

The Right of Property and the Law of Theft*

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I. Introduction

The right of property is fundamental in a society based upon private ownership of the means of production. There is no better way to understand the relation between the development of capitalist legal institutions and the changing contours of the right of property than by studying the cases of those charged with stealing. If the legal institution of property may be described as a relationship, dominion or *dominium*, between a person—*persona*—and a thing—*res*—the law of stealing will necessarily focus upon which “things” are the subject of property and what sort of interference with *dominium* will be punishable.¹ There are, of course, means of protecting the right of property other than punishing those who interfere with it: imposing civil damages, enjoining noninterference, or allowing self-help that—kept within defined limits—will occasion no criminal penalty for the actor.

My view, that stealing cases illuminate the right of property most clearly and give us insight into the structure of our social system, is not shared by all. George Fletcher, in his brilliant study *Rethinking Criminal Law*,² has written, referring specifically to the common law offense of larceny:

This body of law consists of an array of puzzles that have baffled commentators and judges for the last 200 years. Justice Holmes and other distinguished writers have dismissed the rules of larceny as the imprints of historical “accidents.” Jerome Hall has written an influential book maintaining that social and economic forces can be summoned to explain the mysterious tracks of larceny in the legal sand. Somehow in the total confusion about the history of larceny, these two views have coexisted. Larceny is thought to be both the expression of freakish accidents and the

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1. This statement will be familiar to students of civil law; it has the advantage for this discussion of putting the matter as Marx did in his works on the right of property. See, e.g., K. MARX, GRÜNDRISS 102 (M. Nicolaus trans. 1973) (comments of translator) (articulating a distinction between possession and property, the latter being a “juridical relation”); K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 81, 112-15 (1949). See generally M. TIGAR, LAW AND THE RISE OF CAPITALISM (1977).

2. G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

predictable product of social and economic forces.³

Fletcher seeks "a course between these extremes," and he argues for a theory that he terms "the rationale of manifest criminality."⁴

This Article is not simply a reaction to Fletcher's work, although I will argue that his view is partial and therefore flawed. As for Justice Holmes, whatever he may have said of larceny's tortuous history as a common law offense, he understood better than Fletcher suggests he did the central issue in any discussion of stealing: the definition of "property" and the sorts of interference of which the law will take notice.⁵

An earlier work on the history of theft law, Jerome Hall's *Theft, Law and Society*,⁶ was a pioneering effort to sharpen the focus of discussion of theft offenses. Hall sought the social and economic basis of particular changes in the law of theft from the fifteenth century onward, and so raised the level of debate above the passing of ambiguous utterances by common law judges in the yearbooks and law reports. To paraphrase a comment on Beaumanoir, Hall broke the mirror in which the common law looked at itself, and showed us the path.⁷ Further, Hall sought to place the modern debate over statutory reform of theft offenses firmly in the context of the interests served by particular proposed reforms. Although Hall's historical research was pathbreaking, gaps in his analysis leave him open to Fletcher's discerning scholarly attack.

In this Article I shall follow Hall's lead in arguing that the development of theft law is, in Fletcher's words, "the predictable product of social and economic forces," knowing that Fletcher has ably contended that this view is aground on the "shoals of historical determinism."⁸ We must study what Fletcher calls "the mysterious tracks of larceny in the legal sand,"⁹ for these tracks, like those Robinson Crusoe saw one morning, are powerful and important circumstantial evidence. We will see the definition of theft changed by the dominant class at particular moments of history to protect the system of social relations over which it presides and to extend its power to enforce that system. If we survey the law in historical context, we will see deliberate manipulations of the

3. *Id.* § 2.1, at 59-60 (citations omitted).

4. *Id.* § 2.1, at 59.

5. *See* International News Serv. v. Associated Press, 248 U.S. 215, 246-48 (1918) (Holmes, J., dissenting).

6. J. HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952).

7. *See* M. TIGAR, *supra* note 1, at 303.

8. G. FLETCHER, *supra* note 2, § 2.1, at 60.

9. *Id.* § 2.1, at 59-60.

legal definition of theft, as well as patterns of prosecutorial and police discretion designed to achieve these goals.

Part II of this Article reaches back to the precursors of today's debate over stealing and the right of property, with a discussion of the parallel development of theft law in Roman and common law. Part III discusses two uses of theft law to eliminate vestiges of precapitalist social systems: the Black Act in England and the German law relating to the theft of wood. Part IV returns to modern times with an analysis of the prosecutions of Daniel Ellsberg and David Truong for allegedly stealing government information relating to national defense and foreign policy. The Article concludes with an examination of the *Mann* case, a theft-type prosecution in the Texas banking industry.

II. The Nature of Stealing

A. *The Pattern of Development*

The general terms "theft" and "stealing" cover a number of separate offenses, each of which protects a different interest. In tracing boundaries, we must ask whether given conduct amounts, in common law terms, to larceny,¹⁰ larceny by trick,¹¹ false pretenses,¹² or embezzlement.¹³ At the same time, we must determine whether the defendant has committed theft at all, as opposed to having acted rightfully, or having committed an act that would render him liable only to a civil suit.

Larceny has not only Anglo-Saxon roots but Roman and Biblical parallels as well.¹⁴ Larceny consists of "taking" and "carrying away" the property of the victim with the intent permanently to deprive him of it.¹⁵ The taking, in the common law cases up through the end of the eighteenth century, had to be trespassory. Moreover, the property had to be taken from the victim's possession. Larceny was the first theft offense to be recognized by the common law; others came later, by Par-

10. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 85 (1972); *infra* text accompanying note 15.

11. In larceny by trick, the owner is induced by trickery to part with possession. W. LAFAVE & A. SCOTT, *supra* note 10, § 85.

12. False pretenses is a false representation of a material fact that causes the victim to pass title to his property to the wrongdoer, who knows his representation is false and intends thereby to defraud. *Id.* § 90.

13. Embezzlement is the fraudulent conversion of the property of another by one who is already in lawful possession of it. *Id.* § 89.

14. See *infra* notes 19-22, 29-34, and accompanying text. Historical analysis appears in G. FLETCHER, *supra* note 2, chs. 1-2 (1978); J. HALL, *supra* note 6, chs. 1-3; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 30-37, 56-57 (1883); 3 *id.* at 121-76.

15. See W. LAFAVE & A. SCOTT, *supra* note 10, § 85.

liamentary enactment or judicial construction. Larceny has generally been regarded as the criminal law kin to the civil action for trespass *vi et armis*, that is, by actual or implied violence.¹⁶ Most scholars of English law agree that the writ of trespass is derived from the appeal of felony for larceny.¹⁷

The development of larceny, and of related offenses in noncommon law countries, may be summarized as a shift away from the notion that stealing is principally an offense against *possession*, and toward the notion that it is an offense against *property*. Further, both the kinds of interference with the property right—*dominium*—that a legal system terms “stealing,” and the kinds of property—*res*—protected by laws against stealing, expand with the increasing power of a property-owning class and the increasing sophistication of definitions of ownership called into being by the interests of that class. Changes in the law of theft do not always occur in simple and immediate correlation to shifts in social structure or class interest; so to argue would be to ignore how legal rules tend to be shaped in ways that enhance their perceived legitimacy. The impact of class interest on the legal system is mediated by a number of forces, not the least of which is a nominally independent group of lawyers and judges charged with the orderly development and application of legal rules.¹⁸ But the main lines of development of the law of theft bear out my view that the definition of stealing follows the changing contours of the right of property.

B. *Stealing as an Offense Against Possession*

Early definitions of theft focus upon a basic possessory interest, the security of the home. The book of Exodus, in the context of an orderly series of penalties for particular wrongs, contains adjurations designed to encourage resort to judges instead of private vengeance. In contrast is *Exodus 22:2*: “If a thief be found breaking in, and be smitten that he die, there shall no blood be shed for him.”¹⁹

Early Roman law is summarized in the Twelve Tables, dating to about 450 B.C.²⁰ While Roman law, by the time of the Twelve Tables, discouraged private vengeance, killing a “manifest” thief—one caught

16. See G. FLETCHER, *supra* note 2, § 1.1.1, at 6-7.

17. See, e.g., T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 369-70 (5th ed. 1956) (citing Holmes and Ames); 1 J. STEPHEN, *supra* note 14, at 132-34.

18. See generally M. TIGAR, *supra* note 1, chs. 20-22 (discussing the development of jurisprudence in the last few centuries).

19. *Exodus 22:2*; see G. FLETCHER, *supra* note 2, § 1.3.1.

20. See generally M. TIGAR, *supra* note 1, at 10-12 (outlining the use of the Twelve Tables in Roman jurisprudence).

in the act of taking—was a form of justifiable homicide.²¹ The thief caught in the act was, if a free man, subject to scourging and enslavement to the victim; if already a slave, he was scourged and thrown to his death from the Tarpeian rock.²² The “nonmanifest” thief—whose guilt was to be inferred from, for example, possession of stolen goods—was subject only to a twofold restitutionary penalty.²³ The manifest/nonmanifest distinction is iterated in the writings of Gaius, a Roman legal scholar of the second century A.D.; there are, however, grounds to wonder how much of Gaius’ discussion is simply an uncritical recitation of earlier law, for Rome had by his time developed a more discerning and complex law of stealing.

A millenium or so after Gaius, Anglo-Saxon and early English law maintained the distinction between manifest and nonmanifest thievery, emphasizing the seriousness of conduct that threatened the peace and security of the home. Bracton, in the thirteenth century, took a more interesting view of the distinction between the types of theft. He extended the concept of manifest thief to include one caught with the stolen goods in his hands, but made clear that the victim had no right to kill the manifest thief unless he apprehended danger from him.²⁴ It is conjectural whether Bracton’s analysis was borrowed from Roman law or, as Stephen believes,²⁵ simply an instance of similar customs arising in two societies at similar stages of development. English law also recognized from an early date that larceny could be committed by taking not only from an enclosure, but also from the victim, provided the taking was “trespassory,” *vi et armis*.²⁶ Thus was the theme continued of taking from possession.

Bracton’s concerns are not hard to understand. He sought to encourage resort to legal tribunals. Hence, he expressly limited the circumstances under which the thief could be killed. The manifest thief, caught breaking in or with the goods, was a disturbing element in the community, for his capture brought risks of private violence in retribution for a perceived and serious wrong. From Bracton’s time onward, the distinction between manifest and nonmanifest stealing became increasingly a matter of the sort of evidence required to convict: both types of theft were punishable, but the alleged thief not caught red-

21. E. CLARK, HISTORY OF ROMAN PRIVATE LAW: PART III, REGAL PERIOD 617 (1919).

22. INST. GAIUS 3.189.

23. *Id.* 3.190.

24. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 144b.

25. See 1 J. STEPHEN, *supra* note 14, at 132.

26. See G. FLETCHER, *supra* note 2, § 2.2.1.

handed stood a better chance of acquittal.²⁷

The related insistence upon theft being "manifest" in the sense of trespassory is not evidentiary, but concerns the perceived harm done by the thief. Neither early Roman law nor English feudal and manorial law placed emphasis upon property as we understand that term. Neither society based its social relations upon commerce, and neither displayed a highly developed sense of the institution of property as the exclusive right to use and dispose of a thing. One's lawful possession of a beast, a plow, or a store of feed was not regarded as proprietary in the sense bourgeois law makes us familiar with; in feudal England, for example, possessing these things was an incident of a complex set of social relations based upon the reciprocal duties and obligations inherent in the concepts of fealty and vassalage.²⁸ The rules against stealing were designed to interdict and punish conduct that risked disturbing public order by interfering with a right more appreciated than the right to "own" something—the right to possess and "use" it.

C. *The Law of Theft and Its Relation to the Right of Property*

We have briefly surveyed the law of stealing as it protected interests perceived in early Roman and common law. If my thesis is right,

27. Interestingly, being caught with stolen goods was of less significance in the towns than in the country. A townsman caught with stolen goods could escape criminal liability by swearing that he had bought on the open market and did not know the seller. Catching thieves gave way to a bourgeois interest in the security of commercial transactions. See M. TIGAR, *supra* note 1, at 93.

28. As I have written elsewhere:

In the uncertainty of feudal society, possession of property was the essence of ownership; paper rights were worthless without a system to ensure their speedy and unquestioned recognition. The farmer on his plot, the peasant with a herd of sheep, the small artisan with his supply of wool—all regarded possession as the primary token of their rights. Similarly, the contracts of sale along the Mediterranean littoral prior to 1000 are really nothing more than receipts given by the seller to the buyer to acknowledge payment of the price and to transfer physical possession of the property. Often, these briefest of documents mention no legal provisions at all, and some simply warn that anyone disturbing the acquirer's possession shall "incur the wrath of God and suffer with Judas the torments of eternal hell." Others mention that "ecclesiastical and Roman law" require a writing to evidence the sale. These primitive documents were little more than "fossil remains" of Roman legal tradition.

By the end of the eleventh century, however, in northwest Italy and later along the trade routes that led north and west, the Roman notion of sale had begun to reappear in contracts. The single most important legal idea to come out of this period is that of the contract as a uniting of wills, reflecting promises of one, two, or more people, which, *because of a legal system which exists to enforce them, are binding without any other formality*. Specifically, the newer contracts do not require *tradition*—the handing over—of the object sold or of some ritual portion of it to validate a sale. A contract of sale is entered into and reflected in a writing. This contract obliges the seller to deliver the item contracted for, and the buyer to deliver the price. That is the essence of the Roman-law contract of sale, which was bilateral and rested upon good faith, and sharply separated this contract from the delivery of the item sold and the payment of the price—the *agreement* to do these things was its essence.

M. TIGAR, *supra* note 1, at 66-67.

we would expect to see the development of legal rules more overtly based upon protection of property rights as social conditions change and the institution of property is recognized. That we can trace such a development in Roman law casts doubt upon the analysis of those who have argued that early English law about theft took up where the Romans had left off.²⁹

By the first century A.D., Rome was a considerable commercial power in the Mediterranean. It had developed a body of laws and legal procedures appropriate to its position as entrepot to the civilized world. The Roman law of contract and property, as summarized and codified from the first century onward, became the legal foundation for West European merchant capitalism in the wake of the Crusades.³⁰

We should not be surprised to find, therefore, that Roman legal texts anticipate questions that bedeviled English judges centuries later, when English commercial capitalist development got underway. An effort to push the contours of stealing out far enough to protect the right of property as it was understood by the owning class at a particular stage of social and economic development is evident in Justinian's *Institutes*, which restate the Roman law as of the early sixth century. The most significant passage is this: "[T]heft occurs not only when a person removes the thing of another with a view to appropriating it but, generally, whenever someone interferes with the property of another without the owner's consent."³¹ This, in essence, is a rule about stealing shorn of impedimenta of the sort that troubled common law judges centuries later as they sought to vindicate ownership—*dominium*—and to expand the concept of theft beyond trespassory interference with possession. Justinian goes on to state and resolve cases bearing remarkable similarity to the familiar classics of the common law that are treated in more detail later in this Article:

Hence, if a creditor use the pledge or a depositee the thing left with him or if a person use for one purpose a thing put at his disposal . . . for another, theft is committed; for instance . . . if a person ride a horse which was lent him . . . further than was contemplated [P]ersons who use a borrowed thing for a purpose other than that for which it was lent commit theft only if they are aware that they do so without the owner's consent or that, did he but know of it, he would not permit it; . . . for theft

29. Fletcher suggests this to be the case, but omits any discussion of Justinian's views. He thus fails to notice the connection between Roman social conditions and Roman theft law. See G. FLETCHER, *supra* note 2, § 1.3.1.

30. See generally M. TIGAR, *supra* note 1, at 58-75 (outlining the spread of Roman legal concepts, along with their underlying ideology, during the late Middle Ages).

31. INST. JUST. 4.1.6.

cannot be committed without the intention to steal.³²

Justinian also deals with what Fletcher has called the problem of staged larceny.³³ Suppose, he says, Titius incited Maevius' slave to steal Maevius' goods. The slave reports this overture and Maevius, attempting to catch Titius, authorizes the slave to take some goods to him. Justinian claims to have looked at the "ancient jurists" and to have rejected their "sophistry." Titius is liable to penal actions for theft and for corrupting a slave.³⁴

This passage from Justinian contains an astonishing number of insights into the Roman social and legal system, as well as many interesting parallels to legal issues that arose in England a thousand years later. The text begins with a frank recognition that theft is not simply an interference with possession. This theme is taken up again as Justinian declares that the intent to interfere with the property right of another, although impossible of achievement, may be the basis of liability.

Justinian has no trouble carrying through his analysis of the intent element in the law of theft, and his two examples—riding off with a borrowed horse and misusing the proceeds of a loan or deposit—have, as we shall see, interesting parallels in the cases that formed the core of the common law's understanding of theft.³⁵

We find in this passage little of the confusion that attended the English common law's insistence that larceny required a trespassory taking from possession, meaning that in the borrowed horse case the defendant had to have the intent to steal when he rode off. Justinian makes clear that intentional interference with *dominium* is the essential element, that is, the use of property other than as agreed. Such a breach would, at Roman law as at common law, give rise to a contract action.³⁶ But the *Institutes*, focusing upon the element of intent, also make the conduct stealing if the requisite intent is present at the moment of misappropriation.³⁷

It is not surprising that the *Institutes* outlined a law of theft that appeared to anticipate in many respects the legal debates of nineteenth

32. *Id.* 4.1.6-7.

33. See G. FLETCHER, *supra* note 2, § 2.1.3.

34. INST. JUST. 4.1.8.

35. See *infra* subpart II(D).

36. INST. JUST. 4.1.19. At Roman law, the action would have been called deposit. See *id.*

37. I am aware that theft, in Roman law, was generally not "prosecuted" as a crime, in the sense that the state brought a charge against the accused. Rather, the victim sued the thief, exacting the penalty and obtaining restitution. The action was clearly penal, however, analogous to appeals for felony at early common law. See T. PLUCKNETT, *supra* note 17, at 117, 121-223; M. ROUSSELET, *HISTOIRE DE LA JUSTICE* 19-20 (4th ed. 1968).

and twentieth century England and America. Protection of relatively abstract property rights through laws that focused upon the intent to steal rather than upon a manifest interference with possession was natural, perhaps essential, in a society that had created capital-pooling and banking systems appropriate to its stage of development. Other texts than the *Institutes* could be summoned in support of the conclusion that the Roman definition of theft extended to any intentional interference with any movable item of property, sufficient to deprive the owner of the benefits of ownership.³⁸

Neither Fletcher nor Hall has commented upon these portions of the *Institutes*. Yet, taken together with even a cursory analysis of Roman social history, these words bear critically upon the relation between theft law and social and economic forces.³⁹

D. The Common Law Seeks to Define Theft

Much has been written about the sometimes strained reasoning of larceny cases decided between the fifteenth and the eighteenth centuries. It would serve no good purpose to catalog those cases here.⁴⁰ They, and the statutes passed in response to some of them, have a common theme: the contours of theft offenses are gradually expanded to permit punishment of every intentional interference with the owner's undisputed dominion over his property. The law of theft developed on two fronts: first, new statutes and judicial doctrine criminalized forms of taking that did not involve trespassory interference with possession; second, the catalog of things that could be stolen was enhanced.

1. Erosion of the Possession Requirement.—The *Carrier's Case*⁴¹ is an important signpost on this road, though there is little agreement which way it points. A carrier received bales of dyestuff to transport to Southampton. Along the way, he broke the bales open and converted the contents to his own use. Some part of the merchandise was seized by the Sheriff of London, who claimed that because the taking was felonious, the goods were forfeit to the Crown as waif. The merchant apparently contended the contrary, though he also argued that as an

38. See 1 J. STEPHEN, *supra* note 14, at 30-31; INST. JUST. 262-67 (J. Thomas trans. 1975) (comments of translator).

39. Interestingly, Sir James Fitzjames Stephen, in his late nineteenth century classic on the history of criminal law, paid careful attention to at least some of the Roman texts and found the thread that later writers missed. See 1 J. STEPHEN, *supra* note 14, at 29-39.

40. For a brief history, see W. LAFAVE & A. SCOTT, *supra* note 10, § 84; see also sources cited *supra* note 14.

41. Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (Ex. Ch. 1473), reprinted in 64 SELDEN SOC'Y 30 (1945).

alien who was in England to trade, the safe conduct granted him by the Crown overrode the Crown's right to the goods.

The judges in the Exchequer Chamber could not agree on a rationale, although a majority of them agreed that the taking was felony. As Fletcher notes, Lord Chokke's opinion appears to have been taken in later years as the rule of the case.⁴² Chokke reasoned that the carrier was given the bales, and not the contents. When he broke them open, his lawful possession was terminated and he had committed larceny.⁴³ There was a new "taking," against the owner's will and hence *vi et armis*.⁴⁴ This "breaking bulk" exception was an important part of the law of larceny until later legislation made such sophistry unnecessary.

Fletcher has criticized both Stephen and Hall for their views of the case.⁴⁵ Stephen wrote that it reflected judicial solicitude for alien merchants, who were under the Crown's special protection.⁴⁶ Hall put the case firmly in the context of fifteenth century commerce, citing the importance of expanding trade brought to England by foreign merchants.⁴⁷ Fletcher prefers to regard the "breaking bulk" exception as expressing a preference for requiring "manifest criminality" to convict for larceny. He rejects the view that the *Carrier's Case* represented an accommodation of the law to the interests of the merchant bourgeoisie. He continues to believe that

[i]f it is the case that social and economic forces influenced the Carrier's Case, then one should have expected the opposite result. It would have been much easier simply to hold that the taking was not felonious. This would have resulted in the return of the property to the foreign merchant.⁴⁸

He has developed the same thesis, ably and at length, in *Rethinking Criminal Law*, arguing that the court's conclusion that the taking was a felony complicated matters by requiring the further holding that the safe conduct prevented forfeiture.⁴⁹

I think that Fletcher is wrong and that Hall is basically right. The

42. See G. FLETCHER, *supra* note 2, § 2.1.2, at 67. It is interesting that Fletcher should rest his argument on the "breaking bulk" language he quotes from Chokke's opinion, for the major portion of that text does not appear in the Year Book manuscript but is a later interpolation. 64 SELDEN SOC'Y at 32 n.2.

43. 64 SELDEN SOC'Y at 31-32.

44. The judges went on to hold that the merchant's safe conduct interdicted the forfeiture to the Crown. *Id.* at 34.

45. See G. FLETCHER, *supra* note 2, § 2.1.2, at 68-70.

46. See 3 J. STEPHEN, *supra* note 14, at 139.

47. See J. HALL, *supra* note 6, at 14-33.

48. Letter from George Fletcher to the author (April 10, 1984) (responding to an early draft of this Article) (copy on file with *Texas Law Review*).

49. G. FLETCHER, *supra* note 2, § 2.1.2, at 69.

Carrier's Case is really two cases, the first a consideration of the definition of larceny and the second an equally significant example of the role of English courts and English law in disputes involving merchants. The judges' efforts to accommodate the law of larceny to the economic reality of merchant capitalism carried on over routes of trade, and centered in fairs, markets, and towns, constitute a small study in the techniques of common law adjudication. Most of the judges agreed that the carrier had committed larceny, and they struggled to accommodate this notion to the contours of the common law offense. Indeed, the reasoning of Vavasour's opinion is remarkably similar to Justinian's discussion of the faithless bailee, for he focuses upon the breach of the agreement to carry the goods to Southampton.⁵⁰ The rule of the *Institutes* was clear: "[I]f . . . a depositee . . . use for one purpose a thing put at his disposal . . . for another, theft is committed . . ." ⁵¹

This first branch of the case reflects a type of reasoning that was to characterize for two centuries thereafter the efforts of common law judges to assimilate the set of rules concerning property that had become a mainstay of the merchants' legal ideology. They did so in the knowledge that if the common law courts did not provide a home for merchant disputes, the prerogative courts would probably do so. This dispute reached its denouement during the English Revolution, as I and others have written at greater length.⁵²

The second branch of the *Carrier's Case* has to do with the issue of forfeiture. The Chancellor found that the goods were not forfeit because the King had given his safe conduct, a special favor merchants had found at Court. More significantly, the Chancellor held that the merchant could not be put to trial on the forfeiture issue under common law rules and procedures, for merchants were under the King's jurisdiction. This jurisdiction, said the Chancellor, "shall be according to the law of nature which by some is called the law merchant, which is law universal throughout the world."⁵³ This language, evoking the theme of the *ius gentium* so dear to the champions of merchant interests, clearly recognizes that the law will bend to class interest. This theme was to be replayed and modified, as the centuries wore on, first by admitting evidence of merchant custom in common law courts, and finally by simply declaring the law merchant to be the law of the

50. 64 SELDEN SOC'Y at 31.

51. INST. JUST. 4.1.6; see *supra* notes 31-34 and accompanying text.

52. See B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND: 1603-1641* (1973); M. TIGAR, *supra* note 1, at 211-27, 257-67.

53. 64 SELDEN SOC'Y at 32.

land.⁵⁴

In effect, Fletcher asks why, if the merchant interest was to be served, the court did not do so more cleanly. The short answer is that the interplay of jurisdictional rivalry and substantive disagreement between the common law and prerogative courts, together with the demonstrable inflexibility of the common law, would have forbidden doing so. The case represented a clear judicial effort to accommodate merchant interests and the Crown's official posture of encouraging mercantile activity, while doing minimal violence to the other class-based interests at stake.

The courts were not always able to enunciate a theory that swept the defendant's conduct into some arguably trespassory invasion of possessorial immunity. In 1799, a bank clerk named Bazeley pocketed a hundred pound note given him by a bank customer for deposit to the customer's account. Bazeley made the credit entry, so the victim was the bank and not the customer. He was found not guilty. The bank never had "possession" of the note, the evidence being undisputed that Bazeley put it in his pocket without first putting it in the cash drawer; thus, he could not have taken from the bank's possession.⁵⁵ He could not even be convicted on the theory of those cases dealing with misappropriation by servants, who were said to have custody of their masters' goods, although possession remained in the master.⁵⁶

Bazeley led to passage of England's first general embezzlement statute in 1799.⁵⁷ Statutes passed earlier in the eighteenth century had dealt with embezzlement by employees of certain public or quasi-public entities,⁵⁸ and an early seventeenth century law punished workers who embezzled wool delivered for spinning and weaving.⁵⁹ With these exceptions, until 1799 taking by an agent or servant who had lawful possession was a breach of trust that could be remedied only by filing a civil suit.

The embezzlement legislation and the extension of the concept of taking from constructive possession were designed to protect class interests. England was moving from mercantile to industrial capitalism. Units of trade and commerce were growing larger; the image of the

54. See M. TIGAR, *supra* note 1, at 271.

55. *Rex v. Bazeley*, 2 Leach 973 (3d London ed. 1800) (Case CCCXI), 168 Eng. Rep. 517 (Cr. Cas. Res. 1799).

56. See J. HALL, *supra* note 6, at 38-40; W. LAFAVE & A. SCOTT, *supra* note 10, § 85, at 625.

57. 39 Geo. 3, ch. 85 (1799).

58. 5 Geo. 3, ch. 25 (1765) (post office); 24 Geo. 2, ch. 11 (1751) (South Sea Company); 15 Geo. 2, ch. 13 (1742) (Bank of England).

59. 7 Jac., ch. 7 (1609).

solitary merchant or artisan gave way to corporate and partnership forms employing wage labor. A misappropriation between partners or joint venturers might be the stuff of which civil law suits could be made, but the hired clerk's defalcation was a matter for criminal prosecution, a hanging matter.

English law eroded the requirement of taking from possession in two other important respects. First, the offense of larceny by trick was recognized—some would say invented—by the 1779 case of *Rex v. Pear*.⁶⁰ Pear hired a horse, saying to the owner that he was going to Surrey. In fact, he rode to Smithfield and sold the horse. Reports of the case are in disarray, and two inconsistent versions of the judges' decision coexist.⁶¹ The jury apparently found that Pear had the intent to sell when he hired the horse. According to the report of East, which in later years was to be regarded as authoritative,⁶² this was enough to sustain a conviction, because the taking was trespassory in the sense of having been achieved by deceit. Thus, possession remained in the owner until the time of the conversion. Regardless of whose version of the case is accepted, *Pear* represents a step towards criminalizing conduct involving an interference with property rights rather than a trespassory invasion of possession.

Second, the eighteenth century saw expansion by statute and judicial decision of the crime of obtaining money or other property by false pretenses. A statute of 1541 had made it a misdemeanor to obtain goods by use of counterfeit letters or false tokens.⁶³ In 1757, the offense was extended to cover any acquisition of property by false pretense with the intent to cheat or defraud the owner.⁶⁴ After some initial hesitation, English judges applied the statute to the full extent of its arguable reach.⁶⁵ False pretenses soon became difficult to distinguish from larceny by trick, largely because the difference was purely technical: to commit false pretenses, the offender had to cause the victim to part with title to the goods, and not simply with possession.

Thus, by the beginning of the nineteenth century, English criminal law had developed a patchwork of theft offenses that criminalized almost any intentional interference with property rights. The importance

60. 1 Leach 253 (3d London ed. 1800) (Case CV), 168 Eng. Rep. 208 (Cr. Cas. Res. 1779); see G. FLETCHER, *supra* note 2, § 2.3, at 92-93.

61. The matter of the two reports is discussed in G. FLETCHER, *supra* note 2, § 2.3, at 92-93.

62. The modern view of *Pear* is illustrated by, for example, *Bell v. United States*, 103 S. Ct. 2398, 2400 (1983) (holding that the Bank Robbery Act, 18 U.S.C. § 2113(b) (1982), proscribes common law larceny as well as the obtaining of money under false pretenses).

63. 33 Hen. 8, ch. 1 (1541).

64. 30 Geo. 2, ch. 24 (1757).

65. See J. HALL, *supra* note 6, at 49-53.

of possession was de-emphasized, while that of ownership—*dominium*—was elevated.

2. *Expansion of the Concept of Res.*—English theft law developed in the eighteenth century not only with respect to the notions of possession and ownership, but also with respect to the things that might be stolen. In *Carver v. Pierce*,⁶⁶ the plaintiff sued for slander because the defendant had said, “Thou art a thief, for thou hast stolen my dung.” Was dung an article the taking of which was larceny? The Court decided that if it was simply laying about on the ground, the answer was no, and the plaintiff had not been slandered, for slander requires that the words be defamatory. In this instance, the defendant was alleged to have accused the plaintiff of a crime. If the dung had been piled up, however, taking it could be theft.⁶⁷ Other cases used similar analyses: the judges agreed that one could not steal a wild animal, but one that had been captured and caged could be the subject of theft.⁶⁸

It was not simply that the taking would then be from the possession of the owner. Rather, the courts applied a sort of labor theory of value: the definition of value was the expenditure of labor power to bring a thing from its natural state into some usable form.⁶⁹

As for choses in action, Lord Coke had said in 1584 that they could not be the subject of larceny,⁷⁰ although his decision has been much criticized as resting on a misreading of the old cases.⁷¹ Parliament passed a statute in 1729 making it felony to steal a chose in action, such as a check.⁷² This development coincided with the growth of joint stock companies and banking interests in the City of London.⁷³ From the early eighteenth century on, the legislative history of English theft legislation is dotted with special statutes respecting items that Parliament thought important to single out as the subject matter of larceny.⁷⁴

We see, therefore, a change in the law of theft that parallels and

66. 82 Eng. Rep. 534 (K.B. 1648).

67. *Id.*

68. See J. HALL, *supra* note 6, at 83.

69. See K. RENNER, *supra* note 1, at 89-90.

70. Calye's Case, 8 Co. Rep. 32a, 77 Eng. Rep. 520 (K.B. 1584).

71. See 3 J. STEPHEN, *supra* note 14, at 143-44.

72. 2 Geo. 2, ch. 25 (1729). Roman law punished one who stole a paper evidencing indebtedness as though he had stolen a chattel of the same value. DIG. JUST. 47.2.27. See 1 J. STEPHEN, *supra* note 14, at 30-31.

73. See J. HALL, *supra* note 6, at 62-67.

74. See *id.* at 87-92.

reflects the profound social changes in English society. As I have noted elsewhere, the seventeenth century opened with a newly forged alliance between the common-law lawyers and the bourgeoisie.⁷⁵ The English bourgeoisie emerged from these struggles poised for large-scale commercial capitalist ventures and entered the nineteenth century prepared for industrial capitalist expansion. In the realm of private law, these developments were mirrored in the fields of property and contract. We can also observe, in the history of capitalist development, the self-conscious use of theft law not simply to enforce the right to property as newly defined, but to suppress and eliminate vestigial systems of social relations based upon principles other than property and contract.

III. Theft Law as Cudgel: England and Germany

The law of theft sometimes did more than mirror class interest.⁷⁶ It was used as a cudgel for enforcing that interest. In 1723, Parliament passed the “Black Act,”⁷⁷ ostensibly a three-year temporary measure, which was not repealed until the nineteenth century. Indeed, from 1723 until about 1775, the list of capital crimes involving the nonviolent appropriation of property was steadily lengthened.⁷⁸ The “Blacks” were peasants, laborers, and others who were being herded out of their traditional means of livelihood in the forests of Windsor and East Hampshire. Their name—“Black”—derived from a practice of blacking their faces as a disguise when engaged in poaching or in attacks upon members of the gentry.

The Black Act defined about one hundred separate felonies, all punishable by hanging. These included arson, blackmail, and forms of mob violence. For our purposes, the most interesting part of this extraordinarily savage legislation is that it made felonious the taking of rabbits from a warren, fish from a pond, or deer from a forest, as well as the cutting of any tree. To be sure, the taking or cutting had to occur in an enclosed park, garden, or forest; but the Crown and the wealthy

75. See M. TIGAR, *supra* note 1, at 211-27, 257-74.

76. See generally E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975) (recounting the background of the Black Act).

77. 9 Geo. 2, ch. 22 (1723).

78. The repeal of statutes punishing nonviolent appropriation of property with death was a gradual process that began early in the nineteenth century, but gained the most ground as part of the major reforms of 1832. Parliament had begun to balk at creating new capital offenses against property late in the eighteenth century; this reluctance coalesced with the reform movement, and by 1839 the statutes of England contained only one capital offense against property unaccompanied by violence against a person. This history, complete with citations to all the statutory material, is contained in I L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 733-34 (1948). For discussions of the eighteenth century developments, see D. HAY, P. LINEBAUGH, C. WINSLOW, J. RULE & E.P. THOMPSON, *ALBION'S FATAL TREE* (1975); E.P. THOMPSON, *supra* note 76.

gentry owned most of the enclosed land. The livelihood of the Hampshire peasantry depended upon access to things that abounded in the wild state: deer, fish, and rabbits to eat, and wood for burning and building. The Black Act and its extremely harsh enforcement essentially criminalized a peasant way of life.

The Black Act was not unheralded. The peasantry had been progressively denied historic use rights for some time, and many of the Act's prohibitions are foreshadowed in earlier legislation. The Act tells us much about English politics and about an important period in English history. Concerning the Whigs, its authors and enforcers, E.P. Thompson has written:

The Whigs, in the 1720s, were a curious junta of political speculators and speculative politicians, stock-jobbers, officers grown fat on Marlborough's wars, time-serving dependants in the law and the Church, and great landed magnates. They were the inheritors, not of the Puritan Revolution, but of the calm and controlled Settlement of 1688. The libertarian rhetoric passed down from their forefathers they wore awkwardly, like fancy-dress. They derived what political strength they had in the country from the fact that they offered themselves as the only alternative to civil war or to a Stuart and Catholic repossession of the island.⁷⁹

The danger of public disorder from the Blacks' raids, firing of houses, and murder of game wardens was no less severe than social conflict in other times and places. Making such conduct a capital felony can hardly be considered a departure from prior law. Making hanging matters of fish stealing, or of going disguised in a wood, *was* a clear departure. It was a signal that the survival of older systems of social relations would not be tolerated. Parks and forests were to be fenced, marked off, and regarded as the private property of some person, even if that person put the land to no productive use. Once that was done, the deer, fish, rabbits, and trees within were also endowed with the status of private property, so that taking them subjected one to punishment.

Parliament thus legislated away the means by which many people survived, providing a substantial encouragement to leave the land and swell the ranks of the urban proletariat. How can we analyze what Parliament had done to the various legal interests at stake? The forest had been a source of food, fuel, and timber. If a yeoman had killed a deer and carted it home, and then someone had taken it, that would

79. E.P. THOMPSON, *supra* note 76, at 198.

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have been larceny. The possession conferred by expenditure of labor would have been interrupted. The Black Act recognized a law of theft based not upon possession—for no one could possess a forest or the creatures in it—but upon a determinate relationship of *dominium*, an abstract relationship between a person and a thing, betokening the right to exclude all use by all others.

One significant historical parallel is an article written in 1842 by Karl Marx, entitled *Debates on the Law of Thefts of Wood*.⁸⁰ Marx's interest in the redefinition of theft law to the disadvantage of the German peasantry impelled him to begin the research that first appeared in *A Contribution to The Critique of Political Economy*.⁸¹ The peasants of Mosel had been accustomed from time immemorial to gather wood for use in cooking and heating. This indeterminate right to take and possess a means of sustenance did not strictly accord with determinate relations of property. Indeed, as we shall see, a formal legal system rigorously defining property excluded recognition of the peasants' customary right. The legislative solution criticized by Marx was to treat and punish as theft the taking of wood or even fallen limbs. Marx wrote:

But whereas these customary rights of the aristocracy are customs which are contrary to the conception of rational right, the customary rights of the poor are rights which are contrary to the customs of positive law. . . . Little thought is needed to perceive how *one-sidedly* enlightened legislation has treated and been compelled to treat the *customary rights of the poor*, of which the various *Germanic* rights can be considered the most prolific source.

In regard to *civil law*, the most liberal legislations have been confined to formulating and raising to a universal level those rights which they found already in existence. Where they did not find any such rights, neither did they create any. They abolished particular customs, but in so doing forgot that whereas the wrong of the estates took the form of arbitrary pretensions, the right of those without social estate appeared in the form of accidental concessions. . . .

These legislations were necessarily one-sided, for all customary rights of the poor were based on the fact that certain forms of property were indeterminate in character, for they were not definitely private property, but neither were they definitely common property, being a mixture of private and public right, such as we find in all the institutions of the Middle Ages. . . .

80. I K. MARX & F. ENGELS, COLLECTED WORKS 224 (1975).

81. K. MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 19-20 (M. Dobb ed. 1970) (1st ed. London 1859).

Understanding therefore abolished the hybrid, indeterminate forms of property by applying to them the existing categories of abstract civil law, the model for which was available in Roman law.⁸²

The "abstract civil law" of which Marx speaks imposed upon the German peasantry the same set of assumptions that underlay the Black Acts: the right of property—*persona* and *res* united by a relationship of *dominium*—excludes by definition all claims to multiple or shared use based on custom, however longstanding.

In the civil law countries, the Roman "model" lay ready to hand, to be taken up and filled with the new content of capitalist social relations. In England, the story was a bit different: the firm implantation of the property norm into the legal ideology of the common law is one important theme of a process of social change that began in earnest under Henry VIII. By the end of the English Revolution, or at any rate by 1688, the process was virtually complete. The disorder, tumult, and other harms threatened by the Blacks are, under this view, side issues. The point is that, under the common law and at the hands of Parliament, these peasants possessed no right that the law was bound to recognize.

It would be difficult to find a more significant period of English criminal law than the century and more the Black Act stood on the statute books. The Act is powerful evidence that the definition of theft mirrors, enforces, and sharply illuminates the definition of property right imposed by a dominant class.

IV. Modern Trends in the Law of Stealing: New Forms of Property

By the mid-nineteenth century, statutes in England and the United States had imposed some order on the law of theft. Oddities persisted because of the difficulty of determining whether the defendant's conduct amounted to larceny, larceny by trick, false pretenses, or embezzlement.⁸³ Further complications arose because special interests obtained passage of laws that prescribed more severe punishment for certain kinds of theft—stealing a horse in the American West, for example.⁸⁴

Sir James Fitzjames Stephen proposed in the mid-nineteenth cen-

82. I K. MARX & F. ENGELS, *supra* note 80, at 232-33 (footnote omitted) (emphasis in original).

83. *See supra* notes 10-13.

84. *See, e.g.*, CAL. PENAL CODE § 487(3) (West 1970) (enacted in 1872) (also sheep, goats, pigs, and other animals); *see also* J. HALL, *supra* note 6, at 91 n.39 (turnips).

ture that larceny be defined as the taking of “any property whatever, real or personal, in possession, or in action, so as to deprive any other person of any beneficial interest at law, or in equity, which he may have therein.”⁸⁵ Under this proposal, the criminal law’s definition of larceny would have been coterminous with the developing civil law notion of property rights. Although Stephen’s proposal was not adopted, its advancement by one of the nineteenth century’s most influential legal figures is significant. Stephen wrote in the positivist century of English jurisprudence, in which an important theme was tracing rational lines of power and authority.⁸⁶ He regarded the common law theft offenses, with their statutory modifications, as a confusing patchwork in need of reform. He recognized two important issues in the development of theft offenses: criminal punishment of what would otherwise have been breaches of trust remediable in civil actions for damages, and the expansion, case by case and statute by statute, of the categories of property subject to the law of theft. Stephen proposed to make the law of theft simple and elastic. His proposal foreshadowed some significant twentieth century developments in the law.

The categories of “property” grow and change, as we have seen, with the growing complexity of capitalist social relations. This is all very well in a civil context, where the argument about interference with rights results in payment of money damages. When one enterprise hires an employee away from another and exploits knowledge the employee gained in his former position, a court may conclude that the new employer has appropriated something “belonging” to the former one. Indeed, the new employer may well have weighed precisely that risk and considered it a contingent cost of doing business. It would be quite another thing, however, to label the new employer and the employee thieves and to convict them of felonies on that account. A broad and vague definition of theft, such as Stephen proposed, invites prosecutors to chart new courses without waiting for new legislation and visits upon them a considerable unreviewable discretion in choosing targets. To return to the theme with which we began, we look at some recent illustrations.

A. Theft of Information and 18 U.S.C. Section 641

Title 18, United States Code, section 641, punishes one who “embezzles, steals, purloins, or knowingly converts to his own use or the

85. J. STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 129 (1863), quoted in J. HALL, *supra* note 6, at 101 n.67.

86. See M. TIGAR, *supra* note 1, at 290-93.

use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States”⁸⁷

When Daniel Ellsberg took the Pentagon Papers, he was prosecuted under section 641 for, among other things, stealing government property worth more than one hundred dollars.⁸⁸ When David Truong was prosecuted for allegedly passing copies of State Department cable traffic to the Socialist Republic of Vietnam, the government’s multicount indictment included a theft allegation.⁸⁹ Neither theft charge relied directly upon the alleged national security character of the information in these papers; the government’s theory would equally have applied to a “whistleblower” in the Environmental Protection Agency who gave a newspaper reporter a document outlining a plan to dismantle an agency program.

The offense of stealing government property does not, in these cases, require that the information be sold, simply that it be “worth” more than one hundred dollars. The value is established not by the cost of the pieces of paper themselves, but by some valuation of the information on them. In the Ellsberg and Truong cases, one measure of value was supposedly that which a foreign intelligence service would attach to the information. In the EPA example, evidence that newspaper reporters sometimes pay for “leads” or “leaks” would presumably be admissible. But neither Ellsberg, nor Truong, nor the hypothetical EPA employee has dispossessed the government of its information, even momentarily; the documents were simply copies of originals left in the file. Indeed, given the bureaucratic penchant for making multiple copies of everything, it is hard to imagine a case in which taking a document would so deprive the government.

We know why the government wants to prosecute the three leakers, and its reason has nothing to do with loss of information: it wants to warn those with access to government files that serious consequences attend unauthorized use. Yet there is no United States criminal statute that expressly proscribes such use.

These were the first celebrated theft cases involving government information in the post-World War II period. Ellsberg was a target of the Nixon administration, which had sought to prevent publication of

87. 18 U.S.C. § 641 (1982).

88. For capsule coverage of significant events in the Ellsberg case, dismissed by Judge Byrne because of government misconduct, see generally CONGRESSIONAL QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS 30-32, 46, 70-71, 121, 155 (1975); Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

89. *United States v. Truong Dinh Hung*, 629 F.2d 908, 911 (4th Cir. 1980).

the Pentagon Papers⁹⁰ and then embarked upon criminal prosecution when that effort was unsuccessful. The political history of the *Truong* prosecution is replete with evidence that the Carter administration saw the case as part of its effort to reclaim Presidential power that Nixon's resignation had placed in doubt and as an element of its plan to discredit the Vietnamese government and end public support for normalization of relations between Vietnam and the United States.⁹¹ We have, therefore, no trouble in understanding why the Justice Department turned to any available statute to punish Ellsberg and Truong, particularly a statute as broad and standardless as the government claimed section 641 to be.

Section 641 has been on the books since 1875 in much the same form it has today; its legislative history gives no hint that Congress intended it to apply to theft of government information.⁹² Moreover, a number of more specific statutes might be applied to such conduct.⁹³ Of course, under those other statutes, the government would have to prove additional elements, such as injury to the United States to the advantage of a foreign nation, and a relationship between the information and the national defense.⁹⁴

Section 641 contains a broad definition of theft—any “conversion”—and of property—any “thing of value.” By invoking it, the gov-

90. See *New York Times v. United States*, 403 U.S. 713 (1971).

91. See Brief for Defendant-Appellant Truong Dinh Hung at 11-12, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). See generally Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78 (1982) (discussing the conflict between national security and civil liberty).

92. See 18 U.S.C. §§ 100-101 (1940) (repealed 1948); Act of Mar. 4, 1909, ch. 321, § 47, 35 Stat. 1097, 1098; Act of Mar. 3, 1875, ch. 144, §§ 1-2, 18 Stat. 479, 479; *Truong*, 629 F.2d at 923-28.

93. For example, Truong was also prosecuted under several other criminal statutes: 18 U.S.C. §§ 793-794 (1982) (gathering, transmitting, losing, or delivering defense information); *id.* § 951 (agents of foreign governments); 50 U.S.C. § 783 (1982) (conspiring or attempting to establish totalitarian dictatorship). See *Truong*, 629 F.2d at 917-22; see also Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (discussing espionage statutes and other statutes concerning the publication of defense information). Hans Magnus Enzensberger has written:

State secret and espionage as legal concepts are inventions of the late nineteenth century. They were born out of the spirit of imperialism. Their victorious march begins in 1894 with the Dreyfus affair.

. . . The *mana* of the state secret communicates itself to its bearers and immunizes them, each according to the degree of his initiation, against the question; therefore they are free not to answer and, in the real sense of the word, are irresponsible. How many state secrets someone knows becomes the measure of his rank and his privilege in a finely articulated hierarchy. The mass of the governed is without secrets; that is, it has no right to partake of power, to criticize it and watch over it.

H. ENZENSBERGER, *POLITICS AND CRIME* 13 (1974). How much greater is this gulf between rulers and ruled when the former classify everything they know as property of an abstraction called “government.”

94. See 18 U.S.C. § 794(a) (1982); see also *Gorin v. United States*, 312 U.S. 19 (1941) (interpreting the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217).

ernment stakes out a claim about the right of property in the clearest possible terms. It claims that it is the owner—*persona*—and that the information is a *res* capable of being stolen. Its claim to *dominium* is that government, through its authorized agents, has the exclusive power to decide how and when the citizenry will have access to the knowledge contained in papers in government files, and that this control is exercised independent of any concern with classification, or national security, or even trade or business secrecy. The right to exclusive use and possession arises from the definition of the right of property itself. An examination of the legal background against which the Ellsberg and Truong cases were brought will help to demonstrate this process in action.

1. *Government Information as a Protectible Res.*—In *International News Service v. Associated Press*,⁹⁵ the Supreme Court considered the property rights of AP in news dispatches. INS, a rival service, was copying AP material from bulletin boards and sending it out over its wires, edited or unedited. Had INS “converted” a property interest of AP? The Court held the conduct to have been unfair competition and subject to injunction.⁹⁶ But the case evoked separate opinions from Justices Holmes⁹⁷ and Brandeis,⁹⁸ each of whom concluded that a property right should not be recognized in such goods.

The majority opinion, by Justice Pitney, held that “as against the public,” there is no property right in news, “gathered at the cost of enterprise, organization, skill, labor and money,” from the moment the news is published.⁹⁹ But, said the Court, there is a kind of “quasi-property” in news as between the two rival services.¹⁰⁰ This concept of quasi-property is of no analytical worth; it is a form of words used to justify an injunction on unfair trade practice grounds. Thus, the Court upheld an injunction prohibiting INS from using AP bulletins and published stories until enough time had elapsed to give AP a “jump” on the competition. Under Justice Pitney’s analysis, taking information probably would not be punishable as theft. He refused to recognize a right of property, enforceable against the public, in information as such.

Justice Holmes was more direct. He said, dissenting:

95. 248 U.S. 215 (1918).

96. *Id.* at 245-46.

97. *Id.* at 246.

98. *Id.* at 248.

99. *Id.* at 236.

100. *Id.*

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When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it.¹⁰¹

Holmes approved of the injunction because INS was in effect representing to the public that it had gathered this news and that the news was its product. This he was willing to term a species of “unfair trade.”

Justice Brandeis dissented in a characteristically thoughtful opinion. He wrote: “An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified.”¹⁰²

Brandeis went on to note that the attribute of property attaches to published works only by virtue of copyright and patent laws. Because it was not necessary to his analysis, he left undiscussed the status of information possessed by the government, which in general has no claim to statutory copyright.¹⁰³ And, although it would have been interesting for our purposes, he did not consider the question of whether the government’s information is “affected with a public interest.”

Brandeis concluded that an injunction was inappropriate because the myriad questions arising from classifying taking of information either as unfair trade or as a kind of conversion should be settled not in litigation but by the legislature: “Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news”¹⁰⁴

Recent cases focus more specifically upon the theft of information issue. In *Pearson v. Dodd*,¹⁰⁵ Senator Thomas Dodd of Connecticut sued columnist Drew Pearson for removing documents from the Senator’s files, copying them, and replacing them. The information thus obtained later appeared in Pearson’s column. The court declined to hold that Pearson had committed a conversion, because the Senator was deprived neither of the documents nor of the information contained in them.¹⁰⁶

A closely related problem arose in *Chappell v. United States*.¹⁰⁷

101. *Id.* at 246.

102. *Id.* at 250.

103. See *infra* note 113 and accompanying text.

104. 248 U.S. at 267.

105. 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

106. *Id.* at 706-07.

107. 270 F.2d 274 (9th Cir. 1959).

The defendant was charged with violating section 641 by using an on-duty airman's labor to repair his apartment. The Ninth Circuit held that this could not be conversion, because, at common law, the phrase "thing of value" could not extend to intangibles such as labor power.¹⁰⁸

In these cases, judges seem willing to impose limits upon the types of *res* that theft laws will protect. Courts are particularly reluctant to extend theft law to intangibles. But when the intangible in question is information in the government's hands, they are far less likely to endorse similar restraints.

2. *Copying as Theft.*—In the theft of information cases, defining the *res* does not solve all the prosecutor's problems. Typically, the alleged thief does not deprive the complainant of the information, but only discovers it and then either discloses it orally or makes a copy of the documents embodying it. In *United States v. Bottone*,¹⁰⁹ a leading case involving a nongovernmental victim, the proprietary nature of the information was sufficient to sustain a claim that the defendant violated a recognizable right to exclusive use.

In *United States v. DiGilio*,¹¹⁰ the court upheld a conviction for copying FBI documents and selling them, but did so on the theory that use of government paper, copying machines, and "time" by a government employee sufficiently proved a technical larceny.¹¹¹ The court did not, however, reject the government's theory that section 641 is violated by depriving the government of a right to exclusive possession of its information.¹¹²

At least three other provisions of federal law argue against the construction of section 641 advanced by the government in *DiGilio*. First, the United States government, unlike the British Crown, has no "official copyright."¹¹³ This lacuna suggests that the federal govern-

108. *Id.* at 278.

109. 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966).

110. 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The Eleventh Circuit has recently addressed the issue of theft of intellectual property in the context of "pirated" video and audiotapes protected by copyright. *United States v. Drum*, 733 F.2d 1503, 1506 (11th Cir. 1984). The *Drum* court cited *Morissette v. United States*, 342 U.S. 246, 271-72 (1951) (stating that conversion may consist of use "to an unauthorized extent of property placed in one's custody for a limited use"). See also *United States v. May*, 625 F.2d 186 (8th Cir. 1980) (holding that National Guard general's unauthorized use of military aircraft was not sufficient interference with government right to amount to conversion).

111. *DiGilio*, 538 F.2d at 977.

112. *Id.* at 978.

113. "Copyright protection under this title is not available for any work of the United States government . . ." 17 U.S.C. § 105 (1982). The government may be able to acquire a copyright by assignment or escheat, or may obtain protectible information in its capacity as contractor for goods or by its purchases of manufactures—military goods, for example. These minor exceptions

ment should have no property right in information.

Second, Professor Thomas Emerson has suggested that there may be a first amendment right to obtain government information.¹¹⁴ Whether or not one agrees with this view, it is beyond question that the conduct of Ellsberg and Truong sought to be proscribed under section 641 was pure communication. The first amendment protects, at least arguably, every such communication.¹¹⁵ Exceptions to this command, such as sedition,¹¹⁶ libel and slander,¹¹⁷ obscenity,¹¹⁸ and espionage,¹¹⁹ must be narrowly and precisely drawn. To punish as theft an appropriation of government information without regard to the character of the information poses serious constitutional issues.

These issues are analogous to those presented by other government claims of proprietary interest. Government may own, much as a private citizen does, a house, an airplane, or a tract of land. If, however, the property is suitable for expression of ideas about matters of public concern, the first amendment seriously limits the sorts of restrictions government can impose upon such expressive activity. In short, government cannot interpose claims of private property interest as a talismanic phrase that negates citizen claims under the first amendment. As Justice Roberts said decades ago: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹²⁰ One need not trace the precise boundaries of the government's power to restrict first amendment activities in public streets, parks, and halls; the point is that the government's broad-gauge

do not affect the point here. The information we are discussing relates—at least in cases such as *Truong* and Ellsberg—to the processes of ostensibly republican government in making political decisions on behalf of the citizenry. No one would assert that such information would or should be copyrightable by the government.

114. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 673 (1970).

115. See Nimmer, *supra* note 88, at 322.

116. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that the state can restrict advocacy of action only if such expression is directed toward producing imminent lawless action and is likely to accomplish that end); Linde, *Clear and Present Danger Re-examined: Dissonance in the Brandenburg Concerto*, 22 *STAN. L. REV.* 1163 (1970).

117. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); T. EMERSON, *supra* note 114, at 517-62.

118. See T. EMERSON, *supra* note 114, at 467-516.

119. See *Gorin v. United States*, 312 U.S. 19 (1940); Edgar & Schmidt, *supra* note 93. It is worth noting that in the 1930s, an appropriation of cryptographic information was not prosecuted because prosecutors believed no statute was violated. This led to an amendment of the criminal code. *Id.* at 942.

120. *Hague v. CIO*, 307 U.S. 496, 515 (1939). If title to the government's *realty* cannot be invoked as a talismanic and complete reply to a first amendment claim, the same should be true of a claimed title to some ill-defined intangible personality.

assertion of a property right must yield to a first amendment-based consideration of its purposes for placing information beyond the public reach.

Third, the Freedom of Information Act¹²¹ contains a presumption that all information in the government's possession is subject to mandatory disclosure, with the exceptions noted in the statute. While the Act has not proven easy to enforce, its existence argues against any broad governmental right to exclusive possession.

Further, the "takings" in question do not deprive the government of the information, only of the exclusive use of it. Section 641—under the government's theory—does not require proof that the taking harmed the government; it need not be proved, for example, that the information related to the national defense. Any nonpublic information, from war plans to White House wallpaper sketches, is subject to the statute.

Thus, the government's view of section 641 reifies a concept of property that strikes directly at the citizenry's customary use rights. These rights, like the indeterminate rights of the forest-dwellers in eighteenth century England and nineteenth century Germany to gather their means of sustenance, are nowhere codified. Their existence is suggested by the constitutional and statutory provisions I have mentioned, but these provisions are more suggestive than prescriptive. One had simply assumed that, in a democratic society, government would not stand itself in opposition to its citizens and claim an exclusive proprietary right in its information without some further showing that the character of a particular item of information entitled it to special protection.

3. *The Breadth of Section 641 and the Fragility of First Amendment Rights.*—The theft of information cases illustrate how powerfully the private law institution of property governs the relationship between every "thing" and a determinate person or entity, and how fragile is the structure of "rights" defined in general terms by the matrix of custom and general constitutional principles. By making and sustaining a definitional argument about its dominion over property, the government wins out over objections that cannot be fitted into a specific mold. If the government's right is property, conversion consists of interference with the exclusive nature of that right. Marx commented wryly on a

121. 5 U.S.C. § 552 (1982). See generally CENTER FOR NATIONAL SECURITY STUDIES, LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT (7th ed. 1982).

similar definitional argument in his discussion of the “law of thefts of wood”:

At the very beginning of the debate, one of the urban deputies objected to the *title* of the law, which extends the category of “*theft*” to include simple offences against forest regulations.

A deputy of the knightly estate replied:

“It is precisely because the pilfering of wood is not regarded as theft that it occurs so often.”

By analogy with this, the legislator would have to draw the conclusion: It is because a box on the ear is not regarded as murder that it has become so frequent. It should be decreed therefore that a box on the ear is murder.¹²²

The notion that invocation of a property right ends the need for detailed analysis of the government’s power to withhold information from its citizens gained powerful support in *Snepp v. United States*.¹²³ Snepp, a former CIA employee, had signed a contract of employment reciting that his position was one of “trust” and agreeing to prepublication review of any work relating to the CIA, its activities, “or intelligence activities generally.” Snepp wrote and published a book about CIA activities in Vietnam without submitting it for review. The Supreme Court upheld imposition of a constructive trust upon the profits of the book and an injunction against further violation of the agreement.¹²⁴

Snepp’s book has not been the only target of efforts to enforce prepublication review. One revealing episode concerns a book co-authored by former CIA official Victor Marchetti.¹²⁵ The CIA originally insisted on 339 deletions from the text as submitted, including paragraphs that simply listed the candidates in a Chilean presidential election. The Agency restored 171 of these deletions prior to publication, and a further 65 deletions were restored as the result of litigation under the Freedom of Information Act.¹²⁶ The deleted materials that were not restored disclose the essentially standardless and arbitrary character of the review process, perhaps an inevitable consequence of the Court’s decision in *Snepp*. The per curiam opinion for the majority of six Justices, rendered on cross-petitions for certiorari and without

122. 1 K. MARX & F. ENGELS, *supra* note 80, at 225 (emphasis in original).

123. 444 U.S. 507 (1980) (per curiam).

124. *Id.* at 515-16.

125. V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974).

126. *See* CENTER FOR NATIONAL SECURITY STUDIES, *THE CONSEQUENCES OF “PRE-PUBLICATION REVIEW”: A CASE STUDY OF CIA CENSORSHIP OF THE CIA AND THE CULT OF INTELLIGENCE* i-ii (1983).

benefit of full briefs or argument, imposes no first amendment or other limits on prepublication review.

The governmental concern over leaks of information has led to proposals that all employees with access to "sensitive" information sign an agreement providing for prepublication review for the rest of their lives. As several former high government officials have pointed out, a journalist or scholar entering government service would consent to a standardless and cumbersome process of review that could prevent him from publishing anything topical in timely fashion.¹²⁷ Some passages in the *Snepp* majority opinion suggest that such a requirement would pass muster; indeed, the majority seems to accept an assertion that a trial of confidentiality issues in federal court would itself be fraught with unacceptable risk to national security.¹²⁸

I do not, in this Article, undertake a detailed analysis of the constitutional basis of censorship. The Supreme Court has recognized explicitly that the first amendment places a limit upon the permissible extent of a prosecution for espionage;¹²⁹ this holding presumably extends the protections against vagueness and overbreadth even to accused spies. At least one court has followed this lead in the context of alleged exports of industrial information to foreign governments.¹³⁰ Although the courts have afforded the Executive considerable deference in the field of national security, none has expressly doubted that the core values of the first amendment affect what the public may know about foreign policy.

Thus, the Ellsberg case, *Truong*, and the cases and episodes that have followed illustrate that exercise of the power to define property in a particular way remains a powerful analytical device for shutting off countervailing citizen claims based upon assertions of rights not based upon private ownership.¹³¹ The corrective is to question the appropri-

127. See *Former Officials on Prepublication Review*, FIRST PRINCIPLES, Nov./Dec. 1983, at 1-4 (testimony of Charles W. Maynes before the House Subcommittee on Legislation and National Security, Oct. 19, 1983) [hereinafter cited as *Former Officials*]; Powe, *The Constitutional Implications of President Reagan's Censorship* Directive 84, CENTER MAG., March/April 1984, at 2.

128. The Court found that "[t]he trial of such a suit . . . would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs." 444 U.S. at 514-15.

129. See *Gorin v. United States*, 312 U.S. 19, 23 (1941).

130. *United States v. Edler Indus.*, 579 F.2d 516 (9th Cir. 1978).

131. Growing concern about this trend has been expressed of late. See, e.g., Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22. Abrams discusses proposals to control publication of government-funded work by assertion of contract or property rationales. Of course, government sensitivity to unauthorized disclosure is highly selective. As James Reston once said, the American ship of state is the only ship that leaks primarily at the top. *Former Officials*, *supra* note 127, at 3. Another significant example is the history of efforts to force disclosure of the materials relied on in the Kissinger memoirs. Kissinger could rely

The Law of Theft

ateness of the initial decision to grant government a property right that is not securely rooted in some recognized governmental interest and that is not bounded by the first amendment. Neither the right of property, nor the theft laws that enforce it, are neutral; their apparent neutrality is merely an ideological construct designed to protect a particular system of social organization. One need not be a foe of that system to debunk the more outrageous pretenses of its ideology.

B. Theft Law in the Service of Corporate Power: Federal Prosecutions in the Texas Banking Industry

Another recent debate illustrates the relation between theft law and social and economic forces, as well as the tendency of legal analysis to mask that relationship behind the neutral-sounding principles of the right of property.

Title 18, United States Code, section 656,¹³² makes it a crime to “willfully misapply” the funds or credits of a federally insured or national bank. Other portions of the statute punish the familiar banking defalcations of embezzlement and other forms of outright stealing, but misapplication has an elusive meaning that has lent itself to broad-gauge interpretation. Few would cavil over use of the term to cover the making of fictitious loans by an officer, or even loans that he knew would not be repaid; such conduct is, in the decided cases, typically accompanied by a kickback scheme or some other benefit to the officer.¹³³ Aside from clear cases of this sort, section 656 has proven difficult to apply. At bottom, however, a bank official cannot violate the statute unless he “converts” the bank’s funds, either to his own use or to the use of another. Hence, section 656 is a theft statute.

at will upon “sensitive” materials; researchers who wanted to check his facts met a stone wall. *See id.* at 3-4.

While the owner of property in the § 641 cases is the government, the analysis of these cases can readily be—and is being—adopted by private owners. Developers of industrial and technological processes now routinely forswear the protections of the patent laws in favor of imposing obligations of secrecy upon employees, customers, and licensees. After all, patent protection is limited in time, requires disclosure, and assumes the article is patentable. There is evidence that major corporations assiduously seek to extend the protection that civil injunctions and damages afford their proprietary information by inducing prosecutors to regard alleged breaches of exclusivity as theft. *See, e.g.*, Defendants’ Brief in Support of Motion to Dismiss on Due Process and Selective Prosecution Grounds, *United States v. Hitachi, Ltd.*, Cr. 82-0372-SW (N.D. Cal. October 6, 1982) (alleging IBM involvement in FBI investigation); *see also* *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984) (recognizing insecticide producer’s state-law based property interest in health, safety, and environmental data).

132. 18 U.S.C. § 656 (1982).

133. *See* STAFF OF SUBCOMM. ON DOMESTIC FINANCE OF THE HOUSE COMM. ON BANKING AND CURRENCY, 90TH CONG., 1ST SESS., ACQUISITIONS, CHANGES IN CONTROL, AND BANK STOCK LOANS OF INSURED BANKS 38-41 (Subcomm. Print 1967) [hereinafter cited as CHANGES IN CONTROL OF INSURED BANKS].

In *United States v. Mann*,¹³⁴ the Fifth Circuit applied section 656 in a novel fashion. Mann, who owned several small banks, bought a controlling interest in the First National Bank of Waco, Texas, which had deposits of about \$100 million. He paid \$6.9 million for fifty-one percent of the stock, financing his purchase with a loan in that amount from the Bank of the Southwest, a major Houston bank. Southwest sold a participation of \$2.9 million in the loan to another bank, and thus ended up advancing Mann \$4 million. At that time, Southwest's prime rate was eight and one-half percent, but it charged Mann only three percent. Upon assuming control of the Waco bank, Mann caused it to deposit \$4 million in a non-interest-bearing demand account—national banks at that time could not pay interest on such funds—at Southwest. The balance in this account was reduced as Mann's loan was paid down.

Mann and Southwest were indicted for conspiring to violate section 656 by willfully misapplying First National's funds; in the words of the indictment, "the use, benefit and advantage of said monies and funds was converted from the First National Bank of Waco to the use, benefit and advantage of the defendant, Robert A. Mann."¹³⁵ Southwest would, of course, invest the money the Waco bank deposited with it, subject to maintaining a required reserve percentage, and make a profit. The government's theory was that Mann was gaining a personal benefit from a balance maintained with the Waco bank's funds. This benefit could allegedly be measured either by the discount from the prime rate on Mann's loan, or by the profitability to Southwest of demand deposits during the relevant period. The personal benefit did not establish the existence of the "conversion," but did measure its extent.

The Waco bank had the right at any time to withdraw the funds. The government did not contend that Southwest was an unsafe bank. All national banks of the size of First National Bank of Waco maintained at that time, in addition to required federal reserve deposits, a certain amount in non-interest-bearing demand accounts with larger banks. These "secondary reserves" promoted liquidity and were an essential ingredient of correspondent banking relationships. First National Bank of Waco's total correspondent demand deposits were no greater than the average for banks its size,¹³⁶ although the single \$4

134. 517 F.2d 259 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

135. *Id.* at 264 n.1.

136. See Excerpt of Proceedings at 231-32, *United States v. Mann*, Cr. No. 73-H-268 (S.D. Tex. May 10, 1976) (testimony of John W. Shockey).

million deposit was unusual. Mann ran the Waco bank capably and honestly.

The case would not be so interesting save for its social context. Texas is a single-branch banking state; that is, no bank may have more than one office. This policy was thought to prevent undue concentration of bank ownership and is an element of populist social policy. By now, as every Texan knows, this prohibition is meaningless because federal law permits bank holding companies.¹³⁷ The result in Texas has been that large banks form holding companies and buy up a number of smaller banks. Each such bank keeps its name and premises, but it acquires a logo of the parent and its operations are integrated. In 1969, when Mann bought the Waco bank, so-called compensating balance bank stock loans were a favored method for acquiring smaller banks.¹³⁸

The Treasury Department, in consultation with the Justice Department, decided to attack the compensating balance loan as an abuse. The Comptroller of the Currency, responsible for regulating national banks, issued a circular that advised against such transactions.¹³⁹ *Mann* was the first effort to prosecute this conduct under the criminal laws as a form of "conversion," or theft. The Departments of Justice and Treasury concurred in the decision to bring a test case under this novel interpretation of section 656. The Fifth Circuit upheld the government's theory, reversed the trial judge's dismissal of the indictment, and sent the case back for jury trial.

In deciding to prosecute, the government chose to advocate a novel interpretation of a determinate property right, an interpretation that in the Fifth Circuit's opinion prevailed over customary practice. The government clearly favored a form of bank acquisition that would ensure increased concentration in the banking industry. A holding company that chose to acquire a small bank would usually generate funds internally—from itself or from banks already acquired. This method of expansion was not regarded as violating section 656. Holding companies were therefore free to pursue their aggressive expansion policies.

137. 12 U.S.C. §§ 1841-1850 (1982).

138. Among many studies are three prepared under the auspices of Wright Patman. *See* HOUSE COMM. ON BANKING AND CURRENCY, 88TH CONG., 1ST SESS., CHAIN BANKING: STOCKHOLDER AND LOAN LINKS OF 200 LARGEST MEMBER BANKS (Comm. Print 1963); STAFF OF SUBCOMM. ON DOMESTIC FINANCE OF THE HOUSE COMM. ON BANKING AND CURRENCY, 88TH CONG., 2D SESS., THE STRUCTURE OF OWNERSHIP OF MEMBER BANKS AND THE PATTERN OF LOANS MADE ON HYPOTHECATED BANK STOCK (Subcomm. Print 1964); CHANGES IN CONTROL OF INSURED BANKS, *supra* note 133.

139. *See Mann*, 517 F.2d at 268-69.

For individuals such as Mann, the compensating balance loan was the only means to raise the necessary capital, and the evidence showed that such loans—at preferential interest rates—were commonplace in Texas. It could even be argued that the correspondent relations such arrangements fostered were advantageous to the acquired bank's depositors.¹⁴⁰ Certainly, the extension of credit in a fixed amount to a majority shareholder tended to set a value on the usually closely held shares of the minority shareholders.¹⁴¹ By contrast, bank holding company acquisitions are notorious for their "freeze-out" effect on the minority.¹⁴²

Undoubtedly, Mann saved money on his loan and Southwest made money. But all correspondent banks make money on demand deposits; given that the Waco bank had no more than the average amount of total demand dollars on deposit with other banks, it could not be said that the depositors or shareholders lost any profitable opportunity they could reasonably have expected. The case makes sense, if at all, as an exercise in rigorously enforcing the distinction between the human entity, Robert Mann, and the juridical person, the bank, that he controls. Such a rigorous distinction is common in the corporate setting, for it is one mark of the fiduciary duty owed by a director, an officer, or a majority shareholder to the corporation and, under some theories, to the minority shareholders.¹⁴³

The escalation of a breach of trust into the offense of theft is not, however, of obvious wisdom. The government's decision to do so was premised on a choice about whether organizations representing relatively large or small concentrations of capital could best be trusted with running the banking industry; it was a decision that had to acknowledge a preference for concentration, for that was its inevitable result.

The Texas law prohibiting branch banking did not mandate the compensating balance bank stock loan in so many words; had it done so, *Mann* would have presented a direct confrontation between state and federal law. The compensating balance loan was, however, the inevitable and necessary product of the branch banking prohibition, for there was hardly any other practical means to finance bank acquisitions. Thus, a certain type of transaction grew up, was routinely en-

140. See, e.g., Federal Reserve Bank of Kansas City, *Correspondent Banking*, MONTHLY REV., Mar./Apr. 1965, at 9, 16.

141. *Id.*

142. See, e.g., *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).

143. See Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

gaged in, and was tacitly approved by federal banking officials. Federal prosecutors and regulators, rather than attempting to unravel the contradictions between Texas and federal law concerning bank holding companies, sought to wreak a change in the Texas banking industry by defining a practice sanctioned by custom as a violation of a defined property interest.

One answer to this misuse of prosecutorial discretion might be a judicial refusal to regard the definition of misappropriation—a species of conversion or theft—as automatically coterminous with whatever definition of the right of property a prosecutor plausibly advances. Had the Fifth Circuit been more concerned with the consequences of a particular definition of the right of property, it might have been less willing to uphold the indictment. The right of property is so basic and powerful an element of bourgeois legal ideology that invoking it tends to be the end and not the beginning of analysis.

The final irony of the *Mann* case is that the jury acquitted both defendants, after a trial in which the fundamental issues of social and economic policy suggested above were thoroughly ventilated in testimony and argument.¹⁴⁴

V. Conclusion

We have seen how the law of theft mirrors changes in social relations. The change of dominant theme in the development of theft law, away from the protection of possession and towards the protection of the right of property, is one piece of evidence that this is so, but not the only one. The law of theft stands behind the illusory neutrality of the law of property. Sometimes theft is defined so as to enforce a property norm that has taken its place firmly in the legal ideology of the bourgeoisie. Sometimes, as with the Black Act and the prosecutions of Ellsberg, Truong, and Mann, it is a hammer brought to forge a new application of the right of property, broadly defined. In either case, theft law is not a collection of random footprints in the sands of legal history; it is emphatically and precisely the product, more or less mediated, of the system of social relations of which the right to property is the central tenet.

144. *United States v. Mann*, Cr. No. 73-H-268 (S.D. Tex. June 1, 1976).