

10 Theft by Omission

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Other things being equal, should the law regard a crime committed by means of an omission as any more or less blameworthy than the same crime committed by means of an act? The question has arisen mostly in the context of homicide, where significant disagreement about the moral equivalence of killing and letting die persists.¹ Even if we were to assume, however, that these two ways of committing homicide were equally blameworthy, it would be worth asking if the principle of equivalence could be generalised to other offences.

My focus here is on theft. The question is whether thefts by means of an omission – including especially the offence of failing to return lost or misdelivered property – are properly thought of as morally equivalent to thefts by means of an act. Under the consolidated law of theft, as found in both the American Model Penal Code and to a lesser extent in the English

¹ See e.g. J Glover, *Causing Death and Saving Lives: The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War, and Other Life-or-Death Choices* (1990); B Steinbock and A Norcross, *Killing and Letting Die*, 2nd edn (1994); J Bennett, “Whatever the consequences” (1966) 26 *Analysis* 83; D Chandler, “Killing and letting die – putting the debate in context” (1990) 68 *Australasian Journal of Philosophy* 420; D Conway, “Is failing to save lives as bad as killing?” (1988) 5 *Applied Philosophy* 109; A Norcross, “Killing and letting die”, in R G Frey and C Wellman (eds), *A Companion to Applied Ethics* (2005); J Rachels, “Killing and starving to death” (1979) 59 *Philosophy* 159.

Theft Act 1968, most omissive and commissive thefts are subject to the same punishment. In this chapter, I shall argue that this is a mistake. Under basic retributive principles, only acts that are the same in terms of blameworthiness should be subject to the same punishment. Yet it is far from clear that theft by omission is always, or even normally, as blameworthy as theft by act. Indeed, I shall argue that some thefts by omission probably should not be criminalised at all. My argument is based primarily on the view that even if, other things being equal, commissive and omissive theft were properly viewed as morally equivalent, other things generally are not equal, and that the relevant differences – in terms of harms caused, wrongs inflicted, community understandings and criminalisation norms – provide a justification for differential treatment in theft law.

A. THEFT BY OMISSION: THE LEGAL FRAMEWORK

There are at least four ways to commit what I refer to here as theft by omission.² The first is where an offender comes into possession of another's lost property by finding and fails to restore it to its owner though it would be easy to do so. The second is where the offender fails to restore property to its owner after coming into its possession as a result of a mistaken delivery (once again it must be easy for the finder to restore the lost property to its owner). The third is where the defendant fails to make a required disposition of funds received. The fourth is where the defendant commits theft by deception by failing to disclose information he is under a legal duty to disclose.

The trend in modern Anglo-American theft law is to subject all four kinds of omissive theft to the same punishment as each other and as commissive theft. This trend is most obvious under the influence of the Model Penal Code. Section 223 of the Code deals with, among other consolidated theft provisions: (1) failing to return lost property; (2) failing to return misdelivered property; (3) failing to make required disposition of funds; and (4) committing theft by deception by failing to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship, or by failing to disclose a known lien, adverse claim or other

² I appeal here to what I take to be a common sense understanding of omission, sidestepping deeper questions about whether omissions can be distinguished from acts, and the extent to which omissions should be viewed as "causes". For a helpful recent discussion, see M S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (2009) at 436-452.

legal impediment to the enjoyment of property.³ Under the Code, all of these offences are treated as equivalent to, and interchangeable with, each other as well as another half dozen theft and theft-related offences (including theft by unlawful taking, theft by deception by various other means, theft by extortion, receiving stolen property, theft of services, and unauthorised use of automobiles and other vehicles).⁴ Thus, under the Code, if D were charged with, say, theft by failing to return lost or misdelivered property, the government could satisfy its burden of proof by showing that D had committed theft by extortion or receiving stolen property, and vice versa. Moreover, each such offence would be liable to the same basic punishment.

In English law, consolidation is both less complete and more complex. The Theft Act 1968 makes no explicit reference to theft by failing to return lost or misdelivered property, though, as *Smith's Law of Theft* notes, the Act is "obviously intended" to preserve the substance of the common law rule which makes failing to return found property a form of theft.⁵ Section 1 states that a person is guilty of theft if he dishonestly "appropriates" property belonging to another with the intention of permanently depriving the other of it. Section 3(1), in turn, states that, "[a]ny assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner".⁶ Thus, under English law, theft by failing to return lost or misdelivered property is subject to the same punishment as core cases of commissive theft.

English law deals with the remaining forms of omissive theft separately. Section 3 of the Fraud Act 2006 states that a person commits fraud if he "(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and (b) intends, by failing to disclose the information – (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss".⁷ Section 4 of the Act further

3 See the Model Penal Code (hereafter MPC) § 223.5 (theft of property lost, mislaid, or delivered by mistake); § 223.8 (theft by failure to make required disposition of funds received); § 223.3(3) (theft by failing to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship); and § 223.3(4) (theft by failing to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained).

4 Each provision is consolidated through MPC § 223.1 (accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this article, notwithstanding the specification of a different manner in the indictment or information).

5 D Ormerod and D H Williams, *Smith's Law of Theft*, 9th edn (2007) para 2.282.

6 Theft Act 1968 s 3(1).

7 Fraud Act 2006 s 3.

states that a person may be regarded as having committed fraud by abuse of position “even though his conduct consisted of an omission rather than an act”. Both kinds of fraud by omission are treated the same as fraud by affirmative misrepresentation.⁸

The approach to theft by omission is quite different in Scottish law, reflecting its adherence to the common law and rejection of statutory consolidation. Theft by failing to return lost or misdelivered property is clearly a crime, but it is one that appears to have been treated as a less serious offence than commissive theft.⁹ A style of charge for theft of found property is found in the Criminal Procedure (Scotland) Act 1995, and reads as follows: “having found a watch, you did, without trying to discover its owner, sell it on, to O.R., and steal it”.¹⁰ Interestingly, and properly as I shall suggest below, Scottish law seems to focus more on the affirmative civil obligation to return found property than it does on the criminal penalties imposed if one fails to comply with such obligation. As such, the Civic Government (Scotland) Act 1982 provides a fairly elaborate set of procedures for dealing with found property, including procedures for: the deposit of such property with the chief constable, the constable’s retention and disposal of property, claims by the owner for return, payment of rewards to the finder, and compensation for property improperly disposed of. It also imposes, almost as an afterthought, criminal fines not exceeding £50 for failure to comply with such procedures, a penalty that is substantially less than for theft proper.¹¹ Scottish law also treats as a crime cases in which “an over-payment is made to A in error and A retains this payment in knowledge of the error”.¹²

8 Fraud Act 2006 s 1(3).

9 See citations in Gordon, *Criminal Law* vol 2 at 22. At this point, it seems appropriate to say something about the man and work being honoured in this volume. I first encountered Sir Gerald’s treatise on Scottish criminal law during a year-long sabbatical at the University of Glasgow in 2002-2003. I originally consulted it in the hopes of finding an authoritative statement of Scottish criminal law on any number of different points. I did indeed find this, but I also found a work that was so rich in insight that I have often since found myself consulting it even when I was not specifically interested in a question of Scottish law. I also had the pleasure of meeting Sir Gerald on several occasions during my year in Scotland and I found him to be at least as engaging a companion in person as he is in print. I am delighted to have had the opportunity to take part in this birthday celebration.

10 Criminal Procedure (Scotland) Act 1995 Sch 5.

11 Civic Government (Scotland) Act 1982. The practical significance of the 1982 Act in relation to the law of theft is not, however, entirely clear. In *Kane v Friel* 1997 JC 69, the appellant was convicted of the theft of a quantity of metal piping and a sink unit, which he claimed to have found behind a shop. The appeal court quashed his conviction on the basis that theft required a “dishonest” intention, meaning that he “must have known that the items were property which someone intended to retain”. The appeal court noted that neither counsel had referred to the 1982 Act, saying that its provisions “might have been of relevance to the argument – we express no view on that – but they were simply not raised” (at 70 per the Lord Justice General (Rodger)).

12 Gordon, *Criminal Law* vol 2 at 43.

B. FAIR LABELLING

Does the modern tendency to treat theft by omission as equivalent to theft by commission, which we have seen in the US and (to a lesser extent) in England and Wales, but not in Scotland, make sense? Should theft by failing to return lost property be punished in the same manner as larceny and embezzlement? Should theft by failing to make a required disposition of funds receive the same punishment as extortion and false pretenses?

Together with my collaborator, Matthew Kugler, I recently conducted a study to test people's intuitions about the relative blameworthiness of various forms of theft.¹³ We asked our subjects to rank the seriousness of twelve hypothetical cases and found, among other matters, that they consistently rated theft by failing to return misdelivered property as less blameworthy, and deserving of less punishment, than (commissive forms of) larceny, embezzlement, extortion, and false pretenses.¹⁴ (We did not question subjects about their views on the blameworthiness of failing to return lost property, failing to make required disposition of funds, failing to correct a false impression, or failing to disclose a known lien or adverse claim.)

Our study suggests that there is in the realm of theft offences a significant gap between law and norms. We found that people make much more finely-graded blameworthiness distinctions among different forms of theft than is recognised by modern law. The problem presented is thus one of fair labelling, the idea that, as Andrew Ashworth has put it, "widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking".¹⁵ Where people consistently regard two or more types of conduct as different in terms of blameworthiness, the law ought to reflect those differences: other things being equal, it ought to punish the more blameworthy act more severely and the less blameworthy act less severely, whether it is in the area of theft or any other criminal offence.¹⁶ If the law treats some kinds of theft more, or less, harshly than people believe they should be treated, it risks being unjust and

13 S P Green and M B Kugler, "Community perceptions of theft seriousness: a challenge to Model Penal Code and English Theft Act consolidation" (2010) 7 *J Empirical Legal Studies*, 511. The text in this paragraph and the next closely tracks language used in that article.

14 Also consistently rated as less blameworthy was the act of receiving stolen property.

15 A Ashworth, *Principles of Criminal Law*, 6th edn (2009) 78. See also J Chalmers and F Leverick, "Fair labelling in criminal law" (2008) 71 *MLR* 217.

16 For a discussion of fair labelling in the context of theft, see C M V Clarkson, "Theft and fair labeling" (1993) 56 *MLR* 554; P R Glazebrook, "Thief or swindler: who cares?" (1991) 50 *CLJ* 389; S Shute and J Horder, "Thieving and deceiving: what is the difference?" (1993) 56 *MLR* 548.

out of step and likely to lose some of its moral authority and effectiveness. The same can be said if the law fails to criminalise some forms of theft that people believe should be criminalised, or criminalises other forms of theft that people think should be free of criminalisation. The point is not that the criminal law should always follow popular opinion, or that people's moral intuitions are necessarily correct. It is simply that, in formulating an effective and authoritative criminal law, it is essential to know what people's intuitions are and where they diverge from current or proposed legal rules.

C. "OTHER THINGS BEING EQUAL"

How should we compare the moral content of a crime committed by means of an affirmative act to that of the same crime committed by means of an omission? The most obvious approach is to try to construct pairs of hypotheticals that differ in no way other than the means of commission. This is the approach widely used in the literature on killing and letting die.¹⁷

How would this approach work in the case of theft? Elsewhere, I have suggested that the moral content of any crime can be broken down into three kinds of element: the *mens rea* with which it is perpetrated, the harms it causes or risks, and the wrongs it effects.¹⁸ Following this approach, we could try to construct pairs of cases that are identical in terms of each such element and that differ only with respect to the means of commission. In the context of theft, this would presumably mean that both acts would involve depriving a victim of the same property (say, a car, a bicycle or a boat), that both acts would be done with the same intent or purpose to deprive the owner permanently of his property, and that both acts would involve the same element of dishonesty or lack of consent or involve the same violation of duty or of rights.¹⁹

If I am right that the moral content of criminal acts consists solely in these three elements, and if we could find two otherwise identical cases of theft that differed only in the sense that one was committed by means of an act and the other by means of omission, then I believe we would be obliged to conclude

¹⁷ See sources cited above at n 1.

¹⁸ S P Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (2006). I use *mens rea* in its narrow "elemental" sense to refer to the particular mental state with which an offender commits a crime. I use "harmfulness" to refer to the degree to which a criminal act causes, or risks causing, harm, defined loosely as a significant setback to a person's interests. I use the term "wrongfulness" to refer to the extent to which the act violates a victim's rights or a moral norm more generally.

¹⁹ The moral content of theft law is explored in far greater detail in my forthcoming book, tentatively titled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

that the two acts were equivalent in terms of their moral content and that, at least as far as retributivism goes, they should be punished equivalently.

Unfortunately, as Tony Honoré once pointed out in much the same context, “[o]ther things are usually not equal”.²⁰ In particular, though there is little problem in positing commissive and omissive thefts that involve the same *mens rea*, it is much harder to find commissive and omissive thefts that involve precisely the same harms and wrongs. Indeed, as we shall see now, the kinds of harm and wrong entailed by at least some forms of omissive theft differ significantly from the kinds of harm and wrong associated with most kinds of commissive theft.

In what follows, my main focus will be on the various ways in which the moral content typically associated with the first two kinds of omissive theft identified above – namely, failing to return lost property and failing to return misdelivered property – differs from the moral content typically associated with commissive theft. I focus on these two types of omissive theft because they seem to me to present a conceptually clearer case for distinguishing between omissive and commissive thefts. I will therefore have less to say about the second two kinds of omissive theft – namely, theft by failure to make required disposition of funds, and theft by failure to correct a false impression. They will be discussed primarily in contrast to the first two.

D. THEFT BY FINDING AND FAILING TO RETURN LOST OR MISDELIVERED PROPERTY

At common law beginning late in the fifteenth century, one who found lost goods and failed to return them to their owner upon demand was liable in tort, for trover.²¹ It was not until several centuries later, apparently as late as the nineteenth century, that one who took into his possession lost, mislaid or misdelivered property and failed to make a reasonable effort to find the owner could be held guilty of larceny.²² A failure to make an effort to find the owner was considered to be unreasonable if the finder knew the owner’s identity or had reason to believe that he could discover it (for example, from

20 T Honoré, “Are omissions less culpable?”, in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (1991) 31 at 31.

21 F V Harper and F James, Jr, *The Law of Torts*, 3rd edn (2006) vol 1 at 113-115; W L Prosser, “The nature of conversion” (1957) 42 Cornell LR 168 at 169; D Reisman, Jr, “Possession and the law of finders” (1939) 52 Harvard LR 1105 at 1130. The *Oxford English Dictionary* records that the word “trover” comes from the French *trouver*, meaning “to find”.

22 W LaFare, *Criminal Law*, 4th edn (2003) at 928-931; R M Perkins and R N Boyce, *Criminal Law*, 3rd edn (1982) at 308-314.

earmarkings on the property or from the circumstances of its finding).²³ Merely picking up or possessing the lost property did not constitute a crime; the finder had to fail to make an effort to find the owner. If the finder took possession of property intending to look for its owner and restore the thing to him, he did not assume the rights of the owner and did not commit larceny. This was true even if he picked up the property intending to return it to the owner and subsequently decided not to do so.²⁴

As we saw above, theft by failing to return lost or misdelivered property is among the bundle of common law offences that the Model Penal Code incorporated into its undifferentiated offence of “theft”, and thereby subjects to the same punishment as theft by unlawful taking, theft by deception, theft by extortion, theft of services, and receiving stolen property. Section 223.5 of the Code provides as follows:²⁵

A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable steps to restore the property to a person entitled to have it.

The Code formulation is thus both broader and narrower than the common law offence. It is narrower in the sense that a defendant can avoid liability in cases in which he has the intent to steal at the time he takes possession but subsequently changes his mind and takes reasonable steps to find the owner. It is broader in the sense that the defendant cannot avoid liability by postponing his intent to deprive until some time after he has taken possession of the property. The same is true of the Theft Act 1968: as section 3(1), quoted above, makes clear, a finder who forms the intent to deprive the owner of his property only after he has taken possession will nonetheless be guilty of theft.²⁶

(1) Failing to return lost or misdelivered property as an omission

There are two senses in which theft by failing to return lost or misdelivered property might be said to involve the criminalisation of an omission. The first, which will be discussed in this section, arises out of the requirement that the offender, having actively taken possession of some property, subsequently “fails to take reasonable steps to restore the property to a person entitled to

²³ See e.g. *Penny v State*, 159 SW 1127 (Ark 1913).

²⁴ LaFave, *Criminal Law* (n 22) 929.

²⁵ MPC § 223.5.

²⁶ Theft Act 1968 s 3(1).

have it". The second sense, which will be discussed below, occurs in those cases in which the defendant's coming into possession of the property is itself passive, as where the property was misdelivered to his house.

In considering the criminalisation of omissions, we begin with an approach developed by Tony Honoré, who divides conduct into doings and not-doings.²⁷ When a doing is contrary to a norm, it is a commission; when a *not-doing* is contrary to a norm, it is an omission. Norms, in turn, are divided into ordinary norms and norms which impose distinct duties. The distinct-duties theory holds that we have, beyond the background duties we owe to all, special duties to other people and entities, which vary from person to person according to individual circumstances and past dealings between them. A classic example is the duty that parents owe to their children. Under this approach, harms caused by omission are, other things being equal, comparable in their wrongfulness to harms caused by affirmative act when the person who omits to perform some act is under a distinct duty to do so. When only background duties are operative, however, positive acts are normally worse than omissions.

One of the questions we need to ask is whether the offence of failing to return lost property involves a distinct duty and, if so, what form it takes. According to Honoré, there are five types of situation that yield distinct duties:

- (1) The agent, by a positive act, causes a harm or increases a risk to others, and thereby incurs an affirmative duty to mitigate such harm or risk. For example, a motorist who runs over a pedestrian has a duty to summon help, even if his initial act was not at fault (e.g. where he has blamelessly struck a pedestrian who has run into the street).
- (2) The agent occupies a position or office or fills a role which may require him to act positively. An example would be that of a parent who is obliged to act affirmatively in caring for a child, even when he did not create the initial harm.
- (3) Society imposes a duty to act positively because of a need or dependency which the agent is well placed to fulfill, as where an agent takes custody of another and thereby deprives him of normal opportunities of being rescued.
- (4) Receipt of a gift or other benefit sometimes imposes an obligation on the recipient to act.
- (5) People have specific duties to act affirmatively when they have voluntarily agreed to do so, as in the case of promises.

27 Honoré (n 20) 33-34. For alternative approaches, see L Alexander, "Criminal liability for omissions: an inventory of issues", in S Shute and A Simester, *Criminal Law Theory: Doctrines of the General Part* (2002); A Ashworth, "The scope of criminal liability for omissions" (1989) 105 LQR 424; A P Simester, "Why omissions are special" (1995) 1 *Legal Theory* 311; G Williams, "Criminal omissions – the conventional view" (1990) 107 LQR 86.

Of course, not all of these situations create duties in law, let alone criminal law; in some cases, the duty is merely a moral one.

So, what kind of duty, if any, is at play in the case of theft by failure to return found property? For a start, we can rule out, as obviously inapplicable, the second, fourth and fifth grounds noted above. This leaves as potential candidates grounds (1) and (3). Taking ground (1), first, can we say that the finder of lost property has, by a positive act, caused a harm or created a risk to others, and thereby incurred an affirmative duty to mitigate such harm? Assuming, as will normally be the case, that the finder has had no role in the owner's loss of the property, it seems to me wrong to say that the finder of lost property has caused a harm or created a risk. This is therefore not like the case of the motorist who runs over a pedestrian and is then legally obligated to summon help.

A more plausible basis for finding a duty is ground (3) – namely, that the finder, by taking possession of the lost property, deprives the owner of a normal opportunity to find it. Consider the case of Geoffrey Rowlett, an English magistrate who found a £3,200 Rolex watch on the floor of a Tesco supermarket, made no effort to find its owner, and gave it to his wife as a sixtieth birthday present.²⁸ He was subsequently convicted of theft. Rowlett's case seems to reflect the core case of theft by finding.

Upon finding the lost watch, Rowlett had three basic choices. He could have taken possession of the property and then tried to find its owner, such as by alerting the store manager of his find or putting up a "Found" notice on the store's bulletin board. Such conduct would have been proper, even praiseworthy. Alternatively, he could have done nothing; he could have simply walked on by, leaving the watch lying on the floor. Most people in our society today would probably say that, if Rowlett had done this, he would have done nothing wrong, and that his conduct would have been morally neutral (though it is worth noting that Jewish law seems to disagree on this point, also viewing as morally wrong those who find lost property and do nothing to reunite it with its owner).²⁹ Finally, Rowlett could do what he

28 S de Bruxelles, "Magistrate convicted for giving wife Rolex he found in Tesco's", *The Times*, 28 January 2005.

29 See M J Broyde and M Hecht, "The return of lost property according to Jewish and common law: a comparison" (1995-1996) 12 *Journal of Law and Religion* 225 at 235 ("The exact parameters of the obligation to assist in property return is of some dispute within Jewish law. Most authorities are of the opinion that one who sees lost property and then declines to pick it up has transgressed both the negative prohibition of 'you have no right to withdraw [from returning it]' and the positive commandment of 'you shall give it back to him'" (citations omitted). The moral obligation to act affirmatively to find the owner of lost property is based on Deuteronomy 22: 1-3, which states: "If you see your fellow's ox or sheep gone astray, do not ignore it; you must take it

actually did, which was to take the property for his own use and make no effort to find the owner. Most people, I assume, would regard such conduct as wrongful. By taking possession of the watch, rather than leaving it lying on the floor, he deprived the owner of the opportunity to return to the store and find the watch lying on the floor where it was lost. The owner of the watch became (in Honoré's term) "dependent" on Rowlett by virtue of Rowlett's having taking possession of it.

Even if we agree, however, that it is morally wrong to take possession of lost property and then fail to make any effort to find the owner, it hardly follows that such an omission should constitute a crime, let alone that it should be treated as equivalent to commissive theft. Let me suggest a number of reasons why this is so.

The first is that the harm caused by the offender's failure to look for the owner of found property is arguably less serious than that caused by an affirmative act of stealing. If Rowlett had affirmatively stolen O's watch, say, by picking his pocket, he would certainly have caused O a substantial harm. But where O has already lost the watch, the *additional* harm caused by Rowlett's preventing him from having an opportunity to recover it is relatively small. The difference, in short, is between worsening a situation and merely failing to improve it.

Second, even if Rowlett's preventing O from recovering his lost watch were as harmful as his stealing it in the first place, it is doubtful that the harm would be sufficient to merit criminal sanctions. In almost all of those cases in which the law imposes on one who creates a 'dependency' in another a duty to act, the risk involved is one of serious physical harm. This is true even in the case of so-called Bad Samaritan statutes, which almost always say that the victim must be at risk of grave physical harm before the defendant is required to act.³⁰ In the case of omissive theft, by contrast, the harm is the loss

back to your fellow ... You shall do the same with his ass; you shall do the same with his garment; and so too shall you do with anything that your fellow loses and you find; you must not remain indifferent." See also *Bava Metzia* chs 1 and 2 (Talmudic tractate offering regulations as to what constitutes finding, how to take care of found property, under what conditions the finder of a thing is or is not bound to take care of it, and how to guard against false claimants).

It is worth noting that Jewish law also regards the failure to give to charity as a form of theft. For example, the thirteenth-century text *Sefer Chasidim* imagines God as saying: "I gave you wealth so that you could distribute it [in part] to the poor, but you didn't do so ... you kept all the money for yourself. Since you did not keep your part of the bargain, you will be punished as though you have robbed them": *Sefer Chasidim: The Book of the Pious*, para 415, quoted in J Telushkin, *A Code of Jewish Ethics, Volume 2: Love Your Neighbor as Yourself* (2009) 160.

30 J Kleinig, "Good samaritanism" (1976) 5 *Philosophy and Public Affairs* 382. For example, a Vermont statute (Vt Stat Ann tit 12 § 519(a)) makes it a crime to fail to give "reasonable assistance" to another person whom one "knows ... is exposed to grave physical harm" if such aid "can be rendered without danger or peril" to the bystander.

of property.³¹ The criminal law simply does not regard such property-related harms as equal in seriousness to harms to one's physical well-being.

Third, it seems a more significant violation of O's rights that D wrongly take property that is in O's possession than that D fails to return property that is not in O's possession to begin with. Certainly, making an effort to find the owner of the watch would be the decent thing for D to do. But to what extent would D's failing to make such an effort constitute a wrong to the owner? Consider how you would feel if you lost your watch and had it returned to you the next day by its finder. You would, I think, feel grateful. You might even think that the finder had acted supererogatorily.³² You might think it appropriate to give the finder a reward for his virtuous act, as occurred in the recent US case of Mohammed Khalil, a Newark taxi driver who returned to its caretaker a \$4 million Stradivarius violin left on the backseat of his cab.³³ For his honesty, Khalil was given: a cash reward; a private recital by the grateful violinist, Philippe Quint; and Newark's highest honour, the Medallion, presented by Mayor Cory Booker. Indeed, some jurisdictions now *require* that the true owner give the finder a reward for his trouble.³⁴ Assuming that all of this is true, it would seem odd to say that it is morally wrongful to fail to do that which, had one done it, would merit a reward.³⁵

Fourth is the fact that people are presumably less certain about the moral and legal obligations to return found property than they are about the moral and legal prohibitions on out-and-out taking of property from another's possession. The norms associated with returning found property are simply not as strong or as deeply rooted as those associated with the prohibition on taking others' property. The schoolyard proverb "finders keepers, losers weepers", though neither an accurate reflection of the law nor a particularly admirable ethical sentiment, nevertheless seems to have had a lasting effect

31 I leave to the side those cases in which the found property is itself vital to a person's physical well-being, as where a defendant finds another's vial of insulin, takes possession of it, and fails to look for its owner.

32 The seminal piece is J O Urmson, "Saints and heroes", in A Melden (ed), *Essays in Moral Philosophy* (1958). For a helpful taxonomy of morally significant actions, see H Hurd, "Duties beyond the call of duty" (1998) 6 *Annual Review of Law and Ethics* 1 (taxonomy includes actions that are required, actions that are forbidden, actions that are praiseworthy but not required (supererogatory), actions that are blameworthy but not forbidden (suberogatory), actions that are supererogatory if performed and suberogatory if omitted, and amoral or morally neutral actions).

33 R G Jones, "Cabdriver thanked for returning a Stradivarius", *New York Times* 7 May 2008.

34 See e.g. NY Pers Prop L. §§ 251-258.

35 Against this, it might be argued that the relevant question is not how one would feel if one lost one's watch and had the finder return it, but rather how one would feel if one lost one's watch and knew that its finder was *failing* to return it. If this is right, then it suggests an interesting asymmetry in our reactive emotions that calls for further inquiry.

on many people's moral sensibilities. As Gordon's *Criminal Law of Scotland* has put it in this context, "what is clear to a lawyer is not necessarily appreciated by members of the public".³⁶

Fifth, and closely related, is the fact that the criminal law in this area, as we shall see below, is to an unusual degree dependent on somewhat esoteric concepts in the civil law of property. This suggests that theft by finding is even more *malum prohibitum*-like in its character than other forms of theft.³⁷

Finally, it is worth noting that the norms concerning the return of lost property are, to a degree unusual in the law of theft, culturally-specific. For example, a recent study suggests that residents of Tokyo are significantly more likely to return found property than residents of New York.³⁸ Undoubtedly this gap reflects the fact that Japan, in contrast to the United States, has a more widely recognised, accessible and efficient system for reporting lost objects, one that rewards good behaviour and punishes bad – a coherent system of "carrots" and "sticks", as Saul Levmore puts it in his discussion of finders' law.³⁹ To what extent these norms have been internalised, in the sense that residents of Tokyo could be said to be more honest than New Yorkers, seems somewhat harder to say.

(2) Lost property vs misdelivered property

In the previous section, I argued that the reasons for criminalisation are weaker in the case of the non-return of lost or misdelivered property than in the case of affirmative takings of property. We now turn our attention to the difference between failing to look for the owner when one takes possession of property that has been *lost* and failing to look for the owner when one takes possession of property that has been *misdelivered*. I will argue that, as weak as the arguments are for criminalising the first sort of omission, the arguments for criminalising the second sort of omission are even weaker. If I am right, we can observe yet another respect in which the Model Penal Code and the Theft Act 1968 improperly conflate morally distinct forms of theft.

As noted above, the MPC provides that theft is committed where a person "comes into control of property of another that he knows to have been ...

³⁶ Gordon, *Criminal Law of Scotland* (n 9) 22.

³⁷ The *malum prohibitum* character of theft more generally will be discussed in Green, *Thirteen Ways to Steal a Bicycle* (n 19).

³⁸ M D West, "Losers: recovering lost property in Japan and the United States" (2003) 37 *Law and Society Review* 369.

³⁹ S Levmore, "Waiting for rescue: an essay on the evolution and incentive structure of the law of affirmative obligations" (1986) 72 *Virginia LR* 879.

delivered under a mistake as to the ... identity of the recipient” and then “with purpose to deprive the owner thereof ... fails to take reasonable steps to restore the property to a person entitled to have it”.⁴⁰ The Theft Act 1968, as we saw, says that in committing theft by failing to return lost or misdelivered property, one must “assume” the rights of the owner, by “keeping” it or “dealing with it as owner”.⁴¹

In the case of lost property, it will normally be clear when the offender comes into control of the property of another. In the case of misdelivered property, however, the existence of such control is likely to be less clear. Imagine, for example, that a box containing a Rolex watch, addressed to someone other than Magistrate Rowlett, is mistakenly delivered to his house by the mail carrier. And imagine that Rowlett disposes of the box or takes it into his house and puts it in a closet without ever using it. Should we say that Rowlett has necessarily come into control of the property?

Even assuming that Rowlett *has* come into control of the watch, the idea that he should be subject to criminal sanctions for failing to take steps to return it to its owner seems troubling. Rowlett’s conduct in the case of the misdelivered Rolex is even more passive, and therefore arguably even less wrongful, than in the case of the lost Rolex. In the actual case, it was Rowlett’s own act of taking the lost watch into his possession that made it even less likely that its owner would be able to recover it. In my hypothetical case of the misdelivered Rolex, the risk that the owner of the watch will be unable to recover her lost property was created by a third party, namely, the carrier who misdelivered the mail in the first place.

One can easily imagine a case in which O, the former occupant of some premises, has moved away, and that day after day mail addressed to O is received by the new occupant, R. If R fails to send some of the mail on, and instead discards it or keeps it piled up on a table by the door, there is a reasonable argument that R is guilty of theft. Yet to impose sanctions for failing to return misdelivered property in such circumstances would seem to compound the problems of omission liability discussed in the last section.

To treat as criminal those who come into control of misdelivered property and fail to look for the owner becomes even more problematic in the context

⁴⁰ MPC § 223.5.

⁴¹ Theft Act s 3(1). Cf E Melissaris, “The concept of appropriation and the offence of theft” (2007) 70 MLR 581 at 590-591 (2007) (arguing that property left with an offender for safekeeping is not appropriated by the offender unless and until he “replace[s] the owner in [a] special proprietary relationship with the thing ... [h]is attitude towards the [left property] is that of its owner, he behaves as if the [property] were *his*”).

of intangible property.⁴² Imagine the following: (1) Rowlett's bank mistakenly credits to his account a sum that should have been credited to another depositor's account; (2) Rowlett is aware of the mistake but never tells the bank about it; and (3) the money remains in his account. Has Rowlett committed the offence of "theft of property ... delivered by mistake"? Must he use or transfer the funds in order to assert control over them?⁴³ Or can he come into control by simply knowing that the funds have been incorrectly credited to his account and allowing them to remain there? Assuming that he comes into control of the funds as soon as he becomes aware that they are in his account, it would appear that Rowlett has violated MPC section 233.5. The problem is that Rowlett's conduct in this case seems even more passive than in the previous case, since he has not even done so much as taken physical control of the property.

(3) Legality, omissive theft and the civil law of found property

Another problem with the offence of theft by finding and failing to return lost property is that it criminalises conduct the lawfulness *vel non* of which is dependent on sometimes arcane rules in the civil law of property. Indeed, questions concerning the ownership of lost property are among the most difficult and contested in all of personal property law.⁴⁴ Such complexity raises serious concerns about the legality of criminalising this sort of conduct. As we shall now see, there are difficult questions that must be resolved about: when property can properly be said to be abandoned; who owns salvage, treasure trove, property found at sea, and property found underground; and the possible distinction between lost and mislaid property.

Regarding the law of abandonment, consider the case of Fabio Piras, a Sardinian tourist vacationing in London shortly after the death of Princess Diana. Tens of thousands of flowers, teddy bears, letters and other tributes

42 Though it is worth noting that the Scots law of theft is restricted to corporeal property. See Gordon, *Criminal Law* vol 2 para 14.13.

43 Were Rowlett to withdraw the funds and spend them, I assume that he would be unambiguously guilty of theft, since he would have knowingly appropriated funds belonging to another with the intent to deprive the other of them permanently. Cf *R v Shadrokh-Cigari* [1988] Crim LR 465.

44 See e.g. R H Helmholz, "Equitable division and the law of finders" (1983) 52 *Fordham LR* 313; R H Helmholz, "Wrongful possession of chattels: hornbook law and case law" (1987) 80 *Northwestern University LR* 1221; W Landes and R Posner, "Salvors, finders, good Samaritans, and other rescuers: an economic study of law and altruism" (1978) 83 *Journal of Legal Studies* 83; Levmore (n 39); J S Moorman, "Finders weepers, losers weepers? *Benjamin v Lindner Aviation, Inc*" (1997) 82 *Iowa LR* 717; J V Orth, "What's wrong with the law of finders and how to fix it" (2001) 4 *Green Bag* 2d 391; R A Posner, "Savigny, Holmes, and the law and economics of possession" (2000) 86 *Virginia LR* 535.

had been left outside various royal palaces. Piras took one of the teddy bears from outside the gates of St James' Palace and, not surprisingly, made no effort to find the owner. He was convicted of theft and initially given a sentence of one week in prison. He later had his sentence reduced to a £100 fine, but was punched in the face by a member of the public when he left the court having won his appeal.⁴⁵

The obvious question is whether the property taken by Piras should properly be regarded as abandoned. Theft is committed only if the defendant takes the property "of another". Property that is abandoned is deemed not to be property belonging to another. So did the teddy bear belong to "another", and, if so, to whom? It seems unlikely that property left *outside* the gates of St James' Palace should be said to belong to the royal family (who own the palace) or to the British government. Nor is it likely that it still belonged to the person who left it there; such leaving was surely not intended to be temporary. On the other hand, the property does not seem to have been entirely abandoned. It was presumably intended to remain where it was, at least for a time, as a tribute to the late princess, and perhaps later to be given to charity (though it is unclear whether this latter fact would even have been contemplated by the person who left it there). In taking the teddy bear for his own use, Fabio surely violated some expectation of the person who left it there. What seems doubtful, however, is that this is the kind of property violation that theft law is meant to prohibit.⁴⁶

The difficulty of determining whether property is truly abandoned and, if so, who should get subsequent title to it, is reflected in a number of important dichotomies in the civil law of personal property, such as those between: property found at sea and property found underground; property found on land owned by third parties and property found on public lands; property buried intentionally by owners since deceased and property lost unintentionally; property lost, property mislaid, and property unclaimed; property found by a trespasser and property found by one lawfully on property; and treasure trove and salvage.

Consider the case of the container ship, *MSC Napoli*, loaded with brand-new BMW motorcycles and other goods, and stranded in the English Channel

⁴⁵ J Barnes, "Kitty zipper" *The New Yorker* 29 September 1997, 78.

⁴⁶ For another example of the difficulty in determining when property should properly be said to be abandoned, see *Williams v Phillips* (1957) 41 Cr App R 5 (upholding theft conviction of "dustmen" who helped themselves to trash left on curb by householder for trash collection by local authority; the court reasoned that refuse remained property belonging to the householder until collected, whereupon title passed to the local authority). See generally R Hickey, "Stealing abandoned goods: possessory title in proceedings for theft" (2007) 26 LS 584.

off the coast of Devon in January 2007.⁴⁷ After containers from the wreck began washing up on the shore, around 200 people ventured onto the beach to scavenge the flotsam. At first the police tolerated the acts as “salvage”, but later they branded them as “despicable”, closed the beach, and threatened prosecution.⁴⁸ As far as can be determined, there seems to have been genuine confusion among both the scavengers and the police about whether such conduct was permissible.

The law concerning such finding is complex and varies significantly from jurisdiction to jurisdiction. The term “treasure trove” refers to valuable property, such as gold, silver, gemstones or money, hidden underground, in cellars or in attics, where the property is old enough for it to be presumed that the true owner is dead and his heirs undiscoverable. Unlike the Rolex watch lost by its owner and found by Magistrate Rowlett, treasure trove is property that was hidden by its owner with a view to its subsequent discovery. (Thus, shipwrecks like the *Napoli* and *Titanic* are not properly regarded as containing treasure.) In Britain, the traditional rule is that treasure trove is regarded as property of the Crown.⁴⁹ (This is so even if the property was hidden on private land.) One who takes such property for his own is therefore committing theft. In most American states, by contrast, the finder is allowed to keep the property⁵⁰ (though in Louisiana, following the “civilian” tradition, the rule has been that the property is *divided* between the finder and the owner of the land on which it is found).⁵¹

The rights of finders vary depending on where property is found, how it was lost or abandoned, and how long ago it has been lost or abandoned. For example, if abandoned personal property is found embedded in the soil, it will ordinarily be awarded to the landowner rather than the finder.⁵² Abandoned chattels found in public places will ordinarily be awarded to the finder, in contrast to chattels found on private property (such as a store or a restaurant), which will go to the property owner.⁵³ As Gordon’s *Criminal Law*

47 “Can you keep ship-wrecked goods?” *BBC News Online* 22 January 2007.

48 “Police crack down on scavengers”, *BBC News Online* 23 January 2007.

49 In English law, see *R v Hancock* [1990] 2 QB 242. The Scottish position is a little more complex: see K G C Reid, *The Law of Property in Scotland* (1996) § 553 (“the precise meaning of treasure in Scots law is not, as the law stands, of vital importance. In principle, all ownerless property belongs to the Crown if it has once been owned. Thus, where title to the property is concerned, it does not matter whether or not it is classed as treasure unless it should be claimed by a donatory from the Crown of the right to treasure”).

50 J W Singer, *Introduction to Property*, 2nd edn (2005) 803; L Izuel, “Property owners’ constructive possession of treasure trove: rethinking the finders keepers rule” (1991) 38 UCLA LR 1659.

51 Louisiana Civil Code § 3420.

52 Singer, *Introduction to Property* (n 50) 803.

53 *Ibid.*

of *Scotland* indicates, property is not abandoned when put out for rubbish collection or handed over for cremation or burial at sea, while property that is properly abandoned is deemed to belong to the Crown.⁵⁴ It can be difficult to say exactly when lost or abandoned property has become subject to appropriation, at least in cases where it has not been sold or destroyed.⁵⁵

Another traditional distinction is that between lost, mislaid and unclaimed property. Property is considered lost if its owner parted with it involuntarily: a phone that drops unnoticed onto the street through a hole in its owner's pocket is considered lost: the owner will probably not know where to look for it. Property is considered mislaid if the owner parts with it intentionally, but forgets where he puts it: a phone put down on a table in a restaurant and then forgotten would be regarded as mislaid. Its owner may well remember where she placed it and retrace her steps to retrieve it.⁵⁶ The law traditionally held that the owner of lost property lost possession, while the owner of mislaid property maintained constructive possession.⁵⁷ In criminal law terms, this meant that one who took possession of mislaid property was more likely to be held guilty of theft than one who took possession of lost property. Modern theft statutes, following the MPC approach, abrogate the distinction between lost and mislaid property, on the ground that the distinction is too elusive in practice; after all, how exactly is a finder supposed to know whether property is lost or mislaid?

By this point in the discussion, it will, I hope, be clear that the legal status of lost and misdelivered property often depends on finely drawn and contested distinctions in the civil law of property. To premise criminal liability on such distinctions is to introduce serious questions of notice and legality.

From a larger social policy perspective, the goal of the law in this area is to reunite owners with their lost property, and where it is not possible to find the owner, to encourage its use by someone else, so that the value of the property is not lost to the community entirely.⁵⁸ Often, but not always, the

54 Gordon, *Criminal Law of Scotland* (n 9) vol 2 at 22.

55 *Ibid.*

56 Owners of both lost and mislaid phones, incidentally, are usually fairly easy to track down. See e.g. C Flanagan, "Dial M for mother" *New York Times* 11 May 2008 (recommending that one locate the owner of a lost phone by scrolling through the names in the list of contacts, and dialling "Mom"). Even easier, in my view, would be to scroll through the contacts and dial "Home".

57 See e.g. *R v Pierce* (1852) 6 Cox CC 117. The distinction between lost and mislaid property is even more significant in Jewish law. See Broyde and Hecht (n 29). While a person is compelled to act affirmatively when he encounters lost property, he is in fact prohibited from picking up mislaid property, the rationale being that if property is placed in a particular place that is relatively secure, the easiest way to ensure that the object is returned to its owner is to do nothing: the owner will return to retrieve possession.

58 For a similar point, see Perkins and Boyce, *Criminal Law* (n 22) 311.

finder of the chattel will have a better claim to it than anyone other than the original owner.

One way to achieve this societal goal would be to reward people – to give them a “carrot” – for their honesty in returning found property. This is not to say that there should be no role in this area for “sticks” as well, including, certainly, tort actions for conversion and, perhaps, civil fines. What role the criminal law should play in furthering such a policy is another question. What seems clear, at a minimum, is that certain types of theft by omission, such as failing to return lost or misdelivered property, should be viewed as less unambiguously wrongful – and should therefore be subject to less severe punishment – than most kinds of theft by affirmative act.

E. FAILING TO MAKE REQUIRED DISPOSITION OF FUNDS AND FAILING TO CORRECT FALSE IMPRESSION

So far we have been focusing on the moral content of failing to return lost and misdelivered property. I have argued that these kinds of omissive theft are quite unlike commissive thefts in terms of the harms and wrongs they entail, and that they should therefore be punished differently. I now want to say something about the third and fourth kinds of omissive theft identified above – namely, failing to make a required disposition of funds received, and failing to disclose information that one is under a legal duty to disclose. Let us consider each in turn.

The case for treating the offence of failing to make required disposition of funds the same as commissive theft is, in some respects, straightforward. The bank that fails to pay funds received from a depositor and the trustee who fails to pay money received from a beneficiary each breach a distinct duty of the sort that is less clearly present in the case of failing to return lost or misdelivered property.⁵⁹ Such failure to make required disposition thus reflects one or more of Tony Honoré’s situations that yield distinct duties: (1) the agent occupies a position or office or fills a role which may require him to act positively; and (2) the agent has a specific duty to act affirmatively when he has voluntarily agreed or promised to do so. On the other hand, criminalising the failure to make a required disposition of funds received poses a difficulty that is not present in the case of failure to return lost or misdelivered property: it is often difficult to distinguish such cases from mere breach of contract, an

⁵⁹ Cf American Law Institute, *Model Penal Code and Commentaries Part II* § 220.1 to 230.5 (1980) 255-270.

act that modern law regards as inappropriate for criminalisation.⁶⁰

Finally, there is the offence of committing fraud by failing to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship. Here again, the basis for finding a duty to act seems more secure than in the case of failing to return lost or misdelivered property. While the law is ordinarily reluctant to impose affirmative duties to disclose information (for fear that commercial relations will be chilled), the story is different where such affirmative obligations are narrowly limited to cases in which the deceiver fails to correct a false impression that he himself falsely created or reinforced, or in which the deceiver knows he is influencing another to whom he stands in a fiduciary relationship.⁶¹ In such cases, there seems to be a reasonable argument for criminalisation.

60 Although it should be noted that the reason why theft is a crime and breach of contract is not is not all that obvious. The issue will be dealt with in Green, *Thirteen Ways to Steal a Bicycle* (n 19).

61 See American Law Institute, *Model Penal Code and Commentaries* (n 59) 197-200.