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In Defense of Specialized Theft Statutes

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In Defense of Specialized Theft Statutes

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INTRODUCTION

Stuart Green has done us a great favor in *Thirteen Ways to Steal a Bicycle*[1]—well, several really—by documenting our current views on theft; putting them in historical and philosophical perspective; and launching a deep and sophisticated critique of two prominent, and somewhat paradoxical, features of contemporary theft law: the consolidation of common law theft crimes[2] and the proliferation of specialized theft statutes.[3] As Green points out, the modern trend of theft laws in the United States, particularly since the American Law Institute adopted Herbert Weschler's draft of the Model Penal Code[4] in 1962, has

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[1] STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE (2012).

[2] Green describes three major points of criticism that led to a complete overhaul of theft law. First, theft law was conceptually too complex and judges, juries, and the public could not grasp the abstract distinctions between offenses. *Id.* at 17-18. Second, loopholes between offenses allowed defendants to escape conviction on technicalities. *Id.* at 18. Finally, the common law distinctions between various theft offenses were thought to serve no legitimate purpose. *Id.*

[3] Despite the consolidation of common law theft offenses, many states expanded theft laws by enacting specialized theft statutes. Green notes that the proliferation of "subject-specific" theft statutes is the result of the growing complexity of substantive criminal law and does not reflect a deliberate attempt by states to reverse the consequences of consolidation. *Id.* at 34.

[4] Article 223 of the Model Penal Code represented a significant shift in theft law. The Model Penal Code collapsed distinct common law theft offenses, such as larceny, embezzlement, false pretense, and extortion, into a single theft offense. MODEL PENAL CODE § 223.1 introductory note (Official Draft and Revised Comments 1980). The purpose behind consolidation was

> to avoid procedural problems . . . [such as] a defendant's claim that he did not misappropriate the property by the means alleged but in fact misappropriated the property by some other means and from the combination of such a claim with the procedural rule that a defendant

been to eschew the sometimes technical distinctions between common law crimes like larceny, false pretenses, larceny by trick, embezzlement, blackmail, and extortion in favor of consolidated theft statues that frame the offense characteristics in general terms and order severity of punishment mainly according to the value of goods.[5] One problem with consolidation, as Green argues, is that it flattens morally important distinctions between traditional common law theft offenses, leaving a one-size-fits-all scheme that fails to account for differences between either the method by which a theft is accomplished or the nature of the property stolen.[6]

Holding goods and value constant, Green contends that there is a moral difference between larceny and failing to return misdelivered property, say, whether one favors a retributivist or consequentialist theory of punishment.[7] Furthermore, as Green's original empirical study shows,[8] these distinctions are reflected in commonly held intuitions about the relative blameworthiness of various theft strategies.[9] Separately, Green makes the case for treating the theft of different kinds of property differently, based principally on the nature of property rights affected.[10] Thus, sneaking into a full hall to hear a lecture without paying while others wait outside unable to get in is morally distinct from sneaking into a half-filled hall.[11] That is because taking a seat in the full hall excludes a potential paying customer, thereby denying the speaker income he or she otherwise would have had. By contrast, sneaking into the half-filled lecture hall denies the speaker very little in that the speaker receives the same

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who is charged with one offense cannot be convicted by proving another.

Id. § 223.1(b).

[5] GREEN, *supra* note 1, at 23-24.

[6] *Id.* at 30-31.

[7] *See id.* at 169-71.

[8] We discuss Professor Green's study and its implications below. *See infra* Part III.

[9] As the title of the book suggests, Green identifies thirteen main categories of theft conduct: Receiving stolen property, failing to return misdelivered property, false pretenses, passing a bad check, looting, embezzlement, larceny, blackmail, robbery, theft by housebreaking, extortion, and armed robbery. GREEN, *supra* note 1, at 60-61. To provide some context for his moral analysis, Green conducted an empirical study in which he asked participants to assess the comparative seriousness of thefts conducted using each of these means. *Id.* at 57-58, 60-62. In order from most to least serious, his respondents generally agreed on the following list: (1) Armed Robbery; (2) Extortion; (3) Theft by Housebreaking; (4) Simple Robbery; (5) Blackmail; (6) Larceny; (7) Embezzlement; (8) Looting; (9) Passing a Bad Check; (10) False Pretenses; (11) Failing to Return Misdelivered Property; and (12) Receiving Stolen Property. *Id.* at 62.

[10] *See id.* at 6, 75.

[11] *Id.* at 67-68.

compensation from paying attendees that he or she otherwise would have because the "thief's" conduct does not exclude another paying audience member from attending.[12] Here again, Green's empirical study supports his moral views.[13] Green therefore argues for abandoning the project of theft consolidation in favor of adopting statutory structures that give full weight to differences in the manner of theft, the type of property stolen, and the nature and degree of both primary interference with property interests and any secondary harms.[14]

Principally, because he is so clear in developing his critique of consolidation, and so comprehensive and persuasive in assembling the constituents of his normative framework for defining and grading theft offenses,[15] there are many opportunities to quibble with Professor Green but very little ground for serious disagreement. It is therefore in a spirit of broad agreement that we will focus our attention here on what we take to be a paradox of sorts in Professor Green's intuitions, if not his argument. Specifically, as Green notes, there is an odd tension in the recent history of theft law in that an increase in specialized theft laws has accompanied consolidation.[16] Green is of course strongly critical of consolidation, but is also skeptical of many specialized theft statutes.[17] His skepticism seems to

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[12] As Green explains, zero-sumness involves a "transfer of property from owner to offender." *Id.* at 210. In other words, "what the thief gains, the victim must lose." *Id.* Green also points out, whether, and to what degree, a good is commodifiable and rivalrous "determine[s] whether, and in what manner, it is subject to theft." *Id.*

[13] Green's study sampled opinions from 172 incoming students at Rutgers School of Law-Newark to determine whether their "moral intuitions about the blameworthiness of different forms of theft are consistent with the way in which such offenses are treated under a consolidated theft regime." *Id.* at 55, 57. In the second part of the study, Green asked students to compare four different scenarios. The scenarios involved the theft of a $50 test preparation tool in forms ranging from a physical test-preparation book, a downloaded electronic file, a seat in a test preparation lecture for which the lecture hall had empty seats, and a seat in a test-preparation lecture for which the lecture hall had no empty seats. *Id.* at 66. Fifty-six percent of participants said that stealing a physical book was more blameworthy than stealing an electronic copy; forty-one percent said there was no difference between the two. *Id.* at 67. Sixty-seven percent of students reported stealing a physical book as more blameworthy than stealing a seat in a filled lecture hall, while twenty-two percent viewed no difference between the two. *Id.* Stealing a seat in a filled lecture hall was viewed worse than stealing a seat in a partially filled hall and in the final scenario, students ranked stealing an electronic book as more blameworthy than stealing a seat in a partially filled lecture hall. *Id.*

[14] *See* GREEN, *supra* note 1, at 270-75.

[15] *See id.* at 270-76.

[16] *Id.* at 34 ("There is no easy explanation for why such specialization occurred more or less simultaneously with consolidation.").

[17] *See id.* at 33-36 (citing the example of Louisiana and that state's overabundance of specialized theft laws).

derive principally from a concern that specialized theft statutes are products of political expediency, or perhaps unconscious recognition of what has been lost in the process of consolidation, and therefore could do more harm than good by perpetuating the moral muddle created by consolidation while also needlessly cluttering up our criminal codes.[18] Although these are weighty concerns, we think that they may be misplaced, particularly with respect to contemporary laws meant to confront modern forms of theft, like unauthorized downloading, and laws that serve to highlight underappreciated norms internal to important social enterprises, such as retail commerce.[19] In the remainder of this essay, we will therefore attempt to make a case for specialized theft statutes as a complement to Professor Green's broader project.

I. Specialized Theft Statutes

Pennsylvania,[20] New Jersey,[21] and Colorado[22] are just three states of

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[18] *See id.* at 34-36.

[19] *See, e.g.*, David Kravets, *10 Years Later, Misunderstood DMCA is the Law that Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), http://www.wired.com/threatlevel/2008/10/ten-years-later/ (explaining how the specially crafted Digital Millennium Copyright Act provided a successful remedy to an outdated copyright law and ultimately spurred the creation of new technological businesses).

[20] The theft consolidation provision of Pennsylvania's theft chapter provides, in part, "[c]onduct denominated theft in this chapter constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment . . . ." 18 PA. CONS. STAT. ANN. § 3902 (West 1983). The sub-chapter enumerates various types of theft, including: theft by unlawful taking or disposition, theft by deception, theft by extortion, theft of property lost, mislaid or delivered by mistake, receiving stolen property, and theft of services. *See* §§ 3921-3925.

[21] New Jersey's theft consolidation provision provides the following:

> Conduct denominated theft or computer criminal activity in this chapter constitutes a single offense, but each episode or transaction may be the subject of a separate prosecution and conviction. A charge of theft or computer criminal activity may be supported by evidence that it was committed in any manner that would be theft or computer criminal activity under this chapter . . . .

N.J. STAT. ANN. § 2C:20-2 (West 2013).

[22] Colorado's theft consolidation statute provides the following:

> If any law of this state refers to or mentions larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence games, or shoplifting, that law shall be interpreted as if the word 'theft' were substituted therefor; and in the enactment of sections 18-4-401 to 18-4-403 it is the intent of the general assembly to define one crime of theft and to incorporate therein such crimes, thereby removing

many that have consolidated various common law theft offenses into unitary theft provisions.[23] Yet, despite the relative shrinking of their theft chapters to reflect consolidation, these states maintain an array of specialty statutes that target specific conduct likely covered already under the broad umbrella of their consolidated theft statutes. For example, in Pennsylvania, it is a crime to operate an organized retail scheme whereby stolen merchandise is later converted to money for criminal enterprises.[24] In New Jersey, unlawfully accessing a computer database to defraud a third party could carry a sentence of up to ten years' imprisonment.[25] In Colorado, leaving a gas station after dispensing fuel and failing to pay is outlawed by a state fuel-piracy provision.[26] In Green's view, these kinds of specialized theft laws are hard to justify from a normative point of view because they seldom mark any significant differences in blameworthiness or raise particular problems of proof or detection.[27] Rather, all they do is satisfy short-term political impulses while contributing to a broader trend of cluttered and overly complicated criminal codes.[28]

We think these concerns may have less bite on specialized theft laws than it might seem. In fact, we think that these and similar specialized theft statutes play an important expressive function and also serve to highlight norms and expectations that are uniquely important to the functioning of discrete social enterprises like retail sales and digital commerce. For these reasons, we conclude that these specialized statutes are not only appropriate, but also conform to the principled framework for theft laws that Professor Green develops in *Thirteen Ways*.

> distinctions and technicalities which previously existed in the pleading and proof of such crimes.

COLO. REV. STAT. § 18-4-403 (2013); *see also People v. Warner*, 801 P.2 1187, 1189 (Colo. 1990) (en banc) (noting that the Colorado Legislature merged the crimes of larceny, embezzlement, false pretenses, and confidence games into a single general theft provision).

[23] According to Green, "[e]ighteen states have effected a 'complete consolidation' of theft law, meaning that all of the traditional species of theft (larceny, embezzlement, false pretenses, extortion, receiving stolen property, and unauthorized use) have been consolidated into a single offense of theft." GREEN, *supra* note 1, at 27. Another twenty states have partially consolidated their theft laws. *Id.*

[24] *See* 18 PA. CONS. STAT. ANN. § 3929.3(a), (c).

[25] *See* N.J. STAT. ANN. § 2C:20-25.

[26] *See* COLO. REV. STAT. § 18-4-418.

[27] GREEN, *supra* note 1, at 35. The criteria for evaluating the merits of specialized theft statutes that we describe below are meant to complement rather than replace Green's criteria.

[28] *Id.* at 165-66 (describing shoplifting statutes as "narrower than ordinary larceny"); *id.* at 236-40 (discussing theft of intangible information not protected by intellectual property laws); *id.* at 89 (discussing fine distinctions between some forms of theft, such as fuel piracy, and breach of contract).

Many of the concerns that led Professor Green to take on an investigation of theft in the twenty-first century were part of public conversations that took place after the death of Internet activist and social entrepreneur Aaron Swartz.[29] Swartz was accused of using an open network on the Massachusetts Institute of Technology's ("MIT") campus to download over four million academic articles from the online repository JSTOR.[30] According to the amended indictment filed in his case, Swartz accomplished this task by using a software tool that allowed him to download articles at a rate far faster than would be possible if he simply pointed and clicked.[31] He also used several masking techniques that disguised his identity and the identity of his computer to circumvent security measures, deployed by MIT and JSTOR, that were designed to detect and stop him from downloading that many articles in that short a period of time.[32] After he was apprehended, Swartz returned all of the files he downloaded back to JSTOR, which at that point declined to pursue any legal action.[33] Carmen Ortiz, the U.S. Attorney for the District of Massachusetts, was not as understanding. Amidst much controversy,[34] she secured an indictment against Swartz alleging multiple counts of wire and computer fraud.[35] If convicted, Swartz faced a potential sentence of thirty-

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[29] Swartz was known as a "[w]eb entrepreneur and political activist." Evan Allen, *Web Activist Swartz Takes Own Life*, Bos. Globe (Jan. 12, 2013), http://www.bostonglobe.com/metro/2013/01/12/web-activist-aaron-swartz-charged-with-hacking-mit-dies-age/nbl1jOCxqQIFGdDANdYmxH/story.html At the age of fourteen, he helped develop Really Simple Syndication ("RSS"), a website aggregation tool. *Id.* He also founded the grassroots political action group Demand Progress and co-founded the online news website, Reddit. *Id.* On January 11, 2013, Swartz committed suicide. *Id.* He was twenty-six years old. *Id.*

[30] JSTOR is a not-for-profit corporation that collects, stores, and makes available academic articles from a range of scholarly journals. To cover the costs of digitizing the articles, expenses associated with maintaining the servers and bandwidth; to pay royalty fees to the holders of active copyrights, JSTOR collects fees from subscriber institutions like MIT, which in turn offer access to their clients and directly to individuals who are not affiliated with a subscriber institution. Superseding Indictment at 1-3, United States v. Swartz, No. 1:11-CR-10260-NMG (D. Mass. Sept. 9, 2012), *dismissed on* Jan. 14, 2013, *available at* http://www.wired.com/images_blogs/threatlevel/2012/09/swartzsuperseding.pdf [hereinafter Superseding Indictment].

[31] *Id.* at 4-5.

[32] *Id.* at 5-7.

[33] *See Aaron Swartz*, JSTOR (Jan. 12, 2013), http://about.jstor.org/statement-swartz.

[34] *See* Emily Bazelon, *When the Law is Worse Than the Crime: Why Was a Prosecutor Allowed to Intimidate Aaron Swartz for So Long?*, SLATE (Jan. 14, 2013, 3:59 PM), http://www.slate.com/articles/technology/technology/2013/01/aaron_swartz_suicide_prosecutors_have_too_much_power_to_charge_and_intimidate.html.

[35] The charges in the superseding indictment include the following: two counts of wire

five years' imprisonment and one million dollars in fines.[36]

Swartz's indictment met with considerable criticism from a number of corners on grounds that the law was being stretched to cover conduct that was not truly theft or fraud, and at any rate did not warrant the degree of punishment sought by the government.[37] In response, U.S. Attorney Ortiz infamously declared that "'[s]tealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data, or dollars. It is equally harmful to the victim whether you sell what you have stolen or give it away.'"[38] Professor Green's work in *Thirteen Ways* rightly gives lie to this claim.

First, Green shows exhaustively and persuasively why the manner by which a theft is accomplished matters quite a lot, regardless of one's theory of criminal punishment, because different methods of accomplishing a theft threaten or accomplish different secondary harms.[39] Reasonable people might disagree on the cardinal ordering of a theft accomplished by exploiting loopholes in an open computer network and prying open a locked door to effect a forcible entry into a home, but it is simply obtuse to claim that there is no difference between the two.

Second, Professor Green explains why it is critical to account for different kinds of property when assessing the moral blameworthiness of a theft. Again, without begging the question of which is worse, stealing data as Swartz did is not the same as stealing money at least because Swartz left

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fraud pursuant to 18 U.S.C. §§ 1343 & 2, five counts of computer fraud pursuant to 18 U.S.C. §§ 1030(a)(4), (b) & 2, five counts of unlawfully obtaining information from a protected computer pursuant to 18 U.S.C. §§ 1030(a)(2), (b), (c)(2)(B)(iii) & 2, and one count of recklessly damaging a protected computer pursuant to 18 U.S.C. §§ 1030(a)(5)(B), (c)(4)(A)(i)(I), (VI) & 2. The indictment also includes forfeiture allegations pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), 18 U.S.C. § 982(a)(2)(B), and 18 U.S.C. § 1030(i). Superseding Indictment, *supra* note 30, at 1, 10-16.

[36] John Schwartz, *Internet Activist, a Creator of RSS, Is Dead at 26, Apparently a Suicide*, N.Y. TIMES, Jan. 13, 2013, at A25, *available at* http://www.nytimes.com/2013/01/13/technology/aaron-swartz-internet-activist-dies-at-26.html?pagewanted=all&_r=0; Press Release, United States Attorney's Office Dist. of Mass., Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network (July 19, 2011), *available at* http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html.

[37] For criticism of the case against Swartz after his death see, for example, Michael Phillips, *The Terrible Logic Behind the Government's Case Against Aaron Swartz*, BUZZFEED FWD (Jan. 14, 2013, 6:27 PM), http://www.buzzfeed.com/mtpiii/the-terrible-logic-behind-the-governments-case-ag; Tim Wu, *How the Legal System Failed Aaron Swartz—and Us*, NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/01/everyone-interesting-is-a-felon.html?currentPage=all.

[38] John Schwartz, *Open-Access Advocate is Arrested for Huge Download*, N.Y. TIMES, July 20, 2011, at A17, *available at* http://www.nytimes.com/2011/07/20/us/20compute.html.

[39] GREEN, *supra* note 1, at 115–31.

JSTOR in full possession of its data, whereas stealing money is very much a zero-sum game.[40]

Third, Green shows that what a thief plans to do with the property he or she has stolen matters because those plans may affect an owner's property interests differently.[41] For example, the value of JSTOR's academic repository would have been harmed very little, if at all, had Swartz simply held on to the files he had taken. By contrast, the value of JSTOR's property interests would have been profoundly and permanently harmed if Swartz had set up a competing website that gave the articles away for free.[42]

By taking account of the moral differences between a data theft accomplished by computer—where the thief does not plan to publish or otherwise release what he has taken—on the one hand, and a theft perpetrated by breaking a locked door with a crowbar to steal money that is subsequently spent and therefore unrecoverable, on the other hand, we do not mean to suggest that Swartz did not do anything wrong,[43] or even criminal.[44] Rather, the point we take from Professor Green's work is that understanding exactly what the wrong is, and how it should be addressed, requires thoughtful precision. Consolidated theft statutes and U.S. Attorney Ortiz's defense of her indictment fail to persuade because they indulge in hammy platitudes and uncritical analogy. By contrast, we see significant potential in specialized theft statutes to accomplish precisely the conceptual and normative precision that Professor Green rightly demands of our criminal laws.

In our view, specialized theft statutes have a unique and important role in the general project that Professor Green advances in *Thirteen Ways*. Both at the frontiers of twenty-first century theft, and in cases closer to the traditional core of theft law, specialized theft statutes highlight the unique moral, political, and social conditions of the property regimes that are affected by acts of theft. In the subsequent sections of this essay we

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[40] *See id.* at 203-04.

[41] *Id.* at 75-76, 273.

[42] JSTOR clearly recognized as much when it declined to pursue legal action against Swartz after securing both a return of the stolen files and a reliable representation from Swartz that he did not intend to distribute the articles he downloaded. *See Aaron Swartz*, JSTOR (Jan. 12, 2013), http://about.jstor.org/statement-swartz.

[43] In fact, one of Mr. Swartz's most sympathetic supporters, Harvard Professor Lawrence Lessig, publicly disagreed with Mr. Swartz's conduct. Mike Wendy, *Larry Lessig Responds—Says Swartz's Alleged Actions Crossed Ethical Line*, MEDIA FREEDOM (July 20, 2011), http://mediafreedom.org/2011/07/larry-lessig-responds-says-swartzs-alleged-actions-crossed-ethical-line/ (last visited Sept. 16, 2013).

[44] As we argue below, our enterprise account of theft makes it very hard to see how Swartz's conduct could be "criminal" without showing how his conduct fundamentally undermined a socially significant property regime.

highlight two particularly important functions of specialized theft statutes: First, specialized theft statutes serve an important expressive and educative function in cases where common intuitions frequently fail to recognize or give sufficient weight to legitimate property interests affected by a theft. Second, even where those interests may be patent, specialized theft statutes defend unique property norms that are internal to particular social, political, or economic enterprise.

II. Specialized Theft Laws Play an Important Expressive and Educative Function.

The public debate about the prosecution of Aaron Swartz focused on two main concerns. The first was that prosecutors engaged in excessive charging, and as a consequence put Mr. Swartz at risk of punishment far greater than his conduct deserved.[45] Some, in fact, argued that his conduct, although perhaps unethical or even minimally criminal, was so minor that the better course for the prosecutor would have been not to charge him at all.[46] The second was that his conduct itself was not theft because the documents he liberated from JSTOR's servers should be openly available.[47] We think that specialized theft laws play an important role in advancing both of these conversations by providing a forum and tool for education and expression. This is a particularly important service with respect to many twenty-first century theft crimes, like unauthorized downloading, which many people would reflexively not regard as criminal or even particularly immoral. In the context of more fundamental debates about the nature of theft itself, specialized theft laws, and particularly the process of public debate surrounding their passage or defeat, also provide a unique forum for exploring and marking the boundaries of property in the twenty-first century. We explore both of these points below.

The empirical study prominently featured in *Thirteen Ways* inspires our view that theft laws play important expressive and educative functions. As part of an effort to assess common intuitions regarding the relative moral wrong that accompanies thefts accomplished by different means and

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[45] *See* David Friedman, *Overcharging: The Aaron Swartz Case*, IDEAS (Jan. 24, 2013), http://daviddfriedman.blogspot.com/2013/01/overcharging-aaron-swartz-case.html.

[46] Reason Foundation, *Aaron Swartz Was Driven to Suicide by a Broken System*, OPPOSING VIEWS (Jan. 31, 2013), http://www.opposingviews.com/i/politics/aaron-swartz-punishment-did-not-fit-crime. In this argument, Mr. Swartz's allies appear to have a friend in Professor Green. *See* GREEN, *supra* note 1, at 161-65 (arguing that de minimis theft offenses should be effectively decriminalized).

[47] Mr. Swartz himself was a prominent member of the "open source" movement, and issued a manifesto calling others to join him in an effort to copy and make available on the Internet the contents of libraries. Aaron Swartz, *Guerilla Open Access Manifesto*, ARCHIVE, http://archive.org/details/GuerillaOpenAccessManifesto (last visited Sept. 16, 2013).

targeting different kinds of property, Professor Green surveyed 172 incoming Rutgers University-Newark law students.[48] These subjects were asked to evaluate two sets of stories related to theft offenses. The first set involved a series of twelve scenarios concerning the theft of a $350 bicycle accomplished by different means, including armed robbery, simple robbery, extortion, blackmail, theft by housebreaking, larceny, embezzlement, looting, false pretenses, passing a bad check, failing to return lost or misdelivered property, and receiving stolen property.[49] Subjects were asked to rank the scenarios in order of blameworthiness and to assign a sentence. The second set of stories was designed to measure intuitions regarding the relative blameworthiness of stealing different kinds of property.[50] Here, Green's subjects were asked to assess the relative seriousness of taking four different goods, each of which was valued at $50: a physical test-preparation book, a downloaded electronic file, a seat in a test-preparation lecture where the auditorium had empty seats, and a seat in a test-preparation lecture where the auditorium had no empty seats.[51]

The results of the first part of Green's study were not surprising and confirm his moral critique of consolidated theft statutes. With a few outliers, participants consistently ranked armed robbery as the most blameworthy, followed by extortion.[52] At the other end of the spectrum, participants consistently ranked receiving stolen goods and failing to return misdelivered property as the least blameworthy methods by which to accomplish a theft.[53] Sentencing recommendations confirmed these rankings. Students sentenced armed robbery most harshly, followed by extortion.[54] Receiving stolen property and failing to return misdelivered property were given the lightest sentences.[55]

Particularly given the current controversy over illegal downloading and digital pirating evident in the public debate about the prosecution of Aaron Swartz, the results of the second part of Professor Green's study are both surprising and informative. Although 56% of participants said that stealing a physical book was more blameworthy than stealing an electronic copy, 3% said that stealing the electronic book was worse and 41% said that there was no difference between the two.[56] This result is surprising to us.

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[48] GREEN, *supra* note 1, at 54, 57.

[49] These, of course, are Green's titular "thirteen ways" to accomplish a theft. *Id.* at 57-60.

[50] *Id.* at 58.

[51] *Id.*

[52] *Id.* at 60-61.

[53] *Id.* at 61.

[54] GREEN, *supra* note 1, at 61-62.

[55] *Id.*

[56] *Id.* at 67.

Particularly given the casual attitude that many people seem to have toward downloading songs and movies from the Internet,[57] buying pirated movies and music from subway vendors,[58] or copying software from their friends,[59] we would have expected a vast majority of respondents in Professor Green's study to report that downloading the electronic book was less blameworthy than stealing a physical book.[60] Although relevant comparative empirical evidence is sparse, we suspect that the results of Green's study reflect the educative and expressive success of civil litigation, criminal prosecutions, and efforts to pass specialized statutes targeting the theft of digital property.

Unfortunately, we do not have the benefit of a prior study similar to the one conducted by Professor Green from which we can establish a baseline of comparison. Nevertheless, his research and ours indicate that the predominat view of unlawful downloading in the late twentieth and early twenty-first centuries was that it was either not theft, or was substantially less serious than theft of physical objects. *Dowling v. United States*, decided by the Supreme Court in 1985, provides a useful starting point.[61] The appellant in that case, Paul Edmond Dowling, was convicted of violating § 2314 of the National Stolen Property Act ("NSPA") after shipping thousands of bootleg Elvis Presley records across the country.[62] Section 2314 prohibited the interstate transport of "goods, wares, merchandise, securities or money of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."[63] The question before the Court was whether a "bootleg" record that included unauthorized copyright-protected musical performances could be considered merchandise "stolen, converted or taken by fraud" pursuant to

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[57] *Cf.* Matthew Mirapaul, *Is it Theft, or is it Freedom? 7 Views of the Web's Impact on Culture Clashes*, N.Y. TIMES, Sept. 20, 2000, at H42, *available at* http://www.nytimes.com/2000/09/20/business/entertainment-it-theft-it-freedom-7-views-web-s-impact-culture-clashes.html?pagewanted=all&src=pm.

[58] *See* David Mills, *Video Pirates' New Movie Booty; Camcorders Tape Screen Hits*, WASH. POST, May 1, 1991, at B1.

[59] *See* John Markoff, *Though Illegal, Copied Software is Now Common*, N.Y. TIMES, July 27, 1992, at A1.

[60] Green reports some of the evidence of these attitudes in *Thirteen Ways*, including industry claims "that between 50 and 90 percent of all computer software used is unauthorized," that "2.6 billion infringing music files are downloaded every month," and that "[c]opyright infringement alone is estimated to cost about $58 billion and 373,000 jobs a year." GREEN, *supra* note 1, at 249.

[61] 473 U.S. 207 (1985). Green also discusses *Dowling*. *See* GREEN, *supra* note 1, at 254.

[62] *Dowling*, 473 U.S. at 208-09.

[63] *Id.* at 208 (quoting 18 U.S.C. § 2314 (1982)).

the NSPA.[64] For his own part, Dowling argued that the statute prohibited only the taking of physical property and did not reach copyright.[65] Although he admitted that stealing, say, a crate of records packaged for retail sale would constitute theft on this standard, Dowling pointed out that he manufactured or otherwise lawfully acquired all of his physical goods. What he was accused of "stealing" was not physical property, then, but the recorded contents, which remained in the possession of their owners.[66] Absent interference with title or a possessory interest, Dowling maintained, there could be no "theft."[67] Without disputing the fact that common law theft usually entailed some interference with title or possession, the government argued that unauthorized use of the musical compositions amounted to theft, conversion, or fraud.[68]

Expressing views that surely were predominat in 1985, the Court agreed with Dowling, reasoning that the statute was, in essence, an instantiation of common law theft, and therefore required a component of physical interference that copyright infringement lacks.[69] Drawing on that common law sensibility, the Court marked a distinction between the rights protected in copyright and "the possessory interest of the owner of simple 'goods, wares [or] merchandise.'"[70] Unlike the holder of "ordinary chattel," the Court wrote, "[a] copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."[71] The Court reasoned that the language of the statute did not reach the taking that occurs when an infringer violates the rights of a copyright owner because "he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use."[72] "While one may colloquially link infringement with some general notion of wrongful appropriation," the Court concluded, "infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud."[73] Based in part upon this reasoning, the Court held that the contents of bootleg records are not goods "stolen, converted or taken by fraud" within the meaning of the

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[64] *Id.* at 216 (quoting 18 U.S.C. § 2314).

[65] *See id.* at 214.

[66] *See id.* at 216.

[67] *See id.*

[68] *See Dowling*, 473 U.S. at 214-15.

[69] *See id.* at 217-18.

[70] *See id.* at 217 (quoting 18 U.S.C. § 2314).

[71] *Id.* at 216.

[72] *Id.* at 217.

[73] *Id.* at 217-18.

Act.[74]

During the mid-1990s, as the Internet expanded, so too did concerns about its potential to "virtually negate[]"[75] property rights in copyrighted materials by facilitating the illegal copying and distribution of protected materials.[76] Take, for example, the emergence of electronic "bulletin-boards," which early on confounded the entertainment industry.[77] These boards were file-sharing systems that allowed users to link computers through phone lines to send and receive files and programs, often in violation of copyright protections.[78] One contemporary news article described the quandary companies faced in determining the exact nature of the "wrong" committed when copyrighted files are traded over the Internet and who to hold liable for the infringement: "When someone downloads a snippet of music from a network like CompuServe Inc., can the on-line service be held liable? When someone transmits a work, are they 'copying' it in the legal sense of the word or merely 'displaying' it?"[79] Although these questions were in the air, popular public views continued to reflect the Court's holding in *Dowling*, and therefore regarded downloading copyrighted materials through bulletin boards or other forums as something less than stealing.[80] That began to change with the coordinated legal attack on Napster.

In 1999, eighteen-year-old Shawn Fanning launched a pioneering file-sharing program called Napster.[81] This "peer-to-peer" network allowed users to directly exchange digital audio files.[82] Once a Napster subscriber signed onto the program's network, Napster servers searched his or her

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[74] *Dowling*, 473 U.S. at 228.

[75] GREEN, *supra* note 1, at 256.

[76] *See, e.g.*, Kenneth D. Suzan, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 789-80 (1996); Peter H. Lewis, *160 Nations Meet to Weigh Revision of Copyright Law*, N.Y. TIMES (Dec. 2, 1996), http://www.nytimes.com/1996/12/02/business/160-nations-meet-to-weigh-revision-of-copyright-law.html?pagewanted=all&src=pm; Peter N. Spotts, *Copyright Laws Play Catch-Up in Digital Age: Goal is to Stop the Duplication of Protected Material*, CHRISTIAN SCI. MONITOR, Jan. 27, 1995, at 9, *available at* http://www.csmonitor.com/1995/0127/27091.html.

[77] *See* Junda Woo, *Legal Beat: Copyright Law is Easy to Break on the Internet, Hard to Enforce*, WALL ST. J., Oct. 10, 1994, at B6.

[78] *See* Junda Woo, *Copyright Laws Enter the Fight Against Electronic Bulletin Board*, WALL. ST. J., Sept. 27, 1994, at B11.

[79] Woo, *supra* note 77.

[80] *See* GREEN, *supra* note 1, at 249.

[81] *See* Karl Taro Greenfeld, *Meet the Napster*, TIME (Oct. 2, 2000), http://www.time.com/time/world/article/0,8599,2053826,00.html.

[82] *Id.*

computer for music files.[83] These file names were then uploaded to the Napster server where other users could search the index for a particular song or artist.[84] If the search returned results, users simply selected the file they wished to download, and the Napster servers connected the host-user with the querying-user to facilitate a direct download of the selected file.[85] Eighteen months after its launch, Napster had thirty-eight million registered users.[86] It was precisely that success that would prove fatal to Napster's future.

In December 1999, eighteen record companies, all members of the Recording Industry Association of America ("RIAA"), sued Napster in the Northern District of California for copyright infringement and unfair competition.[87] Just one month later, a group of music publishers filed a similar suit.[88] All plaintiffs sought preliminary injunctions barring Napster from engaging in "copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner."[89] The district court rejected Napster's affirmative defenses, including fair use and misuse of copyright, and granted the plaintiffs' preliminary injunction.[90] On appeal, the United States Court of Appeals for the Ninth Circuit largely affirmed the district court's grant of the injunction, requiring Napster to remove any user file from its index if Napster had reasonable knowledge that the file contained copyrighted material.[91] The terms of the injunction proved to be too much for the company to bear. Although Napster barred its users from sharing many copyrighted files, it was simply unable to prevent all copyright-infringing downloads through its service. Faced with this evidence of continued noncompliance, the district court issued a shutdown order in July 2001.[92] In

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[83] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 906 (N.D. Cal. 2000) *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

[84] *Id.*

[85] *Id.*

[86] Amy Harmon, *Napster Users Mourn End of Free Music*, N.Y. TIMES, Nov. 1, 2000, at C1.

[87] *See A & M Records, Inc.*, 114 F. Supp. 2d at 900; *RIAA Members*, RIAA, http://www.riaa.com/aboutus.php?content_selector=aboutus_members&f=# (last visited Sept. 16, 2013) (showing an updated list of RIAA members).

[88] *A & M Records, Inc.*, 114 F. Supp. 2d at 900.

[89] *Id.*

[90] *Id.* at 912, 923, 927.

[91] *A & M Records, Inc.*, 239 F.3d at 1027. The Ninth Circuit modified the injunction slightly to only impose contributory liability to the extent that Napster "(1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works." *Id.*

[92] *See* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1096 (9th Cir. 2002); Sam

June 2002, Napster filed for Chapter 11 bankruptcy.[93]

Following the demise of Napster, the RIAA launched a major litigation program against illegal file-sharing more generally. The RIAA targeted individual file-sharers on peer-to-peer networks on college campuses by writing letters to the institutions whose networks were being used to facilitate their activities.[94] These "pre-litigation letters" were then passed to the copyright-infringing students who were given two options: settle with the RIAA or face a lawsuit.[95] Many settled, but not all. For example, Jammie Thomas went to trial after the RIAA issued to her a cease-and-desist letter for her file-sharing activity.[96] She lost at trial, and eventually was ordered to pay $222,000 in damages by the United States Court of Appeals for the Eighth Circuit.[97]

The fight against digital piracy was not just waged in the courts. In the late 1990s, Congress passed the No Electronic Theft Act ("NET Act") and the Digital Millennium Copyright Act ("DMCA").[98] Both laws strengthened protections for copyrighted works. For example, the NET Act targeted copyright infringers who were not motivated by financial gain by including in the definition of "private financial gain" the "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."[99] The DMCA also included an anti-circumvention rule that prohibited individuals from tampering with a technological measure that controls access to a copyrighted work, such as decrypting an encrypted device.[100]

Costello, *Court Orders Napster to Stay Shut*, PCWORLD (Mar. 25, 2002, 5:00 PM), http://www.pcworld.com/article/91144/article.html.

[93] Benny Evangelista, *Napster Files for Bankruptcy*, S.F. CHRON., June 4, 2002, at B1, *available at* http://www.sfgate.com/business/article/Napster-files-for-bankruptcy-2813933.php.

[94] Emily Banks, *Record Industry's Threats Seem to Reduce Illegal File Sharing: An Aggressive Campaign of Writing Letters to College Officials and Threatening to Sue Students Seems to Be Making a Dent in Illegal Downloads*, STAR TRIB., Mar. 3, 2008, at 3B, available at http://www.startribune.com/local/16167797.html?refer=y.

[95] *Id.*

[96] *See* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 903 (8th Cir. 2012); Greg Sandoval, *Appeals Court Sides with RIAA, Jammie Thomas Owes $222,000*, CNET (Sept. 11, 2012, 9:25 AM), http://news.cnet.com/8301-1023_3-57510453-93/appeals-court-sides-with-riaa-jammie-thomas-owes-$222000/.

[97] *Thomas-Rasset*, 692 F.3d at 910.

[98] No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860.

[99] Lori A. Morea, *The Future of Music in A Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 215-16 (2006).

[100] *See* 17 U.S.C. § 1201 (2006). The DMCA is also widely noted for limiting the liability of Internet service providers and hosting services for the intellectual property violations of their users. Kravets, *supra* note 19.

Specialized statutes targeting digital piracy continue to multiply. For example, in 2008, Congress passed the Prioritizing Resources and Organization for Intellectual Property Act ("PRO IP Act"), which enhanced criminal penalties for copyright infringement and established the Office of the United States Intellectual Property Enforcement Representative within the Executive Branch.[101] That same year, Tennessee became the first state in the country to sign a bill into law that required state public and private educational institutions to adopt policies prohibiting the infringement of copyright-protected works over school networks.[102] In 2011, Senator Patrick Leahy of Vermont introduced the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, known as the PROTECT IP Act.[103] The PROTECT IP Act would allow the Department of Justice to commence civil lawsuits against domain name registrants or the domain names directly.[104] The PROTECT IP Act would further allow a court to issue a cease-and-desist order to the registrant, or its owner or operator, if the site is dedicated to infringing activities.[105]

Alongside these legislative and prosecutorial efforts, law enforcement agencies and trade organizations, like the RIAA and the Motion Picture Association of America, have engaged in a sustained effort to shape public perceptions of unlawful downloading.[106] Professor Green describes some of the highlights in *Thirteen Ways*, including a Justice Department website, which advises readers that "copying [software] from the Internet . . . is the same as stealing it from a store," and a pervasive advertising campaign designed to draw parallels between stealing "a car . . . a handbag . . . a mobile phone . . . [or] a DVD" and downloading pirated films.[107]

There can be little doubt that these efforts to target unlawful downloading have expressive value and educative effects. Before Napster's downfall, downloading free, copyrighted music was widely accepted and widely practiced, apparently without risk.[108] To the extent it was condemned, few appeared to regard it as a kind of theft on par with

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[101] Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256.

[102] TENN. CODE. ANN. § 49-7-142 (West 2009).

[103] PROTECT IP Act, S. 968, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s968is/pdf/BILLS-112s968is.pdf.

[104] *Id.* § 3(a)(1).

[105] *Id.* § 3(b)(1).

[106] *See* Charles Lane, *High Court to Weigh File Sharing; Industry Likens Practice to Theft*, WASH. POST, Dec. 11, 2004, at E1; Editorial, *The New York Times Stands Strongly Against Theft on the Internet*, N.Y. TIMES, Jun. 28, 2005, at A22.

[107] GREEN, *supra* note 1, at 247.

[108] *See* Erik Ahlberg, *The Best Way to…Find Tunes—The Wide Range of Choices Online Will be Music to Your Ears*, WALL ST. J., Nov. 27, 2000, at R22.

stealing a physical book. Today, however, as Green's study reveals, a substantial proportion of people view unlawful downloading as just as bad as stealing physical goods.[109] Some even think it is worse.[110] There is very little reason to think that this shift would have occurred without concerted public education efforts, including the debate and passage of specialized theft statutes such as the DMCA and the PROTECT IP Act.

The expressive and educative value of specialized theft statutes is not diminished when public debate leads to the defeat of a particular measure. Take, for example, Congress's recent failure to pass the Stop Online Piracy Act ("SOPA").[111] Like the PROTECT IP Act, SOPA would have both expanded criminal liability for unauthorized streaming and downloading, and granted law enforcement broad power to seek injunctions against websites, search engines, and Internet service providers whose services facilitated illegal downloading.[112] In part due to public resistance organized by Aaron Swartz and others associated with the open access movement, SOPA did not become law.[113] Rather than undercutting our claim here—that specialized theft statutes play an important expressive and educative function—the defeat of SOPA, and particularly the public debate about SOPA and its alternatives, such as the Online Protection and Enforcement of Digital Trade Act, proves our point.[114] At the frontiers of twenty-first

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[109] GREEN, *supra* note 1, at 67.

[110] *Id*. Three percent of respondents in Green's empirical study viewed stealing an electronic book as more blameworthy than stealing a physical book.

[111] H.R. 3261, 112th Cong. (2011); Matt Williams, *Sopa and Pipa Votes Shelved After Congress Climbs Down on Piracy Bills*, GUARDIAN (London) (Jan. 20, 2012, 11:44 AM), http://www.guardian.co.uk/technology/2012/jan/20/pipa-vote-shelved-harry-reid.

[112] John Naughton, *Q&A: Stop Online Piracy Act (SOPA)*, GUARDIAN (London) (Jan. 21, 2012), http://www.guardian.co.uk/technology/2012/jan/22/sopa-pipa-johhn-naughton.

[113] *See* Hayley Tsukayama, *Alexis Ohanian, Reddit Co-Founder and Web Advocate*, WASH. POST, Sept. 5, 2012, http://www.washingtonpost.com/business/economy/alexis-ohanian-reddit-co-founder-and-web-advocate/2012/09/05/f642f1b6-eb9f-11e1-9ddc-340d5efb1e9c_story.html; Caitlin Dewey, *Aaron Swartz, Internet Activist and Innovator Remembered by Reddit Community*, WASH. POST, Jan. 14, 2013, http://www.washingtonpost.com/lifestyle/style/aaron-swartz-internet-activist-and-innovator-remebered -by-reddit-community/2013/01/14/3549363c-5e90-11e2-a389-ee565c81c565_story.html.

[114] S. 2029, 112th Cong. (2011) / H.R. 3782, 112th Cong. (2012); *see, e.g.*, Naughton, *supra* note 112 (demonstrating that the media thought it worthwhile to educate the public about SOPA and that many expressed dissent). In 2011, Senators Amy Klobuchar, John Cornyn, and Chris Coons introduced another piece of legislation that would have made it easier for federal prosecutors to pursue websites that illegally stream copyright-protected works. The Commercial Felony Streaming Act provides for up to five years' imprisonment for a website operator who transmits at least ten streams of copyright-protected public performances provided that the retail value of the streams, or the total economic value of the streams to the

century theft, debates about specialized theft statutes draw otherwise unrecognized issues to the attention of civil society. The passage and failure of specialized theft statutes play an even more critical role by marking the contested boundaries and shaping our theories and conceptions of property going forward.

In a 2012 *New York Times* editorial applying some of the views Professor Green advances in *Thirteen Ways* to a Department of Justice investigation of a file-sharing site, he notes that "[t]he criminal law also plays an important role in informing, shaping, and reinforcing societal norms."[115] He nevertheless reports the results of his study as showing that "lay observers draw a sharp moral distinction between file sharing and genuine theft, even when the value of the property is the same."[116] We see the available data differently. By comparing evidence of lay views from the early years of the Internet age to the results of Green's own empirical study, we see evidence of a marked shift in public intuitions toward regarding illegal downloading as a form of "cyber theft" that is on par with traditional larceny. Where few people regarded downloading as wrong, much less a form of criminal theft, during the heyday of Napster, Professor Green's empirical work shows that a substantial portion of society now regards unauthorized downloading as at least on par with larceny of physical property.[117] This shift can be attributed in significant part to specialized theft statutes, targeted prosecutions, and focused public interest messaging. Of course, that success may well be undesirable to the extent that it is founded on a conceptual or moral mistake.[118] We turn to this question in the next section.

III. Are Unlawful Downloading and Other Forms of Twenty-First Century Stealing "Theft"?

Professor Green might concede that specialized theft statutes focusing on unlawful downloading and file sharing have been successful in shaping public views, but nevertheless object to them on normative or conceptual grounds. For example, he might contend that conduct like that alleged by the government in its prosecution of Aaron Swartz should not be

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infringer, exceeds $2,500. *See* S. 978, 112th Cong. (2011).

[115] Stuart P. Green & Matthew B. Kugler, *Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation*, 7 J. OF EMPIRICAL LEGAL STUD. 511, 516 (2010).

[116] Stuart P. Green, Op-Ed, *When Stealing Isn't Stealing*, N.Y. TIMES, Mar. 29, 2012, at A27, *available at* http://www.nytimes.com/2012/03/29/opinion/theft-law-in-the-21st-century.html?pagewanted=all; *see also* GREEN, *supra* note 1, at 67-68.

[117] GREEN, *supra* note 1, at 67 tbl.3.

[118] *See infra* Part IV.

criminalized at all. Alternatively, he might argue that, to the extent such conduct is or should be criminal, it is an error to categorize it as "theft." Although many of Swartz's most ardent defenders have argued that his conduct was not, or should not be regarded as, criminal, Professor Green remains largely agnostic on this point in *Thirteen Ways*, preferring instead to draw a conceptual line between "theft" and twenty-first century offenses like unauthorized downloading.[119] In this section, we suggest some reasons why readers might not want to follow Professor Green down this road.

One of Professor Green's objections to specialized theft statutes is that they crowd criminal codes and sometimes make it confusing to figure out exactly what is and is not criminal.[120] There is, therefore, a certain tension in his resistance against efforts to categorize illegal downloading as a form of theft in that adopting his views would require more specialized law in these areas. There is surely a happy median between elegance and conceptual precision, of course, so we do not regard this tension as anything more than practical. Those practicalities aside, we are far more interested in Professor Green's arguments for drawing a conceptual distinction between "theft" crimes and what he regards as quite different sorts of twenty-first century offenses like unlawful downloading, often referred to as theft crimes.

Although his argument is more nuanced than we can hope to capture in a few sentences, the essence of Professor Green's position is that not all property can be stolen and only some interferences with property rights can accurately be categorized as "theft." "Property," Green writes, "is best thought of not as a physical thing but as the bundle of rights organized around the idea of securing, for the right of the holder, exclusive use or access to, or control of, a thing."[121] This definition is in broad accord with the Restatement, which uses "property" to "denote legal relations between persons with respect to a thing," which may have a "physical existence or it may be any kind of an intangible such as a patent right or a chose in action."[122] Among the "legal relations" commonly associated with property are rights to possess, alter, exclude, consume, sell, encumber, rent, exchange, or destroy.[123] Not all property is capable of underwriting all of these rights, of course. Moreover, each of these rights has a different character. As a consequence, some property is hard or impossible to sell because it cannot be readily commoditized.[124] Other forms of property are

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[119] *See* GREEN, *supra* note 1, at 246-52; Phillips, *supra* note 37; Wu, *supra* note 37.

[120] GREEN, *supra* note 1, at 36.

[121] *Id.* at 73.

[122] RESTATEMENT FIRST OF PROP. ch. 1, intro. note (1936).

[123] GREEN, *supra* note 1, at 74.

[124] *Id.* at 208.

highly elastic, which allows many people to possess or use the property without materially affecting the ability of others to do the same.[125] It is these two features, commoditizability and exclusivity, that most concern Professor Green.[126]

In Professor Green's view, the only "kind of property that can be subject to theft reflects two basic requirements: 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 user will prevent simultaneous consumption by others."[127] In short, property that can be stolen has a certain "zero-sumness."[128] So, for example, we have a copy of Professor Green's book. It is a commodity. We paid money for it, and can certainly sell it to someone else when we are through with it.[129] Once it is in possession of another, however, it is beyond our use. On this definition, Green points out, it is hard to make the case that intellectual property, particularly when reduced to digital files, is the sort of property that can be stolen. Take the example given to participants in Green's study of an electronic book. There is no doubt that a digitized book stored on a server is a commodity. The file itself can be bought or sold. It can also be rented by, for example, affording one user access to the contents for a limited period of time. In a more familiar contemporary model, the owner of the electronic book might also charge buyers a one-time fee that would allow them to copy the file for future perusal at their leisure. An electronic book, therefore, has one key feature of property that can be stolen: commoditizability.[130] Where an electronic book begins to look unlike the kind of property that can be stolen on Green's account is the feature that he describes as "zero-sumness."[131]

By its nature, an electronic file is endlessly elastic. Whether it is copied and downloaded once or a billion times, the file is not degraded and remains on the owner's server, ready for use at any time he or she likes. In this sense, any property interest that an owner might have in the content of an electronic file is not rivalrous.[132] An electronic copy of a book can be

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[125] *Id.* at 209-10.

[126] *Id.* at 74, 267-69.

[127] *Id.* at 74.

[128] *Id.* at 80.

[129] In assuming a robust market for Professor Green's book, we deny with all seriousness his self-deprecating description of it as "an obscure book on the moral theory of theft law." GREEN, *supra* note 1, at 255.

[130] *See* Niva Elkin-Koren, *The Changing Nature of Books and the Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1712, 1725-26 (2011) (discussing how ebooks could be published in fewer steps and with less cost than traditional publications).

[131] *See* GREEN, *supra* note 1, at 80.

[132] *Id.* at 255-56.

copied and read by everyone or no one without affecting the ability of the owner to do the same because the owner still has "the work, even after the illegal downloads have occurred."[133] This does not mean that the rights of the book's owner are not affected by illegal downloading, for they surely are.[134] For example, the right to exclude is violated by unauthorized downloading, as is the right to rent or sell copies of his or her book. In fact, unauthorized downloading and distribution might mean that "the economic value of [the electronic book] has been virtually negated."[135] The owner may even have a right to remedy in trespass or tort. Unauthorized downloading is nevertheless not a theft in Green's view because it interferes with neither possession nor title, no matter the degree of interference with commercial value.[136]

In keeping with our defense of specialized theft statutes, we think that Professor Green's focus on commodification and rivalrousness, as two necessary features of property that can be stolen, is too narrow. In our view, "theft" should encompass any criminal interference with property rights, the respect for which is sufficiently central to a socially significant enterprise to make protecting those rights a legitimate matter of public interest. In making this proposal, we rely on a very parsimonious view of criminality that we attribute to a certain brand of retributivism rooted in the work of Immanuel Kant.[137] One of us has written at length elsewhere about Kant's criminal theory and the constraints it puts on the scope of criminalization.[138] We will not repeat that work here, but a few words are necessary to explain our disagreement with Professor Green and the alternative that disagreement recommends.

Kant's theory of punishment is linked to his moral theory, which in turn is built around the categorical imperative.[139] In its most popular formulation, the categorical imperative requires simply that "I should never act except in such a way that I can also will that my maxim should become a universal law."[140] By "maxim," Kant means "[a] rule that the

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[133] *Id.*

[134] *Id.* at 254-57.

[135] *Id.* at 256.

[136] *See id.* at 78-80.

[137] *See, e.g.*, David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1659-60 (2010) (discussing the central feature of Immanuel Kant's moral theory).

[138] *See id.*; David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 153-57 (2010).

[139] Gray, *supra* note 137, at 1660.

[140] IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 14 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993).

agent himself makes his principle [of action] on subjective grounds."[141] Thus, the categorical imperative allows us to act upon principles of conduct that can be universalized without contradiction.[142] Contrariwise, it forbids us to act on maxims that fail the test of logical purity in that they contain their own contradiction.[143] For some crimes, like murder or suicide, the contradiction is inherent in the conduct. After all, proposing as universal law the maxim of murder would be to propose the extinction of rational beings.[144] For other crimes, however, the contradiction is only to be found by reference to a norm or condition that is necessary to the social enterprise, which the conduct, as a crime, offends. Theft is one of these.

Let us assume for the time being that the maxim of theft "is taking the property of another."[145] Theft is immoral in a society that recognizes the concept of ownership because the maxim "I take that which is not mine" cannot be universalized without contradicting the very concept of ownership upon which the maxim itself depends.[146] We can, of course, imagine living in a society where property is held collectively rather than individually owned. In such a world, theft would have no meaning, and therefore would not be criminal.[147] In our society, however, where possession and title in property play a central role in a wide range of social practices, engaging in conduct that offends rights of possession or title is a crime, which we call "theft."[148]

Until quite recently, the social practices that were both sufficiently close to our cultural core and required some respect for property rights could be adequately defended by limiting the scope of "theft" crimes to conduct that contradicted rights of possession and title. That is increasingly less true. As our social practices have diversified, expanded, and become more anonymous, so too have we come to depend on respect for norms that once were secondary, unworthy of note, or even incomprehensible to our common law forebears. As we see it, specialized theft statutes, and

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[141] *Id*. at 17-18. An agent's maxim of action is, by definition available, only to him but can be imputed to him based on his actions. *Id*. at 18-19.

[142] *Id*. at 18; Gray, *supra* note 137, at 1661-62.

[143] Gray, *supra* note 137, at 1662.

[144] *Id*.

[145] *Id*.

[146] *Id*. (internal quotation marks omitted).

[147] *Cf. id*. (explaining that, because theft requires taking another's property, it can be inferred that, if property is owned collectively there is no property of another to be taken—thus rendering "theft" a nullity and, accordingly, not criminal).

[148] Although they differ in the details, many retributivist theories follow this basic outline. *See, e.g.*, Herbert Morris, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE 31, 34-35 (1979); JOHN RAWLS, A THEORY OF JUSTICE 251-57 (1971); 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 230-31, 233 (2007).

contests around them, have a unique role to play in this changing world because they highlight these new social practices and public interests in defending their normative preconditions. Furthermore, contests over these specialized statutes afford an important opportunity to engage in civil society and political debates about not only the internal conditions of these emerging enterprises, but also whether they are sufficiently central to twenty-first century life to be worthy of defense by the criminal law.[149]

By way of explanation, let us consider an example of a specialized theft statute that does not challenge Professor Green's definition of theft. Pennsylvania recently passed an organized retail theft statute.[150] The law works in tandem with Pennsylvania's retail theft and receiving-stolen-property laws to prohibit the coordination, control, supervision, or management of an organized retail theft enterprise.[151] Stolen merchandise with a retail value between $5,000 and $19,000 is graded as a third-degree felony and stolen merchandise with a retail value of more than $20,000 is considered a second-degree felony.[152] Even under Professor Green's definition of property that can rightly be the target of theft, retail goods qualify. They not only have a commercial value, but the shoplifter's possession of goods is directly adverse to the shopkeeper's. Green is nevertheless skeptical of specialized statutes such as this because they add nothing of moral significance over general prohibitions on theft and, therefore, add unnecessary clutter to the criminal law.[153] We think this might be too fast.

In 2010, organized retail crime resulted in losses estimated between fifteen and thirty billion dollars.[154] The scale of those losses is in part due to the activities of organized shoplifting rings, which methodically steal merchandise from stores. As Representative Tom Caltigarone, who sponsored the Pennsylvania bill, pointed out, "[t]hese organizations, many of which operate across state lines, overwhelm retailers with large numbers

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[149] This marks an important distinction between the criminal law, as a species of public law, and private law, including contract and tort. Although we do not accuse Professor Green of making this mistake, an excessive focus on the impact of a particular theft on the interests of an owner or possessor risks equivocating between the two. Kant avoids this trap by linking criminal prohibitions not to the impact of a particular act on a specific victim, but the consequences for a social enterprise that would result if all participants engaged in the conduct marked as a "crime." RAWLS, *supra* note 148, at 251-57.

[150] Organized Retail Theft Act, 2010 Pa. Laws 212 (codified as amended at 18 PA. CONST. STAT. ANN. § 3929.3 (West 2012)).

[151] 18 PA. CONST. STAT. ANN. § 3929.3 (West 2012).

[152] *Id.*

[153] *See* GREEN, *supra* note 1, at 34-36.

[154] *Latest on Organized Retail Crime*, NAT'L RETAIL FED'N, http://www.nrf.com/modules.php?name=Dashboard&id=64 (last visited Sept. 16, 2013).

of shoplifters simultaneously."[155] "They may [also] target the same store more than once, knowing they can risk the arrest of one or some of the group members and still carry out the job."[156] The primary outlets for these stolen goods are grey market fence operators, who sell the illegally obtained goods through pawn shops, flea markets, and auction sites.[157] Some who purchase these goods know, or suspect, that they are stolen. In fact, many find a certain thrill in buying "hot" merchandise.[158] As evidence of these attitudes, the respondents to Professor Green's questionnaire ranked receiving stolen property as the least serious form of theft.[159] This signals to us a broad lack of appreciation for the impact that shoplifting and receiving stolen goods have on the key social enterprise of retail sales. Specialized theft statutes like this Pennsylvania law, therefore, serve an important expressive and educative function by highlighting both the importance of retail commerce in contemporary society and the impact of shoplifting and abetting shoplifting on that enterprise. For both the thoughtless and the ignorant among us, these statutes highlight our important roles in these property regimes and the norms of conduct these enterprises require in order to persist.

Of course shoplifting is theft even on Green's account. We are, after all, talking about goods that are rivalrous commodities. But how does the enterprise approach we have sketched here help us to make sense of specialized theft statutes for twenty-first century crimes like New Jersey's prohibition on taking "data," including information stored on removable disks and external disk drives?[160] The answer is not found in the nature of computer systems or the endlessly scalable data that they trade in—which is the focus of Professor Green's analysis—but in the networks of exchange that they intersect with, advance, enable, or create. Let us consider digital books. Some digital books exist for and intersect with social enterprises that require unrestricted copying, transmittal, and consumption. Take, for

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[155] Press Release, Pa. House of Representatives, Governor Signs Caltagirone Organized Retail Theft Bill into Law (June 18, 2010) (on file with Pa. House of Representatives), *available at* http://www.pahouse.com/pr/127061810.asp.

[156] *Id.*

[157] NATIONAL RETAIL FEDERATION, 2012 ORGANIZED RETAIL CRIME SURVEY 6 (2012), *available at* http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1380 (download complete survey).

[158] We are reminded here of an episode of the television show *Seinfeld* in which the main character, Jerry, told his father that an expensive gift purchased legitimately was bought for much less on the black market because Jerry believed that his father would both object less to the extravagance and find some thrill in the possibility of receiving stolen property. *Seinfeld: The Wizard* (NBC television broadcast Feb. 26, 1998).

[159] GREEN, *supra* note 1, at 60-61.

[160] *See supra* note 21 and accompanying text.

example, open source websites for the distribution of academic work, like the Social Sciences Research Network ("SSRN"),[161] or political organizations engaged in modern-day pamphleteering.[162] For authors of books lodged on these kinds of websites, unlimited access is the point. Too many limitations on parties' access or ability to download copies of their digital books would, to adopt a phrase from Professor Green, "virtually negate" the whole value of the enterprise. Consider, by way of contrast, the author of a novel made available for download through an online vendor like Amazon.[163] Here, unlimited access and downloading "virtually negates" the Amazonian enterprise as a property regime. In both cases, the digital books in question retain their non-zero-sumness, but where one enterprise by definition exploits that characteristic the other must restrict it or cease to exist. In this developing and often confusing landscape of twenty-first century property regimes, specialized theft statutes play a crucial role by marking the line between distinct enterprises and by clarifying for those who participate in different regimes what conduct does and does not hold the potential to negate them.

Adopting an enterprise account of theft law also helps to make sense of grading issues. Contrary to U.S. Attorney Ortiz's claim in defense of her indictment of Aaron Swartz, thefts are not all the same. As Green and his study participants show, both the means and the nature of the property matter.[164] If our enterprise account of theft is right, then there are other important variables that ought to be included in a moral analysis of theft severity, which also likely serve to underwrite common intuitions. In particular, the social importance of a property regime or a property-based enterprise and the centrality of the norm offended by criminal conduct should and do play important roles in grading theft offenses. Thus, unauthorized downloading is less serious than theft by housebreaking because intellectual property regimes are much less central to our society, our lives, and our senses of self than personal property regimes—at this stage at least. We therefore ought to expect that theft by housebreaking will be punished more severely than unauthorized downloading of a digital book. Furthermore, an unauthorized download for personal use is less offensive to intellectual property regimes and commercial online

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[161] *See* SOC. SCI. RES. NETWORK, http://www.ssrn.com/ (last visited Feb. 21, 2013).

[162] *See* Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS 99, 99-101 (2006) (explaining how the blogosphere enables politically-minded individuals to introduce, distribute, and debate their political ideals through a vast medium).

[163] *See generally* Book Marketer, *How Amazon Pricing Affects Author and Publisher Profits*, PUBLETARIAT (Apr. 26, 2010), http://www.publetariat.com/?p=942 (explaining that Amazon's discount model does not affect author profits).

[164] GREEN, *supra* note 1, at 4-5.

publishing enterprises than is competitive distribution. We should therefore expect that specialized theft statutes will reflect these differences as well.[165]

CONCLUSION

The foregoing is, of course, a sketch at best. We nevertheless hope that we have succeeded in making at least a preliminary case for specialized theft statutes. Although we appreciate Professor Green's concerns that these laws can sometimes further clutter already complex criminal codes without marking any moral distinctions of real significance, these laws sometimes serve important educative and expressive purposes. They may be particularly valuable where the target crimes are twenty-first century thefts. Furthermore, the process of drafting, debating, and passing—or failing to pass—statutes governing these crimes is almost as critical as the laws themselves because these conversations provide critical forums for public discussion about the norms and practices that are essential to our evolving world of property regimes. The prosecution and tragic death of Aaron Swartz is such a moment, and demands our careful attention. Professor Green's timely and important book has an important role to play in guiding these conversations, for which we all owe him our thanks.

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[165] We therefore agree with some of Aaron Swartz's defenders that his conduct was relatively innocuous so long as he did not intend to distribute the files he downloaded from JSTOR. *See* Alex Stamos, *The Truth About Aaron Swartz's "Crime,"* UNHANDLED EXCEPTION (Jan. 12, 2013), http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime//#comment-1313.