

Age Before Beauty; Pearls Before Swine: when the Criminal Law's Content Gives Way

By *Matthew Dyson**

“Whosoever, being married, shall marry any other person during the life of the former husband or wife ... shall be guilty of felony ...”
Offences Against the Person Act 1861, s. 57.

“Any assumption by a person of the rights of an owner amounts to an appropriation ...”
Theft Act 1968, s. 3.

What definition of “marriage” should the criminal law use in the offence of bigamy? For instance, should it use a civil law definition, or an autonomous criminal definition? What is the definition of “the rights of an owner” for the purposes of theft, where theft is defined as the dishonesty appropriation of property belonging to another, intending to deprive the other of it?¹ “Appropriate” is a particularly difficult concept in criminal law where, as in England,² private law does not employ a concept of ownership while criminal law appears to assume or pretend that it does? In England, to define marriage criminal courts use a private law test, and would defer to a relevant private law court ruling; there does not appear to be any credible suggestion to the contrary.³ However, English criminal courts will, infamously, find that there was an assumption of a right of an owner, even where the owner granted that right, and all rights, to the property, knowing all relevant facts about the defendant and the transaction.⁴ This might be a prime example of how criminal law is best understood in combination with other legal frameworks.⁵

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¹ Theft Act 1968, s. 1(1).

² In this paper, England refers to the legal system of England and Wales.

³ English courts have added a *mens rea* requirement, that D did not reasonably believe in a fact affecting his/her matrimonial status which, if true, would make his second marriage lawful: *R v Tolson* (1889) 23 QBD 168; *R v Gould* [1968] 2 QB 65; *M v P v Queen's Proctor* [2019] Fam. 431.

⁴ *R v Hinks* [2001] 2 AC 241.

⁵ See, e.g., U. Sieber, (2018), ‘The New Architecture of Security Law – Crime Control in the Global Risk Society’, in: U. Sieber et al. (eds.), *Alternative systems of crime control: national, transnational, and international dimensions*, Duncker & Humblot 2018; U. Sieber/C.-W. Neubert, ‘Transnational Criminal Investigations in Cyberspace: Challenges to National