Ways to Steal a Bicycle

Theft Law in the Information Age

STUART P. GREEN

THIRTEEN WAYS TO STEAL A BICYCLE

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Preface

The idea for this book grew out of two seemingly unconnected series of news events of the past decade. In 2002, Doris Kearns Goodwin and Stephen Ambrose, two popular historians whose work I admired, were accused, separately, of committing plagiarism. As a criminal law scholar, I was intrigued by repeated references to their acts as a kind of "theft," and I began to wonder what it might mean to "steal" ideas, words, intellectual property, and other intangibles. Then, in 2005, Hurricane Katrina struck my then–home state of Louisiana, and I watched with bewilderment as New Orleans fell victim to extensive looting. In some cases, these lootings involved opportunistic and predatory conduct that seemed even more blameworthy than ordinary theft. In other cases, the perpetrators were otherwise law-abiding citizens who found themselves in circumstances of necessity, without food, clean water, or medicine; their acts did not seem particularly blameworthy at all. Watching all of this unfold on television, I began to think about both the moral significance of the means by which theft is carried out and the relationship between theft law and the broader economic order.

My reflection on these two otherwise unrelated series of events led me, in turn, to begin thinking more generally about theft's legal and normative foundations. In 2006, I published a book on the moral theory of white collar crime that touched briefly on the concept of stealing, but I realized soon thereafter that there was much more to say on the subject. I wanted to explore the basic conceptual framework

of theft law and to assess its continuing applicability in an age in which the economy is increasingly based on the commodification of information and other intangibles, where the means of committing theft and fraud have become increasingly sophisticated, and where the gap between rich and poor continues to grow.

The time for such a study is ripe: It has been a half century since the Model Penal Code sought to rewrite the American law of theft, and nearly as long since enactment of the similarly influential English Theft Act. In the intervening years, criminal law theory has made significant strides. The demands of retributivism in particular have emerged as a central focus of analysis. Yet the law and theory of theft have remained largely stuck in the 1960s. My goal in this book is to bring them into the twenty-first century.

* * *

The stealing of bicycles referred to in the title provides an image that recurs throughout the book. More than a million bikes are stolen in the United States every year; many readers will have experienced such thefts firsthand. One can imagine a wide range of different ways in which a bicycle could, at least theoretically, be stolen: most commonly, by means of stealth (larceny), but also by means of force (robbery), deception (fraud or false pretenses), coercion (extortion), breach of trust (embezzlement), and so on. One can also imagine the misappropriation of bike-related services (say, using deception to obtain a ride in a bicycle taxi) and bike-related intangible property (like stealing a trade secret regarding a new bicycle production method). If one adds up all of the different ways of stealing bikes and bike-related property that are mentioned in the book, the total comes out to thirteen. But the precise number is not really so important. The main sense of the title is metaphorical: It is meant to convey the messy complexity that characterizes theft law's moral content, of which this book seeks to make sense.

Acknowledgments

It is often said that the best way to learn a subject is to teach it. In my experience, writing a book works too. In my efforts to learn about the many issues that are explored in what follows, I benefited from the knowledge and expertise of many generous friends and colleagues. Those I managed to keep track of (and my apologies to those I've failed to mention) include Annalise Acorn, Peter Alldridge, Andrew Ashworth, Douglas Baird, Jim Bowers, Mike Cahill, James Chalmers, Markus Dubber, Lindsay Farmer, Marcelo Ferrante, David Gray, Emanuel Gross, Audrey Guinchard, Winifred Holland, Jeremy Horder, Tatjana Hörnle, Kyron Huigens, Sonia Katyal, Wayne Logan, Michelle Madden Dempsey, Sam Mandel, Dan Markel, Emanuel Melissaris, Gerry Moohr, David Ormerod, Iñigo Ortíz de Urbina Gimeno, Eduardo Peñalver, Rosemary Peters, Paul Roberts, Paul Robinson, Ron Scalise, Jennifer Smyre, the late Bill Stuntz, Victor Tadros, Malcolm Thorburn, and Lloyd Weinreb. Thanks also to my Rutgers colleagues, including Dean John Farmer, Vera Bergelson, Adil Haque, Sabrina Safrin, George Thomas, Reid Weisbord, and the erudite John Leubsdorf; to my former colleagues at Louisiana State University, where my work on this book began; and to participants at colloquia at the Universities of Edinburgh and London, Florida State University, Louisiana State University, New York University, Pace University, and Rutgers University. No doubt I misappropriated ideas from all of them.

A few others deserve special mention: Antony Duff and Doug Husak provided their usual generous mix of advice, criticism, encouragement,

and inspiration. Alex Steel read and offered comments on each chapter as I wrote them, and shared with me his enthusiasm for and encyclopedic knowledge of theft law. Ken Simons also read the whole manuscript and had numerous insightful suggestions for improvement. Matthew Kugler made major contributions to the empirical study of theft seriousness described in Chapter 1, and stimulated my thinking about empirical desert more generally. Paul Axel-Lute and Phyllis Schultze, two exceptional librarians at Rutgers Law School, responded promptly to countless calls for help. Jordon Steele, at the University of Pennsylvania's Biddle Law Library, guided me helpfully through Penn's Model Penal Code archive. Elizabeth Knoll, my editor at Harvard University Press, encouraged me to write this book when it was no more than a half-baked idea in an email, and continued to offer encouragement throughout.

Various pieces of this book have appeared previously in print. I am grateful to the following publications for their permission to use those materials here: "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights," 54 *Hastings Law Journal* 167–242 (2002), in Chapter 4; "Consent and the Grammar of Theft Law," 28 *Cardozo Law Review* 2505–22 (2007), and "Looting, Law, and Lawlessness," 81 *Tulane Law Review* 1129–74 (2007), in Chapter 2; "Theft by Omission," in James Chalmers, Lindsay Farmer, and Fiona Leverick (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), pp. 158–77, in Chapter 3; "Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation" (with Matthew Kugler), 7 *Journal of Empirical Legal Studies* 511–37 (2010), in Chapter 1; and "Thieving and Receiving: Overcriminalizing the Possession of Stolen Property," 14 *New Criminal Law Review* 35–54 (2011), in Chapter 3.

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My wife, Jennifer Moses, to whom this book is dedicated, is quite simply the best thing that ever happened to me. Our children, Samuel, Rose, and Jonathan, did not really help that much with the book, but I am tremendously proud of each of them nonetheless. I would also like to acknowledge the contributions of Marion and Amir, who provided good company through thousands of hours of work, with only occasional breaks for tummy rubs.

Contents

Introduction

The crime of theft holds a prominent place in our law and in our culture. It claims more victims and causes greater economic injury, and it may well be committed by a larger number of offenders, than any other criminal offense.[1] The act of stealing—of unlawfully treating *tuum* as *meum*—entails one of the most basic wrongs a person can do to another. It seems likely that prohibitions on theft have been with us for as long as people have made laws and laid claim to property; it is hard to imagine any organized society without them.

Yet theft remains an enigma. For all its timelessness, it is striking that what constituted theft in early eighteenth century England is so different from what constitutes theft in the Anglophone world today. Despite the universality of theft, it is puzzling that different legal systems have sought to conceptualize and structure theft law in such apparently disparate ways. And despite theft's obvious status as one of criminal law's core offenses, there remain fundamentally unresolved questions about exactly what should count as stealing and exactly what types of things can be stolen.

This book seeks to give theft law the thoroughgoing normative analysis that it deserves and that, in recent years, it has failed to receive. The need for such a study has never been greater: In the fifty years since promulgation of the Model Penal Code, and forty-five years since enactment of the English Theft Act, the world has changed dramatically. Information and intellectual property have come to play an increasingly significant role in our economy; the means of committing

theft and fraud have grown increasingly sophisticated; and the gap between rich and poor has continued to grow. Meanwhile, criminal law theory has evolved, offering insights into the rationale for, and proper scope of, criminalization that simply could not have been foreseen at mid-century.

The offense of theft that emerges from this book constitutes a uniquely complex crime, encompassing a broad range of conduct, and reflecting two competing sources of normative content. On the one hand, it reflects a prelegal, universal, and naturalistic conception that stealing is in some sense morally wrong. On the other hand, it is dependent on a highly legalized, culturally specific, and positivist conception that turns on technical notions of property, ownership, abandonment, and the like. Indeed, theft law is dependent on the law of personal property, intellectual property, contract, and agency in ways that no other criminal offense is.

The theory of theft outlined in the pages that follow takes account of both retributive and consequentialist considerations. It offers original empirical research into how theft is viewed by the general public and seeks to explain the deeper conceptual thinking that might explain such intuitive judgments. It draws on insights found in moral and political philosophy, legal history, law and economics, social psychology, and criminology. It considers how theft is dealt with in a wide range of legal systems and offers a glimpse of how theft law would function in societies with radically different systems of property ownership. And it considers how the terms *theft* and *stealing* function in our legal and moral discourse, paying particular attention to the sometimes blurry line between literal and metaphorical usage, as when we talk about identity theft, theft of trade secrets, the federal Stolen Valor Act, and plagiarism as theft.

Along the way, the book offers solutions to a host of real-world puzzles arising out of cases such as those involving:

- the magistrate judge who failed to look for the owner of a Rolex watch he found on the floor of a supermarket, and instead gave it to his wife as a birthday gift;
- the Internet user who parked his car outside a Seattle coffee shop and, without ever buying anything, regularly accessed the shop's wireless network;

- the Internet activist who received copies of tens of thousands of confidential U.S. State Department documents, gave them to leading media outlets, and published them on his Web site, WikiLeaks;
- the doctors who, without their patient's permission, used his tissue to harvest a fabulously valuable cell line;
- the woman who wrote letters to the movie star Clark Gable demanding child support for a child she falsely claimed she and Gable had conceived, even though she knew they had never had sexual relations;
- office workers who take office supplies home from work for use on non-work–related projects;
- the editor of a technology blog who bought a lost prototype iPhone from a man who had found it in a Silicon Valley bar;
- the bootlegger who, during Prohibition, stole whiskey from another bootlegger;
- the elderly Florida man who was charged under the federal Stolen Valor Act with falsely telling others that he had won a Medal of Honor;
- the would-be john who falsely promised a prostitute he would pay for sex and then failed to do so;
- the Sardinian tourist, vacationing in London, who took a teddy bear that had been left as a memorial to Princess Diana from outside the gates of St. James's Palace;
- the college student who sneaked into a classroom to read an examination in advance of its administration and left after memorizing the questions but without ever physically taking the paper on which the exam was written; and
- the Internet entrepreneur who allegedly stole from several Harvard classmates the idea for a social network Web site, and turned it into Facebook.

The text will show that the resolution of each of these and other puzzling cases almost invariably depends on the resolution of deeper conceptual issues in the theory of theft.

A ROAD MAP

Chapter 1 offers a critique of twentieth century Anglo-American theft law reform. At the beginning of the century, reformers on both sides of the Atlantic had become convinced that the common law of theft was badly in need of revision. A series of judicial decisions, legislative enactments, and so-called historical accidents had created a piecemeal collection of seemingly arbitrary, overly technical, loophole-ridden legal rules. The reformers were determined to scrap the old law of theft and essentially start over. In the Model Penal Code, the English Theft Act 1968, the Canadian Criminal Code, and the law of several Australian statutes, they did away with supposedly archaic distinctions, such as those between larceny, embezzlement, and false pretenses, and replaced them with a streamlined and consolidated offense of theft. They also jettisoned age-old distinctions concerning the types of things that could be stolen and in their place formulated an all-encompassing definition of property that indiscriminately included tangible personal property, real property, services, and intangibles.

I argue that, in making such changes, the theft law reformers threw out the baby with the bathwater. What was lost were not only useless common law arcana but also key moral distinctions concerning the means by which theft is committed and the kinds of property stolen. If criminal law is to satisfy what has been called the principle of fair labeling—the idea that offenses should be divided and labeled so as to reflect widely held distinctions in the nature and magnitude of blameworthiness—it must take account of what ordinary people actually think about the law. To that end, I present the results of an empirical study designed to measure people's attitudes concerning theft. The study (which asked subjects to distinguish among various scenarios involving the theft of a bicycle) indicates that people do make sharp blameworthiness-based distinctions as to both the means by which theft is committed and the kinds of property stolen.

Chapter 2 begins the ground-up construction of a normative theory of theft law—in effect, an attempt to explain why people in our study might have made the intuitive judgments they did. The focus here is on three basic (and at times overlapping) elements that define the moral content of any crime: harmfulness, intent, and wrongdoing. The harmfulness in theft consists not only of losses to individual property

owners, but also to the system of property ownership more generally. Theft differs from lesser property crimes like trespass and unauthorized use in that it requires a more substantial and more permanent deprivation of rights in property, including, crucially, a deprivation of the right of use. The *mens rea* in theft typically consists of an intent to deprive another of property permanently, rather than just to borrow without permission. Crucial here is the requirement that the defendant have the intent to deprive at the same time the property is appropriated; it is this requirement of concurrence that ultimately distinguishes theft from mere breach of contract.

The third, and most complex, moral element in theft is wrongfulness. I begin by distinguishing between what I call theft's primary and secondary wrongs. The primary wrong consists of depriving the owner of property rights. Crucial here is the ability of theft law to distinguish between those takings that are wrongful and those that are not, depending on whether they are committed without consent, unlawfully, fraudulently, or dishonestly. The secondary wrong in theft consists of the means by which the theft is carried out. Here, I examine the moral content of thefts committed by means of force or violence (robbery), coercion (extortion and blackmail), housebreaking (burglary), stealth (larceny), breach of trust (embezzlement), deception (false pretenses and passing a bad check), and what I describe as exploiting the circumstances of an emergency (looting).

Chapter 3 asks why theft is a crime and when it shouldn't be. The chapter begins by considering the myriad ways in which theft law overlaps with the civil law of conversion, trespass to chattel, and fraud. It then turns to the question of criminalization itself, which is best approached not on the basis of a generalized and undifferentiated notion of theft, but rather with respect to specific forms of the offense. The analysis here is divided into five questions that need to be considered: (1) is the form of theft deserving of the kind of censure that criminal sanctions are intended to impose; (2) is there a significant advantage to be gained by having the prosecution of such conduct initiated by the state rather than or in addition to an action initiated by a private party; (3) does the state have a substantial interest in preventing the harm caused by the prohibited conduct; (4) does the criminal law provide an effective means of preventing such harms from occurring; and (5) would the benefits of criminalization outweigh its

costs, including not only the costs of prosecution and incarceration but also the costs of chilling otherwise socially beneficial conduct?

This framework is then applied to a collection of potentially problematic, borderline forms of theft and theft-related conduct, which the Model Penal Code treats as functionally equivalent to, and interchangeable with, larceny, but which, I argue, are deserving of more individualized consideration. The chapter considers *de minimis* thefts (including shoplifting and employee thefts), failing to return lost or misdelivered property, receiving stolen property, committing fraud by false promise or passing a bad check, and extortion where the defendant threatens to do an unwanted but lawful act unless paid. I conclude that most of these forms of conduct should either be decriminalized or subject to lesser penalties than other, core theft offenses.

The final chapter considers the difficult question of whether and in what way theft law should apply to various forms of property. I begin with the claim that, for some good or service to count as property for purposes of theft, it must meet two necessary and sufficient conditions: first, it must be commodifiable, meaning that it is capable of being bought and sold; and, second, it must be rivalrous, meaning that consumption of it by one consumer will prevent simultaneous consumption by others. Rivalrousness, in turn, entails that the thief's misappropriation of the owner's property will constitute a zero sum game, loosely defined: the victim/owner must lose all or substantially all of what the thief gains.

Proceeding, roughly, from more to less concrete forms of property, I begin by focusing on those forms of property that pose an issue with respect to commodifiability. These are things that are illegal to buy, sell, or possess (such as contraband drugs and weapons); things that are illegal to buy and sell, but not to possess (such as human beings, body parts and tissue, sex, and possibly animals); and things that are apparently incapable of being bought or sold (such as undeserved credit taken by the plagiarist or by the Stolen Valor Act offender). The focus then shifts to the rivalrous and zero sum dynamics. I first consider the theft of what I call semi-tangibles: electricity, cable television, and Wi-Fi. I then look at theft of services, both private (such as a haircut) and public (such as a concert in the park). Next, I consider the theft of a range of pure intangibles: information, identities, intellectual property (copyright, patent, trademark, and trade secrets), and

virtual property (such as Internet domain names and property generated in online computer role playing games). One of the basic questions here is the extent, if any, to which the illegal copying and sharing of copyrighted materials from the Internet should be regarded—as the Department of Justice and movie and music industries have consistently maintained—as stealing. I argue that, while in most cases misappropriation of intangibles fails to reflect the zero sum dynamic that is characteristic of theft, there are circumstances in which infringement of intangibles effects so significant a deprivation of the owner's property rights that it does amount to theft. The final part of the chapter returns to some of the issues of criminalization first dealt with in Chapter 3, this time in the context of problematic forms of property stolen. I argue that simply because some type of property qualifies as commodifiable and rivalrous, and is therefore theoretically subject to theft, does not necessarily mean that its misappropriation should be subject to criminal prosecution.

The book concludes with a brief "how-to" guide to drafting a better theft statute.

Theft Law Adrift

Of all the reforms in Anglophone criminal law achieved during the twentieth century, few were as radical in form or as widespread in their impact as those involving the offense of theft. At common law, the means by which a theft was committed, as well as the type of property taken, was of great consequence. Starting in the early 1700s, British (and, later, American, Canadian, and Australian) courts and legislatures began drawing sharp distinctions among offenses such as robbery, larceny, embezzlement, false pretenses, extortion, blackmail, fraudulent conversion, cheating, receiving stolen property, and failing to return lost property. Each offense had its own distinct set of elements, applicable defenses, and pertinent range of punishment. In addition, whether a taking was considered a theft at all and how it should be punished often depended on the type of property alleged to be stolen, whether real or personal, tangible or intangible, a good or a service.

By the middle of the twentieth century, however, a consensus developed in each of these jurisdictions that the common law approach to theft was sorely in need of reform. Distinctions among larceny, embezzlement, and false pretenses were said to "serve no useful purpose"; they were "irrational" and "bewilder[ing]," "technical . . . [and] without any substantial basis," the product of "historical accidents."[1] A succession of judicial decisions and legislative enactments had created a dense body of law, full of arcane and inconsistent rules, overlapping offenses, and procedural loopholes. For example, a defendant charged with false pretenses could escape liability by arguing that he had actually committed

embezzlement; and a defendant charged with embezzlement could similarly argue that his actual offense was false pretenses. Defendants were also successful in arguing that an allegedly stolen item was not the sort of property that was properly subject to theft in the first place.

To avoid such problems, law reformers in both the United States and England, when devising the 1962 Model Penal Code (MPC) and the Theft Act 1968, respectively, consolidated many of the traditional common law theft offenses into a single "unitary" offense of theft, with a single broad definition of property (typically, "anything of value"), a single scheme of grading (based, roughly, on the value of the thing stolen), and a single pattern of permitted and excluded defenses.

Despite (or perhaps because of) the radical nature of such changes, scholars have had relatively little to say about this reformed law of theft. English, Canadian, and Australian scholars have been content mainly to explicate the workings of the law and to criticize specific provisions. American scholars have been even more reticent. Virtually no one has questioned the basic assumption that the reformed law of theft is, on the whole, an improvement over what preceded it.[2]

It is precisely that assumption I seek to challenge in this chapter. My argument is not for a return to the law of theft in effect at the time of Blackstone or Hale: I agree that the common law of theft had its flaws and needed to be reformed. Rather, my argument is that the reformers followed the wrong path. In rewriting the law of theft, they threw out the good with the bad. In eradicating morally irrelevant concepts such as asportation, breaking bulk, and trespassory caption, along with esoteric legal fictions such as the distinctions between possession, title, and custody, reformers also did away with morally salient distinctions such as those among theft by stealth (larceny), theft by deception (false pretenses), and theft by coercion (extortion). They replaced the common law of theft with a codified law divested of much of its moral content, inconsistent with community intuitions, and potentially unfair to prospective defendants.

THEFT LAW PRIOR TO CONSOLIDATION

To understand what twentieth-century theft law reformers were reacting to, it is helpful to know what constituted theft at common law