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ESSAY

RETHINKING THEFT CRIMES IN VIRGINIA

*John G. Douglass **

"History has its own logic."¹

I. INTRODUCTION

When it comes to the law of theft, our English ancestors did us no favors. They left us the separate crimes of larceny, embezzlement, and false pretenses. They drew a thin line between larceny and embezzlement, a line that can shift depending upon the moment in time a thief decides to steal.² They distinguished larceny from false pretense based on elusive concepts of "title."³ As if these formal distinctions weren't challenge enough, the common law courts concocted legal fictions like "constructive possession" to turn apparent embezzlements into larcenies and vice versa.⁴ The result is a nightmare for prosecutors. An indictment may

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1. MODEL PENAL CODE § 223.1 cmt. b (1962). For a more complete recounting of the historical development of theft law, see George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976).

2. See *The King v. Pear*, 168 Eng. Rep. 208, 209 (1779).

3. See WAYNE R. LAFAYE, CRIMINAL LAW § 8.7(a), at 828 (3d ed. 2000).

4. "[E]xcept in very early stages of the common law, possession has sometimes been more and sometimes less than what meets the eye." GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 3-9 (1978).

charge one form of theft, while proof at trial suggests a different form. A conviction can hang in the balance.⁵

Over the last fifty years, most American jurisdictions⁶—not to mention the English themselves⁷—have simplified their criminal codes by consolidating larceny, embezzlement, and false pretenses into a single offense called “theft.” Virginia is not among them. Instead, Virginia has tried to address the problem with a procedural device. In various forms for most of the last century, the Code of Virginia has provided that proof of embezzlement or false pretenses would suffice to sustain a charge of larceny.⁸ In theory at least, this procedural solution prevented a thief from escaping conviction simply because a prosecutor miscalculated in framing an indictment.⁹ But it created a new problem. A defendant might go through a trial, and sometimes even an appeal, without knowing the elements of his alleged crime. The unfairness of that process is obvious. Virginia courts have responded by reversing convictions whenever prosecutors sought to convict for a theft crime different than the one charged.¹⁰ As a result, the prosecutors’ dilemma has never really gone away.

This year’s *Annual Survey* comes at a critical time in the evolution of Virginia’s theft law. Events of the past year highlight the dilemma that Virginia’s theft law creates for both prosecutors and defendants. Last November, in *Commonwealth v. Bruhn*,¹¹ the Supreme Court of Virginia ruled that the 1994 amendments to the Virginia Code eliminated Virginia’s permissive indictment

5. Casebooks and treatises are filled with cases where defendants successfully avoided conviction by arguing that the proof at trial established a theft crime, but not the crime charged. Professor LaFave describes such cases as “a favorite indoor sport played for high stakes in our appellate courts.” LAFAVE, *supra* note 3, § 8.8, at 846.

6. John Wesley Bartram, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 WASH. & LEE L. REV. 249, 251 n.23 (1999).

7. Theft Act, 1968, ch. 60, § 1(1) (Eng.).

8. See *supra* text accompanying notes 2–5.

9. I say “in theory” for two reasons. First, for most of the last century, Virginia’s permissive indictment rule has been tempered by an “election” provision allowing defendants to demand that the Commonwealth elect a particular form of theft offense in writing before trial. See VA. CODE ANN. § 18.2-111 (Cum. Supp. 1981); see also *infra* text accompanying notes 80–82. Second, despite the procedural rule allowing proof of embezzlement to sustain a larceny indictment, Virginia courts have continued to reverse convictions where the proof at trial showed a different crime than the theft alleged in the indictment. See, e.g., *Baker v. Commonwealth*, 225 Va. 192, 194–95, 300 S.E.2d 788, 789 (1983).

10. See, e.g., *Baker*, 225 Va. at 194–95, 300 S.E.2d at 789.

11. 264 Va. 597, 570 S.E.2d 866 (2002).

procedure in theft cases.¹² Proof of embezzlement, the court ruled, cannot sustain a conviction under an indictment for larceny.¹³ Months earlier, the en banc Court of Appeals of Virginia reached the same conclusion,¹⁴ while adding a constitutional dimension. It would violate both the Virginia and the United States Constitutions, the court wrote, to allow conviction for a theft offense different from the offense alleged in the indictment.¹⁵ In February 2003, the General Assembly of Virginia responded by rewriting the permissive indictment procedure into Virginia law.¹⁶ The amended Virginia Code provides that proof of embezzlement will sustain a conviction under a larceny indictment.¹⁷ But the new provision ignores the constitutional problem highlighted by the court of appeals in *Bruhn*. It allows trial courts to convict for crimes not charged in an indictment, and appellate courts to sustain verdicts never rendered by trial courts. The statute, which went into effect on July 1, 2003, has yet to be tested in Virginia's appellate courts. Odds are, it will not survive constitutional scrutiny.

In sum, despite the efforts of the General Assembly, Virginia law remains stuck between the "rock" of antiquated theft crimes and the "hard place" of due process. Tinkering with procedural rules merely masks the real problem. My aim in this article is to suggest a different approach.¹⁸ It is time to address the substantive definition of theft crimes in Virginia: to consolidate the crimes of larceny, embezzlement, and false pretenses—as most other American jurisdictions have done¹⁹—into a single offense.

12. *Id.* at 602, 570 S.E.2d at 869.

13. *Id.*

14. *Bruhn v. Commonwealth*, 37 Va. App. 537, 546, 559 S.E.2d 880, 885 (Ct. App. 2002).

15. *See id.* at 541, 559 S.E.2d at 882 (relying on *Satcher v. Commonwealth*, 244 Va. 220, 231, 421 S.E.2d 821, 828 (1992)).

16. Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003)).

17. VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003).

18. I say "different," rather than "new," because consolidation of theft offenses is not a new idea. It is a century-old solution to a three-hundred-year-old problem. For accounts of the movement toward theft consolidation, see generally JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 1031–33 (4th ed. 2000); LAFAVE, *supra* note 3, § 8.8, at 846–51; LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 413–17 (7th ed. 2003). For a more recent discussion of the need for consolidation in Virginia, see Bartram, *supra* note 6.

19. *See* Bartram, *supra* note 6, at 251 n.23.

By dealing with substance rather than procedure, we can eliminate historical distinctions which serve only to confound prosecutors and complicate criminal litigation. And we can do so without sacrificing the rights of defendants.

II. A LEGACY FROM THE BRITISH: A CONFUSING TANGLE OF THEFT OFFENSES

Virginia defines the principal theft crimes of larceny, embezzlement, and false pretenses essentially as they were defined at common law and by the Eighteenth Century British Parliament.²⁰ The narrow, technical distinctions among these crimes have challenged courts and confounded prosecutors for centuries.²¹

A. Distinguishing Larceny and Embezzlement

In Virginia, larceny and embezzlement remain separate offenses with different elements.²² Larceny requires a wrongful taking of property from the victim's possession.²³ Embezzlement occurs where the defendant lawfully obtains possession, then wrongfully converts the property.²⁴ Because, by definition, one

20. See *infra* text accompanying notes 26–62. The Virginia Code adopts the common law definition for larceny simply by using the term “larceny” without further explanation in the statute. VA. CODE ANN. §§ 18.2-95 to -96 (Cum. Supp. 2003) (defining grand and petit larceny, respectively); see also *Gwaltney v. Commonwealth*, 19 Va. App. 468, 474, 452 S.E.2d 687, 691 (Ct. App. 1995). Separate statutes define embezzlement, VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003), and false pretenses, *id.* § 18.2-178 (Cum. Supp. 2003).

21. See LAFAVE, *supra* note 3, § 8.8, at 846. As Justice Moncure stated:

The crimes . . . are so much alike in many respects and often separated by lines so indistinct, and almost imaginary, that it was difficult for the prosecutor, in most cases, to determine, a priori, which particular crime to charge in the indictment, and it very often happened that the proof made out a different crime from the one charged . . . and the consequence was that the accused had to be acquitted, though in fact guilty of a more aggravated crime than the one charged against him.

Anable v. Commonwealth, 65 Va. (24 Gratt.) 563, 580 (1873) (Moncure, J., dissenting).

22. *Smith v. Commonwealth*, 222 Va. 646, 649, 283 S.E.2d 209, 210 (1981); *Gwaltney*, 19 Va. App. at 474, 452 S.E.2d at 690–91. (Ct. App. 1995); *Cera v. Commonwealth*, No. 0432-94-4, 1995 Va. App. LEXIS 407, at *6 (Ct. App. May 2, 1995) (unpublished decision) (“[E]mbezzlement and larceny are separate offenses with different elements.”).

23. *Bruhn v. Commonwealth*, 35 Va. App. 339, 343–44, 544 S.E.2d 895, 897 (Ct. App. 2001), *aff'd en banc*, 37 Va. App. 537, 559 S.E.2d 880 (Ct. App. 2002), *aff'd*, 264 Va. 597, 570 S.E.2d 866 (2002); *Gwaltney*, 19 Va. App. at 474, 452 S.E.2d at 690–91; *Jones v. Commonwealth*, 3 Va. App. 295, 301, 349 S.E.2d 414, 417–18 (Ct. App. 1986).

24. *Smith*, 222 Va. at 649, 283 S.E.2d at 210.

cannot simultaneously be guilty of lawfully obtaining possession and wrongfully obtaining possession, the crimes do not overlap. One who commits larceny is not guilty of embezzling the same property, and vice versa.²⁵

The distinction between the offenses is a product of history. At common law, the crime of larceny was originally designed to prevent breaches of the peace occurring when property was forcibly taken from its rightful holder.²⁶ As a result, the crime focused on possession rather than ownership.²⁷ Over time, the crime expanded to cover takings by stealth and by “trick,” but the essence of larceny remained the same: the wrongful taking of tangible property from possession of the owner. Virginia law inherited that basic limit, and adheres to it today. Larceny requires a taking from “possession.”²⁸ And it applies only to tangible personal property, the kind that can be—literally, physically—possessed.²⁹

As English commerce grew in scale and sophistication, the limits of common law larceny soon became apparent, especially in cases involving thefts from employers. If an employer voluntarily delivered his property to an employee, the employer gave up physical possession.³⁰ When the employee later misappropriated the property, there was no wrongful taking from the employer’s possession, no “trespass in the taking,” and, hence, no larceny.³¹ To cover this gap, common law courts created the legal fiction that the employer retained “constructive possession” when he gave only temporary “custody” of the property to the employee.³² When the employee then misappropriated the property, he took from the owner’s constructive possession and committed larceny.³³

25. This fact alone eliminates the expedient of indicting for both larceny and embezzlement in a close case. Logically, a grand jury cannot find probable cause for both crimes at once. See *infra* text at Part IV.D.

26. LAFAVE, *supra* note 3, § 8.1(a), at 791.

27. ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 334 (4th ed. 1998).

28. Bruhn v. Commonwealth, 35 Va. App. at 344, 544 S.E.2d at 897; Jones, 3 Va. App. at 301, 349 S.E.2d at 418 (“To constitute the crime of simple larceny, there must have been a felonious taking of the property from the possession of the owner . . .”).

29. Lund v. Commonwealth, 217 Va. 688, 691–92, 232 S.E.2d 745, 748 (1977).

30. LAFAVE, *supra* note 3, § 8.8(a), at 792.

31. *Id.*

32. *Id.*

33. *Id.*

Outside of the employment relationship, English courts found mere custody rather than possession in a variety of contexts. A bailee given control of property in a closed container, for example, was deemed to possess the container, but to have mere custody of the contents.³⁴ One who took by fraud obtained mere custody, not possession, and thus committed larceny when he sold or converted the property to his own use.³⁵

Virginia courts inherited, and continue to apply, the same fictional doctrine of constructive possession. In *Overstreet v. Commonwealth*,³⁶ for example, the court held that a defendant who had been given permission to drive a car committed larceny of the vehicle when he kept it beyond the time consented to by the owner.³⁷ The court stated, "where the owner gives consent to a temporary possession or a possession for a limited purpose, the expiration of that qualification creates a constructive reversion of possession in the true owner."³⁸

Over time, the doctrine of constructive possession simply created new line-drawing problems.³⁹ The English courts never applied it to all employees, bailees, and others who received property with consent of the owner. As one commentator notes, the terms "possession" and "custody" really "represent legal conclusions regarding the comparative rights of the parties; there is no bright-line point at which the degree of control over property shifts from custody to possession."⁴⁰ For prosecutors, the problem can be especially acute at the time of indictment. The difference between custody and possession, and therefore the difference between larceny and embezzlement, may turn on the details of a poorly documented understanding between the owner and the defendant.

The fiction of constructive possession filled some, but not all, gaps in common law larceny. The doctrine did not apply where a third party—like a bank depositor—delivered property to an em-

34. *Carrier's Case*, Y.B. 13 Edw. 4, fol. 9, pl. 5 (1473).

35. *The King v. Pear*, 168 Eng. Rep. 208, 209 (1779).

36. 17 Va. App. 234, 435 S.E.2d 906 (Ct. App. 1993).

37. *Id.* at 238, 435 S.E.2d at 909.

38. *Id.* at 236, 435 S.E.2d at 908.

39. See GROOT, *supra* note 27, at 185 (noting that distinctions based on constructive possession by employers have become "much blurred in Virginia").

40. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 511 (2d ed. 1995).

ployee under circumstances where the employee was obligated to turn the property over to his employer.⁴¹ In such cases, common law courts reasoned, the employer could not retain “constructive possession” because he never had possession of the property to begin with.⁴² Without the employer’s possession, actual or constructive, there could be no larceny.⁴³ The landmark *Bazeley’s Case*⁴⁴ established this rule two centuries ago. There, a bank clerk received a customer’s money for deposit into the bank.⁴⁵ He put the money in his pocket rather than into the bank’s cash drawer.⁴⁶ The court held that such evidence was insufficient to prove larceny, because the bank had never obtained possession of the money.⁴⁷

Bazeley’s Case led to the first embezzlement statute, passed by Parliament in 1799.⁴⁸ In effect, *Bazeley’s Case* and that 1799 statute established the basic distinction between the separate crimes of larceny and embezzlement, a distinction that—with minor modification—prevails in Virginia today.⁴⁹ Virginia, by statute, defines embezzlement to include all conversions of property which a defendant “received for another” or “which shall have been entrusted or delivered to him.”⁵⁰

The element of “entrustment,” just like the doctrine of constructive possession, leads to hair-splitting issues in close cases. In *Gwaltney v. Commonwealth*,⁵¹ for example, a bank teller stole not from her own cash drawer, but from the momentarily unattended drawer of another teller.⁵² Gwaltney argued that her crime was larceny, not embezzlement, because she had never

41. See LAFAVE, *supra* note 3, § 8.1(b), at 793.

42. *Id.*

43. *Id.*

44. 168 Eng. Rep. 517 (1799). For a more detailed account of *Bazeley’s Case* and its role in defining the difference between common law larceny and embezzlement, see LAFAVE, *supra* note 3, § 8.1(b), at 793–94.

45. *Bazeley’s Case*, 168 Eng. Rep. at 517–18.

46. *Id.* at 518.

47. *Id.* at 523–24.

48. 39 Geo. 3, c. 85 (1799); see also LAFAVE, *supra* note 3, § 8.1(b), at 794 n.10.

49. In Virginia, the embezzlement statute may sweep more broadly than its English antecedents. See *Gwaltney v. Commonwealth*, 19 Va. App. 468, 474–75, 452 S.E.2d 687, 691 (Ct. App. 1995). But the statute still applies only to theft offenses “which fall outside the common law definition of larceny.” *Id.* at 475, 452 S.E.2d at 691.

50. VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003).

51. 19 Va. App. 468, 475, 452 S.E.2d 687, 691 (1995).

52. *Id.* at 470, 452 S.E.2d at 689.

been entrusted with the particular currency that she stole.⁵³ The court ruled otherwise, finding that "Gwaltney's position of trust extended beyond the confines of her station to the entire teller line."⁵⁴ *Gwaltney* is one of several Virginia cases that demonstrate the troublesome dilemma a prosecutor may face in choosing the appropriate charge for an indictment alleging theft by an employee.⁵⁵ Employment relationships involve an endless variety of rules and practices that may, or may not, result in the entrustment of particular property to a particular employee. Determining how far an employee's "position of trust" extends may require analysis and investigation that, as a practical matter, few police officers and prosecutors are able to undertake before indictment. Conflicting rules or differences of opinion among managers within an employing company may make it impossible to prove entrustment—or lack thereof—beyond a reasonable doubt. Yet, that is what Virginia law currently requires.

B. *Distinguishing Larceny and False Pretenses*

Like embezzlement, the crime of false pretenses was created by the British Parliament to fill a gap in the common law crime of larceny.⁵⁶ At common law, one who gained possession of property by fraud was guilty of larceny "by trick."⁵⁷ A thief who succeeded in gaining both possession and *title* to property, however, was guilty of no offense at all.⁵⁸ Parliament responded to that loophole with a 1757 statute making it a crime to "obtain" property by "false pretense."⁵⁹ Despite the ambiguity of the term "obtain," both the original English version and the many similar American statutes have been construed to require passage of title as an element of the offense.⁶⁰ Virginia's statute and interpretive case

53. *Id.* at 473, 452 S.E.2d at 690.

54. *Id.* at 475, 452 S.E.2d at 691.

55. For a comparison of those close cases, see GROOT, *supra* note 27, at 185, 196 nn. 13–14 (comparing *Simmons v. Commonwealth*, 219 Va. 181, 247 S.E.2d 359 (1978); *Foster v. Commonwealth*, 209 Va. 326, 163 S.E.2d 601 (1968); *Lee v. Commonwealth*, 200 Va. 233, 105 S.E.2d 152 (1958); and *Walker v. Commonwealth*, 35 Va. (8 Leigh) 743 (1837)).

56. See LAFAVE, *supra* note 3, § 8.7(a), at 828.

57. *Id.*

58. *Id.*

59. 30 Geo. 2, c. 24 (1757); see also LAFAVE, *supra* note 3, § 8.7(a), at 828–29.

60. See LAFAVE, *supra* note 3, § 8.7(d), at 834.

law follow that tradition.⁶¹ In essence, then, false pretenses consists of obtaining title to property by fraud. It requires: (1) a false statement of fact; that (2) causes the victim; (3) to pass title to the defendant. The defendant must: (4) know his statement is false; and (5) thereby intend to defraud the victim.⁶²

The main challenge in distinguishing larceny by trick from the crime of false pretenses is determining whether title passed to the thief. In *Baker v. Commonwealth*,⁶³ for example, the defendant took a Jeep from a car dealer for a "test drive," leaving behind as security a truck he had fraudulently obtained elsewhere.⁶⁴ After he failed to return the Jeep, Baker was prosecuted for false pretenses.⁶⁵ The Supreme Court of Virginia reversed the conviction because title to the Jeep never passed to Baker.⁶⁶ Baker's crime was larceny, not false pretenses.⁶⁷ Identifying the crime in *Baker* is relatively easy, because vehicles come with paper titles issued by the state. In many cases, however, passage of title raises more intricate problems. Where a thief fraudulently obtains consumer goods in a retail transaction, his crime typically will satisfy the elements of false pretenses because Virginia's commercial code deems title to pass upon delivery of the goods.⁶⁸ But his crime may be larceny if the small print of a consumer financing contract leaves title with the retailer.⁶⁹ In one Virginia case, the line between false pretenses and larceny turned upon a phrase in a rental contract that required return of keys at the end of the rental period.⁷⁰ Even in cases involving cash, the line-drawing problem may not be easy. Typically, title to currency passes with

61. See VA. CODE ANN. § 18.2-178 (Cum. Supp. 2003); see also *Baker v. Commonwealth*, 225 Va. 192, 194, 300 S.E.2d 788, 789 (1983).

62. LAFAVE, *supra* note 3, § 8.7, at 828.

63. 225 Va. 192, 300 S.E.2d 788 (1983).

64. *Id.* at 194, 300 S.E.2d at 789.

65. *Id.*

66. *Id.*

67. Although it was clear on these facts that Baker had committed larceny, the court declined to affirm the conviction on that ground. *Id.* The court noted, "[w]here, as here, the Commonwealth elects to prosecute a defendant for a specific category of larceny, and no other, its case must either prevail or fail upon that election." *Id.*

68. See *Davies v. Commonwealth*, 15 Va. App. 350, 353, 423 S.E.2d 839, 841 (Ct. App. 1992); see also VA. CODE ANN. § 8.2-401(2) (Repl. Vol. 2001).

69. See VA. CODE ANN. § 8.2-401(2) (Repl. Vol. 2001) (providing that title passes to the buyer upon delivery of the goods "unless otherwise explicitly agreed").

70. See *Bray v. Commonwealth*, 9 Va. App. 417, 425, 388 S.E.2d 837, 841 (Ct. App. 1990) (finding that "[o]wnership to the key does not pass to a tenant but is merely an accessory to the lease . . .").

possession; but it may be otherwise where the victim places conditions on the use of the cash or uses cash as security in a more complex transaction.⁷¹ In such cases, the line between false pretenses and larceny may depend upon what the victim said, or thought, at the time of the crime. In sum, to be confident that false pretenses is the right charge in some close cases, a prosecutor must be a commercial law expert and a mind reader rolled into one.

III. THE LEGACY OF *PITSNOGLE*: VIRGINIA SEEKS A PROCEDURAL SOLUTION TO A SUBSTANTIVE PROBLEM

The complexities of theft law can mean that a guilty thief escapes conviction because a prosecutor miscalculates in crafting an indictment. For decades, Virginia courts and legislators have struggled to avoid that consequence, even while clinging to the substantive law that causes the problem.

A. *The Procedural Solution: Removing the Connection Between Indictment and Proof*

In 1847–48, the General Assembly enacted statutes providing that one who embezzles, takes by false pretense, or receives stolen property “shall be deemed guilty of larceny.”⁷² The 1847–48 legislation, according to one of its principal authors, “abolishes [the] distinctive features [that separate larceny and other theft crimes] and declares that the offenders shall be deemed guilty of stealing, taking and carrying away the property.”⁷³

If merely “deeming” one crime to be another really meant that the “distinctive features” had been eliminated, then the 1847–48 legislation would have resulted in substantive consolidation of theft crimes in Virginia. But that is not what happened. Despite the 1847–48 statute, subsequent judicial rulings in larceny cases

71. LAFAVE, *supra* note 3, § 8.7, at 837.

72. Act of Mar. 14, 1848, ch. 4, 1847–48 Va. Acts 99; *see also* Anable v. Commonwealth, 65 Va. (24 Gratt.) 563, 577 (1873).

73. Anable, 65 Va. (24 Gratt.), at 581 (Moncure, J., dissenting). In his dissent, Justice Moncure notes that he “was a member of the legislature which framed the criminal code.” *Id.* at 583.

continued to insist on a trespassory taking from possession;⁷⁴ the embezzlement statute still required entrustment;⁷⁵ and false pretenses cases never abandoned the requirement that title must pass.⁷⁶ In other words, Virginia's Code and its courts continued to define the three principal theft crimes as separate offenses with different elements, even though the same Virginia Code said all were "deemed" larceny.⁷⁷

Instead of consolidating theft offenses as a matter of substance, a line of supreme court decisions from 1852 to 1895 treated the 1847–48 statute as a procedural device that allowed a prosecutor to indict for larceny and still convict for a different form of theft. In *Pitsnogle v. Commonwealth*,⁷⁸ the court summarized that view:

[U]pon an indictment simply charging larceny the Commonwealth may show either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretence [sic], or that it was embezzled.⁷⁹

B. *Chipping Away at the Procedural Solution: The 1919 and 1994 Amendments and Commonwealth v. Bruhn*

In 1919 the General Assembly codified that procedural device. It amended the embezzlement statute to provide that one who committed embezzlement "may be indicted as for simple larceny, but proof of embezzlement . . . shall be sufficient to sustain the charge."⁸⁰ But what the legislature gave with one hand it took away with the other. The same 1919 amendment inserted an "election" provision into the embezzlement statute, requiring the

74. See, e.g., *Jones v. Commonwealth*, 3 Va. App. 295, 301, 349 S.E.2d 414, 417–18 (Ct. App. 1986).

75. VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003); see also *Smith v. Commonwealth*, 222 Va. 646, 649, 283 S.E.2d 209, 210 (1981).

76. See, e.g., *Baker v. Commonwealth*, 225 Va. 192, 194, 300 S.E.2d 788, 789 (1983) (holding that the passage of title is an essential element of larceny).

77. In *Cera v. Commonwealth*, No. 0432-94-4, 1995 Va. App. LEXIS 407 (Ct. App. 1995) (unpublished decision), it was the Commonwealth that insisted the offenses were separate and distinct in order to avoid a speedy trial claim that arose when Cera was arrested and given a preliminary hearing on an embezzlement charge, but later direct-indicted and convicted for grand larceny. See *id.* at *4.

78. 91 Va. 808, 22 S.E. 351 (1895).

79. *Id.* at 811, 22 S.E. at 352.

80. VA. CODE ANN. § 4451 (1919); see also *Bruhn v. Commonwealth*, 37 Va. App. 537, 548, 559 S.E.2d 880, 886 (Ct. App. 2002) (en banc) (Bumgardner, J., dissenting) (quoting revisors' note to 1919 amendments).

Commonwealth—upon timely demand from the defense—to specify the form of theft crime it intended to prove at trial.⁸¹

What had begun in 1847 as an attempt to eliminate “distinctive features” among theft offenses had done nothing of the sort. The distinctions remained. Even the procedural device of allowing the Commonwealth to indict for one theft crime and prove another had been watered down. The 1919 election provision merely shifted to the defense the initial burden to ask for specificity. Once the Commonwealth elected its charge, it was bound by its own election.⁸²

That state of affairs remained until 1994, when the General Assembly amended the embezzlement statute in four critical ways.⁸³ First, the 1994 amendment removed the language that said one who commits the elements of embezzlement “shall be deemed guilty of larceny.”⁸⁴ Second, it removed the language allowing an embezzler to be indicted “as for larceny” and removed the phrase permitting proof of embezzlement to sustain a larceny indictment.⁸⁵ The third change, removal of the election provision,⁸⁶ followed naturally. Once the permissive indictment procedure was removed, there would be no need for an election. In effect, the indictment itself was now the election of a specific form of theft charge. The Commonwealth would have to prove the charge in the indictment. Fourth and finally, the 1994 amendment added a sentence which said: “Embezzlement shall be deemed larceny and upon conviction thereof, the person shall be punished as provided in § 18.2-95 or § 18.2-96 (the grand and petit larceny statutes).”⁸⁷ The final sentence—“[e]mbezzlement shall be deemed larceny”⁸⁸—carried the hint of theft consolidation. But the placement of that language in the sentence prescribing the penalty for embezzlement, rather than in the sentence de-

81. VA. CODE ANN. § 4451 (1919).

82. *Baker v. Commonwealth*, 225 Va. 192, 194, 300 S.E.2d 788, 789 (1983).

83. Act of Apr. 9, 1994, ch. 555, 1994 Va. Acts 776 (formerly codified as amended at VA. CODE ANN. § 18.2-111 (Repl. Vol. 1996)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

fining the offense, suggested a different purpose. It meant only that the penalties for larceny and embezzlement were the same.⁸⁹

*Commonwealth v. Bruhn*⁹⁰ gave Virginia appellate courts their first opportunity to interpret the 1994 amendments. Bruhn was an employee of a small cabinet-making business.⁹¹ He refinished some furniture for an acquaintance and received payment by check.⁹² The employer later learned the details of the transaction and claimed the money belonged to the business, not to Bruhn personally.⁹³ Bruhn was charged with grand larceny and convicted in a bench trial.⁹⁴ On appeal, both the Court of Appeals of Virginia⁹⁵ and the Supreme Court of Virginia⁹⁶ found the evidence insufficient to prove larceny for the simple reason that Bruhn took no tangible property from his employer's possession. The Commonwealth argued that the permissive indictment rule of *Pitsnogle* had survived the 1994 amendments and, therefore, that proof of embezzlement still would suffice to sustain the larceny charge against Bruhn.⁹⁷ Both the Court of Appeals of Virginia⁹⁸ and the Supreme Court of Virginia⁹⁹ disagreed. The 1994 amendment had removed the provision allowing the Commonwealth to indict for larceny and prove embezzlement, both courts ruled.¹⁰⁰ *Pitsnogle* was dead. The Commonwealth was bound to prove the charge in the indictment and not some other form of theft.

89. *Commonwealth v. Bruhn*, 264 Va. 597, 602–03, 570 S.E.2d 866, 869 (2002) (quoting *Bruhn v. Commonwealth*, 37 Va. App. 537, 546, 559 S.E.2d 880, 885 (Ct. App. 2002) (en banc)).

90. 264 Va. 597, 570 S.E.2d 866 (2002). In the interest of full disclosure, I should acknowledge that I was co-counsel for Bruhn throughout his appeals.

91. *Bruhn v. Commonwealth*, 35 Va. App. at 341, 544 S.E.2d at 896.

92. *Id.* at 342, 544 S.E.2d at 896.

93. *Id.*

94. *Id.* at 342–43, 544 S.E.2d at 897.

95. *Id.* at 344, 544 S.E.2d at 897, *aff'd* 37 Va. App. 537, 540, 559 S.E.2d 880, 882 (Ct. App. 2002) (en banc).

96. *Commonwealth v. Bruhn*, 264 Va. at 603, 570 S.E.2d at 869.

97. *Bruhn v. Commonwealth*, 35 Va. App. at 344, 544 S.E.2d at 897.

98. *Id.* 344–46, 544 S.E.2d at 897–98, *aff'd* 37 Va. App. at 540–47, 559 S.E.2d at 882–85 (Ct. App. 2002) (en banc).

99. *Commonwealth v. Bruhn*, 264 Va. at 602–03, 570 S.E.2d at 869.

100. *Id.*; *Bruhn v. Commonwealth*, 35 Va. App. at 345–46, 544 S.E.2d at 898.

C. *The 2003 Amendment: One More Try at a Procedural "Fix"*

The General Assembly responded quickly. Within months it passed House Bill 1454, which amended Virginia Code section 18.2-111, the same embezzlement statute at issue in *Bruhn*.¹⁰¹ The amendment provided:

Proof of embezzlement shall be sufficient to sustain the charge of larceny. Any person convicted hereunder shall be deemed guilty of larceny and may be indicted as for larceny and upon conviction shall be punished as provided in §18.2-95 or 18.2-96.¹⁰²

The 2003 amendment replaced the permissive indictment procedure that had been removed from the statute in 1994, but with one major difference. The new statute has no election provision.¹⁰³ Today, a defendant facing a larceny indictment has no statutory right to demand that the Commonwealth specify the theft offense it intends to prove at trial.¹⁰⁴ In effect, the 2003 General Assembly turned back the clock on theft crimes not just to 1994, but all the way to 1895.

IV. THE 2003 LEGISLATION VIOLATES THE VIRGINIA AND UNITED STATES CONSTITUTIONS

The 2003 amendment aims to solve a serious problem: convictions lost where proof at trial fails to match the theft offense stated in the indictment. But it creates a constitutional problem. If Virginia prosecutors rely on the 2003 amendment, they are likely to lose convictions on a variety of constitutional grounds. By sanctioning a procedure that permits indictment for one crime to support conviction of a different crime with different elements, the 2003 amendment violates a defendant's constitutional right to be informed of the nature of a criminal charge and his statutory right to indictment by grand jury. By permitting a reviewing court to sustain a conviction for embezzlement after a jury has

101. H.B. 1454, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003))).

102. *Id.*

103. *Id.*

104. *See id.*

found a defendant guilty of larceny, the 2003 amendment violates a defendant's right to trial by jury.

A. *The Court of Appeals in Bruhn Warned of Constitutional Problems*

The opinion of the en banc court of appeals in *Bruhn* contains a clear constitutional warning: "In Virginia, proof of the elements of a crime not alleged in an indictment will not support a conviction . . . [O]ur constitutions demand that the Commonwealth indict for the crime it intends to prosecute."¹⁰⁵ The court of appeals based its opinion on the Due Process Clause and Sixth Amendment to the United States Constitution, which collectively guarantee criminal defendants the right to be informed of the "nature and cause of the accusation,"¹⁰⁶ and on Article I, section 8 of the Virginia Constitution which establishes an equivalent right under state law.¹⁰⁷ The court's warning applies directly to the procedure that the General Assembly adopted in its 2003 amendment to the embezzlement statute. The process now allowed by the amendment is exactly the process that the *Bruhn* court found unconstitutional.¹⁰⁸

The statement of the court of appeals in *Bruhn* was not new or unique to Virginia law. For decades the Supreme Court of Virginia has sounded the same theme. "It is firmly established," the court has written, "that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged."¹⁰⁹ *Bruhn* is merely the most recent in a series of cases in which Virginia courts have applied this

105. *Bruhn v. Commonwealth*, 37 Va. App. at 541, 559 S.E.2d at 882. In affirming the court of appeals' decision, the Supreme Court of Virginia ruled simply that the Code of Virginia no longer allows proof of embezzlement to sustain a charge of larceny. *Commonwealth v. Bruhn*, 264 Va. at 602–03, 570 S.E.2d at 868–69. Because of its interpretation of the embezzlement statute, the court never reached constitutional issues. *See id.*

106. *Bruhn*, 37 Va. App. at 541, 559 S.E.2d at 882 (citing *United States v. Cruikshank*, 92 U.S. 542, 557–58 (1875)).

107. *Id.*

108. *Compare id.*, with Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003)).

109. *Commonwealth v. Dalton*, 259 Va. 249, 253, 524 S.E.2d 860, 862 (2000).

principle where indictments alleged one theft crime but proof at trial established a different offense.¹¹⁰

B. *The 2003 Amendment Violates the Right to be Informed of the “Nature and Cause” of a Criminal Charge*

The Sixth Amendment grants criminal defendants the right “to be informed of the nature and cause of the accusation.”¹¹¹ By virtue of the Fourteenth Amendment, that federal right applies in state prosecutions.¹¹² In order to satisfy the Sixth Amendment, an indictment must meet three requirements.¹¹³ First, the indictment must adequately serve a “notice” function. It must “furnish the accused with such a description of the charge against him as will enable him to make his defence [sic].”¹¹⁴ Second, the indictment must serve a “double jeopardy” function. It must plead an offense in a manner that will support a double jeopardy plea if the same defendant is later tried for the same crime.¹¹⁵ Third, the indictment must satisfy a “judicial review” function. It must set forth the elements “to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction.”¹¹⁶ By allowing a defendant to face trial without clear notice of the elements of his alleged crime, the 2003 amendment

110. See *Bruhn v. Commonwealth*, 37 Va. App. at 540, 559 S.E.2d at 882; *Gardner v. Commonwealth*, 262 Va. 18, 25, 546 S.E.2d 686, 690 (2001) (holding that evidence was insufficient because of a variance in the indictment and proof); *Baker v. Commonwealth*, 225 Va. 192, 194, 300 S.E.2d 788, 789 (1983) (stating that the jury instruction was improper because it did not address title to the property taken, and focused only on possession which does not encapsulate all of larceny by false pretenses); *Owalbi v. Commonwealth*, 16 Va. App. 78, 81, 428 S.E.2d 14, 16 (Ct. App. 1993) (holding that evidence was insufficient to prove the value of stolen credit cards).

111. U.S. CONST. amend. VI.

112. *Argersinger v. Hamlin*, 407 U.S. 25, 27 (1972).

113. See *United States v. Cruikshank*, 92 U.S. 542, 557–58 (1875). For a summary of the constitutional doctrines addressing the functions and sufficiency of indictments, see YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* 983–86 (10th ed. 2002).

114. *Cruikshank*, 92 U.S. at 558.

115. KAMISAR, *supra* note 113, at 984. Even before the 2003 amendment, there were complex double jeopardy issues inherent in the retrial of a defendant on a new theft charge after he had been acquitted of a different kind of theft involving the same property. Arguably, the 2003 amendment will further disadvantage prosecutors in this regard. A defendant tried for larceny after the 2003 amendments can argue plausibly that he has been “in jeopardy” for embezzlement as well, because the amendment would allow conviction for embezzlement upon a charge of larceny.

116. *Cruikshank*, 92 U.S. at 558.

fails the “notice” test. By allowing a reviewing court to sustain a conviction that was never rendered by the fact finder at trial, it fails the “judicial review” test as well.

1. The Notice Function

In one respect, at least in some cases, an indictment that alleges larceny of specific property would seem to give an accused adequate notice to defend against a claim that he embezzled the same property. After all, one might argue, he is informed of the time and place of the offense, the property at issue, and that he is accused of stealing it. Whether he stole from the victim’s possession or after obtaining lawful possession should matter little.¹¹⁷

This view of an indictment’s “notice” function, however, misses a fundamental point. In addition to providing “factual notice”—orienting a defendant to the time, place, and basic facts of a crime—an indictment also provides a kind of “legal notice.” It serves to identify the legal components or “elements” of the crime as well.¹¹⁸ Justice Thomas put the matter succinctly in *Apprendi v. New Jersey*:¹¹⁹

In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime.¹²⁰

That kind of legal notice is essential to allow defense counsel to do her job. The legal elements of an offense typically inform defense counsel’s major choices in preparing and trying a criminal case: from the witnesses she chooses to call (or even to interview), to the exhibits she offers or opposes, to the pretrial motions she files, to the opening statement or closing argument she delivers. An indictment that fails to specify the elements of an offense or,

117. This was the view of Justice Moncure in responding to defendant’s “notice” claims in *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 593–97 (1873) (Moncure, J., dissenting) (stating that jury instructions should be propounded when offenses are so intertwined only if there is at least a slight basis in law for the instruction).

118. Several Supreme Court of the United States’ decisions highlight this function by insisting that an indictment include the legal “ingredients” or “elements” of an offense. See, e.g., *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Cruikshank*, 92 U.S. at 558.

119. 530 U.S. 466 (2000).

120. *Id.* at 500 (Thomas, J., concurring).

worse yet, specifies one set of elements but allows them to change mid-trial, can confound defense counsel at each of those steps.¹²¹

It is not enough, therefore, to suggest that under the 2003 amendment a defendant is on notice that an indictment alleging the elements of larceny means, for practical purposes, that he is simultaneously charged with embezzlement as well. That approach may make sense where the crime ultimately proved is a lesser-included offense within the crime alleged. After all, in such circumstances a defendant was on notice before trial that he must meet all of the elements ultimately proved. But the situation is far different in the case of larceny and embezzlement. The elements of the two crimes are different and—in one critical respect—mutually contradictory.¹²² Defending against one can mean conceding an element of the other. Under such circumstances it is manifestly unfair to tell a defendant: “Go to trial now, and we’ll choose the elements of the crime after you’ve completed your defense.”

2. The Judicial Review Function

One of the essential checks and balances in the American criminal justice system is a division of labor between factfinder and legal arbiter. Juries—or judges in bench trials—determine the facts from evidence presented at trial and render a verdict based on those facts. At several steps along the way, however, judges impose limits on that factfinding process. Before trial, a judge reviews the indictment or information to insure that the facts alleged amount to a crime. The trial judge, in considering a motion to set aside the verdict, must determine if the facts proved at trial are sufficient as a matter of law to support a factfinder’s verdict. On appeal, an appellate court performs a similar function. The “nature and cause” clause of the Sixth Amendment pre-

121. It was this kind of unfairness which concerned the Court of Appeals of Virginia in *Bruhn*. See *Bruhn v. Commonwealth*, 37 Va. App. 537, 542, 559 S.E.2d 880, 883 (Ct. App. 2002) (en banc) (noting that “throughout his trial, Bruhn defended a charge of grand larceny . . . [and] presented evidence . . . that there had been no ‘trespassory taking’ of the property. . . . Clearly, the indictment did not provide Bruhn sufficient notice to adequately prepare to defend the accusations [of embezzlement now] made against him.”).

122. A defendant who commits a trespassory taking from the victim’s possession, and therefore is potentially guilty of larceny, has not been lawfully entrusted with the property, and therefore could not be guilty of embezzlement. See *supra* Part II.A.

serves the division of labor essential to that system of checks and balances by insuring that the reviewing court is considering the same charge that the factfinder considered.¹²³ Indeed, some commentators suggest this is the primary justification for a constitutional rule requiring that a formal criminal charge must identify all elements of the offense.¹²⁴

The 2003 amendment to Virginia's embezzlement statute violates this basic principle when it provides that "[p]roof of embezzlement shall be sufficient to sustain the charge of larceny."¹²⁵ The reason is simple; on a motion to set aside the verdict or on appeal, the amended statute would allow a reviewing court to sustain an embezzlement verdict that was never rendered by the factfinder.¹²⁶

C. *The 2003 Amendment Violates the Right to Trial by Jury*

For essentially the same reasons, the 2003 amendment can violate a defendant's Sixth Amendment right to trial by jury.¹²⁷ The problem will arise where a defendant convicted of larceny by a jury moves to set aside the verdict and then appeals on the familiar ground that the evidence is insufficient to support proof of "trespassory taking" from the victim's "possession."¹²⁸ The 2003 amendment would permit the Commonwealth to argue, as it did in *Bruhn*,¹²⁹ that proof of embezzlement—where "entrustment," rather than trespassory taking is the distinguishing element—is "sufficient to sustain the charge."¹³⁰ But, under these circum-

123. See *Cruikshank*, 92 U.S. at 558.

124. See *KAMISAR ET AL.*, *supra* note 113, at 984.

125. Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003)).

126. The Supreme Court of Virginia already has found this type of procedure unconstitutional. In *Baker v. Commonwealth*, 225 Va. 192, 300 S.E.2d 788 (1983), the court cited Article I, section 8 of the Virginia Constitution and held that, "[t]he Commonwealth cannot retrospectively argue that Baker should be convicted of a crime for which he was not prosecuted, and on which the jury was not instructed." *Id.* at 194–95, 300 S.E.2d at 789.

127. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."). The Sixth Amendment right to a jury trial applies in state prosecutions as well, by virtue of the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

128. The *Bruhn* appeal raised the same argument, but the case had been tried without a jury. *Commonwealth v. Bruhn*, 264 Va. 597, 600, 570 S.E.2d 866, 867–68 (2002).

129. See *id.* at 601–02, 570 S.E.2d at 868–69.

130. See Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA.

stances, no jury would have found the element of “entrustment” beyond a reasonable doubt. In effect, the 2003 amendment allows appellate courts to “sustain” proof of an element never considered by a jury. That process stands in clear violation of recent pronouncements by the Supreme Court of the United States, holding that the Sixth Amendment right to trial by jury means that a jury must find every element of an offense beyond a reasonable doubt.¹³¹

D. *The 2003 Amendment Violates the Statutory Right to a Grand Jury Indictment in Felony Cases*

There is no constitutional right to a grand jury indictment in a Virginia prosecution.¹³² By statute, however, Virginia law provides that “no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury.”¹³³ The statute essentially tracks the language of the Fifth Amendment to the United States Constitution,¹³⁴ which creates a similar right in federal prosecutions.¹³⁵

The 2003 amendment violates a Virginia defendant’s grand jury right when it allows conviction for a felony for which a defendant was never indicted.¹³⁶ That is exactly what occurs when a defendant indicted for larceny is ultimately convicted of the separate crime of embezzlement. Unless a grand jury indicts him for

CODE ANN. § 18.2-111 (Cum. Supp. 2003)).

131. See *Ring v. Arizona*, 536 U.S. 584, 602–03 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

132. See *Wilson v. Commonwealth*, 31 Va. App. 495, 504, 525 S.E.2d 1, 5 (Ct. App. 2000) (“[O]ne accused of a violation of the laws of the Commonwealth has no constitutional right to indictment by a grand jury.”).

133. VA. CODE ANN. § 19.2-217 (Repl. Vol. 2000 & Cum. Supp. 2003).

134. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” U.S. CONST. amend. V.

135. The right to grand jury indictment is among the few guarantees in the Bill of Rights which has never been applied to state prosecutions through the Supreme Court’s doctrine of “selective incorporation.” See *Hurtado v. California*, 110 U.S. 516, 534–35 (1884); see also JEROLD H. ISRAEL, ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* 535 (2003 ed.).

136. Although there is no Virginia decision directly on point, decisions of the Supreme Court of the United States, interpreting the identical grand jury provision of the Fifth Amendment, are instructive. See, e.g., *Stirone v. United States*, 361 U.S. 212, 215–16 (1960) (“[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.”).

embezzlement, the statute prohibits his trial—and therefore his conviction—for embezzlement.¹³⁷

One could argue that, under the 2003 amendment, a grand jury charge of larceny is really a “generic” form of theft allegation that implicitly includes a charge of embezzlement as well. After all, the statute now says that a defendant who commits embezzlement “may be indicted as for larceny.”¹³⁸ That argument fails, however, for reasons I have already identified. Larceny and embezzlement of the same property by the same defendant cannot coexist in the same charge. The crimes are contradictory and mutually exclusive.¹³⁹ Larceny requires an unlawful taking from the victim’s possession, while embezzlement requires lawful receipt from the victim.¹⁴⁰ It is literally impossible for a grand jury to find probable cause of both crimes at once. The grand jury right exists in Virginia law, as it does in the Fifth Amendment, in order to protect defendants from criminal charges not based on probable cause as found by a neutral body of citizens.¹⁴¹ If we construe a larceny indictment to support an embezzlement charge, then we have abandoned the very reason for having a grand jury indictment in the first place.

137. The 2003 amendment to Virginia’s embezzlement statute appears to contemplate trial on a larceny indictment followed by conviction for embezzlement, but without amendment of the indictment. *See* Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003)). Virginia Code Section 19.2-231 allows for the amendment of indictments “provided the amendment does not change the nature or character of the offense charged.” VA. CODE ANN. § 19.2-231 (Repl. Vol. 2000 & Cum. Supp. 2003). Though there is no Virginia case directly on point, it seems likely that any attempt to amend a larceny indictment to allege an element—entrustment—that is the *opposite* of an element found by the grand jury—trespassory taking—would change the nature and character of the offense. *Cf.* *Wilson v. Commonwealth*, 31 Va. App. 495, 508, 525 S.E.2d 1, 7 (Ct. App. 2000) (permitting amendment which merely “narrowed the scope of the indictment” by striking out one of several allegations phrased in the disjunctive). In any event, unlike the procedure contemplated by the 2003 amendments to the embezzlement statute, the amendment provision in Virginia Code section 19.2-231 applies only before the verdict, provides for a new arraignment on the amended charge, and allows for a continuance where the amendment might prejudice the defense. *See* VA. CODE ANN. § 19.2-231 (Repl. Vol. 2000 & Cum. Supp. 2003).

138. VA. CODE ANN. 18.2-111 (Cum. Supp. 2003).

139. *See supra* Part II.A.

140. *See supra* text accompanying notes 22–25.

141. “The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *Stirone*, 361 U.S. at 218.

E. *An Election Provision Would Only Partially Solve the Problem*

For seventy-five years, Virginia theft law included a provision requiring prosecutors, upon demand by the defense, to specify the theft crime which the Commonwealth intended to prove at trial.¹⁴² The 2003 General Assembly considered, but ultimately discarded, an identical election procedure.¹⁴³

An election procedure would have solved at least some of the constitutional shortcomings identified above.¹⁴⁴ Nevertheless, it is far from a perfect solution. Competent defense counsel will almost always demand an election. In that circumstance, prosecutors still face the familiar historic dilemma of choosing the right theft offense at the risk of losing a conviction. And where defense counsel fails to demand an election, his failure may open up a new round of post-conviction litigation over ineffective assistance of counsel.¹⁴⁵

142. The General Assembly added the election provision in 1919, then removed it in 1994 at the same time it removed the provision allowing proof of embezzlement to sustain a larceny conviction. Compare VA. CODE ANN. § 4451 (1919), with Act. of Apr. 9, 1994, ch. 555, 1994 Va. Acts 776 (formerly codified as amended at VA. CODE ANN. § 18.2-111 (Repl. Vol. 1996)); see also *supra* Part III.B.

143. The original version of House Bill 1454 included no election provision. H.B. 1454, Va. Gen. Assembly (Reg. Sess. 2003). The Senate amended the bill and passed a version that included an election right. The election provision was removed by a conference committee, resulting in a final version of House Bill 1454 which contained no election provision. See H.B. 1454, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003))).

144. By clearly identifying the charge before trial, an election procedure would satisfy the notice and judicial review functions of the Sixth Amendment "nature and cause" clause. Allowing a jury instruction on all of the elements of the ultimate crime of conviction would prevent infringement upon the defendant's right to a jury trial. Although an election provision would not address the right to be tried only on felonies indicted by the grand jury, one might argue that it would create a statutory exception to the right. Arguably, the addition of an election procedure to the embezzlement statute in 1919 resulted from the legislature's recognition that it was unfair to require a defendant to face trial without knowing the elements of his alleged offense. The election procedure probably protected the statute from constitutional challenge in most cases, except where the Commonwealth elected one form of theft and later argued that the evidence proved a different crime. See, e.g., *Baker v. Commonwealth*, 225 Va. 192, 194-95, 300 S.E.2d 788, 789 (1983).

145. While the Sixth Amendment allows defense counsel wide latitude in exercising professional judgment as demonstrated in *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984), there are few cases where there would be a valid strategic reason for failing to ask a prosecutor to specify the charge before trial.

V. CONSOLIDATING THEFT CRIMES: GETTING TO THE SUBSTANCE OF THE PROBLEM

In fairness to our English forebears, we should acknowledge the necessities which led to the complex tangle of theft offenses which now characterize Virginia law. Common law judges built these doctrines one case at a time. Sometimes they bent precedent or “deemed” elements to exist in order to prevent an obviously guilty thief from escaping justice.¹⁴⁶ In an age where all felonies were punishable by death, sometimes they contracted the definition of “felony” where a petty crime might otherwise lead to the gallows.¹⁴⁷ Occasionally Parliament stepped in to fill gaps in response to public disapproval of a judicial decision.¹⁴⁸ Each step—perhaps—may have made sense at the time. But, like an old lawn mower strapped together with baling wire and patched with duct tape, no one would have built it that way from the start.

While English history can explain the subtle boundaries that separate theft offenses, almost no one claims that those distinctions serve any purpose in the modern age.¹⁴⁹ It should not matter whether I loan my car to a thief who already has decided to steal it or to one who reaches that decision moments after she sits in the driver’s seat. If a crook uses a phony identity to take my merchandise, it should not matter whether the small print of the financing agreement leaves me with title. Over a hundred years ago, an early Virginia advocate of theft consolidation wrote that larceny, embezzlement, and false pretenses “differ only in a few circumstantial details, immaterial in a moral point of view. They all amount to a criminal and fraudulent conversion by one man to his own use of another man’s property.”¹⁵⁰ In terms of a defen-

146. See *Rex v. Chisser*, 83 Eng. Rep. 142, 142–43 (K.B. 1678). *Chisser* is among the early cases that extended the reach of larceny through the legal fiction of “constructive possession.” See *supra* Part II.

147. “The severity of this penalty not only made the judges reluctant to enlarge felonious larceny but also may account for the host of artificial limitations that they engrafted on the offense” MODEL PENAL CODE § 223.1, cmt. 2, at 129 (Proposed Official Draft 1980).

148. The creation of the separate offenses of false pretenses in 1757 and embezzlement in 1799 are the prime examples. See *supra* text accompanying notes 48–49, 56–60.

149. “The distinction [between embezzlement and larceny], now largely obsolete, did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim.” *Van Vechten v. Am. Eagle Fire Ins. Co.*, 146 N.E. 432, 433 (N.Y. 1925).

150. *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 581 (1873) (Moncure, J., dissent-

dant's moral culpability, his dangerousness, or the loss he causes to his victim, there is no sensible reason to distinguish among the offenses.¹⁵¹

Because the archaic distinctions among theft offenses serve no purpose other than to confound prosecutors, most jurisdictions have abandoned them. The criminal codes of most American states discarded the distinctions over the last half century.¹⁵² The federal criminal code penalizes theft of federal property without regard to the narrow distinctions among traditional theft offenses.¹⁵³ The Model Penal Code consolidates not only larceny, embezzlement, and false pretenses into the offense of "theft," but receiving stolen property, extortion, and blackmail as well.¹⁵⁴ In an ironic twist, the English themselves consolidated larceny, embezzlement, and false pretenses into the crime of "theft" more than thirty years ago.¹⁵⁵

Rather than pursuing failed efforts to address the muddle of theft crimes through procedural devices, Virginia should choose the best from these many examples and address the real problem directly. The Commonwealth should simplify its substantive law by eliminating the separate crimes of larceny, embezzlement, and false pretenses, and replacing them with the single offense of "theft." Most importantly, the change must be more than cosmetic: more than a change of labels that merely "deems" various offenses to be "larceny" without changing the elements of the offenses. The key to successful consolidation is to eliminate the elements that distinguished the traditional offenses—the elements which make no difference from a moral standpoint and serve only to complicate prosecution. In essence, that means eliminating the crime of false pretense by making passage of title irrelevant. That means eliminating the distinction between lar-

ing).

151. The moral equivalence of the three theft offenses accounts for the near-universal trend to treat them the same for purposes of punishment. Virginia does exactly that. Compare VA. CODE ANN. § 18.2-95 (Cum. Supp. 2003) (grand larceny) and VA. CODE ANN. § 18.2-96 (Repl. Vol. 1996 & Cum. Supp. 2003) (petit larceny), with VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003) (embezzlement) and VA. CODE ANN. § 18.2-178 (Cum. Supp. 2003) (false pretenses).

152. See Bartram, *supra* note 6, at 251 n.23.

153. See 18 U.S.C. § 641 (2000).

154. See MODEL PENAL CODE §§ 223.1 to -223.6 (Proposed Official Draft 1980).

155. The English Theft Act of 1968 defines the crime as follows: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it." Theft Act, 1968, c. 60, § 1(1) (Eng.).

cey and embezzlement by making entrustment irrelevant. The best way to achieve that change is to eliminate those traditional offenses altogether, and to replace them with a single new offense with simpler elements. The basic elements of theft are: (1) obtaining the property of another; (2) with the intention of depriving another of property; and (3) with no honest claim of right to the property. The basic definition of “theft” should say so; and it need say no more.

I will not pretend that the change will be as simple as that. The term “larceny,” along with the historical baggage it carries, is sprinkled throughout the Code of Virginia.¹⁵⁶ It will take a painstaking review of those related crimes to ensure a smooth transition. But the benefits of theft consolidation are obvious, and the time is ripe for change. The events of the last year—the *Bruhn* decision and the legislative response—point out the need for a broader solution than the procedural fixes that have failed in the past. The Crime Commission has already begun a comprehensive review of the criminal code.¹⁵⁷ It should put theft consolidation at the top of its list of priorities.

VI. CONCLUSION

For more than a century, Virginia has made unsuccessful attempts to achieve a kind of theft consolidation through procedural means. Those attempts have failed because they conflict with procedural rights guaranteed by the constitutions of Virginia and the United States. The General Assembly’s latest effort to amend the embezzlement statute is merely more of the same, and it is doomed to failure for the same reason. In the end, the problems we inherited from our English ancestors cannot be solved by demanding that a defendant face trial without knowing the elements of his alleged crime. The arcane subtleties of English common law cannot be erased simply by “deeming” one hard-to-define crime to be a different hard-to-define crime. The problem lies in the definitions themselves.

156. See, e.g., VA. CODE ANN. § 18.2-104 (Repl. Vol. 1996) (punishing recidivism); *id.* § 18.2-114.1 (Repl. Vol. 1996) (punishing commissioners who fail to account for receipts); *id.* § 18.2-115 (Repl. Vol. 1996 & Cum. Supp. 2003) (criminalizing the fraudulent conversion of property subject to lien); *id.* § 18.2-181 (Repl. Vol. 1996 & Cum. Supp. 2003) (punishing those who write bad checks).

157. See H.J. Res. 687, Va. Gen. Assembly (Reg. Sess. 2001).
