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13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE, by **Stuart P. Green**. Harvard University Press, 2012. 400 pp. Hardback \$45.00.

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Stuart Green's book *13 WAYS TO STEAL A BICYCLE* impresses with its breadth and insightful detail as the author performs a tour de force in his comprehensive treatment of the historically rich and in parts still controversial law of theft. Green argues that the scholarly framework regarding theft has remained fairly undeveloped to this day, and he seeks to begin to fill this gap by delving into the history of theft law, the essential components of theft, the principles behind and unresolved tensions in the criminalization of theft, and the question of what constitutes property in the context of potential theft. Concluding, most importantly, that theft law today has eliminated moral distinctions and apportioned similar punishments for vastly different offenses in a manner severely disconnected from community sentiments, Green calls for significant reforms of theft law. As part of his discussion, Green also tackles difficult issues relating to the application of theft law to intangible property, such as intellectual property, virtual property, and information. The result is a fascinating introduction into every major area of theft law, although, as Green himself acknowledges throughout, many questions remain for further exploration.

What makes Green's book particularly interesting for those who study intellectual property is that it combines the often-asked question of whether intellectual property is truly *property* with an analysis of how the answer to that question in turn shapes criminal law. The applications of this examination are varied and of both legal and ethical significance, determining matters such as whether or for how long individuals should be imprisoned who never improperly acquired tangible property, but rather only goods covered by copyright, trademark, patent, or trade secret law.

Chapter 1, entitled “Theft Law Adrift”, examines the history of theft law, and in particular the movement in the twenty-first century across Anglophone countries to overhaul arbitrary and inconsistent systems of theft law. The American Model Penal Code (MPC), the English Theft Act 1968, and similar legislation sought to eliminate some of the archaic distinctions that the common law drew between various related offenses as well as some of the unhelpful categorizations of different types of property. The main goals were ones of consolidation and streamlining, but Green argues that—in addition to cleaning up arcana—the reforms also swept aside useful moral distinctions regarding the means of committing theft and the types of property stolen. Green explains that the corresponding flaws in legislation neither have been nor can be corrected at the sentencing level, whether through sentencing guidelines or individual judicial decision-making (pp.30-33). One of the key problems with the consolidated schemes, Green states, is that they violate the principle of fair labeling (pp.52-54), which dictates that the law must reflect and signal the community’s perceptions of differences in the kinds and respective gravity of offenses; hence, crimes should be categorized and labeled such as to embody the type and extent of legal violations.

In pursuit of achieving fair labeling in theft law, Green conducted extensive empirical work that he describes in the book (pp.57-68) in which he sought to test the community’s perceptions of various theft-related legal wrongs and uncover whether the law reflects these sentiments. Some of the study stimuli to which he exposed his experiment participants included scenarios involving the theft of a bicycle and scenarios describing the theft of a test preparation tool. He varied aspects of the scenarios such as the means by which the relevant theft was committed or its likely financial impact. Green asked participants to grade and rank the blameworthiness of the offender between different variations of the bicycle theft and of the test preparation tool theft, and the participants also had to assign a sentence to the offenders in the bicycle theft scenarios. The study results provided evidence for a chasm between people’s intuitions and the existing consolidated law of theft, with participants giving more weight to the type of theft and kind of property involved than theft law considers.

In Chapter 2, named “The Gist of Theft”, Green attempts to “develop a theory of theft law practically from scratch” (p.69). He begins by examining the role of blameworthiness in the criminal law, or to what extent particular types of conduct can be said to entail moral fault. Building on his previous work in this area,¹ Green studies three elements to determine blameworthiness (p.72). The first element is harmfulness to

others. The second is the *mens rea*, or mental state required for an offense, usually consisting of intent, knowledge, recklessness, or negligence. The third element is moral wrongfulness in the sense of the breach of a norm, rule, right, or duty.

Green first turns his attention to the harm in theft, which generally consists of substantial interference with property that is both commodifiable and rivalrous (p.74). He argues that theft law should reflect the value of the property stolen, though he does not believe that the law can take into account the subjective value of property to the victim (pp.76-77). Green also shows the difficulties inherent in defining the *mens rea* for theft, such as how to best define the necessary “intent to deprive” (pp.84-87). How permanent does the deprivation need to be? What if a perpetrator takes an object with the intent to return it and changes his mind later? Unsurprisingly, there turns out to be variation between jurisdictions on some of these matters that cannot escape some degree of arbitrariness.

Green goes on to discuss the wrongs of theft, which he separates between primary and secondary wrongs. Primary wrongs are those occasioned by the violation of a property right itself (p.93). Green explains that “the norm against stealing does have a prelegal, natural existence, but that the norm is so thoroughly mediated and shaped by the law of property and by other cultural and social forces that we cannot make much practical sense of it without reference to such influences” (pp.95-96). Green cites four types of evidence for the prelegal aspect of the prohibition against stealing. The first is that society views stealing as wrong as a purely moral matter because it “is regarded as both sinful and deeply threatening to society” (p.96). Second, some forms of theft are illegal but not immoral while others are viewed as immoral but not illegal (p.96). Third, even young children have a sense of ownership and an awareness that taking another’s belongings is wrong (p.97). Fourth, anthropological studies have shown that groups and tribes with only the most rudimentary system of laws enforce prohibitions against stealing (p.98). When it comes to the post-legal nature of theft, Green shows how property, contract, and agency law actually fill in the content of the basic prohibition against stealing (p.99). His study of the primary wrongs of theft in practice take him through the concepts of lack of consent, unlawfulness, fraudulence, and dishonesty (pp.104-114).

As far as the secondary wrongs of theft are concerned, Green defines those as the wrongful means that accompany the deprivation of property (p.115). He showed in his empirical study that these means are very relevant to the extent of individuals’ judgments of the gravity of different kinds of thefts,

and he walks readers through the issues of violence, coercion, housebreaking, stealth, breach of trust, exploitation of the circumstances of an emergency, and deception (pp.117-131). For offenses involving each of these types of wrongs, Green uncovers the tensions that underlie close cases and provides guidance as to how he would resolve them.

Chapter 3, “Theft as a Crime”, deals with the ability and need of the criminal law to respond to theft. After giving an overview of the civil law and non-legal tools to address theft, Green presents his view of how and when theft should be treated as a crime. He explains that criminalization is generally justified because “[t]hose who steal challenge the authority of property rules; they express contempt for the property owner and for society more generally; they trample over others’ rights in pursuit of their own selfish interests” (p.141). Green explains how the state has traditionally been viewed as justified to intervene in theft because individual civil plaintiffs will not always be willing and able to seek remedies, the state can best prevent violent retaliation, and theft run amok can undermine the sense of trust between citizens (pp.144-146). Not entirely satisfied with these explanations, Green proposes a two-step inquiry as to whether a form of theft should be criminalized. In the first step, lawmakers would have to ask themselves if “the crime type *typically* or *normally* involved (1) the kind of conduct that is properly declared wrong by the community as a whole, (2) a non-negotiable wrong of the sort that one should expect to be categorically safe from, and (3) something more than a mere conflict that can be negotiated and resolved” (pp.147-148). The second step of the inquiry would have prosecutors apply the same analysis when faced with an alleged criminal (p.148).

In his discussion of the state’s interest in preventing theft, Green mentions the direct financial costs of theft, estimated at about \$15 billion per year in the United States, but also the indirect costs that come in the form of reduced property values, lowered life satisfaction, raised anxiety, and damaged neighborhoods (p.149). Green supports a classical economic approach to establish an optimal system of criminal sanctions (p.151). He acknowledges that it is difficult to prove the deterrent effect of theft law with any precision and that in some cases of theft, the costs of criminalization may exceed the benefits (pp.152-55). Green concludes Chapter 3 with an extensive discussion of borderline cases of theft such as *de minimis* thefts, theft by failing to return lost or misdelivered property, receiving stolen property, theft by false promise, writing bad checks, and extortion that involves a threat to do an unwanted but otherwise legal act. In the end, he criticizes the MPC and to some extent the English Theft Act

1968 for subjecting these forms of conduct to the same level of punishment and allowing proof of one to be sufficient to constitute proof of any other (pp.157-202).

Chapter 4, “Property in Theft Law”, attempts to understand why in Green’s empirical work participants made clearly different moral judgments depending on the type of stolen property involved. His study showed that people viewed the stealing of a physical book as more wrongful than the unlawful downloading of an electronic book or than sneaking into a lecture without paying the entrance fee (whether the lecture was sold out or not) (p.204). Green’s goal is to understand the rationale of study participants in this respect and to determine what deserves the label of “theft”, which ultimately determines “how an offense is formulated, classified, and codified; how such lawbreaking is viewed by the general public; the level at which punishment will be assigned; and how prosecutorial policy will be carried out” (p.207). Green states that any property subject to theft must be commodifiable, rivalrous, and excludable, and that every theft must create a genuine zero-sum transaction (pp.208-211). Next, he analyzes the applicability of the theft label to variations of property within these categories, like things illegal to buy, sell, or possess (such as contraband and stolen goods); things legal to possess but not to buy or sell (such as body parts); and things incapable of being bought or sold (such as credit in the case of plagiarism and honor in that of the Stolen Valor Act) (pp.211-225).

The book then moves on to the topic of the unlawful taking of semi-tangibles such as electricity, cable, and Wi-Fi services, as well as other private and public services. After examining to what extent theft of the first three types of services occasions losses to the seller or third parties, Green concludes that the strongest case of theft is for electricity, followed by cable and then by Wi-Fi (pp.225-230). Green also believes that unlawful behavior in the case of other types of services is best pursued via breach of contract claims rather than criminalization and the use of the theft label (pp.230-234).

Most of the rest of the book focuses on the theft of intangible property. After showing that some forms of such property can be commodifiable but not always also rivalrous in the way that theft law requires (p.238), Green explains how identity theft is a misnomer because “personal identities are nontransferable and therefore noncommodifiable” (p.245). He then tackles the main forms of intellectual property as they relate to theft. As Green mentions, both intellectual property (especially copyright) owners and the

Department of Justice routinely refer to some forms of infringement as theft (p.246). As far as social norms are concerned, far more individuals engage in illegal downloads of copyrighted materials than in theft of tangible property (p.249).

Green questions whether copyright can be subject to theft law by testing whether the materials it covers are indeed commodifiable, rivalrous, and subject to zero-sum transactions (p.255). He gives the hypothetical example of a copyrighted monograph with limited market potential that is available for download on the publisher's website for forty dollars and that is expected to sell about 1,000 copies (p.255). In variation one of the scenario, a defendant makes an illegal download for personal use. In variation two, the defendant downloads the book, makes 1,000 digital copies, and distributes them to libraries and individuals that she thinks would likely buy the book otherwise. In variation three, the defendants are 1,000 likely buyers who circumvent the paywall on the publisher's website and each illegally download a copy of the book for personal use. Green notes that the material in question is a nonrivalrous public good, and hence the typical zero-sum nature of tangible property theft is not present, but he notes that the copyright owner lost, or potentially lost, a thing of value in each case anyway (p.256). He argues that variation one does not constitute theft because the owner has suffered only a limited setback to his property interests but no deprivation of his property (p.256). In variation two, the defendant possibly deprived the owner not only of the purchase price paid by the defendant himself but also of that paid by another 1,000 purchasers, and thus theft has occurred (p.256). In variation three, while the total financial loss to the owner is the same as in variation two, "no single offender or group of offenders is sufficiently culpable to justify criminalization" (pp.256-257).

A similar analysis follows for patent infringement, where Green believes that losses of a certain level (mainly, the loss of the value of a patent), could turn an offense into theft (pp.258-259). He acknowledges some of the special problems related to patent infringement, however, including the difficulty of criminalizing such infringement in light of the uncertainty about the validity of an infringed patent, as I have also discussed in my work on the matter (p.257).²

When it comes to trademark infringement, Green brings up the existence of two kinds of victims. First are consumers who mistakenly buy counterfeit goods, and second are trademark owners who lose sales when potential customers buy counterfeits or who are deprived of potential licensing fees

(pp.260-261). Green also references the risk that the use of a trademark on lower-quality infringing goods will lead to a weakening of the mark and that, therefore, trademarks are “at least semi-rivalrous in the sense that if anyone other than the trademark owner uses the mark, it will normally interfere with the benefits the owner derives from the mark” (p.261). Should an infringer completely or almost completely deprive a mark of value, this could result in the use of a label of theft (p.261).

The type of intellectual property that Green deems to be the best fit for theft law is trade secrets, whose value is often greatly diminished once confidentiality has been destroyed (p.264). Last, Green believes that virtual property such as website URLs and the goods in massively multiplayer online role playing games (MMORPG) could technically qualify for theft law purposes, even though in the latter case a gaming company could eliminate a game without owing players indemnification for accumulated virtual property (pp.265-267).

Concluding Chapter 4, Green cautions that just because something could qualify as theft, criminalization is not always wise (pp.267-268). Green also stresses that only misappropriations that involve deprivation of the owner’s ability to substantially use her property should possibly be labeled as theft (p.268). Green emphasizes that other legal and non-legal means can serve to prevent theft, and that some areas such as plagiarism and MMORPG theft should remain outside the purview of legal regulation from a policy perspective (p.269).

Green’s parting words acknowledge that this book constitutes a “first cut”, whose main goal is to encourage other scholars and policymakers to engage in a more meaningful discussion about theft law (p.270). Green offers some advice for law reformers wishing to engage in related debates: avoid overcriminalization; balance concerns of fair labeling with administrability; define both the *actus reus* and *mens rea* elements; define property for purposes of theft law; grade theft offenses according to three independent variables: the value of the stolen property, the means by which the theft was carried out, and the type of stolen property; specify how to allege and prove theft; and in some cases allow reprosecution for a different form of theft than that originally charged (pp.271-276).

13 WAYS TO STEAL A BICYCLE is a much-needed book in the world of legal scholarship. Stuart Green provides the most thorough account of the foundations, logic, and tensions of theft law of which I am aware, thus giving an unparalleled overview of an important and strangely neglected

field. As with any book that seeks to offer a readable account of a broad and complex area, some gaps and questions remain. For example, while Green offers his thoughts on whether a significant number of hypothetical scenarios should qualify as theft, several of the dilemmas he presents are left unanswered. To name just one example of where the lesson to draw remains a bit elusive, Green discusses how the case for labeling the unlawful taking of cable television services as theft is more difficult than that for the taking of electricity (pp.228-229). He then moves on to discussing Wi-Fi services, however, without giving further guidance as to whether he would deem any taking of cable television services to be theft (p.229). Rather, he says a bit later that the case for labeling Wi-Fi piggybacking as theft is weaker than that for the taking of electricity or cable, and that one possibility would be to treat such piggybacking as theft only if it results in degraded service for others (pp.229-230). I would have enjoyed reading a bit more about his ideas of what this means in the end as to the optimal criminalization of each of these types of services under theft law rather than just as to the relative merits of doing so.

Some of the greatest strengths of Green's book stem from the breadth and depth of his knowledge of criminal law, which he brings to life through both historical examples and sometimes amusing yet always enlightening examples from pop culture. The section on theft in intellectual property could have been expanded further in my view, in particular because the book seeks to focus on "Theft Law in the Information Age" as the second part of its title indicates. One of my questions about the copyright section was how to determine the total pre-infringement value of a good given that Green would apparently only allow for a finding of theft if most of the value has been removed. Even leaving aside some of the other complexities, the value of a copyrighted good significantly fluctuates over time and is often more subjective than that of tangible property, and it appears disconcerting to have such a potentially arbitrary criterion determine criminalization.

Further, in Green's example with the three variations on the monograph download, I remained curious as to how he would feel about some hybrids of the scenarios he gives (pp.255-256). For example, if someone who illegally distributes copies to 1,000 potential buyers may be a thief, what about someone who just tells 1,000 potential buyers how to circumvent the paywall and access the material themselves? Perhaps more poignantly, I am not sure why Green exempts individuals who each only downloaded for themselves from theft liability when he states elsewhere in his book that exempting *de minimis* takings from theft law in the context of tangible

property is unlikely to work because “[b]y creating a license to steal low value items, it would undermine the norm against theft generally and potentially raise the aggregate level of . . . theft to intolerable levels” (p.169). What is the meaningful difference for theft law, to draw a comparison to variation three of Green’s hypothetical, between 1,000 people each taking one dollar from a man’s wallet that contains no more money afterwards and the 1,000 likely buyers of the monograph each illegally downloading the text and hence depriving the owner of its value? Why are the individuals in the latter scenario insufficiently morally culpable to subject them to criminal law punishments when those in the former scenario are not? These tensions pose some important difficulties for Green’s framework and his requirement of individually caused substantial deprivation of value for intangible goods in the context of theft law.

In future work, Green may also want to give greater credence to the possibility that a number of intellectual property goods outside of trade secrets and virtual property are actually to greater or lesser degrees rivalrous. For example, Green allows for the possibility that trademark dilution harms owners. As others³ and I⁴ have argued, however, there is a chance that dilution could also harm the consumers of the originally branded goods, leading to a diminished enjoyment of it and potentially also a lowered resale value. Whether that should enter the calculus when it comes to the theft label is subject to exploration, but these are some examples of issues that had to remain untouched due to how condensed the section on intellectual property is in the book.

Stuart Green has given us much to consider, and I have only touched on some of the fascinating issues with which we can now wrestle more wisely and better equipped with knowledge thanks to *13 WAYS TO STEAL A BICYCLE*. Future readers will certainly enjoy the ride.

ENDNOTES

¹ Stuart P. Green, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME* (Oxford University Press, 2006).

² Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 *Harv. J. L. & Tech.* 469 (2011).

³ Shahar Dillbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 14 *George Mason L. R.* 605 (2007).

⁴ Irina D. Manta, Hedonic Trademarks, 74 Ohio State L. J. 241 (2013).

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