A

N ‘OBJECTIVE’ MEANS of assessment, in modern legal parlance, applies uniformly to all parties, regardless of their individual traits and capacities. Almost all rules, standards, lists and tests are objective, in this sense, but the term is usually applied to a small subset of these devices—the ones that are specified by reference to the reasonable person. Analyses of the reasonable person account for most of the scholarly attention bestowed on objective grounds of liability, and this tendency is significant because when an objective measure is rendered in a personified form, we are quickly plunged into debates about how generic the measure must be and whether (and how) to factor in certain personal traits, such as a party’s age or mental capacity. That the reasonable person has, for most of its history, been cast as the reasonable man helps to show how readily the personification acquires specific features that may undermine its universal application. Though typically traced back to the 1837 case of Vaughan v Menlove,¹ this figure has various precursors in eighteenth-century law. Even before the eighteenth century, English law had occasionally borrowed personified standards from the civil law, such as the ‘good father of the family’ (bonus paterfamilias) who models a certain kind of diligence, and the ‘firm man’ (constans vir) who withstands duress. Those figures, however, had not yielded replicas or variants, but remained doctrinally confined, possibly because their personifications appear to specify a fixed level, appropriate to specific contexts, rather than embodying the flexibility now associated with the reasonable person. This latter figure, once introduced, would grow like kudzu in the garden of the common law.

A landmark precursor for the reasonable person appears in R v Jones (1703),² which addressed the question of criminal liability for fraud, using a personified standard in a different fashion from the civil law figures and from the modern versions: neither to exemplify a virtue nor to help in determining

---

¹ Vaughan v Menlove (1837) 3 Bing (NC) 468, 173 ER 232.
² Anonymous (1703) 6 Mod 105, 87 ER 464. Though styled as ‘anonymous’ here, the other reports call the case Jones (see nn 12 and 14), and I adopt that name for convenience.
the defendant’s liability, but to draw the line between civil and criminal harms. In Jones and the jurisprudence that followed, we do not see a preview of the debates about adapting the standard with respect to personal characteristics, but we can discern the outlines of another contemporary debate associated with the personified standard, involving its ability to impose normative demands that are less easily communicated by non-personified standards. This chapter looks at how Jones introduced that question, how the standard was reframed when William Hawkins’s treatise on criminal law catapulted it out of an obscure niche in one of the case reports, how the standard functioned in fraud jurisprudence and how it began to spread to other, more familiar, areas of criminal law.

Jones has a cryptic, almost fable-like quality that leaves the case open to various interpretations. A man borrows £20. A trickster appears, claiming that the lender sent him to collect the debt. The rube unhesitatingly pays up and discovers his error at leisure. The Queen’s Bench refuses to convict, ruling that the deceit would be criminal only if it were ‘such a Cheat as a Person of an ordinary Capacity can’t discover’. In the court’s disdainful summation, ‘this is an Indictment to punish one Man because another is a Fool’.3

From this slender thread, various tales might be spun: a tale of contributory criminal fault, starring a boob who was so remarkably lax about protecting his own interests that in the court’s view, he practically invited the harm; a tale about unreasonable reliance that strips the victim of any claim at all; a tale about the difference between civil and criminal liability, in which the malefactor’s conduct does not threaten enough people, or is too mild, to be a crime; or a tale (which runs through several of the above) about the development of objective standards of liability. The focus here will be on the last two points. The use of a standard that is both objective and personified, to mark the threshold for criminal liability, is worthy of extensive discussion by itself.4

Preliminarily, it will help to contrast Jones with two contemporaneous cases, one involving commercial fraud and one involving a conspiracy to defraud. Jointly, these cases delineate the field that would define fraud jurisprudence over the next century and a half. In Nehuff’s Case (1705), ‘the Defendant borrowed 600l. of a Feme Covert, and promised to send her fine Cloth and gold-Dust as a Pledge, and sent no gold Dust, but some coarse Cloth worth little or nothing’. The Queen’s Bench granted a certiorari to remove it from the Old Bailey, ‘because the Fact was not a matter Criminal, but it was the Prosecutor’s [victim’s] fault to repose such a Confidence in

---

3 Jones (n 2).
4 As for the other possible interpretations, I discuss the question of contributory fault below (n 24), and while the case might belong to the pre-history of ‘reasonable’ reliance in the law of fraud (see n 26), this distinction did not figure in the eighteenth-century fraud jurisprudence.
the Defendant; And because it was an absurd Prosecution.\(^5\) The comments about the victim’s credulity and the absurdity of the claim are reminiscent of Jones, and the importance of the victim’s contributory fault—only a vague implication in Jones—comes to the fore. Because it featured parties in a commercial relationship, the dispute could be resolved on a different ground from Jones, by asking whether the defendant had breached a contract.

Taken together, Jones and Nehuff point up the distinction between civil and criminal fraud in two contexts: where the fraud arises as part of a contractual relationship and where it occurs among strangers. That the court in Nehuff did not apply Jones’s requirement of ‘ordinary capacity’ is hardly surprising; although both cases pitted the victim against the offender, breach of contract provided a ready doctrinal handle for addressing the problem, and its applicability helped to show why this was a private dispute, whereas in Jones, it was the lack of such an option that prompted the court to go further in explaining why the dispute was private. As we will see, disputes arising out of commercial relationships would typically yield the same result as in Nehuff, although courts usually cited Jones instead, ruling that the victim had been deceived by ‘mere words’ and had only a civil claim.

Conversely, in R v Mackarty (1705), the court held the defendants criminally liable, apparently because they had formed a conspiracy.\(^6\) Posing as wine merchants, they offered to trade ‘true new Lisbon wine for a quantity of hats’, but what they exchanged was ‘good for nothing’ and ‘non potabile nec salubre’ (neither drinkable nor wholesome). The dispute turned in part on a question of mens rea: the need to specify, in the indictment, that the defendants knew their wine was worthless, because their claims about its quality might have been an innocent mistake. The court was clear that it could not ‘presume the defendants knew wine better than the prosecutor [victim]’. The judgment does not address that issue directly, but says only that ‘the fact as it appeared upon the evidence was criminal’ and that the allegations in the indictment were sufficient: ‘here enough was set out, to shew the defendants to be cheats’.\(^7\)

The court could have treated this case, like Nehuff, as a breach of contract or (considering the remarks about the atrocious wine) might have likened it to Jones as another easily detectable deceit. The court cited neither one, but later courts would treat Mackarty as showing that conspiracies were, by

---

\(^5\) Nehuff’s Case (1705) 1 Salk 151, 91 ER 139. Nehuff has the distinction of appearing on the first page of Kenny’s A Selection of Cases Illustrative of English Criminal Law (Cambridge, Cambridge University Press, 1901); Kenny presents it as a case of breach of contract and uses it to illustrate ‘the distinction between civil and criminal wrongs’.

\(^6\) R v Mackarty (1705) 2 Ld Raym 1179, 92 ER 280. See also R v Orbell (1703) 6 Mod 42, 87 ER 804, which involved a prosecution for conspiring to cheat by persuading the victim to bet on a fixed race. The court suggested that such a conspiracy is, by its very nature, criminal: ‘being a Cheat, though it was private in the Particular, yet it was publick in its Consequences’.

\(^7\) Mackarty (n 6) 1182, 1184.
their nature, too clever to be readily detectable and hence that *Jones* did not apply to those cases. The question of mens rea, however, offers another way to make sense of *Mackarty*. Evidently, despite the professed concern about presuming the defendants’ knowledge, the court was willing to infer, from their conspiratorial conduct, that they knew exactly what they were doing; conversely, in the cases involving one-on-one commercial transactions, like *Nehuff*, the courts were reluctant to assume that the defendants knowingly cheated their customers or bought goods without intending to pay.

Taken together, *Jones*, *Nehuff* and *Mackarty* suggest a few distinctions that would become clearer as the jurisprudence developed. The ‘ordinary capacity’ rationale would usually be invoked to explain why commercial transactions were generally not criminal, but the standard’s effect, in those cases, was actually to solve a problem of mens rea: rather than asking juries to distinguish the cases of intentional fraud from the ones involving an inadvertent mistake, the courts took that question out of the juries’ hands by removing this whole set of cases from the criminal docket. In conspiracy cases, where mens rea was easily inferred, the ‘ordinary capacity’ standard served largely the same function, allowing courts to treat conspiracies as too sophisticated to be easily detectable. The result, once again, was to avoid any inquiry into mens rea, this time by treating the defendants’ stratagem as proof of intentional deception. When we line up the cases that followed *Jones*, we see that very few involve defendants who (on the facts mentioned in the judgment) were clearly out to cheat the victim. The vast majority were commercial cases, where it was possible, even if not likely, that the defendant had made an innocent mistake. Judges often remarked, when acquitting these defendants, that if misstating the quantity of grain (or the like) were criminal, every breach might be turned into a criminal case. This conclusion does not follow, but its frequent repetition shows that applying the doctrine of *Jones* seemed preferable to the more involved process that would be required to separate civil and criminal cases—namely, tasking the jury with an inquiry into the defendant’s intentions. In a few cases—all of them outside the context of ordinary commercial transactions—the facts strongly supported an inference of culpable intent, and the courts convicted, either under *Jones* or by modifying its doctrine. *Jones* itself is notable as the only case in the whole series in which the defendant was acquitted even though he was clearly a fraudster. By the nineteenth century, the courts would largely abandon the personified standard in fraud cases, opting instead for a rule that distinguished (culpable) lies from (permissible) statements about the future, but in the meantime, the standard had begun to acquire its modern significance in other legal contexts.

---

8 The point was finally announced directly in *R v Wheatly* (1761) 2 Burr 1125, 1127, 1129, 97 ER 746.

9 See below, n 31.
I. THE CASE

Jones comes down to us in three versions. The one in the Modern Reports, quoted above, is the most important for present purposes. This version was first printed in 1713, in time for William Hawkins to use it in the first volume of his treatise on criminal law (1716), where he reformulated the holding in terms that would give the case much more impact. In the Modern Reports, the case occupies two short paragraphs. After describing the defendant's ruse, the court repeats a view taken from earlier fraud cases (and from the statute of 38 Hen VIII c (1547)), noting that the defendant's conduct would have been criminal if it had involved 'a false Token' such as false dice. Next, the distinction between artless and artful types of chicanery is explained by reference to the 'Person of an ordinary Capacity'—a touch that is unique to this report of the case. The remark about the victim's heedlessness follows immediately afterwards.

Salkeld's report, printed in 1717, compresses the facts and holding into a single paragraph. However, he makes no mention of any standard, instead moving directly from the absence of any 'false Tokens' to the conclusion that the court would not 'indict one Man for making a Fool of another'. This report adds that the victim may have a civil claim ('Let him bring his Action'), showing that the dispute exposes a distinction between criminal and civil liability, whereas the version in the Modern Reports seems to imply that the victim had no recourse at all. Salkeld's second paragraph is devoted to a comparison with Bainham's Case (not otherwise reported), in which the court refused to make a pawnbroker criminally liable for refusing to return an item when the bailor came in with the money to redeem it. The third report of Jones, in Lord Raymond, closely follows Salkeld's, but attributes to Holt CJ the line about the defendant's foolishness (a detail that all the reporters evidently relished), whereas the other two versions wrap all of the reasons together as 'per curiam'.

The version in the Modern Reports is significant because of the effort to explain what differentiates a mere lie, leading to civil liability for breach of

---

10 W Hawkins, A Treatise of the Pleas of the Crown (London, 1716) 1:188 (citing Jones (n 2)). Hawkins may have also have had access to a manuscript report of the case.
11 Jones (n 2).
12 R v Jones (1703) 1 Salk 379, 91 ER 330; quotations are from the first edition of Salkeld's Reports (1717). The second edition of Modern Cases, which includes Jones, printed in 1719, is attributed to Salkeld on the title page, but that attribution has not generally been accepted.
13 ibid 379. If the victim had sought to bring a civil claim, he could not have been a witness in the case, because parties were excluded from testifying on oath. See MRT Macnair, The Law of Proof in Early Modern Equity (Berlin, Duncker & Humblot, 1999) 206; W Holdsworth, A History of English Law (London, Methuen, 1938) 9:193–97; JH Wigmore, A Treatise on the Anglo-American System of Evidence, 3rd edn (Boston, MA, Little, Brown & Co, 1940) 2: §575.
14 2 Ld Raym 1013, 92 ER 174; quotations are from the first edition of Lord Raymond's Reports (1743).
contract, from contrivances such as false dice, which led to criminal liability. The distinction was long-standing in contract law. In the early seventeenth century, it was held that if a party ‘buys an horse upon [the seller’s] warranting him to have both his eyes, and he hath but one Eye, [the buyer] is remedyless … But otherwise it is … where the matter is secret … and cannot be known to him who buyes’.

The question, the court explained, is whether the truth ‘lies in [the buyer’s] own Conusance’. This explanation anticipates the one that Holt would give, but applies only to tangible property (and also leaves the buyer without any claim at all, whereas Jones suggests that civil liability remains available). The same distinction was applied in a criminal case from the later seventeenth century. In R v Worrall, the prosecution argued that selling improperly dyed cloth should be criminal, by analogy to ‘playing with false Dice’, because both involved hidden defects, whereas ‘a Horse having but three Legs’ has an ‘open and manifest’ defect.

Jones grounds the distinction on an entirely different basis. In these earlier cases, the court sets out a rule and suggests no standard that would help to resolve future disputes that the rule does not cover. Jones attempts to do just that, offering the discernment of someone with an ‘ordinary Capacity’ as a means of determining which kinds of deceit are crafty enough to be crimes.

This approach may have been inspired, in part, by the court’s experience, about six months earlier, in Coggs v Bernard, a bailment case that has been discussed in connection with the formation of objective standards of liability in tort, but which also discussed fraud, and considered the use of personified standards in ways that Jones would echo. The reference in Jones to Bainham’s Case suggests that Holt saw bailment as a fruitful source of analogies for the question at hand. In Coggs, confronted with the question of how much care a bailee was required to take when transporting some brandy that he had agreed to carry for free, Holt considered various standards that might apply (‘ordinary care’, ‘reasonable care’, the same degree of care the bailee shows for ‘his own’ goods or ‘the utmost diligence, such as the most diligent father of a family uses’) and concluded that the bailee was ‘oblige[d] … to a diligent management’; failing that, his ‘neglect [was] a deceit’ that amounted to ‘fraud’ (in the civil sense).

Some of these standards are personal and some are generic, but only one—the diligence of the paterfamilias—uses a frame that is at once personified and external to the perspectives of the parties. Notably, that example pitches the standard

\[15\] Bayly v Merrel (1616) Cro Jac 386, 387, 79 ER 331.
\[16\] ibid.
\[17\] R v Worrall (1683) Skin 108, 109, 90 ER 51.
\[19\] Coggs (n 18) 913, 916, 917, 918, 919.
II. WILLIAMS HAWKINS, JONES AND THE OBJECTIVE STANDARD

William Hawkins’s 1716 *Treatise of the Pleas of the Crown* recapitulated the decision in *Jones*, presenting it in a way that endowed it with a new significance. Hawkins’s interpretation of the ‘Person of ordinary capacity’ standard, though doubtless meant simply to restate and clarify Holt’s ruling, would set it on a new footing that made it much more adaptable. Indeed, Hawkins’s treatise offers one of the earliest portrayals of the figure whose qualities would eventually become familiar as the traits of the ‘reasonable person’. Indeed, Hawkins follows Holt in suggesting an objective means, involving a personified standard, for determining what kind of deception (and, by implication, what kind of harm more generally) warrants the attention of the criminal law. Despite what he says, ‘bare naked lies’ are not invariably transparent at a high level, rather than using these features to approximate a minimally adequate level of competence. By contrast, this is exactly what the ‘Person of ordinary Capacity’ does, in identifying a generic viewpoint: it locates the standard in a human figure that establishes not a paragon, but a kind of least common denominator. Although none of the alternatives in *Coggs* serves quite that function, Holt’s review of these various options may have planted the seed for the approach he proposed in *Jones*, which raised the question of fraud in a different guise.

---


or easily verified, but the more basic point is that common prudence creates a standard for gauging the kind of deception involved, assessed in terms of the effort required, or the means available, to detect it. In both Holt’s and Hawkins’s formulations, the standard is normative in application and probably also in intent. To call the victim a fool is to imply that the case was a waste of the court’s time and that the victim should learn to be less gullible. Nevertheless, a significant difference, which probably helps to explain why Hawkins’s formulation became more influential, is that his version openly signals its normative orientation. ‘Ordinary capacity’ sounds more descriptive: even if it escapes precise definition, it appears capable of empirical measurement in a way that prudence and caution are not. Moreover, no legal standard will encourage someone with a limited capacity to become more astute, whereas a standard of ‘common prudence’ may induce the imprudent to be more careful. Because prudence and caution are interactive qualities, they harmonise more readily with a standard that evaluates interpersonal conduct. Eventually this standard would come to serve, in tort, as a means of evaluating the defendant’s conduct, thus aligning the normative function directly with the imposition of liability: the duty to pay damages results from failing to act as a ‘reasonable person’ would (and causing harm as a result). Jones presents the mirror image of this alignment, demanding a certain level of vigilance from the victim and declining to punish the fraudster if the victim failed to meet that requirement.

Although the traits of prudence and caution are already recognisable here as exercising the same kind of demand that the ‘reasonable person’ standard imposes (and these traits would themselves be subsumed into the term ‘reasonable’), the descriptive force of the concept, as Holt and Hawkins express it, is evident in the adjectives they use—‘ordinary’ and ‘common’. It would be a mistake to saddle these terms with a particular statistical meaning at a time when conceiving of populations in this way had barely begun. Rather than designating an average, the idea is simply to indicate a usual, prevalent kind of conduct. Persons of common prudence and caution take measures that, by virtue of their ordinariness, obviate the need for criminal sanctions to prevent the harm. Someone who fails to take those measures ought to adopt them, instead of seeking to have the malefactor punished. A tension between the normative and descriptive functions of the standard (a tension that persists in contemporary uses) is apparent from its inception.

Criminal law was an unlikely area for the incubation of this standard, given that it rarely looks to the victim’s conduct. Deceit is one of the few

24 However, for arguments that criminal law does consider contributory fault and should do so more, see Aya Gruber, ‘Victim Wrongs: The Case for a General Criminal Defense Based
criminal contexts where this consideration might arise, because it involves a criminal act that must somehow be distinguished from the voluntary transfer of property that it resembles. Just as this question would later make ‘larceny by trick’ a proving ground for the shift from ‘manifest’ to ‘subjective’ criminality, here the question prompts the court to focus on the interaction between fraudster and dupe, and to adopt an approach that imposes certain demands on the latter, if the loss is to justify a criminal prosecution. Ultimately, as we will see, the same type of personified, objective standard would find a place in other areas where criminal law considers the interaction between the parties, as here, but uses the personification to examine the perspective of the defendant, whom it construes, in effect, as a kind of victim—namely, in the law of duress and provocation.

III. FRAUD AFTER JONES

The option of civil liability, which the reports of Salkeld and Lord Raymond highlight, would be a persistent theme as the jurisprudence developed. The Jones standard—as articulated by Hawkins—was being used, in these cases, to mark the place where criminal law intervenes, rather than to mark the difference between reasonable and unreasonable reliance in fraud and misrepresentation generally. Today, that distinction serves to screen out the deceptions that should escape liability altogether, in various American jurisdictions that continue to require reasonable reliance as an element of fraud. Thus, although we see the incubation of an objective standard here, it serves a different function from the one now performed by the ‘reasonable person’.

In Jones and its successors, the deception is a public offence when it threatens enough people (everyone who takes care to look after their own interests) or poses a high enough degree of harm (because the usual practices of self-interest will not guard against it), whereas the feeble effort that would only deceive a fool does not require what Hawkins calls the ‘severe’ machinery of the criminal law. Given the elliptical language of Holt’s judgment, these justifications remain implicit, although Hawkins’s explanation on Wrongful Victim Behavior in an Era of Victims’ Rights’ (2003) 76 Temple Law Review 45; A Harel, ‘Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault’ (1994) 82 California Law Review 1181; Forum on Comparative Liability in Criminal Law (2005) 8 Buffalo Criminal Law Review.


goes some way towards unpacking them. The logic seems to be that criminal sanctions are ‘needless’ because people should, and usually can, be expected to take at least that much care in protecting their own interests, and if they will not, they should have the burden of pursuing a civil claim instead of seeking criminal sanctions. In all likelihood, however, the very reason for bringing criminal charges was that the victim lacked any other recourse: because plaintiffs could not testify in civil disputes, the criminal fraud cases were presumably the ones in which the victim been driven to that route because there were no other witnesses to the transaction. Practically speaking, then, by dismissing the criminal charges, the courts were probably terminating the litigation altogether.

As the doctrine of Jones was applied, many courts simply followed the holding without comment, but when they bothered to mention the rationale, they invariably opted for Hawkins’s language rather than Holt’s. The phrase ‘ordinary capacity’ is nowhere to be found in the case law that followed. Commentators, similarly, echoed Hawkins rather than Holt. Giles Jacob, in his A New Law-Dictionary (1729), copies Hawkins almost word for word. Though lawyers would not have relied on Jacob, his recapitulation of Hawkins’s treatment may have helped it reach a wider audience of non-professional readers. In any case, the transition from Holt’s to Hawkins’s version of the criterion marks a crucial development in the evolution of objective standards of liability. In expanding on Holt’s rationale, Hawkins hit on a phrase that would slowly seep into the legal vernacular, spreading into various parts of criminal law and beyond it, and seeding the bed for the time when a more pronounced demand for a personified standard would arise. Treatises have performed a vitally important role in the history of the common law by highlighting easily overlooked points in the process of collecting, aligning and explaining decisions; one lesson from the fraud cases is that a fortuitously timed treatise can make a huge difference in the development of a line of jurisprudence.

In most of the eighteenth-century cases that drew on Jones, the holding was taken to provide a bright-line rule about fraud, and almost every

---

27 See n 13. The court in Wheatly hinted at this conclusion, observing that the dispute was a ‘private breach of contract’ and if it were allowed to proceed as a criminal case, ‘the injured person [could become] a witness upon the indictment, which he could not be (for himself) in an action’ (Wheatly (n 8) 1128).

28 See, eg, Wheatly (n 8) 1129, 1130; R v Bower (1775) 1 Cowp 323, 324, 98 ER 1110; Pasley v Freeman (1789) 3 TR 51, 64, 65, 100 ER 450; Young v R (1789) 3 TR 98, 99, 100, 100 ER 475; R v Lara (1795) 6 TR 565, 567, 568, 101 ER 706; R v Bazeley (1799) 2 Leach 835, 838, 168 ER 517; R v Haynes (1815) 4 M & S 214, 219, 105 ER 814; R v Goodhall (1821) Russ & Ry 461, 463, 168 ER 898; R v Woolley (1850) 3 Car & K 102, 104, 175 ER 479; R v Hudson (1860) Bell 263, 267, 169 ER 1254.

29 See, eg, R Burn, The Justice of the Peace (London, 1755) 1:179; TW Williams, The Whole Law Relative to the Duty and Office of a Justice of the Peace (London, 1793–95) 2:584; R v Grantham (1709) 11 Mod 222, 88 ER 1002 (note b) (note added by Leach to the 1796 text).

30 G Jacob, A New Law-Dictionary (London, 1729), sv ‘counterfeits’. The same account appears in the nine later editions published between 1732 and 1797.
time the question arose, the doctrine saved the accused from criminal liability because there had been no false token. The usual setting involved a misstatement as to the quantity of goods, such as grain, coal or beer. The courts refused to treat these cases as criminal even if the defendant had falsely marked the container; in order to be liable for using a false token, the defendant had to go through the motions of weighing out the goods.31 Often, the courts made a point of observing that the harm alleged was private in nature, sometimes because the victim had been a fool, sometimes because the lack of false tokens showed that it might have been an innocent mistake—and increasingly, as time went by, because otherwise every breach of contract would be converted into a crime.32 These last two points explain the commercial cases most effectively and also help to explain the pattern that developed in these cases, by which even ‘bare words’ could be sufficient to support an indictment, but only when the defendant had impersonated someone else or had procured the fraud through a conspiracy.33

In a short-lived line of cases, the courts focused on the victim’s failure to exercise common prudence, but instead of acquitting the defendants, as the criminal/civil distinction in Jones would require, the courts reduced the gravity of the offence. This was a judicial version of the ‘pious perjury’ that jurors sometimes used to undervalue stolen goods. If the victim’s inattentiveness had created the opportunity for theft, the court ruled that the statutory (and non-clergyable) offence of ‘felonious Taking of [property] from the Person of any other … privily without his Knowledge’ could not apply, but the defendant could be convicted of stealing at common law. In R v Trippet and Fannen, tried at the Old Bailey in 1769, the victim became intoxicated and fell asleep late at night on a bench on Westminster Bridge. A printer’s apprentice and a waiter from Vauxhall, ‘walk[ing] about to pass the time away’, stole his watch and shoe buckles, and then made the mistake of calling on an acquaintance at Tothill Fields Prison, where they were apprehended. The two were found guilty of ‘stealing, but not privately from the person’.35

31 See, eg, R v Channel (1728) 2 Stra 793, 93 ER 852; R v Wilders (1732) 11 Mod 309, 88 ER 1057; R v Pinkney (1733) Sess Cas 57, 93 ER 58; R v Pickley (1733) 2 Barn KB 244, 94 ER 477; R v Combrine (1751) 1 Wils KB 301, 95 ER 630; R v Driffield (1754) Sayer 146, 96 ER 844; Wheatly (n 8); R v Dunnage (1761) 2 Burr 1130, 97 ER 749; R v Osborn (1765) 3 Burr 1697, 97 ER 1052.

32 See, eg, Wheatly (n 8) 1128; Osborn (n 31) 1697; Bower (n 28) 324; R v Codrington (1825) 1 Car & P 661, 663, 171 ER 1358.

33 Wheatly (n 8) 1127 makes explicit the point about conspiracy; see also Lara (n 28) 567, 569. For impersonation, see, eg, R v Govers (1755) Sayer 206, 96 ER 854; R v Story (1805) Russ & Ry 81, 168 ER 695; R v Douglass (1808) 1 Camp 212, 170 ER 933; R v Barnard (1837) 7 Car & P 784, 173 ER 342.

34 8 Eliz 1 c 4, s 2.

35 R v Trippet & Fannen, Old Bailey Sessions Papers (hereinafter OBSP), 28 June 1769. The case is cited in R v Gribble (1782) 1 Leach 240, 168 ER 222, which describes the facts without giving a name or citation. Indeed, one might think, from the account in Gribble that the case is apocryphal; however, Trippet perfectly matches the description.
More than half a dozen similar cases, featuring intoxicated or sleeping victims, were tried at the Old Bailey with similar results between the mid-1760s and the early 1780s. Only in the last of these, *R v Gribble* (1782), did the court explain why the culprit could not be convicted of 'such a stealing privately as would oust the offender from the benefit of clergy': once again echoing Hawkins’s language, the court observed that 'the statute was intended to protect the property which persons by proper vigilance and caution should not be enabled to secure'. Perhaps the judge's effort to rationalise this approach was one of the factors that brought about its demise. The other prosecutions, at least as recounted in the *Old Bailey Sessions Papers*, included no reference to similarly decided cases, but in *Gribble*, Perryn B mentioned the facts of *Trippet*, showing that this way of handling the cases was becoming routine. Four years later, two cases tried at Newcastle Assizes marked the end of this line. In one case, the defendant and some associates had conspired to intoxicate and rob their victim; in the other, the accused was convicted stealing a watch from the master of a ship ‘while he was asleep in his cabin … and without his knowledge’. Both were convicted at trial, and when reserved and sent up to the 12 judges, the convictions were affirmed. The next such case to be tried at the Old Bailey, in 1788, produced the same result.

At around the same time, some courts began to repudiate the suggestion that ‘bare lies’ could not support an indictment for fraud. At Chester Assizes in 1778, the Chevalier de Villeneuve was convicted and sentenced to three years’ hard labour for obtaining 12 guineas from Sir Thomas Broughton. Villeneuve had told a story about incurring unforeseen expenses while traveling on behalf of the Duke de Lauzun, but the latter disclaimed any knowledge of him. Villeneuve thus was convicted on the basis of mere lies.

---

36 *R v Hatch*, OBSP, 16 October 1765; *R v Jones*, OBSP, 15 July 1767; *R v Green*, OBSP, 24 October 1770; *R v Marshall*, OBSP, 3 July 1771; *R v Bodkin*, OBSP, 23 October 1771; *R v Richards*, OBSP, 9 December 1772; *R v Reading and Jones*, OBSP, 9 December 1778; *R v Gribble*, OBSP, 20 February 1782 (cf n 35).

37 *Gribble* (n 35). As reported in the OBSP, the judge instructed the jury that Gribble could be found guilty of stealing, but ‘it cannot be a capital offence’.


40 *R v Willan* (1788) 1 Leach 495, 168 ER 349. The prisoner’s counsel argued that ‘the Act did not extend to protect the property of persons asleep’ and the court responded that ‘whatever notions might have formerly prevailed upon this subject, the contrary had lately been determined by all the Judges of England’.

41 The case is unreported, except in Buller J’s judgment in *R v Young* (1788) 1 Leach 505, 168 ER 354, but several newspapers covered the case; see *Morning Post* (London, 22 December 1777) 4; *St James’s Chronicle* (London, 30 December 1777) 3; *Adams’s Weekly Courant* (Chester, 28 April 1778) 3.
Young (n 41) 508. In specifying its subject matter and scope, the statute addressed: ‘All persons who knowingly by false pretences shall obtain from any person money, goods, &c. with intent to cheat or defraud.’

Unlike the cases of mismeasured commercial goods, Young featured a scheme with obviously malicious defendants. They had obtained 20 guineas from an army colonel through a complicated ruse involving a pretended bet with each other. According to Ashurst J: ‘The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind.’ Buller J agreed, observing that ‘the ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud’, crisply specifying the actus reus and mens rea in a fashion that excluded any inquiry into the type of deception or the amount of vigilance required to detect it. This language signals a departure from the approach taken in Jones, focusing on the effects of the fraudster’s efforts rather than their nature and sophistication. If Young had been followed, references to ‘common prudence and caution’ probably would have become much rarer, and might have vanished before the standard could drift into other areas of law and gain the foothold that allowed it to spread in the nineteenth century.

However, Young was quickly forgotten. Hardly any of the reported fraud cases tried over the following three decades involved recourse to the doctrine of Jones and, as a result, this reversal had faded from memory by the time the question of the defendant’s guile arose again. Nevertheless, the arguments in Young were prescient in anticipating a view that would come to dominate in the nineteenth century. In Young, William Fielding (son of the novelist Henry Fielding), representing the defendants and attempting to apply the standard in Jones, insisted that it necessarily precluded criminal liability for statements about the future. If the defendant’s statements referred to ‘thing[s] past or present’, Fielding contended, they might be prohibited by the statute of 30 Geo II, because they might be so cunning that ‘caution cannot guard’ against them, whereas statements about ‘future transaction[s]’ are always detectable: ‘inquiries may be made’ and consequently ‘the party can only be imposed upon through his own negligence’. Fielding maintained that the defendants’ bet, as a statement about the future, necessarily fell...
outside the statute. The logic is dubious: the conspirators pretended they had already made a bet, not that they were going to make one; moreover, there was no one else to consult in order to verify the details, so any inquiry would have been pointless. However, instead of engaging with Fielding’s logic, the court concluded that even the imprudent were entitled to protection under the statute. In the years following Young, the courts addressed various aspects of the doctrine—such as how to treat false impersonations and what details needed to be set out in the indictment—but none of these cases required resort to Young’s expansion of the scope of fraud.

No more is heard about this treatment of future-oriented statements for more than 30 years, and then it was adopted with little explanation in R v Goodhall (1821). The defendant had ordered 250 pounds of meat (valued at £4 10s), but failed to pay on delivery. Indicted under the statute of 30 Geo II, he was convicted at trial, at Stafford Assizes, with a finding by the jury that ‘at the time he applied for the meat … he did not intend to return the money’. It was reserved and sent to the 12 judges, who reversed the decision, without inviting argument from counsel. There is only one report of the case, which gives the justification in a single sentence: ‘It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it.’ This explanation corresponds perfectly to Fielding’s argument, yet there is no reference to Young. Indeed, as one commentator notes, under the procedures for considering reserved cases, the judges did not have the power to overrule the King’s Bench, making it unlikely that they had consulted Young. Nor was the idea likely borrowed from a treatise, because only a few mentioned the ‘future promise’ argument, and they noted that Young had rejected it.

One might speculate that Goodhall’s holding reflected the same logic we have seen in the eighteenth-century jurisprudence, which preserved judicial control over the commercial cases by excluding them from the criminal docket, rather than trusting to the jury’s ability to assess mens rea. That explanation has some force, given that this was an era of increasing distrust

44 Young (n 41) 506.
46 The defendant, Moses Goodhall, evidently did not mend his ways, because he was convicted of another offence at the Stafford Quarter Sessions in 1839 and was transported to New South Wales. The conviction was recorded under the name ‘Moses Goodall’. Transportation Register, 10 October 1839, National Archives, HO 11/12/101.
47 Goodhall (n 28).
48 AR Pearce, ‘Theft by False Promises’ (1953) 101 University of Pennsylvania Law Review 967, 974. Pearce notes that if ‘the King’s men had marched up the hill’ in Young, they ‘marched down again’ in Goodhall, and that given the change in personnel in the interim, ‘it was not the same men; it appears they did not even know it was the same hill’. ibid 972.
49 See n 45.
of juries in England, when questions of fact were being recharacterised as questions of law precisely to maintain judicial control. Nevertheless, solving the mens rea problem is not the only possible explanation for the ‘future promises’ rule, as we may see from a trio of commercial fraud cases decided by the New York Court of General Session two years before *Goodhall*.

In the first of these cases, *People v Conger* (1819), New York City Mayor Cadwallader Colden acknowledged that he lacked the authority to ‘sett[le] the law on any point’, sitting as he was on a ‘subordinate tribunal’, but sought nevertheless to propose ‘some general rules upon this subject’ because ‘indictments of this nature are becoming very frequent’. He referred to *Young* at several points and adopted Fielding’s argument about future-oriented misrepresentations, but rejected Fielding’s justification that a prudent person can always investigate them. Instead, he reasoned that such statements were neither true nor false. *Conger* was a prosecution for using false pretences to obtain more than 300 dollars’ worth of fabrics. Colden acquitted the defendant, in part because ‘[a] false pretence must relate to an existing fact’ and one who ‘promises to pay for [goods] at a future time’ has made ‘false promises and not false pretences’. This view was consistent with the holding of *Young*, according to Colden, because the conviction there had turned not on a false promise, but on a false pretence (the defendants’ supposed bet). At the same time, Colden showed no inclination to remove these cases from the jury. After referring to the received wisdom about ‘mere naked lie[s]’ that ‘common sagacity or common precaution might detect’, he rejected the ‘bare words’ rule and embraced the personified standard that had accompanied it. Deceptions were not criminal, he explained, if they would not deceive ‘a person … possessed of ordinary caution … But what would or would not be ordinary caution, is a question for the jury, which may depend on a thousand circumstances to be considered on a trial’. How to gauge ordinary caution and how to tell which ‘bare lies’ might baffle it were for the jury to decide in any given case. Colden applied this approach in two later jury trials during the same term, yielding another acquittal and a suspended sentence.

*Conger* is a remarkable decision. It is more methodical, more carefully researched and more disciplined in its reasoning than any of the English judgments on the subject over the previous century. It is also one of the first

---

50 For a relatively contemporaneous observation about this phenomenon, see [HP Brougham], ‘Rossi on Criminal Law’ (1831) 54 *Edinburgh Review* 183, 222. The pattern is usually associated with civil law, not criminal law; see P Handler, ‘The Court for Crown Cases Reserved, 1848–1908’ (2011) 29 *Law and History Review* 259, 283–84 and the sources cited there.
51 *People v Conger* 4 NY City-Hall Recorder 65, 68–69 (Sess Ct 1819).
52 ibid 69.
53 ibid 72.
54 *People v Collins* 4 NY City-Hall Recorder 143, 149 (Sess Ct 1819); *People v Stuyvesant* 4 NY City-Hall Recorder 156, 157 (Sess Ct 1819).
decisions in any common law jurisdiction that clearly adopted a standard akin to the ‘reasonable person’ as a question for the jury. If Conger had been more widely reported, it might have influenced the jurisprudence significantly. But unlike Holt Colden did not have a Hawkins to record and publicise the decision. Conger was printed in a short-lived reporter that was not gathered into a larger series until 1854.\footnote{55} In the interim, other American courts followed the holding in Jones. In Commonwealth v Drew (1837), the Supreme Judicial Court of Massachusetts signed on to the view that statements about the future ‘afford an opportunity for inquiring into their truth’, and Drew was treated as a leading authority in the first edition of Francis Wharton’s influential treatise on American criminal law (1846).\footnote{56} Conger adopted the ‘future promises’ doctrine in a fashion that was consistent with giving juries more control over these cases, whereas the primary means by which the doctrine developed in England and the US depended on preserving the rule about ‘bare promises’ and giving judges the control.

Over the following decades, the present/future distinction became a basic tenet of the jurisprudence in both England and the US.\footnote{57} Predictably, the courts tied themselves up in knots trying to determine which statements related to existing facts, which ones related to future facts, which ones in either category were material in prompting the victim to pay the defendant, and in which instances the statements about the present and future were so hopelessly intermingled that the whole charge had to be rejected as defective for want of a clearly specifiable falsehood.\footnote{58} (The distinction also figured as a loophole in a mystery story, ostensibly aimed at legal reform.)\footnote{59} Little purpose would be served by detailing these cases; the complications they spawned have yielded various results. Some jurisdictions have maintained the distinction, while others have recognised that statements about the future may also be intended as lies (as the Goodhall jury itself had concluded). Some jurisdictions have gone further, eliminating ‘reasonable’ reliance
as an element of fraud, which also abolishes the temporal distinction, where it was adopted under Fielding’s theory.\textsuperscript{60} For present purposes, the significance of these changes—the treatment of future promises as categorically incapable of supporting reliance and the elimination of reliance as an element of fraud—is that both of them effectively remove the ‘man of ordinary prudence’ from the inquiry. This line of jurisprudence began by adopting a human measure to evaluate fraud, but ultimately gravitated towards solutions that make no reference to a personified standard.

IV. CRIMINAL LAW PERSONIFIED

In the early nineteenth century, however, the standard began to find other outlets in the criminal law, which enabled it to spread further. In \textit{R v Southerton} (1805), the court adopted this approach in evaluating an extortion threat. Southerton had demanded £10 from a pair of druggists, Richard and William Allen, saying that otherwise he would prosecute a trumped-up information against them for ‘selling … medicines without stamps’.\textsuperscript{61} He was convicted of extortion at trial, but the King’s Bench reversed the decision, ruling that he uttered ‘a mere threat to bring an action which a man of ordinary firmness might have resisted’.\textsuperscript{62} This standard was suggested by Attorney-General Spencer Perceval for the prosecution in an effort that backfired. Perceval evidently thought to propose this approach partly because of the ‘constans vir’ in the law of duress and partly by way of analogy to the fraud cases.\textsuperscript{63} Drawing again on Hawkins’s account of \textit{Jones}, Perceval argued that even if Southerton’s threat ‘could be considered only as a fraud upon an individual, yet if it were such against which common prudence could not guard, nor common firmness resist, it would still be indictable’ and that ‘no prudence can guard against a false charge’.

Lord Ellenborough accepted the premise but not the conclusion. He mentioned the ‘man of common firmness’ and the ‘man of ordinary firmness’, as well as the ‘ordinary free will of a firm man’, and perhaps we should treat one of those qualifiers as implicit in his fullest statement of the rationale. Stating that ‘the threat must be … calculated to overcome a firm and prudent man’, he concluded that the Allens had been too easily rattled by a threat that ‘a firm and prudent man might … and ought … to have resisted’.

\textsuperscript{60} Besides the sources cited in nn 48 and 56, see M Bedi, ‘Contract Breaches and the Civil/Criminal Divide: An Inter-common Law Analysis’ (2012) 28 \textit{Georgia State University Law Review} 559.

\textsuperscript{61} \textit{R v Southerton} (1805) 6 East 126, 127, 136, 140, 142, 102 ER 1235. East’s report summarises the facts very cursorily; for a fuller account, see ‘Summer Assizes’ \textit{Morning Chronicle} (London, 20 August 1804) 3.

\textsuperscript{62} \textit{Southerton} (n 61) 141.

\textsuperscript{63} ibid 132–33.
This language is even more openly normative than the language of the fraud cases: ‘firmness’ carries a strong moral charge and the ‘ought’ emphatically prescribes a norm. Lawrence J agreed, but heeded more consistently to the common and the ordinary: after citing Jones, he observed that extortion required ‘means [that] common prudence and firmness cannot guard against’ and that in this case, ‘a man of ordinary firmness’ would have left Southerton to ‘prosecute … at his peril’.64

Perceval’s analogy, in fact, was very apt. The interpersonal dynamics of extortion mirror those of fraud. A avoids, or cannot manage to avoid, suffering a loss—in one case, depending on whether A can see through B’s more or less wily fabrication and, in the other case, depending on whether A can withstand B’s more or less severe threat. Insofar as criminal law now uses different means to calibrate the threshold for the two offences, then, that is not because of a difference in the relationship between victim and victimiser; it is because, according to contemporary social norms, a scam artist is more contemptible than even a highly gullible victim, whereas an extortionist is less contemptible than a fearful victim who will pay anything to avoid a minor physical harm. This difference in social norms explains why a personified standard might be apt for extortion, but not for fraud. In both instances, the attempt cannot become a completed offence without the would-be victim’s participation, but we do not consider the fraud victim’s perceptions as relevant to the analysis, nor (for the most part) do we use the law to establish a standard indicating the level of deceit that people can and should resist—even a blatant lie is good enough. It is therefore useless to adopt a device that asks the trier of fact to consider the fraud victim’s perspective or to gauge a communal norm of reasonable vigilance, which are the functions that a personified standard would serve.

Conversely, this standard does have something to contribute to the analysis of extortion. That analysis takes the victim’s perceptions into account, at least to the extent of asking whether someone in the victim’s position would actually have perceived a threat. The analysis also asks, normatively, whether the victim should have perceived a threat under the circumstances. Lord Denman makes the latter point in an 1849 judgment that explains the holding of Southerton: ‘Whether a threat be criminal or no, cannot be taken to depend on the nerves of the individual threatened, but on the general nature of the evil with which he is threatened.’65 Formulated in this way, the exercise would not seem to demand a perspectival inquiry; however, assessing the gravity of the threat is a normative exercise in which a personified standard can assist. If ‘the general nature of the evil’ could be measured on a scale, yielding an objective and unchanging distinction akin to the ‘bare

64 ibid 142–43.
65 R v Smith (1849) 1 Den 510, 514, 169 ER 350.
words’ rule, a personified standard would serve no purpose; however, in the absence of that option, a plausible way to identify the applicable norm is to refer to an embodiment of the community that holds the norm and to bear in mind the descriptive considerations that pitch the requirement at an ‘ordinary’ or ‘common’ level. The personified standard does not tell us how to reconcile the tensions between normative and descriptive considerations—which is why Lord Ellenborough’s different formulations are significant and why commentators continue to debate these issues—but by figuring the standard in a human form, we can at least indicate what kind of evaluation is to be undertaken.

From extortion to duress and provocation was only a short step conceptually (though hardly one that followed automatically) and, as these comments have implied, duress and provocation resemble extortion rather than fraud with respect to the kind of inquiry they prompt. Starkie, in the second edition of his treatise on evidence (1833), adds Southerton to the section on ‘duress’, thus facilitating a move by which the court’s analysis would be applied to the definition of a defence rather than being used to define an offence. In the following decades, in both criminal and civil contexts, the courts increasingly referred to the ‘man of ordinary firmness’ in duress cases. Similarly, whereas Blackstone treats the standard categorically, listing various threats that will not amount to duress and quoting Bracton’s requirement of a ‘virum constantem’, his nineteenth-century editors would recharacterise the standard as requiring ‘common firmness’, Southerton, and doubtless various other expressions of the personified standard as embodying ‘common’ or ‘ordinary’ traits, also led jurists to recraft the civil law standard of duress so as to partake of the same features as the ‘reasonable’ person.

Provocation developed in a similar fashion: whereas the defence had formerly operated categorically, covering a short list of triggers, the court in R v Kirkham (1837) introduced the idea of ‘reasonable control’, and some 30 years later, in R v Welsh (1869), the standard would be formulated as requiring ‘the amount of provocation’ sufficient to spark the passion of ‘a reasonable
man’. Historical research has suggested that Welsh inaugurated the modern approach to provocation in England; the American courts started to use a personified standard around the time of Kirkham, and while those cases deserve more attention, an examination would take us beyond the scope of the present inquiry.

Extortion, duress and provocation all turn on a person’s ability to resist a certain amount of pressure, as well as on the person’s perception of the pressure. A personified standard directs the trier of fact to the actor’s perspective (when that is relevant) and provides a means of factoring in the normative and descriptive concerns that inform the analysis. Liability for fraud, even in the eighteenth century, did not depend on these questions; as we have seen, Holt proposed the standard for a different purpose, and Hawkins’s reformulation, though it would prove tremendously productive in other contexts, functioned in fraud mainly as a redescription of the ‘mere words’ rule, serving to manage a question of mens rea and thereby removing it from the jury’s control, rather than formulating an issue for the jury to consider.

Well into the nineteenth century, the modern uses of the ‘common’, ‘ordinary’ or ‘reasonable’ person were hardly self-evident. In R v Wickham (1839), Lord Denman queried Jones’s objective approach, doubting that it struck the right standard, but also doubting that any objective standard could be established. Told that a promissory note was a ‘bare assertion’ and not the kind of ‘artful device as will impose on a man of ordinary caution’, Denman asked: ‘Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?’ The answer he received—‘The law prescribes it’—might worry a modern lawyer, insofar as it treads on the jury’s discretion, but it evidently worried Denman for a different reason. He soon repeated the question: ‘There are indeed cases where the pretence is so very foolish that it is difficult to say that an imposition is practiced; but still, who is to give the measure?’ ‘The law prescribes it’ would be a satisfactory answer to

69 R v Kirkham (1837) 8 C & P 115, 173 ER 422; R v Welsh (1869) 11 Cox CC 336.
71 See State v Hill (NC 1839) 4 Dev & Bat 491, 496 (‘men of ordinary tempers’); State v McCants (SC 1843) 1 Speers 384, 387 (‘an ordinary reasonable man’); People v Stonecifer (1856) 6 Cal 405, 411 (‘a reasonable person’); and particularly Maher v People (1862) 10 Mich 212, 220, which discusses the question at length, speaking of ‘ordinary men, of fair average disposition’ and ‘reasonable, ordinary human nature, or the average of men recognised as men of fair average mind and disposition’, while making allowance for ‘some peculiar weakness of mind or infirmity of temper’ if it does ‘not aris[e] from wickedness of heart or cruelty of disposition’.
72 Wickham (n 58) 36–37.
anyone who takes the standard to be normative—in this case, the law may have prescribed it incorrectly, but the law is competent to prescribe normative standards. Denman, however, seems to regard the standard as purely descriptive. He is not playing devil’s advocate, but is denying that the law could prescribe a standard that makes an empirical claim about people’s acuity and behaviour. His resistance does not reflect a doubt that the ‘person of ordinary caution’ can achieve the function it was designed to serve so much as a doubt about what that function is. That he could be uncertain about this function is, perhaps, not surprising. ‘Common prudence and caution’ had largely been a motto in the fraud cases, serving as a paraphrase of the rule that ‘bare lies’ did not constitute fraud, and in 1839 this standard had appeared only by fits and starts in other legal domains, such as tort. Denman’s questions are significant precisely because they remind us that despite the landmark of Jones and the cases following it, in the 1830s, the idea of a personified objective standard could not yet be taken for granted.