



**BUDDHIST CASE LAW ON THEFT:
the *vinītavatthu* on the second *pārājika***

In memory of David Daube (1909-1999)

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We lawyers, especially we common lawyers, think of legislation and case law as utterly separate sources of law. The vinaya is usually talked of in legislative terms as “the monastic code” or “the Buddha’s rulings,” yet it contains a surprising amount of case law. Of the twenty-eight pages of the *vinayapāli* devoted to theft, fifteen contain case law. They are the object of this study. The *vinayapāli* (which was collated and reduced to writing in the first century BCE) consists of oral memorized texts and jottings of various kinds from the prior Buddhist centuries, the core of which must have been fixed by the reign of King Aśoka (circa 273–232 BCE) The four most dramatic offences known to the *vinayapāli* are the *pārājika*, the conditions of defeat, dealt with in the first of its six volumes. The second *pārājika*, identified by a Pāli abstract noun that means *taking things which haven’t properly been offered to you*, is what we call theft. A monk who commits theft is defeated, which means he has *ipso facto* excluded himself from monkhood. The word-commentary to the second *pārājika* defines it as follows:

To be defeated means: as a withered leaf freed from its hold on the tree can never become green again, so a monk who has taken something worth £5 which had not been given to him ceases to be a recluse, a member of the Buddha’s Sakyan clan. Hence we call him one who has suffered defeat.¹

The *Great Commentary* (fifth century CE) understands this to mean that a defeated monk loses all power to meditate, and thus all the powers that he had acquired by meditating. The *vinayapāli*'s chapter on theft consists of six layers of text that have coalesced around a single paragraph of a markedly legalistic kind:

Should any monk steal what has not been given to him, whether from a village or from the jungle, in circumstances such that a king would have arrested, flogged, imprisoned, or banished him with the words, "You are a robber, you are a fool, you are benighted, you are a thief," that monk who took what has not been given to him is defeated and is no longer in communion (V iii 45).

For as long as there have been monks, this formula has been repeated in public at least once a month. Four layers of material, the word-*commentary*, *lesser offences*, *defences*, and *case law*, comment on, or supplement, or interpret this paragraph. A fifth layer precedes the paragraph, explaining the circumstances in which the Buddha came to make the ruling. This story, *Dhaniya, the first offender*, is, in the temporal logic of the *vinayapāli*, the first Buddhist case law on theft. If the word "thief" conjures up images of a pickpocket or shoplifter, think again: Dhaniya's offence was to build his meditation hut using some government material that hadn't been cleared through the appropriate bureaucratic channels. He escaped defeat by privilege of the first offender: only when the Buddha has declared it to be the case, and when each monk has repeated monthly that it is the case, does the causal link between theft and defeat kick into effect. This suggests that the link is as much a matter of speech-acts as of nature or science. The case law on theft (V iii 54–67) consists of forty-nine cases, preceded by a mnemonic index in verse. I shall refer to individual cases as $2p(1-49)$, where $2p$ stands for the second *pārājika*.²

A sufficient reason for examining the *vinītavatthu* (the case law attached to the four *pārājika* and to some of the lesser offences) is that no one has yet done so. A better reason is that it provides evidence for the development of Buddhist legal reasoning, and thus for an early chapter in any *History of Eurasian Legal Reasoning*. Through the first four centuries of Buddhism, the vinaya texts were preserved by a body of specialist reciters and experts. Our understanding of the texts they accumulated and transmitted would improve if we knew how these specialists came into being, then perpetuated themselves. What can we learn from the texts themselves about the milieu in which they were created? What pedagogic techniques did the vinayadhara use to pass on their knowledge? Will we ever be able to describe Buddhism in as much detail as Fritz Schulz can supply about the equivalent period in the development of Roman law, when experts would

give their considered reply (*responsum*) to real or hypothetical legal problems. These *responsa*,

if delivered in writing, would be preserved in the family archives of the respondent, where they would be available for his future literary publications and open presumably to his friends and pupils. Again, pupils present at the consultation of their master might take notes Thus preserved, a jurist's *responsa* might come later to be published as a collection ...³

I presume that the oral stage of the *vinītavatthu*'s textual history was somewhat similar. Whether oral or written, particular monasteries preserved their own particular texts. But such texts, in order to eventually become part of the canon, must in some sense have been "published as collections." My guess is that the canonical *forty-nine cases on theft* was compiled from several such collections. If this is right, we could try to identify earlier and later cases within the collection, representing different stages in the development of Buddhist legal reasoning. But can we ever judge what is "primitive" or "advanced" in another legal culture's legal reasoning, without bias toward the forms of reasoning preferred by our own legal culture? In an attempt to avoid such bias, I shall start by discussing some terms used by Max Weber.

A warning: I shall emphasize the legalistic qualities embodied in some of these forty-nine cases. But it may be that this collection, because of its subject matter, is atypically legalistic. In many legal cultures the topic of theft spurred early lawyers on to their first flights of abstraction: ideas on ownership emerged through discussion of theft, and ownership is, *par excellence*, the legal abstract noun. We need further micro-studies of some of the other collections in the *vinayapāli* before we can generalize about Pāli Buddhist case law as a whole.

Casuistry, Hypotheticals, and Rules

Max Weber uses the term *casuistry* as part of the rhetorical apparatus by which he seeks to persuade us that *premodern* is to *modern* as *irrational* is to *rational*. He tells us that the Hindu law books give "a casuistic treatment of the legal data that lacks definiteness and concreteness, thus remaining juridically informal and but moderately rational in its systematization."⁴ I'm not sure exactly what Weber meant by the term, but I know what he felt about it: he always uses casuistry as a *boo-word* in contrast to his *hooray-phrase* "formal rational legal reasoning." When praising the *Napoleonic Code* (1805) as the acme of legal rationality, for instance, he applauds its freedom from "nonjuristic elements ... merely ethical admonitions ... [and] casuistry."⁵ The Assyriologists, those who study the cunei-

form codes, use *casuistry* as a term of art. H. L. J. Vanstiphout mentions “the widespread casuistic literature, or the technique of *if... , then ...*, which underlies not only jurisprudence but also divination.”⁶ Raymond Westbrook adds that the two Biblical codes share a “casuistic presentation, e.g., a particular set of circumstances given (usually but not always) by *if ... , then ...*.”⁷ The *if... , then ...* structure (which modern lawyers refer to as a sanction–stipulating formula)⁸ lies near the heart of what law does. But I am unhappy with labeling it as casuistry, since, in English at any rate, the word carries its own value judgement. The terms *casuist* was first recorded in 1609, *casuistic* in 1660 and *casuistry* in 1725. These terms were invented during the crucial years 1550–1650, when lawyers were becoming more learned and kings were becoming more Protestant. It was used by Protestants and Jansenist Catholics as a *boo-word* to denigrate Jesuit ethics. This quarrel about ethical methodology is reflected in the Oxford Dictionary’s definition:

The science, art or reasoning of the casuist; that part of ethics which resolves cases of conscience, applying the general rules of religion and morality to particular instances in which “circumstances alter cases,” or in which there appears to be a conflict of duties. Often (and perhaps originally) applied to a quibbling and evasive way of dealing with difficult cases of duty⁹

The term *hypothetical* seems a less loaded term by which to refer to the *if... , then ...* formulation. To convert a hypothetical into a *rule*, we must increase the level of abstraction so as to embody the legal content in a single sentence, or slogan or formula. I shall proceed to explore the overlapping categories of case law, hypothetical and rule.

Some of these forty–nine cases may be precedents, in the sense of records of how actual cases were resolved. But others appear to have taken on the dress of case law solely for expository purposes. I’ll use an example from the third *pārājika*, since I have already tested out its intelligibility on my third year law students:

3p5: In the middle of a meal, monk A choked on a piece of meat. Monk B slapped him on the neck. It got the meat out, but it also caused hemorrhage and death. Monk B felt remorse, and inquired whether he had committed an offence. “There is no offence, monk, as you did not intend to cause his death.” Another time the facts were similar, except that monk B intended to kill monk A ... “There is an offence of defeat.” Yet another time, the facts were similar, except that monk A, though losing blood, did not die from his wounds ... “There is no offence of defeat, monk, but there is a grave offence.”

I gave my students this *translation*, from Pāli to English. What they

gave me back was a *reinterpretation*, using concepts they had picked up from modern English criminal law. In the first case, they told me, monk B has an *actus reus* but no *mens rea* and goes free. In the second case he has both, and has committed the third *pārājika*. In the third case he has *mens rea* but only partial *actus reus*, and is guilty not of the third *pārājika* but of a lesser offence. They could even sum this analysis up in a single rule: murder requires both a specific mental intention and a physical act leading to specific physical consequences. To describe what mental processes my students went through in their reinterpretation is to get near to the heart of comparative legal reasoning. What they mainly did, I suggest, was to nominalize. Where the Pāli text uses the sentence “Monk A died,” my students use the noun phrase *complete actus reus of murder*. As European legal reasoning developed, abstract nouns have multiplied, *entia sunt multiplicanda*. For a small community of legal hobbyists, enjoying discussion together, the nouns act as a shorthand, allowing a simplification of discussion and argument. Max Weber, in celebrating this, has taken the opposite position to William of Ockham: abstract noun-phrases allow a conceptual analysis of law which is the highest form of legal rationality. Weber, no doubt, would have referred to the Pāli reasoning in 3p5 as *casuistry*.

I don't think 3p5 shows any clear advantages between using expository case law and using the hypotheticals, *entia* and rules of the modern lawyer. Either way, the point gets across. My students use less words, which is a measure of communicative efficiency. However, they do so by coining legal technicalities which exclude the general public from understanding, which contributes to communicative inefficiency. Let's compare another piece of vinaya reasoning, this from the chapter on theft. A lengthy passage at V iii 53 plots the degree of asportation (whether the monk removed the item altogether, or moved it from its position or merely touched it) against the value of the stolen item (whether worth more than £5 or less than £1). Which offences are committed in which combination of circumstances? The translation of the *vinayapāli* fills the best part of a page, even though it omits repetitions.¹⁰ Here Weber's scorn for casuistry is merited: there must be a shorter way to make this point. The same information can be conveyed very simply if (as a text for recitation cannot) we were to use a two dimensional table:

Table 1

	remove	move	touch
worth 5 or more	<i>pārājika</i>	<i>thūllaccaya</i>	<i>dukkāṭa</i>
worth 1 > 5	<i>thūllaccaya</i>	<i>dukkāṭa</i>	<i>dukkāṭa</i>
worth 0 > 1	<i>dukkāṭa</i>	<i>dukkāṭa</i>	<i>dukkāṭa</i>

Even within the constraints of orality, the information could be written in a single sentence:

In cases where the asportation provisions and the valuation provisions both apply, the latter provide the baseline on which the former operate to reduce liability.

But before we can write this sentence, we must nominalize the labels of the ranks as asportation and the labels of the rows as *valuation*. This reduction of a list of alternatives to an abstract noun makes shorter, more information-heavy sentences possible. Though my students use far more abstract technical legal nouns than did the authors of the *vinayapāli*, the case law on theft shows that the process was underway by 100 BCE:

2p30: Once some men left their raft by the side of the river Aciravatī, awaiting repair. Some monks came across the raft and, seeing only a heap of timber and bindings, helped themselves. The raft owners reprimanded them ... “Monks, there is no offence, since you thought that they were rags taken from the dust-heap.”

Here “rags taken from the dust-heap” has become a noun-phrase meaning “goods thought by the taker to have been abandoned.”

The expository cases are very close in form to hypothetical statements of the law. We merely need to shift tenses from past imperfect to present conditional, change “once” to *if*, and “They told this matter to the Lord Buddha, who ruled ...” to *then*. Compare:

2p2: ... Once a monk saw a very valuable garment laid out to dry by the bleachers. He formed the intention to steal it and touched it, but immediately felt remorse for his intention ... “There is no offence of defeat, monk, there is a *dukkāṭa* offence.” On another occasion, the same thing happened, but the monk touched the garment so as to make it quiver ... “There is no offence of defeat, monk, there is a *thūllaccaya* offence.” ... When this happened a third time, the monk actually removed the garment ... “You, monk, have fallen into defeat.”

with this passage from the lesser offences section:

Here are five checkpoints for the offence of *taking what has not been given to you*, leading to defeat:

- (1) Did the item belong to another?
- (2) Was it known to belong to another?
- (3) Was the item non-trivial?
- (4) Is it worth more than £5?
- (5) Was there an intent to steal?

If he touches it, there is a *dukkata* offence. If he makes it quiver, there is a *thūllaccaya* offence. If he removes it from its place, there is an offence of defeat. (V iii 53)

Such hypothetical formulations are characteristic of the *lesser offences* stratum of material on theft. It would be nice to draw some conclusion about its dating from this, but we must not assume that cases are always older than hypotheticals. The cuneiform literature uses similar forms for law, divination, and astronomy. I would expect case law (“When that happened, this was the result”) and hypotheticals (“If that should happen, this should be the result”) to be as old as each other, and as old as proto-science and futurology. Nor, in the case of the vinaya, do hypotheticals and cases precede rules, if you concede that the Buddha’s original paragraph on theft can be aptly described as a rule. Rather than trying to fit case law, hypotheticals, and rules into some developmental pattern, we should consider how they might find their uses in the process of legal education.

The Educative Functions of Buddhist Case Law

Gregory Schopen has described Mūlasārvastivādin Buddhist case law in these terms:

... Vinaya cases are neither fables nor historical accounts but rather the forms that vinaya masters chose narratively to frame the issues that concerned them ...¹¹

In my view, what chiefly concerned them was educational. No doubt from time to time a vinayadhara must have delivered his opinion to the king, or delivered advice to his fellow-monks or refused to ordain a certain monk. At such moments we need a socio-political analysis of how vinaya-learning impinges on real life. But most of the time a vinayadhara’s job was to pass on vinaya-learning to his students. This, at any rate, was the case in eighteenth and nineteenth century Burma, when the vinayadhara’s monastery was home to a handful of newly ordained monks in their early twenties. Whenever their teacher judged a dispute, or gave formal advice to the king, the students were, I guess, present to observe and note. Most of the time, though, they would listen to their teacher reading through the

vinayapāli or reminiscing about his experiences or recalling the wisdom that his teacher had passed down to him. From time to time, the vinayadhara must have presided over a moot court of his students, or, in less legally loaded terms, a semi-public debate on moot problems in vinaya — such knotty points, for example, as are listed in the *Sweat-inducing sutta* of the paracanonical *Parivāra* (V vi 216).

I think the forty-nine cases on theft can best be understood as documents generated by legal education. They can be used in different ways for different educative functions. I shall identify six such functions: *confidence inspiring cases*, *expository cases*, *precedents*, *genre-validating cases*, *cases illustrating legal reasoning* and *cases illustrating ownership*. Actual cases overlap my terminology. Just as very different sermons can be preached on the same text, so very different law lectures can be based on analysis of the same case. I shall introduce these categories in turn. The first two cases in the collection *inspire confidence* in their content. 2p1 recapitulates the story of the second offender (V iii 44) while 2p2, as we have seen, recapitulates the rules on asportation from the *lesser offences* section (V iii 53). In other words, the casebook starts by affirming its continuity with the previous *vinayapāli* materials that have accumulated round the ruling on theft. Having won our trust, it then recites forty-seven cases decided by the Buddha. The group of *expository cases* can be exemplified by 2p2, for reasons we have already examined. At the opposite extreme stand the *precedent cases*, which appear to describe real events that happened to named people. The last five cases have, at any rate, broken away from the anonymity of their predecessors: instead of “a certain monk” as protagonist, we hear what befell the nun Thullanandā, and the monks Ajjuka, Pilindavaccha, Paṇḍaka and Daḷhika. This brings us a little closer to the realm of non-fiction. In the case of Pilindavaccha, about whose *iddhi* accomplishments there are many stories (V i 203–8), it is possible that the *vinayapāli* case came from a preexisting collection of stories about this magician-monk:

2p47 The lay supporters of the venerable Pilindavaccha lived in Benares. On one occasion thieves pillaged their house and kidnapped two of their children. Thereupon the venerable Pilindavaccha used his psychic powers to teleport the children back home. The neighbors were most impressed, saying “The learned and subtle Pilindavaccha is a maestro of paranormal powers! We too shall support him.” The other monks, in vexation, anger, and annoyance said to each other “Just what does he think he’s doing, teleporting the kidnapped children back to safety?” They complained to the Lord Buddha, who decreed: “Monks, no offence has been committed here by the use of paranormal powers.”

If the compilers excerpted this from a Pilindavaccha-cycle, it might

explain why the tradition has had great difficulty in deciding the legal point at issue. Krom Phraya Vajirañāṇavarorasa's *Entrance to the Vinaya*, published in Thailand in 1904, takes this as illustrating a point of theft law:

The children belonged to their parents. It cannot be theft to take what has not been given from the thieves in order to restore it to the original owner.¹²

Thanissaro Bhikkhu, writing in California in 1994, prefers what Weber would have called a disenchanting reading:

The Buddha's statement, though, was probably meant to discourage bhikkhus without psychic powers from getting directly involved in righting wrongs of this sort.¹³

The nearer these cases are to history, the harder it is to elicit the legal moral they illustrate.

What, for instance, is the point of the next case, which I'm prepared to believe actually happened:

2p48: Two monks called Paṇḍaka and Kapila were friends. One lived in a village and the other in the city of Kosambī. Once, as Paṇḍaka was crossing the river between his village and Kosambī, a piece of fat, escaped from the hands of pork-butchers, stuck to his foot. The monk took hold of it and said "I will give it back to the owners." When he did so, the owners reprimanded him, saying: "You're not a proper monk, you're a thief." A woman cowherd who had watched the whole scene unfurl said to him: "Come, honored sir, and let us commit sexual intercourse." He replied: "Sure thing. Now that I have committed theft, I am no longer a proper monk." After they had sex, he carried on to Kosambī and told the monks there everything that had taken place. The monks repeated the whole story to the Lord Buddha, who ruled as follows: "Monks, there has been no offence of defeat for taking what has not been given. But there has been an offence of defeat for unchastity."

This case is in the *vinayapāli* because a lot of monks went to a lot of effort to preserve it. Why? What moral did they expect future monks to draw from it? My tentative answer is that it contrasts the stark simplicity of the law on the first *pārājika* with the complexities of the law on the second *pārājika*. If you think you've committed theft, check with an expert first. If you think you've had sex, then you're probably right.

2p49 is a *genre-validating case*. The first forty-five cases are decided by the Buddha, but in the final cases the emphasis passes from the Buddha to his successors. In 2p46, Upāli's opinion (that a monk is innocent of theft) prevails over Ānanda's. We do not learn the Buddha's thoughts on the matter. Upāli is, of course, the first in the lineage of Theravāda vinayadharas, and it is fitting that he should decide the earliest non-

Gautaman Buddhist law report. 2p49 takes matters further, by reporting the advice given by Daḷhika (a monk otherwise unknown) that his roommate was not in defeat as a thief. Thus the very last sentence of the chapter on theft shows an ordinary monk applying his knowledge of the vinaya to his fellow monks. Authority has passed from the Buddha to the vinaya specialist. “If an ordinary monk’s legal advice is worth preserving in the *vinayapāli*, then,” thought the vinayadharas, “my own legal advice and lecture notes are worth preserving for future vinaya experts to consult.” Implicitly, 2p49 validates the future collection and publication of case law. The genre thus validated was to flourish in eighteenth and nineteenth century Burma under the name *Wīni pyatton* (Vinaya Precedents). Since this literature has been strangely overlooked by vinaya specialists, I shall say a little about it. These works usually have a macaronic Pali–Burmese title which includes the word *vinicchaya* (translatable as “judgements, rulings, precedents”). I shall spell them using Burmese transcription. Examples of such works written by most of the important sayadaws discussed in the religious histories have survived. We have a *Pakinnaka vinicchaya kyan*, a series of rulings on clerical discipline, written by the Aungmye shwebon sayadaw who sat in judgement on the shoulder dispute about 1735. We have an *Atula pyatton*, circa 1760, collated by Alaunghpaya’s chief monk, the leader of the *One Shoulder* faction. And we have a *Ganhasarapakasani kyan*, a Collection of the Essence of the Book, circa 1790, written by the *Two Shoulder* ideologue, the Sinde sayadaw. We have several mid–19th century works from the Thilon sayadaw (1786–1860), including a *Chuddasama vinicchaya*, Rulings on Fourteen Points of Clerical Discipline. The Thilon sayadaw was the *éminence grise* behind Mindon’s splitting of the sangha in the 1850s:

[The Thilon sayadaw] was the teacher of the Thingaza and the Shwegyin sayadaws, the latter of whom founded the Shwegyin or Sulagandhi Sect (as opposed to the Thudhamma or Mahagandhi Sect). The Thingaza sayadaw was also highly venerated, and in his day was head of the Mahagandhi. But the monks of both sects look up to the decisions of the Thilon sayadaw given in his *Wīni pyatton*.¹⁴

After the split, Shwegyin produced lineage case books of his own, which those in Thingaza’s lineage disdained to read. But both lineages treat a lineage casebook written just before the split took place as authoritative. I mention finally the elite vinayadhara lineage that includes the first, second, and third Maungdaung sayadaws. Third Maungdaung (1815–1868) made a Pāli translation of the *Thathana lankara sadan* (Chronicle of Religion), composed by first Maungdaung (1753–1833). Third Maungdaung also edited and enlarged two works by second Maungdaung (1801–1866).

One of these was a treatise on Pāli orthography, the other a case law collection (*Vivada vinicchaya kyan*). Here we see a tradition of linguistic and legal education snowballing as a particular monastic lineage recopies its own manuscripts.¹⁵

Returning to the first century BCE, 2p6 is my example of a *case illustrating legal reasoning*. The point at issue is whether everyday informal exchanges such as “Who pinched my robe?” “I did” count as a confession to theft. They do not, since formal and considered speech is required for a confession to a *pārājika* offence. I am interested in the fact that the redactor feels he must repeat the story five times. The result, he tells us at great length, would be the same whether the robe is spread out on the ground, or put on a chair, or hung on a fence. The result is the same if we substitute a mat or a bowl for the stolen robe. It is the same if nuns, rather than monks, are the protagonists. Every year I lecture my students on the case of the snail in the ginger-beer bottle (*Donoghue v Stevenson* 1932 AC 562). Because we share a consensus on the significance of the facts in the case, we do not waste time considering whether the result would have been different had it been a cockroach in a ginger-beer bottle, or a snail in a Lucozade bottle. For us, the significant facts are “Who paid for the drink?” and “Who manufactured it?” The redactor of this case cannot rely on a similar consensus. His repetitions are, I think, a laborious attempt to establish that very consensus.

Such awkward passages contrast with the sophistication of the *cases illustrating ownership*. One obvious riposte to the question “Why did you steal my robe?” is “That robe was not yours.” The law of robe-ownership is gradually established by the case law on robe-theft. This emerging conception of ownership will be localized:

Stealing is always wrong, but what makes something the legitimate property of some person or group is variable, depending ... upon a variety of social factors and conventions ... The different property arrangements might be equally justified by the relevant principles of justice ...¹⁶

About half of the forty-nine cases fall into this category. Here, if anywhere, the Buddhist case law is doing the same kind of educative job as modern English case law. These cases can be read to extract one aspect of an accumulating conception of ownership. As an aid to vinaya specialists who are not well-read in European law-texts, I shall cite parallel passages from the *Digest* of the *Corpus Iuris Civilis*. The *Digest* was compiled under Justinian’s orders by a committee chaired by his quaestor, Trebonian. David Pugsley suggests that Trebonian had accidentally discovered a third century law library in the archives of the emperor’s palace at Constantinople,

and had become fascinated by its contents. Perhaps his discovery was the personal law library of the Emperor Constantine (306–337).¹⁷ My citations from the *Digest* come from the second title *On Theft* of Book 47. I abbreviate D.47.2 to the letters “ht,” standing for “in this title.” These *responsa* were also collected and reproduced for use in legal education. Since they act as the founding document from which all modern European legal reasoning descends, they offer an excellent test of precisely how “substantive–irrational” Buddhist legal reasoning actually was.

On the question *whether it is possible to steal from the dead?*

2p8: On one occasion a monk went to the cemetery and helped himself to the cloth that wrapped a recently deceased corpse. The spirit of the dead man, which had not yet left the body, addressed the monk: “Honored sir, don’t take hold of my cloak.” The monk ignored him and took the cloak. The naked corpse got up and followed closely behind the monk until they reached his monastery. The monk managed to close the monastery door, and the corpse fell down lifeless on the spot. The monks repeated the whole story to the Lord Buddha, who ruled as follows: “Monks, there has been no offence of defeat for taking what has not been given. But in future, monks must wait until a corpse is decomposed before taking the cloth wrappings for their own use.”

ht69: (MARCELLUS) Julian maintained that the assets of a deceased person were not susceptible of theft in the time between the deceased’s death and the heir’s entry into his estate, except for those things which the deceased had pledged or lent.

I prefer the Buddha to Julian: the common sense view that “dead men can’t own” must be modified in the interests of the dignity of the recently departed. Otherwise the death–rattle will signal nearby relatives and monks into a feeding frenzy on the ex–owners assets.

On the question *whether it is possible to steal from a non–owner in possession?* (I run a laundry. You give me clothes to dry–clean. A monk or a Roman citizen steals the clothes from me, then argues that it is not theft because I was not their owner.)

2p1: On one occasion the gang of six monks, having gone where the laundry was spread out to be bleached, stole a bleacher’s bundle. In their remorse, they told this matter to the Lord Buddha ... “You, monks, have fallen into an offence involving defeat.”

ht12: (ULPIAN) Thus a laundrywoman who has taken in clothes for cleaning or mending can bring an action if they are stolen from her, provided she is solvent, because she is responsible in her contract for their safekeeping. But if she is not solvent, the right to sue for theft passes to the owner of the clothes.

The Buddha declares his conclusion without explanation; his authority is such that reasons are unnecessary. Ulpian reaches the same result by a short analysis of the legal ties between owner and laundry-person. This particular question interested Buddhist grammarians as well as Buddhist lawyers. Aggavaṃsa's *Saddanīti* (written in Pagan just when the vinaya was inspiring the production of *dhammathat* texts to regulate the Burmese laity) devotes a long excursus to whether the laundryman in the sentence *He gives the clothes to the laundryman* should be construed as the beneficiary (*sampadāna*) of the sentence. Aggavaṃsa attacks those Sanskrit grammarians who insist that laundryman, lacking ownership in the clothes, cannot be a beneficiary:

We get this endless opposition between the conventions of the canonical texts and the conventions of the science of grammar ... Only the meaning of [canon and commentary] is praiseworthy, so who cares about the grammarians?¹⁸

Aggavaṃsa treats the laundryman as having enough ownership over the clothes to count grammatically as the beneficiary. This is consistent with the Buddha's ruling that the laundryman has enough ownership over the clothes to convict the thief of a *pārājika* offence. Has law influenced lexicography?

On the question *whether it is possible to steal from a thief?*

2p36: On one occasion thieves had killed a cow in the Dark Wood at Sāvathī. They ate a lot of its flesh and then, having tidied the remains into a pile, went away. Some monks, thinking that the pile of meat, offal and bones had been abandoned, ate them. The thieves reprimanded these monks, saying: "You are no longer proper monks." In their remorse, they told this matter to the Lord Buddha ... "Monk, there is no offence of defeat for taking what is not given, since you thought that they were abandoned."

ht77: (CELSUS) If a man steals another's property and someone else steals it from him, the owner can bring an action against the second thief, but the first thief cannot, because it is the owner and not the first thief who has an interest in the safety of that property. This is the view of Quintus Mucius Scaevola and it is quite right, for although the first thief has a sort of interest in the property's safety because he may be liable in an action to return it or its value, nevertheless an interest upon which an action of theft is founded must be an honest interest. We have not adopted the opinion of Servius, who thought that if no one appears as owner, nor seems likely to appear, the first thief would then have an action, for even then a person who would be making an improper gain is not to be understood as having sufficient interest in the goods.

Celsus steers between the conflicting Roman *responsa* by inquiring about the nature of the first thief's interest in his loot. The Buddha appears more concerned with protecting the reputation of his monks from calumny by thieves.

The special rules for ownership of monastery property require exploration. Heavy property, including the food distributed at meal times, belongs collectively to all monks, referred to in the vinaya as *The Sangha of the Four Quarters*. To wangle an extra helping of food is to obtain something of which you are already part-owner (along with every other Buddhist monk in the world). On the question *Whether I can steal something I jointly own?*

2p12: On one occasion at meal time when gruel was being distributed, monk A said: "Give me an extra portion, so I can take it to monk B." But there was no such person as monk B. In his remorse, he told this matter to the Lord Buddha ... "Monk, there is no offence of defeat for taking what is not given, but there is a lesser offence of deliberate lying."

ht45: (ULPIAN) If a partner steals something belonging to the partnership (for he can indeed steal such things) it must be said that there is no doubt whatsoever that an action of theft is available against him.

Ulpian and the Buddha give different answers to the question, because they have different degrees of interest in it. Ulpian's ruling is more hypothetical than practical: on the breakup of a partnership, other remedies, more useful than theft, would come into play. For the Buddha, however, the special case of theft of monastery property must loom large, both in theory and practice. We must understand 2p12 alongside 2p14, which implies that a monk can steal another monk's *requisites* (the very limited class of personal items that a monk may hold [to use the Burmese term] in *poggalika* ownership).

The cases lay down further detailed rules for the fruit from the monastery's fruit-trees. A comparison of 2p38 with 2p23 suggests that, until a group of monks have made a formal distribution of the fruit, individual monks, though nominally co-owners, can steal their "own" fruit. Some even more technical rules cluster round the relationship between a monk and his lay-donor. 2p25 and 2p45 imply that, since any gift to a monk is technically a gift to the sangha collectively, monk A cannot steal from monk B by fraudulently inducing a gift from monk B's lay donor. 2p43 is of considerable interest in that it envisages a layperson owning a monastery and choosing which monks are allowed to stay there. The verse index describes this case as "One should not take away what has an owner" which suggests that *vinayadharas* of the first century BCE were relaxed about the

laity owning what the Burmese would later call *sanghika* property.

Implicit within these cases on ownership is the possibility of translating their legal content into a rule-based code. A modern lawyer would prefer to receive the information in this form:

Neither hungry ghosts (2p8) nor predatory animals (2p11) have property rights. When an animal predator (2p29) or a human thief (2p21) takes human-owned property, the human property rights in it remain. Humans (collectively or individually) do have property rights. Dead humans have rights which should be respected for some time past the moment of death (2p8). Non-fungibles belonging collectively to the sangha can be stolen (2p40, 2p41, 2p42) (though destroying them is not theft: 2p41). Fungibles owned collectively by the sangha can be stolen by an individual monk (2p23, but monks can help themselves to fruit in a strange monastery if they are hungry (2p38).

Transforming the material into a Code is only possible if we nominalize several more abstract concepts, including especially “property rights.” The Buddhist lawyers had no need of such transformations. They could retrieve the equivalent information about ownership directly from the cases. Invoking a rule and invoking one of these canonical cases are equally rational ways of mapping the limits of theft. For most of the nineteenth and twentieth centuries, European lawyers accepted what Bentham and Weber had told them: that legislated rules are a superior source of law to decided cases. Since Ludwig Wittgenstein criticized the contemptuous attitude toward the particular case and the craving for generality inherent in codified rules, this preference has begun to seem less natural. Annette Baier says:

... if philosophers choose to see implicit rules wherever there is a tradition and a teachable practice, ... that is their hang-up (and one that a reading of the *Brown Book* might cure). It is mere Kantian dogma that behind every moral intuition lies a universal rule ...¹⁹

“A tradition and a teachable practice” is a fine phrase to describe the knowledge of *vinaya studies* that the *vinayadhara* passed on to their pupils. I have described various ways in which the case law in the *Suttavibhanga* embodied this teachable practice.

Conclusion

It is fascinating to consider how the *vinaya* was used within Indian monasteries during the centuries BCE. But I am equally interested in how the *vinaya*, seen as a classical legal tradition, was interpreted by the succeeding millennia of interpreters. The comparison between the Roman and Buddhist laws on theft provides one example of this. The Roman texts concern theft as a tort (*delictum*) rather than a crime. Their primary con-

cern is not with the punishment of the thief, but with the compensation payable to the victim. Ulpian tells us that by the classical period this tortious approach to theft had been overshadowed by the criminal law, which proved a more effective way of limiting the city's larceny. Yet the classical jurists continued to give prominence to discussions of theft as a tort. This may be due to the innate conservatism that grips all written legal systems.²⁰ Or it may, in this specific case, be because the material was thought to be an exemplary set of civil law rules which provided a useful introduction for first year students to proper ways of legal thinking.

The second *pārājika* concerns the punishment of the thief, but it would hardly be right to characterize the *Suttavibhaṅga* as criminal law. Theft in the vinaya helps define who is a monk. Along with the first *pārājika*, it lays down chastity and mendicancy as the defining characteristics of the office. "As a man with his head cut off cannot live, so a monk who has sex is not a recluse, not a son of the Sakyans." (V iii 27) I read this simile, and the simile of the fallen leaf which I quoted earlier, as signaling the presence of a constitutive rule defining an institution. The Buddha is saying: "You cease to be a monk, as I define the term, the moment you steal or have sex." By committing either act, a monk thereby strips himself of monkhood. At any rate, the *vinayapāli* is concerned with defeat, not with tortious compensation:

2p27: One day, for compassionate reasons, a monk released a wild pig that had been caught in a trap ... "Monks, there has been no offence of defeat, since he acted from compassionate motives." One day a monk released a wild pig that had been caught in a trap, intending to steal it ... "Monks, there has been an offence of defeat."

The *Great Commentary*, glossing 2p27, discusses the question of compensation to the victim:

A wild pig is caught in a trap. Its body has become emaciated through not eating anything for three or four days. A monk, intending to steal the pig, feeds it to strengthen it up. Then he makes a sudden noise, so that the pig, in alarm, snaps the net by itself and runs off. The monk has committed an offence of defeat. If, however, he had acted throughout for compassionate motives, then he has not committed an offence of defeat but must still pay the price of the pig to the owner.²¹

Designed by the Buddha as a voluntary code of practice for a self-selecting group of meditators, the vinaya had, by the fifth century CE, become integrated into the legal life of the whole Sri Lankan community. It was this wider, more modern, understanding of vinaya that traveled to Southeast Asia, as can be seen from an eighteenth century Burmese prec-

edent. A lay judge decided *Kyaw Hla v. Upazin Sandathura* (1749 CE), but the decision was collected in a document edited by the top monk of the day, Shin Atula, and preserved in royal and monastic libraries:

The monk Sandathura came across the villager Kyaw Hla as he was setting up his fishing nets in the river. Sandathura reprimanded him for attempting to take the life of sentient beings, ripped up his fishing net, broke his bow, and gave him a beating. The judge ordered Sandathura to pay Kyaw Hla compensation for his bow and fishing net, but not for the beating, which was fully justified in the circumstances.²²

Shin Sandathura was committed to realizing Buddhist ethics in the Burmese society of his day: in order to promote respect for animals, he attacked predatory humans. In relation to vivisection, factory–farming, and fox–hunting in today’s society, we must decide whether or not to follow his example. In the popular mind, Buddhist monks are anemic, non–violent, world–renouncing vegetarians. Shin Sandathura reminds us of a more muscular approach to Buddhist ethics.

Notes

¹ All quotations from the vinaya in this file have been paraphrased so as to be as intelligible as possible to a modern lawyer. In terms of a distinction I shall draw further down the file, I am *reinterpreting the vinayapāli*, not *translating* it.

² This notation system is capable of being extended to denote the other collections as well.

³ Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), p. 91.

⁴ Max Weber, *Law in Economy and Society*, ed. Max Rheinstein (Cambridge: Harvard University Press, 1954), p. 209.

⁵ *Ibid.*, p. 285.

⁶ H. L. J. Vanstiphout, “On the Old Babylonian Eduba Curriculum,” in *Centres of Learning: Learning and Location in Pre–modern Europe and the Near East*, edited by Drijvers and MacDonald (Leiden: E.J. Brill, 1995), p. 7.

⁷ Raymond Westbrook, “Biblical and Cuneiform Law Codes,” *Revue Biblique* 92 (1985): 247–64, p. 254.

⁸ Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1946), p. 46.

⁹ *The Compact Edition of the Oxford English Dictionary*, two volumes (London: Book Club Associates, 1979), vol. 1, p. 352.

¹⁰ I. B. Horner, *The Book of the Discipline*, vol. 1 (*Suttavibhaṅga*) (Oxford,

Pali Text Society, 1992), p. 90.

¹¹ Gregory Schopen, “Ritual Rights and Bones of Contention,” *Journal of Indian Philosophy* 22 (1994) 31–80, p. 61.

¹² Krom Phraya Vajirañāṇavarorasa, *The Entrance to the Vinaya*, three volumes, translated from the Thai (Bangkok: Mahamakut Rajavidyalaya Press, 1969–83), vol. 1, p. 46.

¹³ Thanissaro Bhikkhu, *The Buddhist Monastic Code*, (California: Metta Forest Monastery, 1994), p. 63.

¹⁴ *Shwe Ton v. Tun Lin*, L.B.R., 1918, 9, 229, 252, per Maung Kin, J.

¹⁵ Printed versions of most of these *Wini pyatton* may be found in two collections: Saya Pye, *Vinaya pakinnaka vinicchaya kyan* (Mandalay: Myanma Taya Satinsahpon Hnaitaik, 1901) and U Nirodha, *Vinaya samuha vinicchaya kyan*, three volumes, (Mandalay: Tain Satinsahpon Hnaitaik, 1899–1902), both of which are held by the British Library. A manuscript of the Sinda sayadaw’s *Ganthasara pakasani kyan* is described in Heinz Bechert, Khin Khin Su, Tin Tin Myint, *Burmese Manuscripts Part 1* (Wiesbaden: Franz Steiner Verlag GMBH, 1979), p. 134.

¹⁶ Joseph Boyle, “Natural Law and the Ethics of Traditions,” in *Natural Law Theory: Contemporary Essays*, edited by Robert P. George (Oxford: Clarendon Press, 1992), p. 19.

¹⁷ David Pugsley, “On Compiling Justinian’s Digest (3): ‘The Florentine Index’,” *Legal History* 14 (1993): 94–105, p. 99.

¹⁸ E. G. Kahrs, “Exploring the Saddanīti,” *Journal of the Pāli Text Society* 17 (1992): 1–212, p. 117, 119.

¹⁹ Annette Baier, *Postures of the Mind* (Minneapolis: Minnesota University Press, 1985), p. 232.

²⁰ Including the vinaya: see Oskar v. Hinüber, “Buddhist Law According to the Theravada Vinaya — a Survey of Theory and Practice,” *Journal of the International Association of Buddhist Studies* 18 (1995): 7–45, p. 14.

²¹ P. Bapat and A. Hirakawa, *Shan–Chien–P’i–P’o–Sha* (Pōna: Bhandarka Oriental Research Institute, 1970), p. 278.

²² Shwe Baw, *The Origin and Development of Burmese Legal Literature* (Ph.D. Diss. for School of Oriental and African Studies), Thesis #41 in the collection of the Institute of Advanced Legal Studies Library, London, 1955. Volume 1, p. 34.