the criminal prosecution. The principle of parsimony guided the development of common-law remedies. Two remedies should not be afforded when one will do.

IV. ALTERNATIVE REMEDIES

A. *Trespass De Bonis Asportatis*

Trespass was an innovation of the thirteenth century that was originally conceived as a semi-criminal action.¹⁵⁹ A dispossessed owner, now omitting words of felony, accused the wrongdoer of taking and carrying away his goods "*vi et armis*" and "*contra*

157. 2 H. BRACON, *supra* note 39, at 413. The appeal of robbery shared with the appeal of larceny a recuperative component. AMES, LECTURES, *supra* note 23, at 48.

158. Cf. R. GLANVILL, *supra* note 40, at 128, wherein it is stated that the bailee is required to return the chattel to the bailor in its original condition if it still exists. Otherwise, the bailee is "strictly bound to pay me a reasonable price."

159. The action of trespass developed during the thirteenth century. AMES, LECTURES, *supra* note 23, at 56; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 166. Replevin and detinue are much more ancient institutions. H. MAINE, *supra* note 26, at 265; F. MAITLAND, EQUITY 344 (1926).

pacem regis."¹⁶⁰ Since every trespass involved a breach of the king's peace¹⁶¹ as well as a wrong to a chattel holder, a finding of guilt resulted in a fine or imprisonment in addition to an award of damages.¹⁶²

While the actions of trespass and theft were not coextensive in scope, two similarities are immediately apparent. Each was supported by an allegation of taking and carrying away, and each had remedial and punitive components. The trespasser was required to buy his way back into the king's peace as well as compensate the owner for the harm done. The element of compensation, on the other hand, was a novelty.¹⁶³ The action of trespass entitled the owner to receive damages for temporary or permanent loss of possession, but not to recover his goods. Theft prosecutions were often recuperative, but never compensatory.¹⁶⁴

To explore fully the relationship between theft and trespass actions, we must consider a case in which the two overlap. Suppose *T* takes a chattel belonging to *O*. If it can be established that the taking was accompanied by felonious intent, *T*'s conduct constitutes both larceny and trespass *de bonis asportatis*. *O*'s options to redress the injury include two hypothetical courses of action that illuminate the interaction of the felony and the trespass: (1) *O* prosecutes *T* for larceny, then sues in trespass; (2) *O* sues *T* in trespass, neglecting to prosecute the crime.

Consider first the effect of successful criminal prosecution. While there was no legal impediment to bringing an action of trespass following prosecution of the thief,¹⁶⁵ the concurrence of the

160. AMES, LECTURES, *supra* note 23, at 56; M. BIGELOW, *supra* note 109, at 277; NORTHAMPTONSHIRE SESSION ROLLS no. 137, 11 NORTHAMPTONSHIRE REC. Soc'y 35 (1940). Note that even though words of felony were omitted, the count in trespass alleged that the offense was committed "with force and arms" and "against the king's peace."

161. F. MAITLAND, *supra* note 159, at 343-44; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 166; Branston, *The Forcible Recaption of Chattels*, 28 LAW Q. REV. 262, 267 (1912). It may be doubted whether the violence attributed to the trespasser need be serious, but the requirement at least kept technical trespasses out of the king's court. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 526-27.

162. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 513-18.

163. To confirm that this was a novelty, see *id.* at 522-23.

164. Ames classified the minor appeals of battery, mayhem and imprisonment as compensatory appeals in which damages could be recovered. AMES, LECTURES, *supra* note 23, at 48. *But see id.* at 42, 47; C. KENNY, OUTLINES OF CRIMINAL LAW 585 (15th ed. 1936); Woodbine, *The Origins of the Action of Trespass*, 33 YALE L.J. 799, 801-02 (1924).

165. Neither return of the goods by the trespasser nor recovery of them by the owner extinguished the claim for damages for the taking. AMES, LECTURES, *supra* note 23, at 59; Branston, *supra* note 161, at 272. The measure of damages in the case of permanent loss of the chattel would be the value of the chattel. AMES, LECTURES, *supra* note 23, at 59.

actions seems more apparent than real when we consider the consequences of the larceny conviction. All of the felon's goods were forfeited to the crown, his heirs were perpetually disinherited, his lands were laid waste for a year and a day and then escheated to his lord.¹⁶⁶ The question of the availability of the trespass remedy against a convicted thief was largely academic. He had nothing left out of which a judgment for damages could be satisfied.

If the criminal appeal failed, recovery of damages in trespass was no more certain. The unsuccessful prosecutor of an appeal of larceny paid a fine to the crown for his false appeal and damages to the acquitted appellee.¹⁶⁷ According to some authorities, the chattel would be forfeited despite evidence that it belonged to the prosecutor and that the appellee came into possession of it wrongfully, though not feloniously.¹⁶⁸ It is doubtful that the appellor subsequently would have been suffered to sue in trespass.

Unsuccessful prosecution by indictment carried with it no penalty, but it might be an impediment to recovering damages for loss of the chattel. By the end of the sixteenth century there developed the budding heresy that when a trespass also constituted a felony, the lesser wrong merged into the greater wrong.¹⁶⁹ That amounted to saying that once a wrong was characterized as an offense against the crown, it became exclusively and immutably a criminal matter. Although the heresy was short-lived, it did foreclose recovery in trespass for a small class of litigants.

The uncertain path to recovery of damages when a criminal prosecution preceded the suit in trespass made the second optional course of action appealing. A dispossessed owner might be sorely tempted to ignore the criminal aspects of the taking and merely

166. R. GLANVILL, *supra* note 40, at 173; BRITTON, *supra* note 23, at 90; 2 H. BRACON, *supra* note 39, at 362-64, 374. Forfeiture of goods upon conviction of felony was abolished in 1870 by the Forfeiture Act. 33 & 34 Vict., c.23, § 1 (1870). The rules of escheat and disinheritance were modified, and eventually abolished, by a series of enactments. 3 & 4 Wm. 4, c.106, § 10 (1833); 54 Geo. 3, c.14 (1813).

167. See note 114 and accompanying text *supra*.

168. See 1 M. HALE, *supra* note 17, at 539. See, e.g., Y.B. Trin. 12 Edw. 2 (1319), 81 SELDEN Soc'y 122-23 (1964) (jury said the horse belonged to plaintiff and that prisoner had bought it, not stolen it; "awarded that the prisoner should go quit, and that the king should have the horse"); Y.B. 30 & 31 Edw. 1, 508 (1302) (R.S.) (if appellee had been attainted at the suit of another, appellor would not have recovered the chattels); 1 EYRE OF KENT 6 & 7 Edw. 2 (1313-14), 24 SELDEN Soc'y 108 (1909) (same). The first evidence of mitigation of the rule that a felon could forfeit goods of another appeared early in the fifteenth century. 3 W. HOLDSWORTH, *supra* note 45, at 330.

169. See 9 M. BACON, *supra* note 47, at 477; 20 VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 472, 475, tit. Trespass, § Y.3, § A.a (2d ed. London, 1793). See also *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1606), 74 Eng. Rep. 989.

pursue a remedy in trespass. But if one could privately satisfy wrongs without also satisfying the king's justice, the crown would lose an important source of revenue. Moreover, such irregular procedure might diminish the inducement to prosecute to the extent that "parties would seek their own immediate advantage rather than the security of the public."¹⁷⁰

We know that one who retook his goods from a thief upon agreement not to prosecute committed the offense of theftbote, which once was punished capitally.¹⁷¹ There is reason to believe that absent such compromise with the felon, the crown even discouraged a unilateral decision not to prosecute by suspending the owner's civil remedies until he pursued a criminal action against the felon.¹⁷² He would want to avoid pressing the action too heartily, of course, for to succeed in bringing the felon to justice was also to succeed in assisting the crown to obtain all of the felon's assets, and we have come full circle.

One who pursued an action for damages pleaded carefully to avoid using words of felony. When the conduct of a wrongdoer constituted a felony as well as a trespass, official interest in the criminal aspects of the event limited the availability of the remedy of damages. Trespass nonetheless was a popular remedy that gained ready acceptance and enjoyed steady growth.¹⁷³ Trespass remedied a larger class of injuries than the appeal of larceny, for it provided a mechanism for compensating a dispossessed party when the trespasser intended only a temporary deprivation of property.¹⁷⁴ In one significant respect, however, theft prosecutions cast a wider net.

One who innocently acquired stolen goods from a thief was not liable in trespass, for he had neither interfered with the possession

170. 1 J. CHITTY, *supra* note 138, at 821.

171. E. COKE, *supra* note 19, at *134; M. DALTON, *supra* note 138, c.108 at 357-58; 3 W. HOLDSWORTH, *supra* note 45, at 330; 2 EYRE OF KENT 6 & 7 Edw. 2 (1313-14), 24 SELDEN Soc'y 83-84 (1909). See also 1 M. HALE, *supra* note 17, at 546; F. PULTON, *supra* note 44, at 131. The owner's act of retaking the goods absent an agreement not to prosecute was no offense. E. COKE, *supra* note 19, at *134; 1 M. HALE, *supra* note 17, at 546; F. PULTON, *supra* note 44, at 131.

172. 4 W. BLACKSTONE, *supra* note 18, at *363; 1 J. CHITTY, *supra* note 138, at 820-21; 2 E. EAST, *supra* note 44, at 790; 1 M. HALE, *supra* note 17, at 546; 3 W. HOLDSWORTH, *supra* note 45, at 330-33; Hitchler, *Crimes and Civil Injuries*, 39 DICK. L. REV. 22, 32-33 (1934-35).

173. AMES, LECTURES, *supra* note 23, at 56; F. MAITLAND, *supra* note 159, at 345-50, 360-62.

174. 4 W. BLACKSTONE, *supra* note 18, at *232; 7 W. HOLDSWORTH, *supra* note 77, at 415.

of another nor broken the king's peace.¹⁷⁵ Notwithstanding his freedom from wrongdoing, he could be appealed as one who was the thief or one who could name the thief because he possessed the stolen chattel.¹⁷⁶ Upon vouching his warrantor or proving purchase at an open market, he was acquitted of the theft but was compelled to relinquish the chattel. In later years when a criminal prosecution could succeed only against the wrongdoer, conviction of the thief nevertheless enabled an owner to recover the chattel from an innocent party notwithstanding a sale in market overt.¹⁷⁷ The innocent third party who was not liable to the owner for damages in trespass was bound to restore the chattel, because the nature of the two actions was fundamentally different.

The action of trespass *de bonis asportatis* redressed an injury resulting from wrongful interference with the use and enjoyment of chattels.¹⁷⁸ Only the party who committed the wrong was liable to compensate for the harm done. Trespass was strictly an *in personam* action. The theft prosecution, on the other hand, served dual functions. In addition to punishing the wrongdoer, the criminal action reached the chattel in the hands of anyone found in possession of it, whether innocent of wrongdoing or not.

B. Detinue

Detinue more closely approximated a possessory remedy than did trespass, and its origins were in the action of debt.¹⁷⁹ Glanvill's writ of debt countenanced recovery of a chattel that had been loaned for another's use.¹⁸⁰ The borrower was obligated to restore the thing in its original condition. If it had perished or been damaged, he was bound to pay the owner a reasonable price. By the early thirteenth century, debt and detinue had split into separate actions.¹⁸¹ Detinue was founded on the breach of an obligation to

175. AMES, LECTURES, *supra* note 23, at 60; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 167.

176. See text accompanying notes 91-97, 105-06, and 125 *supra*.

177. See text accompanying notes 96-97, 105, and 143-44 *supra*.

178. It is, therefore, not surprising that if goods had been bailed the action belonged exclusively to the bailee, for it was the bailee who suffered loss of use of the chattel. By mid-fourteenth century, however, the bailor was permitted to sue in trespass when the bailment was determinable at will, "doubtless by the fiction that the possession of a bailee at will was the possession of the bailor also." AMES, LECTURES, *supra* note 23, at 58. The privilege of suing in trespass was never extended to a bailor for a term. *Id.* See also 3 W. HOLDSWORTH, *supra* note 45, at 348; 7 W. HOLDSWORTH, *supra* note 77, at 461-63.

179. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 173.

180. R. GLANVILL, *supra* note 40, at 128. See also 2 H. BRACON, *supra* note 39, at 292.

181. F. MAITLAND, *supra* note 159, at 342. When the action of detinue became separate

return a bailed object, and it was necessary to allege that the recusant possessor had acquired the object by bailment.¹⁸² A traverse of the allegation was a good answer.¹⁸³

Detinue sur bailment, then, was an action for the wrongful withholding, rather than taking, of a movable good.¹⁸⁴ The bailor was entitled to demand recovery of the object the bailee unjustly detained. He accused the bailee of refusing a lawful demand to return his chattel of a stated value.¹⁸⁵ The bailee should return it. Should the bailee prove to be disputatious, however, he could instead pay the owner the value of the chattel and extinguish his obligation. A judgment for the bailor was a judgment for return of the goods or payment of their value. If the bailee refused to do either, the court directed the sheriff to sell as much of the bailee's goods (quite possibly the chattel in question) as necessary to satisfy the amount of the judgment, and to pay over the proceeds to the bailor.¹⁸⁶

The curiousness of this result is striking. The judgment for the bailor recognized his right to the chattel but permitted the bailee to keep it. An order to pay the value of the bailed goods would be eminently sensible if there were reason to believe that the bailee had damaged or disposed of the chattel. If he had not, the alternative order of specific restitution or payment of damages simply enabled the bailee to purchase the chattel for a fair price if it were in good condition, or to return it if in bad condition.¹⁸⁷ This anomaly can only be explained as a matter of jurisdiction. The bailee's option to retain the chattel and pay money damages existed because *detinue* was an action at law. Whereas equity moved against the person of the defendant, the process for enforcing common-law

from that of debt, liability was contractual in nature. AMES, LECTURES, *supra* note 23, at 71-73. One consequence of the contractual nature of the action was that the bailee was the only proper party defendant. Purchasers, thieves, and sub-bailees were immune from suit. *Id.* at 73; 2 F. POLLOCK & F. MATTLAND, *supra* note 7, at 175-76.

182. AMES, LECTURES, *supra* note 23, at 71; 2 F. POLLOCK & F. MATTLAND, *supra* note 7, at 176.

183. AMES, LECTURES, *supra* note 23, at 71. *But see* note 195 *infra*.

184. *See generally* 3 W. HOLDSWORTH, *supra* note 27, at 324-25; 7 W. HOLDSWORTH, *supra* note 77, at 437-40; 2 F. POLLOCK & F. MATTLAND, *supra* note 7, at 173-75.

185. 2 F. POLLOCK & F. MATTLAND, *supra* note 7, at 174-75. Mention of the value of the good was essential.

186. *Id.* at 174; Jenks, *A Blind Spot in English Law*, 49 LAW Q. REV. 215, 217 (1933).

187. By the fifteenth century the bailor who received damaged goods under the judgment could bring a second suit to recover damages. The action was an outgrowth of trespass, the special action on the case. AMES, LECTURES, *supra* note 23, at 83-84. *See text accompanying notes 221-29 infra*.

judgments operated against his property.¹⁸⁸ Common-law courts had no power to require the performance of specific acts,¹⁸⁹ so no process to compel the return of a chattel existed.¹⁹⁰

Notwithstanding procedural inadequacies, detinue *sur bailment* played a distinct role in the scheme of remedies for injury to property. Because trespass and larceny shared the common element of an unlawful taking, detinue was the only action by which bailee misappropriation could be remedied. Bailees obtained possession lawfully, not by trespass. Taking bailed goods with intent to steal was a breach of trust, but no crime.¹⁹¹ In the late fifteenth century the rule was modified to the extent that a bailee who broke into bales in his custody and wrongfully carried away the contents was guilty of larceny.¹⁹² Until the nineteenth century, the doctrine of breaking bulk was supplemented only by imposition of liability on carriers who transported bailed goods to the appointed destination and then took them with intent to steal.¹⁹³ Detinue remained the exclusive common-law action given a bailor against a fraudulent bailee.¹⁹⁴

Detinue assumed additional importance during the fifteenth century as the scope of the action enlarged and the allegation of bailment became unnecessary. Instead, the owner could allege that the goods had been lost and that the finder wrongfully refused to give them back.¹⁹⁵ With this development detinue filled another

188. Yale, *Introduction to LORD NOTTINGHAM'S MANUAL OF CHANCERY PRACTICE* at 20-22 (Yale ed. 1965).

189. C. Christopher, *Progress in the Administration of Justice During the Victorian Period*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 518 (1907).

190. W. Barbour, *The History of Contract in Early English Equity*, in 4 *OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY* 111 (Vinogradoff ed. 1914). The Common Law Procedure Act of 1854, 17 & 18 Vict., c.125, § 78, vested discretionary power in the court to award an execution for return of the detained chattel.

191. See generally 3 W. HOLDSWORTH, *supra* note 45, at 362-66.

192. Y.B. Pasch, 13 Edw. 4, pl.5 (1473), reprinted in 2 *SELECT CASES IN THE EXCHEQUER CHAMBER*, 64 *SELDEN SOC'Y* 30 (1945). For divergent views on this development, compare J. HALL, *THEFT, LAW AND SOCIETY* 3-79 (2d ed. 1952), with Fletcher, *supra* note 36, at 481-86.

193. Fletcher, *supra* note 36, at 482-83 n.59.

194. This gap was filled on the criminal law side by supplementing the common-law crime of larceny with the statutory crime of embezzlement. For a discussion of the development of the crime of embezzlement, see J. HALL, *supra* note 192, at 35-40.

195. This bifurcation of the action created uncertainty about the nature of detinue. Liability had originally appeared to be *ex contractu*. See note 181 *supra*. With elimination of the element of bailment, the element of contract also disappeared. The action now seemed to be at once delictual and contractual. 7 W. HOLDSWORTH, *supra* note 77, at 438-39.

Although not widely used until the fifteenth century, there is some evidence that detinue *sur trover* was known in the fourteenth century. 3 W. HOLDSWORTH, *supra* note 27, at

void in the remedial scheme, for a finder was neither trespasser nor thief.¹⁹⁶ A finder who wrongfully withheld the goods was liable only in detinue.

In one respect detinue resembled Bracton's *res adiratae*.¹⁹⁷ It, too, was a civil action for recovery of a chattel,¹⁹⁸ but if the possessor refused to comply with a demand for return of the good the action could be augmented to an appeal of larceny by adding an accusation of felonious taking. Bracton's action was a civil suit to recover a chattel "*though it is stolen*,"¹⁹⁹ and there the resemblance ends.

Detinue was an action to recover bailed or lost goods, not stolen goods. One who sued in detinue had to be cautious in framing his count. If the words complained of an unlawful taking the proper suit was trespass, for which he could demand damages but not return of the chattel. If his words complained of a felonious taking, there existed the now familiar possibility that the owner must first initiate a criminal prosecution before seeking a civil remedy.²⁰⁰ Moreover, he was assured of recovering the chattel only through successful criminal prosecution. The action of detinue entitled the owner to demand, but not require, return of his goods.

C. Replevin

Replevin was an important action during the Middle Ages,²⁰¹ and it evolved around an ancient institution, the village pound.²⁰² The scope of the action was limited, however, for it lay only in

324, 327; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 175. There is, no doubt, room for mischief here. It is not unreasonable to suppose that there were fictitious allegations of losing and finding, but during the fourteenth century the plaintiff was required to prove how the defendant came into possession of the goods. W. BARBOUR, *supra* note 190, at 111. It was later that allegations of bailment or finding became nontraversable. Then the defendant could contest only the allegation of wrongful detention. 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 176.

196. It was not until the nineteenth century that finders who intended to keep their freely acquired holdings were convicted of larceny. Compare E. COKE, *supra* note 19, at *108, M. DALTON, *supra* note 138, c.103 at 331, and 1 M. HALE, *supra* note 17, at 506, with 2 E. EAST, *supra* note 44, at 651, and F. POLLOCK & R. WRIGHT, *supra* note 27, at 172-73.

197. 2 H. BRACTON, *supra* note 39, at 425-26. See also 3 W. HOLDSWORTH, *supra* note 45, at 320-22, 325.

198. The good could have been lent or lost. 2 H. BRACTON, *supra* note 39, at 292, 425.

199. *Id.* at 425 (emphasis added). See generally Kaye, *Res Adiratae and Recovery of Stolen Goods*, 86 LAW Q. REV. 379 (1970).

200. See text accompanying notes 170-72 *supra*. See also E. JENKS, *supra* note 145, at 134.

201. F. MAITLAND, *supra* note 159, at 355.

202. H. MAINE, *supra* note 26, at 265.

cases of wrongful distress.²⁰³ One who levied upon another's beasts as security for unpaid rent or other debt seized them as distress and placed them in the pound.²⁰⁴ Typically, this act of the distrainer was the end of his participation in the matter. The owner was required to feed them, the distrainer forbidden to work them.²⁰⁵ A subsequent refusal to return the animals upon the owner's satisfaction of the obligation constituted unlawful distraint, which could be remedied only by suing in replevin.²⁰⁶

The owner initiated the action by giving good security and enlisting the sheriff to return the impounded beasts to his possession. By this action of replevin, the distrainer lost his material security. By the giving of new security, the owner became personally bound.²⁰⁷ Not until this point would there be a proceeding in court to determine the lawfulness of the distraint. If it were found to be unlawful, the owner retained the chattel and recovered damages for the injury.²⁰⁸

Although replevin appears to share common characteristics with trespass and detinue—with trespass the element of unlawful taking and with detinue unlawful detention—the three actions were separate and distinct. When goods were taken as distress, the original taking was not unlawful. The creditor was entitled to seize the personal goods of his debtor so long as their value did not exceed the amount of the debt.²⁰⁹ There was no trespass in the taking. When goods were detained as distress, the original detention

203. 3 W. BLACKSTONE, *supra* note 18, at *146. Isolated cases indicating that the action might be used to recover goods not taken as distress "occur late in the day, and are not important in relation to general theory." F. MAITLAND, *supra* note 159, at 355. See also H. MAINE, *supra* note 26, at 265. Professor Ames relied on these "stray dicta" in concluding that replevin became a remedy concurrent with trespass during the fourteenth century. *History of Trover* (pt.2), *supra* note 23, at 375. On the other hand, Blackstone believed that cases of wrongful distraint were the only cases in which replevin would lie at the time he wrote. 3 W. BLACKSTONE, *supra* note 18, at *146.

204. The animals might be seized *damage feasant*—that is, for security for payment of damages incurred as a result of their trampling another's land. 2 H. BRACON, *supra* note 39, at 445; BRITTON, *supra* note 23, at 118; 3 S. STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 363 (1844).

205. H. MAINE, *supra* note 26, at 265-66; S. STEPHEN, *supra* note 204, at 371.

206. See generally 3 W. BLACKSTONE, *supra* note 18, at *145-51; 2 H. BRACON, *supra* note 39, at 442-49; BRITTON, *supra* note 23, at 112-28; Ames, *Disseisin of Chattels*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 541, 551-55 (1909).

207. H. MAINE, *supra* note 26, at 267. The writ of replevin directing the sheriff to deliver the distress to the owner issued out of chancery. 3 W. BLACKSTONE, *supra* note 18, at *147.

208. 3 W. BLACKSTONE, *supra* note 18, at *150.

209. See BRITTON, *supra* note 23, at 127.

was not unlawful. The detention was justified until the owner fulfilled his obligation to pay.²¹⁰ Replevin was the exclusive remedy for wrongful detention of lawfully impounded goods.

Since there was no trespass in the taking of distress for rent, it would seem that replevin and the appeal of larceny must have functioned entirely independently; but that is only partly accurate. The discussion of the nature of the action of replevin was premised on the assumption that things proceeded as they should. If they did not, the character of the remedy changed.

Once the owner initiated the action of replevin, the distrainer was obliged to permit the sheriff to view the animals in the pound and to retake them.²¹¹ The distrainer who refused to do so and claimed the goods were his deprived the sheriff of jurisdiction and terminated the suit.²¹²

In that event the owner's proper course of action was to raise hue and cry and appeal the distrainer of larceny,²¹³ or to sue in trespass.²¹⁴ This hardly seems appropriate, because we have previously seen that there was no trespass in the taking. The explanation of this paradox lies in the status of the property in distrained goods. The distrainer neither claimed nor acquired any property by the distress.²¹⁵ The goods were said to be in the custody of the law, not in the possession of the distrainer.²¹⁶ When he wrongfully withheld the distress from the sheriff under a claim of right, he disseised the plaintiff of the goods²¹⁷ and converted his status from that of distrainer to that of possessor. By doing so he committed a trespass and became vulnerable to a charge of theft. The action of replevin was at an end and the sole action for recovery of the goods was a larceny prosecution.

210. If the defendant prevailed in the action, the replevied goods were returned to him. 3 W. BLACKSTONE, *supra* note 18, at *150.

211. BRITTON, *supra* note 23, at 114-15.

212. By the fourteenth century, this hardship was avoided by invention of the writ *de proprietate probanda*, which enabled the sheriff to conduct an inquest to determine whether the goods were those of the distrainer. AMES, LECTURES, *supra* note 23, at 67; 3 W. BLACKSTONE, *supra* note 18, at *148; 3 W. HOLDSWORTH, *supra* note 45, at 284.

213. 2 H. BRACON, *supra* note 39, at 442; BRITTON, *supra* note 23, at 115.

214. AMES, LECTURES, *supra* note 23, at 67.

215. *Id.* at 64.

216. 3 W. BLACKSTONE, *supra* note 18, at *146; 3 S. STEPHEN, *supra* note 204, at 369. Since the distrainer had no possession, he could not maintain an action of trespass against one who took the goods from him. AMES, *supra* note 206, at 551-52.

217. AMES, *supra* note 206, at 552.

D. Trover

The action of trover, a species of the special action of trespass on the case,²¹⁸ was founded on a fictitious allegation of loss and finding.²¹⁹ The complainant asserted that his goods were casually lost from his possession and that they came into the hands of a possessor who wrongfully converted them to his own use, knowing they were the goods of another.²²⁰ Although the action of trover had little history prior to the sixteenth century,²²¹ its origins lie in the gap between detinue and trespass. If a bailee destroyed goods in his keeping, the bailor could recover their value in detinue.²²² If the bailee returned the goods in damaged condition, the bailor was not so fortunate. Detinue would not lie because there was no wrongful detention,²²³ trespass would not lie because there was no wrongful taking.²²⁴ The relief ultimately granted the bailor was a suit in case to recover damages for the harm to the goods.²²⁵

Still another practical problem remained, however, for the actions of detinue and case were separate and distinct.²²⁶ Consider the bailee who both damaged the goods and wrongfully refused to give them back to the owner, *O*. If *O* sued in detinue he might receive the damaged goods in satisfaction of the judgment. He would then be put to the trouble of prosecuting a second action in case in order to be made whole.²²⁷ If *O* first sued in case, he would

218. See generally A. KIRALFY, *THE ACTION ON THE CASE* 1-48, 109-14 (1951).

219. This allegation enabled the pleader to avoid defenses that might be raised if there had been allegations of taking (trespass) or bailment (detinue). See E. JENKS, *supra* note 145, at 141; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 326-30 (1969). As was true in the later history of detinue, the allegation of loss and finding could not be disputed. Cf. note 195 *supra*. The only issue was misappropriation. F. MAITLAND, *supra* note 159, at 365.

220. Simpson, *The Introduction of the Action on the Case for Conversion*, 75 *LAW. Q. REV.* 364, 370-71 (1959).

221. See generally AMES, *LECTURES*, *supra* note 23, at 81-87; 7 W. HOLDSWORTH, *supra* note 77, at 440-47; Milsom, *Not Doing is No Trespass: A View of the Boundaries of Case*, 1954 *CAMB. L.J.* 105; Simpson, *supra* note 220, at 364-72.

222. AMES, *LECTURES*, *supra* note 23, at 84; S.F.C. MILSOM, *supra* note 219, at 324.

223. AMES, *LECTURES*, *supra* note 23, at 83.

224. *Id.*

225. This development occurred in the middle of the fifteenth century. AMES, *LECTURES*, *supra* note 23, at 83. Simpson places the first case toward the end of the fourteenth century. Simpson, *supra* note 220, at 365. Since the gist of this germinal action in case was compensation for misuse of goods by a bailee, it seemed logical to extend the action to instances when finders and other possessors caused the damage or destruction. AMES, *LECTURES*, *supra* note 23, at 84; 3 W. HOLDSWORTH, *supra* note 45, at 350.

226. AMES, *LECTURES*, *supra* note 23, at 84. It is important to note that even though the actions were separate and distinct, the camel's nose was definitely in the tent.

227. *Id.* at 84.

receive damages equal only to the diminution in value caused by the adverse possessor's mishandling of the goods. Unless they were utterly destroyed, *O* would not be fully compensated for the loss and must then sue in detinue to recover the damaged goods or their value.²²⁸ This injustice soon was remedied by permitting a bailor to sue a bailee for the full value in case, rather than detinue, when there was an act of misfeasance by the bailee. Recovery of the full value was justified on the premise that the bailee's conduct amounted to a total misappropriation of the goods.²²⁹

The extension of this category of special action on the case made trover and detinue concurrent in cases of bailee misconduct.²³⁰ Owing to the simplicity of the action and the hazards of litigating in detinue,²³¹ trover surpassed detinue in popularity, and the possessory action gradually fell into disuse.²³² The decline of the action of detinue was hastened by brief acceptance of the notion that trover would lie in cases of nonfeasance by a bailee. If wrongful use of another's goods was evidence of conversion to one's own use, it was believed that a simple failure to return the goods on demand was at least presumptive evidence of conversion.²³³

By the seventeenth century, the logic that produced the short-lived heresy that mere failure to redeliver a chattel constituted a conversion enabled trover to encroach upon the sphere of trespass. If damaging the goods of another was evidence of conversion, then wrongful taking also must be. Trover thus became concurrent with

228. See Simpson, *supra* note 220, at 370; S.F.C. MILSOM, *supra* note 219, at 324. It was also possible that the bailee might object to the action on the ground that since judgment in detinue would result in award of the object or its value, a claim for full value was proper only in detinue. *Id.*

229. Simpson, *supra* note 220, at 370-71.

230. AMES, LECTURES, *supra* note 23, at 85.

231. In addition to the risk of recovering a chattel in damaged condition, one who sued in detinue might confront the archaic mode of trial by wager of law, an elaborate swearing match. Simpson, *supra* note 220, at 364-65. See generally M. BIGELOW, *supra* note 109, at 301-09; 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 634-39. The party with the burden of proof was required to present a specific number of witnesses, called compurgators, who swore to the purity of the litigant's oath. If anyone made a mistake in repeating the oath formula, the litigant's proof failed. This mode of trial must have been perilous when compurgators were required to join hands and repeat the oath in unison. Their number might reach as many as forty-eight, depending on the rank of the parties and the nature of the suit. M. BIGELOW, *supra* note 109, at 301-04.

232. 3 W. HOLDSWORTH, *supra* note 45, at 580. After the abolition of wager of law in 1833, detinue enjoyed a minor revival. F. MAITLAND, *supra* note 159, at 366; 7 W. HOLDSWORTH, *supra* note 77, at 413-14.

233. 7 W. HOLDSWORTH, *supra* note 77, at 407-11.

trespass,²³⁴ and it was inevitable that through similar reasoning trover and replevin also would become interchangeable.²³⁵ The development of tort theory had provided common-law courts with a single mechanism for granting a remedy for a multitude of injuries to property. That an award of damages was the exclusive remedy attests the fragile status of ownership without possession. The action of trover provided a pecuniary remedy for misappropriation of chattels, but the common law gave little assistance to one who desired to be restored to the *status quo ante*. While the owner out of possession had not lost his "property," he had assuredly lost his goods.

V. CONCLUSION

The tendered reconstruction of the evolution of common-law remedies for wrongs to chattels clarifies the practical and doctrinal importance of the recuperative component of the larceny prosecution. Absent a process to enforce judgments directing the return of a chattel, the exclusive civil remedy for misappropriation was exaction of a legal price for the object.²³⁶ The pecuniary character of the remedy, as well as the blurring of theory that occurred as trover subsumed the older proprietary actions, tended to obscure the distinction between actions taken on a disputed claim of right (I own) and actions for redress of an injury (I am owed).²³⁷

In contrast, the early procedures for prosecuting larceny confirm that the common law originally had little difficulty conceiving and protecting what we have come to recognize as chattel ownership and that much of the jurisprudence that shaped the concept was, remarkably, an appendage of criminal law. Taking and withholding the goods of another constituted a direct attack on owner-

234. AMES, LECTURES, *supra* note 23, at 85-86; 7 W. HOLDSWORTH, *supra* note 77, at 416-21.

235. AMES, LECTURES, *supra* note 23, at 86-87; 3 W. HOLDSWORTH, *supra* note 45, at 285.

236. To suggest that pecuniary compensation is an inadequate substitute for a chattel may seem unduly harsh, but things are temporal in this world. If one who siphons the last gallon of fuel from a conveyance is only required to give the owner a dollar for the loss, the remedy will be profoundly inadequate when fuel is scarce. It is not difficult to imagine such a state of affairs in medieval times, especially while few established markets existed. Replacing a winter's store of hay could be unpracticable for Anglo-Saxon folk. An award of damages for adverse holding of that commodity would be tantamount to a forced sale of something valuable to the owner only as an item of use and enjoyment, and it causes us to wonder whether the concept of property relates to specific objects, or to money. See F. LAWSON, *supra* note 59, at 180-81.

237. See F. MARTLAND, *supra* note 159, at 332.

ship that was remediable only by pursuing a larceny prosecution. Unlike the civil plaintiff, the private prosecutor of the ancient action of theft and the appeal of larceny had a real action for the recovery of movable goods. One whose goods were stolen could recover them from anyone in whose hands they were found, though honestly acquired, by charging that the possessor was the thief or could name the thief. Proof of guilt was secondary to obtaining specific restitution. Only after larceny became a plea of the crown did the interest of the sovereign in suppressing theft and punishing wrongdoers become the focal point of the criminal prosecution and the corporeal injury to the interests of the prosecutor become obscure in legal theory. Although taking from possession was the definitional core of common-law larceny, the criminal prohibition extended only to inroads on ownership, not mere inroads on possession.

