

# The Distinction Between Larceny and Embezzlement: With Special Reference to the Concept of Possession

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**Abstract:** The distinction between larceny and embezzlement has long been a contentious issue in judicial practice, with its core lying in the accurate determination of the possession status of property at the time of the act. Centering on the concept of possession, this article systematically reviews major theoretical doctrines in criminal law, including the theory of Factual Control, the theory of Normative Possession, and comprehensive approaches. It reveals the interpretive difficulties these doctrines face when applied to typical disputed scenarios such as mislaid property, sealed containers, and belongings on a deceased person. To unify adjudication standards and enhance practical applicability, this article attempts to construct a comprehensive, step-by-step analytical framework based on 'the possibility of Factual Control as the foundation, supplemented necessarily by societal normative recognition.' This framework is then applied to test three types of classic disputed cases: mobile phones forgotten in taxis, couriers extracting contents from parcels, and property appropriation after homicide, yielding consistent conclusions that align with prevailing judicial understanding. The research demonstrates that by establishing a clear, hierarchical method for determining possession—one that integrates factual and normative considerations—a more explanatory and applicable theoretical tool can be provided for distinguishing larceny from embezzlement. This contributes to achieving uniformity and justice in the application of criminal law within complex property relationships.

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## 1. Introduction: Possession as the Key to Distinguishing Larceny and Embezzlement

In judicial practice, distinguishing between larceny and embezzlement can sometimes be contentious. According to the theory of Criminal Law in China,

larceny refers to the act of unlawfully taking possession of another's property by means of secrecy and without violence, against the will of the possessor, thereby transferring possession of the property to oneself or a third party. Its core lies in breaking another's possession.

Embezzlement, on the other hand, refers to the unlawful appropriation of another's property that one already possesses, or of mislaid or buried property that has left the possession of its original owner. Its prerequisite is that the actor either lawfully possesses the property or the property is no longer in the possession of its original owner (Zhang, M., 2003). Therefore, the essential distinction between the two offenses lies in whether, at the time the act is committed, the property is in the *possession of another* or in the *possession of the actor*. Typical contentious scenarios include, for example, the following two categories of cases: First, a passenger leaves a mobile phone on the back seat of a taxi, and the driver later discovers it and appropriates it for themselves. Second, a courier, during the sorting process, privately opens a parcel in their custody and removes the items inside. For the former, the key issue is determining whether the phone has become mislaid property now possessed by the driver, or whether it remains property in the possession of the passenger. For the latter, the core disagreement lies in whether the courier's act should be viewed as an infringement of the consignor's possession of the contents, or recognized as an abuse of their own lawful custody of the parcel as a whole. The root of this divergence lies in differing determinations of the 'possession' status of the property at the time the act occurs.

Under the theoretical framework of Chinese criminal law, the object of larceny is defined as *property in the possession of another*, whereas the object of embezzlement refers to property *lawfully possessed by oneself* or *mislaid or buried property belonging to another* (Zhang, M., 2021). Thus, determining who possesses the property at the time of the offense constitutes the key to distinguishing between these two crimes. However, *possession* in criminal law is not a purely factual concept, and its criteria for recognition are subject to differing theoretical perspectives. Some viewpoints emphasize objective, physical control over the property (Li, H., 2009). Others argue that determination should be based on general social norms. Still others attempt to integrate both approaches, treating *Factual Control*

as a necessary condition and the degree of normative acceptance as the evaluative benchmark (Che, H., 2014). These divergent theoretical doctrines may lead to different legal conclusions when applied to the same factual scenario.

This theoretical divergence not only directly contributes to inconsistency in judicial adjudication but also manifests in more complex scenarios beyond cases like mobile phones left in taxis. Similar disagreements or even contradictory rulings are not uncommon in judicial practice when addressing more complex scenarios. These include determining the possession of sealed entrusted goods such as express parcels, or defining the possession status of property held by a deceased person before death when the perpetrator appropriates such property after harming the victim. Such circumstances not only undermine the fairness of individual case adjudication but also erode the uniformity and authority of legal application.

In light of this, the precise distinction between larceny and embezzlement fundamentally hinges on establishing a clear and operational definition of the concept of *possession*, which serves as the core distinguishing criterion. This article aims to systematically review the primary doctrines regarding *possession* in criminal law theory, thoroughly analyze the interpretative difficulties they reveal when applied to the aforementioned typical contentious situations, and subsequently attempt to construct a more appropriate framework for determination. This framework seeks to better align with the needs of China's judicial practice while offering both theoretical explanatory power and practical applicability, thereby providing a reference for promoting more uniform legal application.

This article makes three main contributions. First, it clarifies the structural limitations of existing doctrines by demonstrating how factual control theory and normative possession theory fail in different types of contested scenarios. Second, it develops a sequential, step-by-step analytical framework that integrates factual control and normative recognition in a hierarchical manner

rather than treating them as parallel criteria. Third, it shows that this framework provides a more stable reasoning path in hard cases, not by changing conclusions, but by improving the justification and consistency of those conclusions.

## 2. The Fundamental Framework of Possession Theory and Doctrinal Disputes

### 2.1 Possession in Criminal Law Emphasizes Factual Dominion and Exclusive Control

*Possession* is a foundational concept in property crimes, and its definition directly shapes the boundary between different offenses. Similar debates can also be found in German and Anglo-American criminal law. In German criminal law theory, possession (*Gewahrsam*) is generally understood as a combination of actual control over the object and social recognition of such control, emphasizing both factual dominance and normative attribution (Roxin, 2006; Jakobs, 1991). In Anglo-American law, although the terminology differs, concepts such as “possession” and “constructive possession” also reflect a dual structure that incorporates both physical control and legally recognized authority over property (LaFave, 2017). These comparative perspectives indicate that the tension between factual and normative elements is not unique to Chinese criminal law, but represents a common theoretical challenge in the law of property offenses. The definition of its connotation directly determines the scope for establishing specific offenses such as larceny and embezzlement. Unlike civil law, which focuses on entitlement and the publicity of real rights, the concept of *possession* in criminal law places greater emphasis on the factual state of dominion and control over property. The core of this factual dominion lies in its exclusivity, meaning the possessor can exclude arbitrary interference by others with the property (Shen, Z., 2010). The original purpose of constructing this concept in criminal law is not to confirm rights or guarantee the transfer of property rights, but to serve criminal policy objectives. It aims to achieve comprehensive protection of property interests by

preserving the existing order of property dominion (Zhou, G., 2018). In other words, *possession* in criminal law is a form of factual dominion, not based on any underlying right, and its determination primarily depends on who factually controls the property.

Within the doctrinal system of property crimes, *possession* serves a pivotal function in delineating the scope of criminal liability and distinguishing between different offenses. First, it constitutes the fundamental criterion for differentiating acquisitive property crimes (such as larceny, snatching, and robbery) from the crime of embezzlement (Li, H., 2024). The essential nature of acts like larceny is ‘breaking the existing possession and establishing a new one,’ and their object must be ‘property in the possession of another’ (Zhang, Li., 2019). In contrast, the essential nature of embezzlement is ‘unlawfully appropriating another’s property that is under one’s actual control.’ Therefore, determining under whose possession a piece of property falls at the moment of the act becomes the logical starting point for distinguishing between these two categories of crimes. Second, the assessment of the state of possession also directly influences the boundaries between various offenses within the category of acquisitive property crimes. For instance, openly seizing property that is in the close possession of a victim constitutes snatching, whereas transferring possession without the victim’s knowledge constitutes larceny. The distinction between them lies in whether the act ‘openly’ infringes upon another’s actual control over the property.

### 2.2 The Constituent Elements of Possession Can Be Categorized into Three Major Doctrines

#### 2.2.1 Theory of Factual Control

The Theory of *Factual Control* posits that the core of possession lies in objective, physical, and actual control over the property. Whether *possession* is established should be judged based on the factual, physical relationship of dominion over the property (Zhang, M., 2021). For instance, *possession* is established when property is held in one’s hand,

placed within one's personal residence or vehicle—areas constituting a sphere of exclusive control.

The strength of this doctrine lies in its relatively objective and clear criteria, which contributes to maintaining legal certainty. While this theory provides relatively clear and objective criteria, its limitations will be further illustrated in the following case analysis (Zhao, Y., 2025).

### 2.2.2 Theory of Normative Possession (Social Norms Perspective)

To address the rigidity of the Theory of *Factual Control*, the Theory of *Normative Possession* proposes that the determination of possession should be based on general social norms or customary perceptions. As long as, according to the norms of communal life, a piece of property is considered to remain under a person's sphere of control—even if their physical control has weakened or been temporarily interrupted—their possession should still be recognized (Wang, H., 2015).

For instance, a wallet left on a restaurant seat is, according to social norms, typically considered to remain in the possession of the person who forgot it, or at least to have transferred into the general control of the restaurant management, rather than becoming ownerless property. This doctrine offers flexibility, allowing it to better adapt to the complexities of social life and align judicial outcomes more closely with the public's sense of justice. This approach allows greater flexibility, but its limitations in terms of uncertainty and potential subjectivity will be further discussed in the case analysis below.

### 2.2.3 Comprehensive Doctrine (or Middle-Ground Theory)

In light of the respective strengths and weaknesses of the aforementioned two doctrines, the *Comprehensive Doctrine* (also known as the *Middle-Ground Theory*) seeks a balance. This theory posits that possession in criminal law is neither a purely physical fact nor merely a normative construct, but rather the product of the combination of *Factual control* and *Normative Possession* (Che, H., 2014). The

establishment of possession generally requires a foundation of objective control as a basis. However, such control does not necessitate immediate, physical holding; it can also be a more attenuated possibility of control recognized according to the rules of social life (Ma, Y., 2015). Concurrently, general societal norms play a crucial supplementary and normative role in determining whether this possibility of control exists. Currently, the *Comprehensive Doctrine* has gained relatively broad acceptance within both academia and judicial practice, emerging as the prevailing view, although its internal structure and operational logic still require further clarification.

## 3. Typical Contentious Scenarios Exposing the Interpretive Difficulties of Existing Possession Theories

In judicial practice, the determination of *possession* often sparks controversy in several typical scenarios. The application of different theoretical doctrines can lead to markedly different judicial conclusions, highlighting the inherent difficulties within existing theoretical frameworks. The following analysis is conducted through three common types of cases.

### 3.1 Divergence in Determining Misplaced Property in Scenarios of Spatial Separation

Taking the case where a passenger leaves a mobile phone on the back seat of a taxi as an example, the legal characterization of the act where the driver or a subsequent passenger takes it hinges on determining whether the passenger's possession terminates immediately upon exiting the vehicle. The key issue lies in whether the passenger's possession terminates immediately upon exiting the vehicle.

Two different lines of reasoning can be observed. One approach treats the loss of direct physical control as decisive and considers that possession shifts to the driver once the passenger leaves the enclosed space. Under this view, the driver's subsequent appropriation may be characterized as embezzlement. Another approach emphasizes that,

according to ordinary social expectations, the passenger still retains a realistic possibility of retrieving the item within a short time, and therefore possession should not be regarded as immediately terminated. Under this view, taking the phone may be treated as larceny.

This divergence shows that existing approaches do not provide a stable criterion for determining how long possession continues after physical separation, especially in semi-controlled spaces such as taxis.

### 3.2 Doctrinal Opposition Regarding the Possession of Contents in Sealed Containers

In cases where a courier opens a parcel and steals its contents, the controversy centers on whether the courier's possession of the parcel as a whole automatically extends to the items inside. The central issue is whether possession of the container necessarily extends to the items inside.

One line of reasoning distinguishes between the parcel as a whole and its contents, holding that although the courier has control over the package, the contents remain under the control of the sender, particularly when the parcel is sealed. Under this view, the act constitutes larceny. Another approach treats the delivery as transferring overall control, suggesting that the courier's conduct should be regarded as embezzlement.

The disagreement indicates that existing doctrines lack a consistent method for determining whether control over a container implies control over its contents, especially where the owner's intention to retain control is externally expressed.

### 3.3 Controversy in Determining the Transfer of Possession of Property on a Deceased Person

In scenarios where a perpetrator kills another and subsequently takes the victim's property, the focal point is whether the deceased's possession terminates immediately upon death. The majority view in academia holds that the property of a deceased person becomes unpossessed, while a minority of scholars recognize the deceased's possession in a limited sense (Zhou, G., 2009). The

key issue is whether possession terminates immediately upon death.

One possible view holds that possession ceases at the moment of death, which may lead to the conclusion that the subsequent taking does not constitute larceny. Another view attempts to maintain some form of continuing possession, either by extending the victim's control or by attributing possession to another subject, so as to justify treating the act as larceny.

This tension reflects a deeper difficulty: existing approaches struggle to explain how possession should be treated in situations where the original possessor disappears suddenly, especially when the taking of property is closely connected with the preceding act of violence.

The above scenarios demonstrate that existing doctrines, when applied independently, often lead to divergent or unstable conclusions. This calls for a more structured and hierarchical method for determining possession.

## 4. The Need to Establish a Comprehensive Criterion for Determining Possession

The theoretical divergences and practical difficulties discussed above demonstrate that neither the pure Theory of *Factual Control* nor the abstract Theory of *Normative Possession*, when applied in isolation, can fully resolve the challenges in determining 'possession.' While the Theory of *Factual Control*, grounded in objective physical control, offers a relatively clear starting point for judgment and contributes to legal certainty, its rigidity lies in its inability to encompass situations where normative dominion is widely recognized by law and social life despite the absence of close physical connection. Examples include possession of items within a sealed container, or the legitimate expectation of rights by a deceased person's close relatives over personal effects.

Conversely, the Theory of *Normative Possession*, despite its flexibility in responding to prevailing social norms and compensating for the shortcomings of *Factual control*, risks sliding into subjective speculation if completely detached from

the foundational possibility of *Factual control*. This would cause the concept of 'possession' to lose its objective boundaries, ultimately undermining the uniformity and predictability of criminal law application.

In light of this, this article advocates for constructing a comprehensive criterion for determination based on 'the possibility of *Factual Control* as the foundation, supplemented necessarily by societal normative recognition.' This criterion does not represent a simple compromise between existing doctrines but rather attempts to establish a test framework with a sequential order and internal logic. It can be developed concretely according to the following steps:

**Step One: Foundational Assessment of *Factual Control*.** The primary basis for determination is to examine whether a clear, stable, and exclusive physical relationship of dominion exists. For instance, this includes situations where property is carried on one's person, held in hand, or placed within a private domain under one's exclusive control, such as a residence, a locked vehicle, or a drawer. In such cases, the relationship of *Factual Control* is readily discernible, and the attribution of possession can be determined accordingly without needing to proceed to subsequent steps. This step aims first to confirm possession statuses that are beyond dispute, thereby safeguarding the objectivity and efficiency of the determination.

**Step Two: Supplemental Assessment Based on Social Norms.** When property departs from the close physical control of the right holder, rendering the relationship of *Factual Control* ambiguous, tenuous, or temporarily interrupted (e.g., mislaid property, lost property, or items temporarily left in a public space), it becomes necessary to introduce general social norms as a supplementary basis for determination. In such scenarios, possession cannot be negated solely based on the momentary lack of physical control. Instead, multiple factors should be comprehensively considered to ascertain who is regarded as the possessor according to general social norms. These factors primarily include:

First, the Nature of the Location: Whether it is a highly exclusive private sphere (e.g., a residence), a relatively enclosed space with some degree of managed order (e.g., a taxi, a restaurant private room, a hotel room), or a completely open, unmanaged public space. Second, the Time Interval: The length of time the right holder has been separated from control, and whether it falls within a reasonable scope for immediate or relatively easy recovery. Third, the Condition of the Property Itself: Whether the property was intentionally placed in a specific spot, concealed, or bears identifiable features, thereby manifesting the right holder's intention of continued control. Forth, the Existence of a Third Party with general management responsibility or reasonable control capability over the relevant space (e.g., a taxi driver, mall management, left luggage office staff). Fifth, through the holistic weighing of these factors, a judgment is made as to whether, according to general social norms, possession can be considered as either not having transferred or as having transferred to a managing party.

**Step Three: Recognition of Limited Exceptions for *Normative Possession*.** Based on specific legal relationships or firmly established general social norms, criminal law may, in exceptional circumstances, establish a legal fiction for the existence of certain forms of *Normative Possession*. However, its scope must be strictly confined to prevent undue expansion. Such legal fictions are typically supported by clear legal policy considerations or strong societal recognition. For example, regarding the contents of a sealed entrusted item, based on the bailor's explicit intention and the intention of control manifested through the act of sealing, the law may fictionally deem that possession remains with the bailor, while the bailee possesses only the external packaging. Similarly, property left by a deceased person in a non-public, relatively private location may, based on the needs of inheritance rights and social order, and under certain conditions (such as the heir's ability to become aware and take over in a timely manner), be fictionally deemed to be in the

*Normative Possession* of the heir. This aims to avoid a vacuum of possession, but such a fiction must be premised on the privacy of the location and the reasonable expectation of takeover, preventing its over-application in scenarios like property left in public spaces.

The core of this three-step criterion lies in anchoring the determination of 'possession' in the objective possibility of *Factual Control*, while employing social norms as a necessary adjustment and supplement, and recognizing legal fictions under strictly defined conditions. This approach offers a more operational and logically coherent path for resolving the various contentious scenarios discussed previously.

Compared with existing approaches, the proposed framework does not necessarily aim to produce different outcomes in standard cases. Its advantage lies in restructuring the reasoning process. Instead of relying on intuitive or parallel balancing between factual control and normative considerations, the framework introduces a clear sequence of analysis. This reduces arbitrariness, makes judicial reasoning more transparent, and allows similar cases to be handled with greater consistency. In borderline cases where existing doctrines may yield competing interpretations, the step-by-step method helps to clarify which factors should be considered first and which play only a supplementary role.

## 5. Testing and Applying the New Criterion to the Previously Discussed Contentious Scenarios

The three-step determination criterion, summarized as 'based on the possibility of *Factual Control*, supplemented necessarily by societal normative recognition,' was formulated to establish a clear, hierarchical, and logically coherent framework for determining possession. This chapter applies this criterion to re-examine the three typical contentious scenarios presented earlier, thereby assessing its practical utility.

### 5.1 Application to the Case of a 'Mobile Phone Forgotten in a Taxi'

The analysis using the three-step method proceeds as follows. First Step: The passenger exits the vehicle and leaves, thereby terminating the direct, close physical relationship of dominion over the mobile phone they carried. The state of *Factual Control* becomes ambiguous.

Second Step: As *Factual Control* is unclear, it is necessary to introduce general social norms as a supplement. A taxi compartment constitutes a relatively enclosed space under the operational management of the driver. According to general social norms, the driver bears a temporary duty of care and restitution for items left in the vehicle by passengers for a reasonable period, a managerial authority recognized in social life. Therefore, after the passenger alights, social norms dictate that the driver instantly acquires a general, temporary *Normative Possession* of the phone. The property does not instantly become an ownerless 'mislaid item.'

Third Step: This case does not involve rules of exception requiring special legal fiction for *Normative Possession*. Consequently, the conclusion becomes clear: when the driver discovers the phone and unlawfully appropriates it, this constitutes the misappropriation of another's property that they legitimately possess based on social norms, fulfilling the elements of embezzlement. A subsequent passenger who boards the taxi, knowing the phone is another's property under the driver's control, and secretly takes it, acts to break the driver's possession. This act should constitute larceny.

This judgment avoids the excessive rigidity in determining possession that the Theory of *Factual Control* might cause (by neglecting the driver's managerial position), while also guarding against the drawback of uncertain duration of possession that a pure Theory of *Normative Possession* might entail.

### 5.2 Application to the Case of a 'Courier Stealing Contents from a Sealed Container'

The analysis using the three-step method proceeds as follows. First Step: Examine the possibility of *Factual Control*: The courier, based on the transport contract, possesses exclusive physical control and factual dominion over the sealed parcel as a whole. However, regarding the contents inside the parcel, the sealing act (e.g., taping, locking) creates a clear physical barrier. Objectively, the courier does not have the factual possibility to directly control the contents without breaking the seal.

Second Step: Prevailing social norms generally hold that 'delivering the box does not equate to delivering the items inside.' The sealing serves as an external manifestation of the bailor's intention to retain control. Therefore, a distinction in possession attribution should be made between the parcel as a carrier and its contents.

Third Step: This case precisely qualifies for the application of the limited exception rule for *Normative Possession*, namely that 'the possession of the contents of a sealed container is legally fictionally deemed to remain with the bailor.' This rule is grounded in the special protection afforded to relationships of trust in bailment and clear societal consensus.

Synthesizing the above, the conclusion is as follows: The courier's unauthorized act of opening the seal and taking the contents does not constitute misappropriating property already lawfully in their possession. Instead, by breaching the seal, they infringe upon the *Normative Possession* that the law fictionally deems retained by the bailor. Therefore, the act should constitute larceny.

### 5.3 Application to the Case of 'Appropriating Property After Homicide'

The analysis using the three-step method proceeds as follows. First Step: The victim's death terminates their bodily and conscious *Factual Control* over the property on their person, separating the property from its original factual possessor.

Second Step: When the homicide occurs in a non-public, relatively secluded location (e.g., a private residence, a remote spot), prevailing social norms generally do not accept that property on the victim's person instantly becomes ownerless property subject to a first-come-first-served rule upon death. This is particularly true when the homicide and the subsequent appropriation of property are closely connected in time and place, forming an almost seamless sequence. In such a scenario, the perpetrator's act of killing has, in substance, precluded any possibility for others to establish new, stable possession over the property. The perpetrator, by virtue of the preceding violent act and their presence at the scene, factually establishes exclusive control over the property. At this point, the act of taking the property can be viewed as asserting and unlawfully converting a 'quasi-possession' status that is grounded in the *Factual Control* established through the perpetrator's preceding conduct.

Third Step: One could also consider, under strict conditions, applying a legal fiction deeming property left by the deceased in a private location to be in the *Normative Possession* of their heirs (premised on a clear inheritance relationship and a reasonable expectation of takeover). Under this view, the perpetrator's act breaks this *Normative Possession*. However, a more direct and less contentious interpretative path is to evaluate the closely connected homicidal act as the precondition and means by which the perpetrator subsequently acquires a position of exclusive *Factual Control* over the property, thereby negating the existence of any 'vacuum of possession.'

Accordingly, the conclusion is as follows: The perpetrator's act of taking the property after committing homicide constitutes larceny. This judgment overcomes the unreasonable conclusion of non-liability or liability only for embezzlement that an extreme Theory of *Factual Control* might yield. It also avoids the jurisprudential difficulties of fictionalizing 'possession by the deceased' inherent in the Theory of *Normative Possession*. Through a comprehensive consideration of factual and

normative elements, and by evaluating the preceding and subsequent acts as an integrated whole, the final conclusion aligns with the principle of proportionality between crime and punishment. It is also consistent with the common judicial practice of punishing such conduct with combined penalties for larceny and homicide.

## 6. Conclusion

At its core, the distinction between larceny and embezzlement hinges on determining the 'possession' status of property at the time of the act. By reviewing the theoretical doctrines of possession and analyzing three typical contentious scenarios in judicial practice, this article reveals the interpretive difficulties faced by a single criterion when dealing with complex cases. Neither the Theory of *Factual Control*, which prioritizes objective control, nor the Theory of *Normative Possession*, which emphasizes general social norms, can independently fulfill the function of unifying adjudication standards.

To resolve the aforementioned dilemma, this article advances a tiered analytical approach: the determination of possession should be grounded in the possibility of *Factual Control* and then supplemented, where necessary, by general social norms. By establishing a sequence of relatively clear

evaluative steps, this framework insists on the objective factual basis essential to possession, while also accommodating situations where judgment must draw upon common life experience. When applied to the representative cases discussed earlier—such as mobile phones left in taxis, couriers removing contents from sealed parcels, and property appropriation after homicide. This approach yields consistent conclusions that align with widely held practical judgments. This demonstrates its viability as a functional analytical tool.

In summary, the accurate distinction between larceny and embezzlement depends crucially on the interpretation of the concept of 'possession.' The discussion herein indicates that adopting a step-by-step, comprehensively considered method can provide a relatively clear framework for resolving common determination challenges, contributing to the formation of more uniform perspectives in practice. It must be recognized that property relationships in reality are increasingly complex, and new issues will continue to arise. Therefore, how to determine 'possession' remains a subject requiring continued in-depth reflection in future theoretical research and judicial practice.

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