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Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation

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In the middle of the 20th century, criminal law reformers helped pass laws that consolidated previously distinct common-law offenses such as larceny, embezzlement, false pretenses, extortion, blackmail, and receiving stolen property into a unified offense of theft, imposing uniform punishments for a diversity of methods of stealing and a diversity of types of property that could be stolen. The result was a "consolidated" scheme of theft, with a single, broad definition of property (typically, "anything of value") and a single scheme of grading (based, roughly, on the value of the thing stolen). In this study, participants were given two sets of scenarios—one involving variations in the means by which a theft was committed, the other involving variations in the type of property stolen—and asked to rate these thefts in terms of blameworthiness and punishment deserved. They drew sharp distinctions across both means of theft and type of property, not adopting a consolidated view. Under the principle of fair labeling—the idea that criminal law offenses should be divided and labeled so as to represent widely felt views about the nature and magnitude of law breaking—such data provide the basis for a significant challenge to modern theft law.

If Tom steals Owen's bicycle, should the punishment the criminal law imposes on him differ depending on the *means* by which he achieved his ends? For example, if Tom obtained Owen's bike by means of deception, is he any more or less to blame, or deserving of any more or less punishment, than if he had obtained it by threat, or by force, or by betraying Owen's trust? What if Sally steals a book from the ABC Company? Should our judgment of her act's blameworthiness depend on the *form* of the book? Should the criminal law impose any more or less punishment depending on whether the contents of the book are contained in a physical object, an electronic file, or a live lecture?

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At common law, the means by which a theft was effected as well as the form of the property taken were of great consequence. Starting in the late 1500s, British and, later, U.S., Canadian, and Australian courts and legislatures began to draw sharp distinctions among crimes such as robbery, larceny, embezzlement, false pretenses, extortion, blackmail, fraudulent conversion, cheating, receiving stolen property, and failure to return lost property. Each offense had its own distinctive set of elements, applicable defenses, and pertinent range of punishment. In addition, whether a taking was considered a theft at all would often depend on the type of property alleged to be stolen, whether tangible or intangible, a good or a service.

By the middle of the 20th century, however, there had developed in each of these jurisdictions a consensus that the common-law approach to theft was badly in need of reform. Distinctions among larceny, embezzlement, and false pretenses were said to "serve no useful purpose";[1] they were "technical . . . [and] without any substantial basis,"[2] the product of historical "accident."[3] A succession of judicial decisions and legislative enactments had created a dense body of law, full of arcane and sometimes inconsistent rules, overlapping offenses, and procedural loopholes. For example, a defendant who was charged with false pretenses could sometimes escape liability by arguing that he or she had actually committed embezzlement, and a defendant charged with embezzlement could similarly argue that the actual offense was false pretenses. In addition, defendants were often successful in arguing that the thing allegedly stolen was not the sort of property that is properly subject to theft.

In part to avoid such problems, law reformers in both the United States and England, in devising the Model Penal Code and the English Theft Act 1968, respectively, decided to consolidate most of the traditional common-law theft offenses into a single "unitary" offense of theft, with a single broad definition of property (typically, "anything of value"), a single scheme of grading (based, roughly, on the value of the thing stolen), and a single pattern of permitted and excluded defenses.

The question posed by this study is whether, and to what extent, the consolidated approach to theft is consistent with community norms. We sought to determine whether citizens agree or disagree with the view implied by modern theft law that the *means* by which a theft is committed as well as the *form* of the property stolen are, with few exceptions, irrelevant to judgments about the blameworthiness of the crime and the punishment it deserves.

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[1]Rollin M. Perkins & Ronald N. Boyce, Criminal Law 389 (West Publishing, 3d ed. 1982); Herbert Wechsler, The Challenge of the Model Penal Code, 65 Harvard L. Rev. 1097, 1112–13 (1952).

[2]Dale E. Bennett, The Louisiana Criminal Code: A Comparison with Prior Louisiana Law, 5 Louisiana L. Rev. 6, 37 (1942).

[3]Commonwealth v. Ryan, 30 N.E. 364, 365 (Mass. 1892) (Holmes, J.).

I. The Consolidation of Theft Law

In the United States, the consolidation of theft law has been widespread. Most of this consolidation has resulted from the influence of the Model Penal Code (MPC), which we take to be broadly representative of contemporary U.S. law.[4] The MPC includes eight means of committing the offense of "theft" within its Article 223: theft by unlawful taking or disposition, theft by deception, theft by extortion, theft of lost or mislaid or misdelivered property, receiving stolen property, theft of services, theft by failure to make required disposition of funds received, and unauthorized use of automobiles and other vehicles. Each form of theft is treated as essentially interchangeable. As the MPC puts it, an "accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information."[5] The most significant exceptions to this unitary approach are robbery (defined as theft involving serious injury or the threat of serious injury) and writing a bad check, both of which are treated as separate offenses not interchangeable with other theft offenses.[6]

The MPC also treats all the traditional common-law theft offenses according to a unified grading scheme: theft constitutes a felony of the third degree if the amount involved exceeds $500 or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle; if the property is not covered by the first provision, it is treated as a misdemeanor unless the amount involved is less than $50, in which case it is a petty misdemeanor.[7] Once again, robbery and writing a bad check are exceptions. Writing a bad check is treated as a misdemeanor. Robbery is treated as a felony of the second degree if it involves the infliction or threat of serious bodily injury and as a

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[4]By our count, 18 states have effected a "complete consolidation" of theft law, meaning that all the traditional species of theft (larceny, embezzlement, false pretenses, extortion, receiving stolen property, failure to return lost property, and unauthorized use) have been consolidated into a single offense. Twenty-one states have enacted what we call "basic" or "intermediate" consolidation, meaning that the three traditional common-law crimes of larceny, embezzlement, and false pretenses are all consolidated, but at least one other morally relevant kind of theft is left as a separate charge: in 10 states, the nonconsolidated offense is extortion; in five states, the nonconsolidated offenses are extortion and receiving stolen goods; in one state, the nonconsolidated offenses are extortion and theft of lost property; in one other state, the nonconsolidated offense is receiving stolen property; in three additional states, the nonconsolidated offense is unauthorized use. Another 12 states have adopted what we regard as a "nonconsolidated" law of theft, meaning that at least one or more of the three central common-law theft offenses remain separate offenses. This catalogue will be discussed more fully in Green's work-in-progress, Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age.

[5]MPC § 223.1(1). This rule is "subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise."

[6]MPC § 222(2) (robbery); MPC § 224.5 (writing bad check). Burglary also constitutes a separate offense. MPC § 221.1.

[7]MPC § 223.1(2).

felony of the first degree if the actor attempts to kill someone or purposely inflicts or attempts to inflict serious bodily injury.[8]

The MPC, in another reform of the common law, also does away with the distinctions in prior law among different kinds of property stolen. In their place, Section 223.0(6) offers a broad definition of "property," which includes "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power."[9] The result of this provision, read in conjunction with Sections 223.7 and 223.1(1),[10] is that theft of tangible goods, theft of intangible goods, and theft of services are all treated as equivalent and subject to the same punishment.

The Theft Act 1968, which applies in England and Wales, offers its own version of consolidation, which in some respects is even more radical than the MPC, but in other respects is less so. The Theft Act's consolidation is more radical in the sense that, unlike the MPC, it offers a single definition of theft—namely, "dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it."[11] As such, according to a leading commentary, it "embraces all—or virtually all—of the kinds of dishonest conduct which came within the definition of the old crimes of larceny (in all its various forms), obtaining by false pretences, embezzlement, and fraudulent conversion."[12] Indeed, unlike the MPC, the Theft Act does not even make reference to the common-law offenses. On the other hand, the Theft Act is less radical than the MPC in the sense that it maintains separate provisions not only for burglary[13] and robbery,[14] but also for fraud,[15] blackmail,[16] and handling stolen goods.[17]

The Theft Act also follows a mostly uniform approach to sentencing. As the Criminal Law Revision Committee puts it in its *Eighth Report: Theft and Related Offences*, "[e]xcept in three cases (burglary, criminal deception and taking a motor vehicle or other conveyance

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[8]MPC § 222(2).

[9]MPC § 223.0(6).

[10]MPC § 223.7 (theft of services); MPC § 223.1(1) (consolidation provision).

[11]Theft Act 1968 § 1.

[12]David Ormerod & David Huw Williams, Smith's Law of Theft 1–2 (Oxford University Press, 9th ed. 2007).

[13]Theft Act 1968 § 9.

[14]Id. at § 8.

[15]Fraud Act 2006, §§ 1–4. The Fraud Act provisions replace an earlier set of provisions concerning fraud in the Theft Act 1968, §§ 15–17.

[16]Theft Act 1968, § 21.

[17]Id. at § 22.

without authority) we have provided single maximum penalties for the offences in place of the present widely different penalties depending on various factors—the kind of property involved, the relations between the offender and the owner, [and] the method by which or the place where the offence is committed . . . ."[18] The result of all this is a kind of leveling in the punishment of theft—with maximum penalties raised with respect to some theft offenses, and lowered with respect to others.[19]

Finally, the Theft Act offers a consolidated definition of property that, though certainly broader than at common law, is nevertheless narrower than under the MPC. Although the Theft Act definition of "property" includes "money and all other property, real or personal, including things in action and other intangible property," it excludes from its scope the theft of services, which is dealt with in a separate provision and subject to a maximum penalty of five years,[20] and offers special rules regarding the theft of land, wild animals, fruits, flowers, foliage, and mushrooms.[21]

In short, Anglo-American law has effected a radical transformation in the law of theft. Taking a complex body of law in which the punishment, if any, varied depending on the means by which theft was effected and the type of property stolen, the MPC and English Theft Act have created a simpler—but also flatter and more homogenized—law of theft, one that, we would contend, has been denuded of much of its moral content.[22]

II. Why Citizens' Intuitions About Moral Blameworthiness Matter to the Criminal Law

The question being tested in this study is whether people's moral intuitions about the blameworthiness of different forms of theft are consistent with how such offenses are

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[18]Law Commission of England and Wales, Eighth Report: Theft and Related Offences 7–8. The current penalty is seven years. Theft Act 1968 § 7.

[19]Theft Act 1968 § 9.

[20]Fraud Act 2006 § 11 (replacing § 1 of Theft Act 1978).

[21]Theft Act 1968 § 4.

[22]Simply because the MPC and Theft Act treat various common-law theft offenses as interchangeable does not necessarily mean they regard such offenses as morally equivalent. In fact, the MPC studiously avoided any claims about moral wrongfulness other than saying that one of the purposes of its provisions concerning sentencing was to "safeguard against . . . disproportionate . . . punishment." MPC § 1.02(2)(c). The framers of the MPC subscribed to the idea that crime should be "forbidden" and "prevented," and where not preventable, its perpetrators "treated" and "rehabilitated," rather than punished. MPC § 1.02(1)(a). The MPC as originally promulgated nowhere spoke about assessing "blame" or "retribution" and made no claims that crimes that are treated as equivalent for purposes of punishment should be regarded as morally equivalent. (But note that the recent proposed revisions to the MPC sentencing provisions explicitly identify as one of their goals "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." Model Penal Code: Sentencing—Tentative Draft No. 1 (2007), § 1.02(2)(i)). The English Theft Act also has little or nothing to say about the moral implications of consolidating theft law. The sole rationale offered for consolidation was a desire to simplify the arcane complexities of the common law. Criminal Law Revision Committee, Eighth Report: Theft and Related Offences, Cmnd. 2977 (1967), ¶¶ 110–12, at 7–9.

treated by the modern, consolidated approach. In particular, we want to know whether and if so, to what extent, people view various acts of theft as morally equivalent regardless of the means by which the act was committed or the type of property stolen.[23]

What citizens think about the seriousness of various criminal acts matters for a number of reasons. Most scholars agree that society's ability to enforce compliance with the law lies less in the power to impose sanctions than it does in the norms by which people direct their lives. Generally, people refrain from committing crimes not because they fear sanctions, if they even do, but because they believe it is morally wrong to engage in the crime.[24] Thus, it is important that the law be consistent with moral norms. As Paul Robinson and John Darley have put it:

> The criminal justice system's power to stigmatize depends on the legal codes having moral credibility in the community. The law needs to have earned a reputation for accurately representing what violations do and do not deserve moral condemnation from the community's point of view. This reputation will be undercut if liability and punishment rules deviate from a community's shared intuitions of justice.[25]

Where the criminal law is viewed as offering a reliable statement of what the community regards as wrongful, citizens are more likely to follow its lead in cases that are unclear. When criminal codes deviate from the norms of the community, citizens may be less likely to cooperate with or acquiesce to the system's demands.[26]

It is not merely the case that social norms play a role in shaping the criminal law. The criminal law also plays an important role in informing, shaping, and reinforcing societal norms. Children and adults learn what is wrong in part from what the law says is wrong. Where the law deviates too far from existing norms, its instructive function is impaired as well.

Maintaining consistency between the law and social norms is important not only in connection with deciding *which* conduct should or should not be criminalized. Such consistency is also vital in deciding *how much* to punish. If the legal system imposes more, or

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[23]Previous studies have sought to assess the public perception of the seriousness of various crimes, including theft offenses. However, none of these studies has held constant the amount of property stolen, the identity of the victim, and other variables; and none has varied only the means by which the theft was effected or the type of property stolen. See, e.g., Marvin Wolfgang et al., National Survey of Crime Severity (U.S. Department of Justice, Bureau of Justice Statistics, 1985); Paul H. Robinson & Robert Kurzban, Concordance and Conflict in Intuitions of Justice, 91 Minn. L. Rev. 1829 (2007); Michael O'Connell & Anthony Whelan, Taking Wrongs Seriously, 36 Brit. J. Criminology 299 (1996); M. Levi & S. Jones, Public and Police Perception of Crime Seriousness in England and Wales, 25 Brit. J. Criminology 234 (1985).

[24]See, e.g., Tom Tyler, Why People Obey the Law (1992).

[25]Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Cal. L. Rev. 1, 21 (2007). See also Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (Westview Press, 1995); Paul H. Robinson & John M. Darley, Testing Competing Theories of Justification, 76 N.C. L. Rev. 1095 (1998); John M. Darley et al., Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code, 39 Am. Behav. Scientist 405 (1996).

[26]Elizabeth Mullen & Janice Nadler, Moral Spillovers: The Effect of Moral Mandate Violations on Deviant Behavior, 44 J. Exper. Soc. Psych. 1239–45 (2008); Janice Nadler, Flouting the Law, 83 Tex. L. Rev. 1399–1441 (2005); Robinson & Darley, Intuitions of Justice, supra note 25, at 23; William Stuntz, Self-Defeating Crimes, 86 Va. L. Rev. 1871 (2000).

less, punishment on some crimes than citizens believe is deserved, the system seems unfair and it loses its credibility and, ultimately, its effectiveness.

What is ultimately at stake here is what Andrew Ashworth has called the "principle of fair labeling"—the idea that "widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences should be divided and labeled so as to represent fairly the nature and magnitude of the law-breaking."[27] As Ashworth puts it, "one of the basic aims of the criminal law is to ensure a proportionate response to law-breaking, thereby assisting the law's educative or declaratory function in sustaining and reinforcing social standards."[28] Where people consistently regard two or more types of conduct as different in terms of blameworthiness, the law ought to reflect those differences. Other things being equal, it ought to punish the more blameworthy act more severely and the less blameworthy act less severely.

All these considerations would seem to apply in the case of theft.[29] If the law treats some kinds of theft more, or less, harshly than people believe they should be treated, the law will seem unjust and out of step and likely to lose some of its moral authority and effectiveness. The same can be said if the law fails to criminalize some forms of theft that people believe should be criminalized, or criminalizes other forms of theft that people think should be free of criminalization.

The point is not that the criminal law should always follow popular opinion, or that people's moral intuitions are necessarily correct; it is simply that, in formulating an effective and authoritative criminal law, it is essential to know what people's intuitions are and where they diverge from current or proposed legal rules.

III. The Effects of Sentencing

As we have seen, the tendency of modern Anglo-American law has been to authorize the same punishment or range of punishments for a collection of theft offenses that, under earlier law, would have been subject to different punishments. The effect has been a flattening in the moral landscape of theft law. One might well wonder, however, whether some of the moral sensitivity that has been lost through legislative consolidation might be restored by judges on a case-by-case basis at sentencing.[30] For example, is it possible that even if the statutory

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[27]Andrew Ashworth, Principles of Criminal Law 89–90 (Oxford University Press, 4th ed. 2003). See also James Chalmers & Fiona Leverick, Fair Labelling in Criminal Law, 71 Modern L. Rev. 217 (2008).

[28]Ashworth, supra note 27, at 90.

[29]For a discussion of fair labeling in the context of theft, see C.M.V. Clarkson, Theft and Fair Labelling, 56 Modern L. Rev. 554 (1993); Stephen Shute & Jeremy Horder, Thieving and Deceiving: What is the Difference? 56 Modern L. Rev. 548 (1993); P.R. Glazebrook, Thief or Swindler: Who Cares? 50 Cambridge L.J. 389 (1991).

[30]Indeed, the Law Commission's commentary on the Theft Act explicitly noted that it was only the maximum penalties that were being standardized, and that judges would still be free to distinguish between theft type in determining specific sentences. Criminal Law Revision Committee, Eighth Report: Theft and Related Offences, Cmnd. 2977, 7–8 (1967).

punishments for extortion and receiving stolen property were identical, judges might nevertheless have a tendency to sentence one offense more harshly than the other?

The question is a reasonable one, but there are several grounds for skepticism. The first relates to the use of sentencing guidelines, which largely dictate the terms of sentencing in the United States and, to a lesser extent, in England. Is there evidence that state sentencing guidelines somehow restore moral content lost during consolidation? In an effort to answer this question, we examined schemes from six states with either complete or intermediate statutory consolidation: Maryland, Minnesota, Pennsylvania, Utah, Washington, and Wisconsin.[31] We found that such guidelines largely tracked the consolidated statutory provisions themselves. Indeed, the guidelines in Minnesota explicitly recommend that the offenses of theft by unlawful taking, receiving stolen property, refusing to return lost property, theft by false representation, theft by check, and theft of services, among other offenses, should all be "treated similarly."[32] To the extent that state guidelines do go beyond such statutory provisions, they tend to take account of factors such as: the amount of property stolen (by far the most important factor in all the guidelines we looked at); the kinds of property stolen (especially common aggravating factors included theft of firearms, motor vehicles, and livestock); and, less commonly, factors such as the motivation for the theft (e.g., greed vs. the need for basic necessities);[33] and the impact on, and vulnerability of, the victim.[34] The focus in England is also on the monetary value of the loss, in addition to factors such as the vulnerability of the victim and length of course of offending.[35] The closest thing we could find to an arguable restoration of moral content lost during consolidation was in several jurisdictions whose guidelines recognized an aggravating factor for "abuse of trust" or "misappropriation by fiduciaries."[36] In short, we think that the impact of sentencing guidelines in this context is, at most, minimal.

Somewhat harder to assess is the extent to which moral content might be restored by individual judges making discretionary sentencing decisions in specific cases. The problem is that few data on the sentencing of specific forms of theft are currently maintained. (This is, we suspect, in large part because statutory consolidation has mostly eliminated the need

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[31]Maryland Sentencing Guidelines Offense Table, Appendix A at 43; Minnesota Sentencing Guidelines at 57; Pennsylvania Sentencing Guidelines at 25–30; Utah Sentencing Guidelines at 13; Washington Adult Sentencing Manual 2008, tbl. 2; Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines at 1. The value of property stolen is also the most important factor in the federal sentencing guidelines. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1) (containing detailed enhancement schedule based on value of property stolen).

[32]Minnesota Sentencing Guidelines at 73–74.

[33]Wisconsin Sentencing Guidelines: Worksheet, Theft—More than $10,000.

[34]Wisconsin Sentencing Guidelines at 4.

[35]Sentencing Guidelines Council, Guidelines on Theft and Burglary in a Building Other than a Dwelling (2008), available at <http://www.sentencing-guidelines.gov.uk/docs/Theft%20and%20Burglary%20of%20a%20building%20other%20than%20%20dwelling.pdf>.

[36]See USSG Manual § 3B1.3; Guidelines on Theft, pt. E3 (England); Maryland Sentencing Guidelines Manual at 43; Minnesota Guidelines; Wisconsin Guidelines.

for such data.) The most comprehensive set of data concerning length of sentences imposed in U.S. state courts is that maintained by the Department of Justice's Bureau of Justice Statistics. The latest available data show that, in 2004, the aggregate median sentence for offenders convicted of robbery was 60 months; for burglary, 36 months; fraud, 24 months; motor vehicle theft, 24 months; and larceny, 16 months.[37] Such data are of very limited value for present purposes. For one thing, they tell us nothing about sentencing for such key offenses as embezzlement, extortion, blackmail, receiving stolen property, and failing to return lost property. Moreover, even with respect to robbery, burglary, and larceny, they tell us little that is useful. Information regarding what is undoubtedly the single most important variable in all the cases (with the possible exception of robbery)—namely, the amount of property stolen—is not included in the data set, and thus cannot be controlled. Indeed, the fact that the median sentence for fraud was longer than the median sentence for larceny even though our empirical findings indicated that people tended to view larceny as the more serious crime is probably best explained by the fact that fraud is more likely to involve the theft of higher-value property than larceny. Nor does the BJS report tell us anything about the possibility that some forms of theft may involve a higher level of recidivism, another key factor in determining sentences.[38]

Data obtained directly from individual states also do little or nothing to support the view that sentencing in practice restores moral content removed by consolidation. For example, the Washington State Statistical Summary of Adult Felony Sentencing tells us what percentage of defendants convicted of various forms of theft—identity theft, retail theft, theft of a firearm, theft of livestock, theft of telecommunications, theft of rental or leased property, and theft of a motor vehicle—were sentenced to prison and what percentage were sentenced to nonprison.[39] Data from Maryland indicate the average length of sentence for robbery, burglary, felony theft, and misdemeanor theft.[40] Data from Florida indicate what percentage of those convicted of what is referred to as "property theft/fraud/damage" were sent to state prison, what percentage were put on probation, and what percentage were sentenced to county jail.[41] None of these reports answers the question posed regarding the

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[37]U.S. Department of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties—2004, tbl. 26, available at <http://www.ojp.usdoj.gov/bjs/pub/html/fdluc/2004/tables/fdluc04st26.htm>. For a study examining differences between sentences for armed and unarmed robbery, larceny, and burglary, see Henry R. Glick & George W. Pruett, Jr., Crime, Public Opinion and Trial Courts: Analysis of Sentencing Policy, 2 Just. Q. 319 (1985).

[38]For a discussion of the variables that most affected the length of sentence in theft cases, see Roger Douglas, Sentencing in the Suburbs I: Theft and Violence, 13 Aust. & N.Z. J. Criminology 241 (1980); Matthew Zingraff & Randall Thomson, Differential Sentencing of Women and Men in the U.S.A., 12 Int'l J. Soc. L. 401 (1984); Robert Tillman & Henry N. Pontell, Is Justice "Collar-Blind"? Punishing Medicaid Provider Fraud, 4 Criminology 547 (1992).

[39]State of Washington, Sentencing Guidelines Commission, Statistical Summary of Adult Felony Sentencing (Fiscal Year 2008).

[40]Maryland State Commission on Criminal Sentencing Policy, Maryland Sentencing Guidelines Compliance and Average Sentence for the Most Common Person, Drug and Property (Fiscal Year 2007) (unpaginated).

[41]Florida Department of Corrections, Bureau of Research and Data Analysis, Florida's Criminal Punishment Code: A Comparative Assessment (Sept. 2007).

restoration of moral content. Without further, extensive study of files in individual cases, we simply cannot conclude that moral content of the sort that concerns us here is routinely being restored by judges at sentencing; the hypothesis remains nothing more than that.

Additionally, even if it could be demonstrated that judges *were* exercising their limited discretion at sentencing to "correct" for the effects of consolidation, a separate problem would remain. Under the MPC approach to consolidation, an "accusation of theft may be supported by evidence that it was committed in any manner that would be theft under [the relevant law], notwithstanding the specification of a different manner in the indictment or information."[42] Indeed, in various cases, prosecutors have been successful in obtaining conviction of a defendant for one form of theft (such as larceny or false pretenses) on the basis of evidence that he or she committed a different form of theft entirely (such as extortion or receiving stolen property).[43] To the extent that such results are regarded as unfair (and we believe they are), this is not a problem that can easily be fixed by sentencing guidelines or individualized sentencing decisions.

Finally, even if judges and prosecutors did their utmost to correct for the errors of consolidation, we believe our main point about the principle of fair labeling would still stand: the concern of fair labeling is to ensure that widely felt moral differences between criminal offenses are respected and signaled by the law. The clearest, most transparent, and most consistent way to do this is through legislation. Even if judges or prosecutors were to correct for the overly broad classification system in some individual cases, this still would not resolve the basic problem raised by consolidation.

IV. Method

A. Participants

There were 172 participants in the study. All were first-year Rutgers–Newark law students who completed the study during their orientation period, prior to the start of classes.[44] Six participants did not rank all the scenarios for the first set of scenarios and their data were excluded from all analyses for both sets. Of the remaining 166 participants, 80 were

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[42]MPC § 223.1(1). This rule is "subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise."

[43]See, e.g., Commonwealth v. Louis, 445 A.2d 798 (Pa. Super. Ct. 1982) (evidence of robbery and larceny sufficient to support charge of receiving stolen property); State v. Jonusas, 694 N.W.2d 651 (Neb. 2005) (charge of false pretenses proved on evidence of larceny); State v. Talley, 466 A.2d 78 (N.J. 1983) (defendant charged with robbery convicted on evidence of false pretenses); State v. Hill, 332 A.2d 182 (N.H. 1975) (theft of services conviction allowed to stand on evidence of larceny).

[44]On the use of law student subjects in such studies, see Joshua Dressler et al., Effect of Legal Education upon Perceptions of Crime Seriousness: A Response to *Rummel v. Estelle*, 28 Wayne L. Rev. 1247 (1982).

male, 85 were female, and one did not report his or her sex. The sample was predominantly white (109), though there were also African-American (19), Hispanic (13), and South- or East-Asian (18) students. Seven participants did not report ethnicity or were multiracial. Participants were not required to participate in the study nor were they given compensation for having done so.

B. Procedure

Participants were recruited during their law school orientation week. The study was conducted in an auditorium setting, with all participants being run at the same time. As study materials were distributed, participants were told that they would be asked to evaluate two sets of stories related to theft offenses. The first set (12 stories) concerned the theft, by various means, of a $350 bicycle. These 12 scenarios were pasted on index cards. Participants were asked to sort the cards from most to least blameworthy, record that order on an answer sheet, and then rate the blameworthiness of and assign a prison sentence for each scenario. Ties were permitted in the rank order.

The second set of stories concerned the theft of a $50 study aid. The form of the study aid varied. It was either a physical book, a downloaded electronic file containing the text of the book, a seat at a lecture for which the hall had empty seats (thus the illicit attendee did not prevent a paying customer from attending), or a seat at a lecture for which the hall did not have any empty seats (paying customers were thereby denied admission). These vignettes were presented as paired comparisons between scenarios of interest. Participants were asked whether one story was more blameworthy than the other and, if so, which one. They also rated the scenarios' blameworthiness on a 1–9 scale.

C. Set 1—Theft by Various Means

The first set of stories concerned the theft of a $350 bicycle. The victim, Owen, was described in the instructions as having a good job, a family, and a desire to get in better shape by riding his new bicycle. The thief, Tom, is described as living alone in an apartment, holding a modest job, and being able to meet all his basic needs. Varying across scenario were the circumstances under which Tom acquired the bicycle.

1. Scenarios

Subjects were asked to assess the wrongfulness of, and assign a penalty to, thefts that varied in method. The methods were as follows.

a. Armed Robbery and Simple Robbery. The offense of robbery consists of taking property by means of force or the threat of force. It is the only form of theft that involves aggressive physical contact or the threat of physical contact between offender and victim. The grading of robbery varies significantly from jurisdiction to jurisdiction. Under the English Theft Act, no distinction is made between robberies committed by means of force that causes serious physical injury and robberies committed by means of mild force, such as a bump, a push,

or a pull.[45] Under the MPC, by contrast, only those thefts involving the infliction, or threat, of immediate serious bodily injury are treated as robbery and subject to heightened punishment.[46] If the theft involves only minimal force, the MPC treats it as "ordinary theft."[47] Many states follow yet a third approach, treating thefts involving mild force as "simple" or "second-degree" robbery or "purse snatching," and thefts involving more violent force or threats as "armed," "aggravated," or "first-degree" robbery.[48] In what we refer to here as armed robbery, Tom threatens Owen with a gun. In the simple robbery scenario, Tom grabs the bike from Owen's hands.

b. Extortion and Blackmail. Extortion and blackmail both involve obtaining property from a victim by means of coercing the victim's consent.[49] The coercion invalidates the consent, making the act theft.[50] As the terms are used here, "extortion" refers to cases in which the future threatened conduct is itself unlawful, while "blackmail" refers to cases in which the future threatened conduct is not itself unlawful.[51] In the extortion scenario, Tom threatens to burn down Owen's house if he does not hand over the bicycle. The conduct threatened—arson—is itself illegal. In the blackmail scenario, Tom threatens to spread embarrassing photos of Owen to Owen's boss if the bicycle is not surrendered. Here, the conduct threatened—spreading embarrassing photos—is not itself illegal. The MPC makes no distinction between extortion and blackmail; it uses the term "extortion" to refer to both kinds of cases and treats them as equal in seriousness to, and interchangeable with, other forms of theft, such as larceny, embezzlement, receiving stolen property, failing to return found property, and the like.[52] The English Act also does not distinguish between the two kinds of act; instead, it uses the term "blackmail" to refer both to threats to do what is lawful

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[45]See Theft Act 1968 § 8 (punishment is life imprisonment). For a critique of English law's failure to distinguish between aggravated and simple robbery, see Andrew Ashworth, Robbery Reassessed, 2002 Crim. L. Rev. 851 (pointing out that the law surrounding assault, at least in England, is much more finely graded than that surrounding robbery).

[46]MPC § 222.1 (second-degree felony). If the infliction or attempted infliction is purposeful, then it is treated as a first-degree felony.

[47]MPC § 223.2; MPC, Comments to Section 222.1, at 108.

[48]E.g., N.Y. Penal Law Arts. 160.05 (third-degree robbery is forcible stealing), 160.10 (second-degree robbery is forcible stealing causing physical injury or involving the display of what appears to be a weapon), 160.15 (third-degree robbery is forcible stealing causing serious physical injury or involving a deadly weapon); La. Rev. Stat. Arts. 14:64 (armed robbery), 14:64.1 (first-degree robbery), 14:64.4 (second-degree robbery), 14:65 (simple robbery), 14:65.1 (purse snatching).

[49]E.g., Hobbs Act, 18 U.S.C. § 1951.

[50]See Stuart P. Green, Consent and the Grammar of Theft Law, 28 Cardozo L. Rev. 2505, 2515–16 (2007).

[51]Stuart P. Green, Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime 214 (Oxford University Press, 2006).

[52]MPC § 223.4.

and threats to do what is unlawful, and imposes a higher maximum penalty on both acts than for basic theft.[53]

c. Theft Following Burglary. In this scenario, Tom steals the bicycle after breaking into Owen's house. The scenario loosely tracks the offense of burglary, which consists of breaking and entering of another's dwelling with the intent to commit a theft or other felony therein.[54] Both the MPC and the Theft Act treat burglary as an offense separate from theft.[55] The MPC treats burglary as a felony of the second degree if it is perpetrated at night; otherwise, it is a felony of the third degree (the same as theft).[56] The English Theft Act treats burglary as a significantly more serious offense than theft, imposing a maximum term of 14 years if it involves a dwelling and 10 years in other cases (whereas the maximum term for theft is only seven years).[57]

d. Larceny. The common-law offense of larceny is the unlawful or dishonest taking of property from another with the intent to deprive him or her of it permanently.[58] Neither the MPC nor the English Theft Act has a separate offense of larceny. In the MPC, the closest analogue is the offense of theft by unlawful taking or disposition, which is interchangeable with and subject to the same punishment as false pretenses, extortion, failing to return lost or misdelivered property, and receiving stolen property.[59] The English Theft Act folds larceny into the general offense of theft.[60] We regard larceny as a kind of baseline form of theft; the offender simply takes the property from the victim, without the victim's knowledge or consent. Here, Tom picks the lock on Owen's bicycle (which is located outdoors). The seriousness of the theft is neither aggravated nor mitigated by additional factors.

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[53]Theft Act 1968 c. 60, § 21.

[54]Joshua Dressler, Understanding Criminal Law 410 (Lexis, 4th ed. 2006). Technically, burglary does not require any actual theft; the primary focus of the offense is the unlawful entry itself. Thus, the scenario presented here corresponds more precisely to the Scottish offense of "Theft by Housebreaking," an aggravated form of theft that consists of stealing by means of unlawful entry. See Gerald Gordon, The Criminal Law of Scotland vol. 2, 57 (Michael Christie, ed., 3d ed. 2001). We use the term *burglary* simply because it will be more familiar to most readers.

[55]Theft Act 1968 § 9; MPC § 221.1.

[56]MPC § 221.0.

[57]Theft Act 1968 § 9.

[58]Dressler, supra note 54, at 592.

[59]MPC § 223.

[60]Theft Act 1968 § 1.

e. Embezzlement. Embezzlement is the fraudulent taking of property with which one has been entrusted.[61] For this scenario, Tom is an employee at a bicycle shop who was entrusted with the bicycle for repairs. The MPC has no separate offense of embezzlement; what was embezzlement is covered by the same broad language of Section 223 that covers the other common-law theft offenses.[62] The Theft Act also folds embezzlement into the general offense of theft.[63]

f. Looting. The commission of looting typically involves an offender who makes an unauthorized entry into a home or business in which the normal security of property is not present by virtue of some natural disaster or civil disturbance, and thereby obtains control over, damages, or removes the property of another.[64] At common law, there was no offense of looting; such acts would typically be treated as larceny or burglary. Nor is looting treated as a distinct offense under the MPC or the Theft Act. A handful of states, however, have enacted specialized looting provisions.[65] Looting reflects what may be a uniquely wide range of moral blameworthiness, arrayed along a continuum of bad to good.[66] It can be very wrongful indeed in those cases in which it manifests predation and exploitation, but there are also cases of "good looting," in which otherwise law-abiding citizens are driven to loot from necessity. The scenario used here captured the exploitative case: Tom steals the bicycle in the aftermath of a hurricane with the intent of later selling it.

g. False Pretenses. This scenario involves a case of fraud or false pretenses, defined at common law as knowingly obtaining title to another's property by means of a lie or misrepresentation.[67] Tom in this case takes the bicycle under a false promise to return the next day with payment. The MPC treats "Theft by Deception" (its label for false pretenses) as interchangeable with, and subject to the same punishment as, larceny, embezzlement, extortion, receiving stolen property, and failing to return lost property.[68] The English Fraud Act 2006, by contrast, treats it as a separate and potentially more serious offense.[69] As in the case of extortion, blackmail, and embezzlement, false pretenses involves obtaining property

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[61]Dressler, supra note 54, at 609–10.

[62]MPC § 223.

[63]Theft Act 1968 § 1.

[64]See, e.g., La. Rev. Stat. § 14:62.5.

[65]Stuart P. Green, Looting, Law, and Lawlessness, 81 Tulane L. Rev. 1129, 1140–42 (2007).

[66]Id.

[67]Dressler, supra note 54, at 611–12.

[68]MPC § 223.3.

[69]Fraud Act 2006 § 2.

with the victim's consent, but once again, the consent obtained is invalid. Some commentators have suggested that unlike the victim of extortion and embezzlement, the victim of false pretenses deserves some of the blame for the offender's act; they argue that the victim should have known better.[70]

h. Passing a Bad Check. In this scenario, Tom is again purchasing the bicycle from Owen. Tom pays Owen with a check that Tom knows the bank will not cover. Under the MPC, writing a bad check is treated as a distinct, lesser offense, separate from theft, and punishable as a misdemeanor.[71] In Britain, bad checks are addressed under the Fraud Act 2006 as a potentially more serious offense.[72] The crime of knowingly writing a bad check is hard to distinguish, as a matter of proof, from the noncriminal act of accidentally writing a check for which there are insufficient funds.[73]

i. Failing to Return Lost or Misdelivered Property. In this scenario, Owen's bicycle is mistakenly delivered to Tom and Tom makes no effort to notify Owen or the delivery service of the error, instead keeping the bicycle for himself. Under both English and U.S. law, anyone who receives misdelivered property or finds lost property is guilty of theft if he or she does not take reasonable measures to restore the property to its proper owner.[74] The MPC treats this offense as interchangeable with the other basic theft offenses and subjects it to the same punishment.[75] The English Theft Act makes no explicit reference to theft by finding, though as J. C. Smith noted, with one important exception, the Act is "obviously intended" to preserve the substance of the common-law rule.[76] Failure to return property is unusual among theft offenses in that it involves an omission rather than an act.

j. Receiving Stolen Property. This scenario involves a case of receiving (or handling, in English usage) stolen property, defined as the possession or acquisition of property known to have

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[70]Vera Bergelson, Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law, 8 Buff. Crim. L. Rev. 385, 426 (2005); Bernd Schünemann, The Role of the Victim Within the Criminal Justice System: A Three-Tiered Concept, 3 Buff. Crim. L. Rev. 33, 39–40 (1999) (citing additional German sources).

[71]MPC § 224.5.

[72]Ormerod & Williams, supra note 12, at 152–53.

[73]See generally Ian Ayres & Gregory Klass, Insincere Promises: The Law of Misrepresented Intent (Yale University Press, 2005).

[74]Rollin M. Perkins & Ronald N. Boyce, Criminal Law 308–14 (3d ed. 1982).

[75]MPC § 223.5.

[76]J.C. Smith, The Law of Theft § 2-117, at 70–71 (Butterworths, 8th ed. 1997). The exception can be found in § 3(1), which states that "[a]ny assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."

been stolen by another.[77] Tom buys Owen's bicycle from a person who claims to have stolen it from Owen. Once again, the MPC treats this form of theft as equivalent to the other forms of theft, and subject to the same punishment.[78] The English Theft Act both continues to treat "Handling Stolen Goods" as a separate offense and subjects it to the possibility of even harsher maximum penalties than theft itself.[79]

At the end of every vignette it was clearly stated that Tom had possession of the bicycle and did not intend to return it (see Appendix A for full text). These descriptions were printed on index cards that were labeled with random letter combinations (e.g., "ZR" rather than "receiving stolen property"). The cards were shuffled so that the order of the cards was randomized for each participant. Participants were told to read through the scenarios and sort them by blameworthiness. They were then to record the ranking on an answer sheet. If scenarios were tied by blameworthiness, participants could indicate this by writing their codes on the same line or by making a note. They then rated each story's blameworthiness on a 1–9 scale and assigned a sentence. Previous work has shown that the moral blameworthiness of an offense is a very strong predictor of punishment severity.[80] In verbal instructions, the experimenter informed participants that the sentence for thefts of this type could range from no punishment or a few days up to 20 years in extreme cases.

2. Results and Discussion

Participants assigned a sentence to each scenario and ranked them in order of blameworthiness. Ties in rank-order data were entered as the midpoint of the tied range. An example may help. If theft by deadly threat was ranked as the most serious offense, it received a 12. If the next two crimes were tied, then each would be given a rank of 10.5 (falling midway between 10 and 11). The next crime would have a rank of 9, and so on.

Participants rated punishment in terms of days, weeks, and years. All data were converted into weeks for the purpose of analysis. For sentences of less than three months, duration was rounded to the half-week. Sentences of less than half a week were rounded up

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[77]Jerome Hall, Theft, Law, and Society, ch. 5 (Bobbs-Merrill, 2d ed. 1952).

[78]MPC § 223.6.

[79]The maximum penalty for handling is 14 years, Theft Act 1968 § 22, while the maximum penalty for theft is only seven years, § 7. From this, one might infer that the Theft Act regards handling as more wrongful than theft. In fact, the real reason for the differential is less straightforward. According to the Criminal Law Revision Committee Report, there might be cases in which a court is called on to sentence an offender who receives property obtained in a robbery, rather than just a theft. Because the penalty for robbery is higher than that for theft (indeed, the maximum penalty for robbery is life in prison, Theft Act 1968 § 8), the Committee apparently felt that a court should have the option of imposing a higher penalty for receiving, if only in such cases. Criminal Law Revision Committee, Eighth Report: Theft and Related Offences, Cmnd. 2977, 143, at 69 (1967).

[80]See Adam L. Alter, Julia Kernochan & John M. Darley, Transgression Wrongfulness Outweighs its Harmfulness as a Determinant of Sentence Severity, 31 Law & Hum. Behav. 319 (2007); Kevin Carlsmith, John M Darley & Paul Robinson, Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment, 83 J. Personality & Soc. Psych. 284 (2002).

Table 1: Evaluations of Scenarios from Set 1

	Rank			*Sentence*			*Blameworthiness*		
Receiving stolen property	2.13	g	(1.30)	0.11	h	(0.18)	4.39	f	(2.34)
Failing to return misdelivered property	2.27	g	(1.56)	0.12	h	(0.24)	4.37	f	(2.37)
False pretenses	4.46	f	(1.83)	0.35	g	(0.36)	6.11	e	(2.01)
Passing a bad check	4.71	f	(1.93)	0.40	g	(0.41)	6.30	e	(2.05)
Looting	5.74	e	(2.56)	0.58	f	(0.55)	6.51	d,e	(2.01)
Embezzlement	5.98	e	(1.95)	0.55	f	(0.47)	6.88	c,d	(1.78)
Larceny	6.84	d	(1.79)	0.69	e,f	(0.51)	7.22	c	(1.56)
Blackmail	7.23	d	(3.14)	0.86	d,e	(0.76)	6.94	c	(2.04)
Simple robbery	8.38	c	(2.11)	1.00	d	(0.78)	7.70	b	(1.39)
Theft following burglary	8.53	c	(1.83)	1.24	c	(0.76)	7.73	b	(1.44)
Extortion	9.79	b	(2.25)	1.98	b	(1.22)	8.10	b	(1.41)
Armed robbery	11.86	a	(0.48)	4.10	a	(1.97)	8.95	a	(0.25)

NOTE: Means (standard deviations in parentheses) for all scenarios from the first set. Higher numbers indicate more blameworthy ranks, longer sentences, and higher blameworthiness scale scores. Means not sharing subscripts are significantly different at the $p < 0.05$ level.

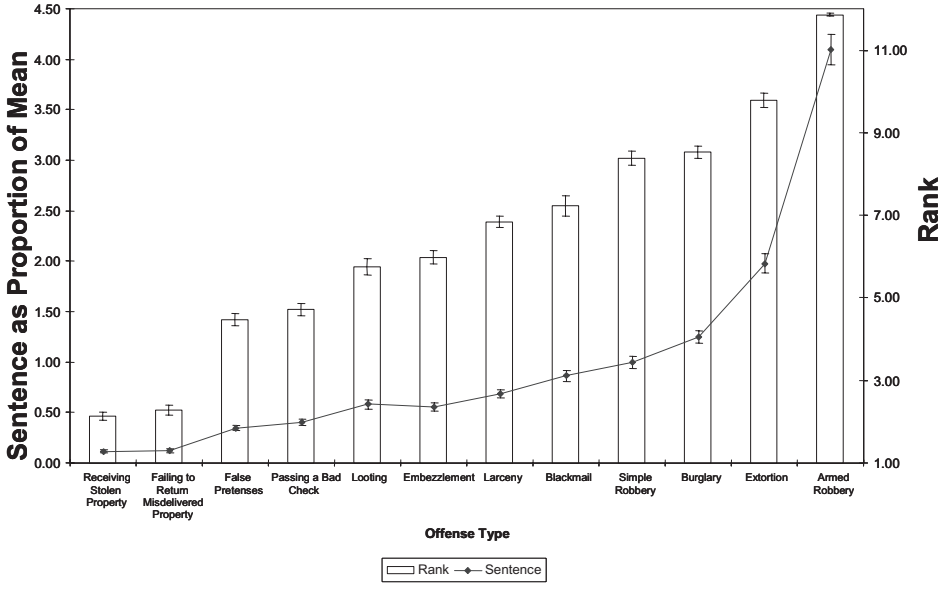
to half a week if they were greater than one day (one-day sentences were rounded down to zero weeks). There was considerable variation in sentencing across participants. Some participants assigned a maximum sentence of many years; others, just a few weeks. As our key interest was how severely participants wished to punish each case relative to the other cases, we divided a person's sentence for a given scenario by his or her average sentence. Thus, the sentencing data are proportional in nature. This transformation also makes the sentencing data conform to statistical assumptions of normality.[81]

Data from all measures were remarkably consistent. In Table 1, all means and standard deviations are reported. For each measure, those means that share a subscript are not significantly different from each other.[82] For the rank-order data, we have a clear pattern. Theft using deadly threat (armed robbery) is considered the most blameworthy by a considerable margin. Extortion by threat of arson is a step below. Breaking into Owen's house and stealing from his basement (burglary) is tied in the ranking with grabbing the bike from his hands on the street (simple robbery), though the former receives a slightly more severe sentence. On the next step, we have blackmail and taking the bike from Owen's porch (larceny). Below those are embezzlement (Tom-as-employee stealing the

[81]Before the transformation, the sentence scores of 9 of the 12 scenarios were extremely skewed (skew > 3) and 9 had extreme kurtosis (>10). After the transformation, none of the 12 had extreme skew or kurtosis. It is thus appropriate to assume that the transformed scores have sufficiently normal distributions for parametric analysis. See Rex B. Kline, Principles and Practice of Structural Equation Modeling (Guilford Press, 2d ed. 1998).

[82]Data were analyzed using ANOVAs with crime type as a within-subjects factor. Crime type affected ratings of blameworthiness F (6.77, 1112.8) = 160.03, $p < 0.001$ $\eta^2 = 0.49$; the assigned sentence F (3.05, 500.25) = 267.50, $p < 0.001$ $\eta^2 = 0.62$; and ranking order F (6.43, 1050.17) = 325.71, $p < 0.001$ $\eta^2 = 0.66$. Greenhouse-Geisser corrections were performed for all analyses due to violations of sphericity. Crimes with nonoverlapping 95 percent confidence intervals for a given measure were deemed to have differed significantly on that measure. Analyzing the rank-order data with a nonparametric Wilcoxon test yields identical results.

Figure 1: Sentence and rank-order ratings for the various means of theft (Set 1).



NOTE: All error bars are +/−1 standard error of the mean.

bike from the repair shop) and looting the bike for profit after the storm. Tied below those are the two cases of fraud—false pretenses and passing a bad check. Least blameworthy are receiving stolen property and failing to return misdelivered property. The rank-order data are expressed in bar chart form in Figure 1 (scale on the right axis).

The sentence data strongly support the rank-order data. The sentence for theft by blackmail falls between that of theft by minimal force and larceny and fails to be significantly different from either, but the significant differences in the rank order otherwise replicate perfectly. Coincidentally, the mean sentence for theft with minimal force is 1.00. This means that theft with minimal force received the average sentence. Theft with deadly threat has a score of 4.20, meaning it received, on average, 4.2 times that sentence. Because the scale is proportional, it is also possible to say that theft by means of a bad check (0.40) received on average 3.33 times the punishment as retaining misdelivered property (0.12). The sentence data are expressed as a line graph in Figure 1 (scale on the left axis). The blameworthiness rating scale data are consistent with both the rank-order and sentence data. Differences on the blameworthiness scale are less clear than on the other measures because there was a ceiling effect; some participants considered all methods to be very blameworthy and the distinctions that they drew on other measures were not well reflected on this one.

Several clear distinctions can be drawn across all three measures. First, armed or aggravated robbery (theft by deadly threat) was regarded as significantly more blameworthy and more deserving of punishment than any of the other theft offenses. Such intuitions are more consistent with the law in those states, such as New York, that distinguish between

first- and second-degree robbery than it is with the MPC (which treats as robbery only those thefts involving serious harm or threat of harm) or the English Theft Act (which does not distinguish between more and less serious forms of robbery).

One step below armed robbery was extortion—taking Owen's property by threatening to do an unlawful act (namely, burning down his house). Participants viewed this scenario as much more blameworthy than the blackmail scenario (theft by threatening to circulate embarrassing photos of Owen). There are several possible explanations for this. One is that the conduct threatened in the first scenario is unlawful, while the conduct threatened in the second is not. A second is simply that arson is a more wrongful act than circulating embarrassing photos. A third possibility is that Owen might have been viewed as somehow partly responsible for his plight in the blackmail scenario in a way that he was not in the extortion scenario. Whatever the explanation, our subjects' intuitions differed from current law. To the extent that neither the MPC nor the English Theft Act distinguishes between theft by threats that are lawful and threats that are not, they are inconsistent with community perceptions.

On the step following armed robbery and extortion were breaking into Owen's house to steal from his basement (burglary) and grabbing the bike from his hands on the street (simple robbery), though the former received a slightly more severe sentence. Immediately below these were blackmail and taking the bike from Owen's porch (larceny). It is consistent with the MPC and the Theft Act that burglary was seen as worse than simple larceny; burglary receives elevated sentencing in both codes. It may be that the added component of invasion of the victim's home in the burglary case is seen as an aggravating factor. With respect to the simple robbery scenario, our subjects' attitudes were consistent with the elevated sentencing that occurs in non-MPC jurisdictions.

Below larceny and blackmail were embezzlement and looting the bike for profit after the storm. We were somewhat surprised by these results. Embezzlement involves a betrayal of trust and looting a form of exploitation that arguably aggravate their seriousness and might have been expected to cause them to be rated as more blameworthy. Neither the MPC nor Theft Act distinguishes these cases from simple theft.

One of the most theoretically interesting categories of cases was that of fraud. Obtaining the bicycle by falsely promising to pay the seller later or by writing a worthless check was seen as substantially less blameworthy than merely walking off with it (larceny). This could be seen as somewhat counterintuitive, as fraud involves the additional wrong of deception. One possible explanation is that participants thought the victim of false pretenses was partly to blame for his plight. As noted earlier, the MPC treats passing a bad check as less serious than most other forms of theft and false pretenses as equivalent; the English Fraud Act treats both passing a bad check and false pretenses as potentially more serious than other forms of theft. Given the complexity of such crimes and the varied ways they have been treated across time and jurisdictions, this might well be an area for further study.

At the very bottom of the blameworthiness and deserved punishment rankings were retaining misdelivered property and receiving stolen property. In fact, both offenses often received no punishment at all. These are interesting cases in that the actor being judged did not cause the victim's initial loss of property. In one case, Tom received an object in error and only then decided to retain it; in the other, Tom knowingly benefited from the wrongful

act of another. To the extent that our subjects ranked these acts as less serious than every other form of theft, their judgments were inconsistent with both the MPC and the Theft Act.

That citizens drew so many and such large distinctions among these means of theft is surprising from the standpoint of the consolidation of theft law. The U.S. MPC and the English Theft and Fraud Acts recognize minimal distinctions between the various means of theft. Armed robbery and simple robbery receive elevated punishment and most other forms of theft (with some variance in fraud) are treated as approximately equal by those standards. This is a stark contrast with our participants' assessments.

D. Set 2—Varying the Form of Property Subject to Theft

In the second set of scenarios, subjects were asked to compare the blameworthiness of thefts of property that had the same monetary value but were of different kinds (tangible good, service, intangible good, and so forth).

The question whether theft of intangible property should be regarded as morally equivalent to theft of tangible property is one that has figured in various debates in both popular and academic culture in recent years. Many observers have wondered why people who would never think of walking into a store and shoplifting a CD or DVD nevertheless seem to have little hesitation in downloading music and video from the Internet without permission.[83] The movie and music industries have waged major public relations efforts aimed at convincing people that Internet "piracy is theft" and that "pirates are thieves."[84] Whatever the success of these efforts, the incidence of unauthorized downloading of material from the Internet remains far higher than the incidence of theft of tangible goods.[85] The public opinion surveys that have been conducted indicate that a majority of people believe that such downloading is less wrongful than theft of tangible property (if wrongful at all).[86]

Although much has been written concerning the theft of intangibles, we are unaware of any previous studies testing people's attitudes concerning the theft of services. As we have

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[83]See, e.g., Oliver R. Goodenough & Gregory Decker, Why Do Good People Steal Intellectual Property? (Gruter Institute Working Papers on Law, Economics, and Evolutionary Biology, vol. 4, article 3), available at <http://www.bepress.com/giwp/default/vol4/iss1/art3>; Stuart P. Green, Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights, 54 Hastings L. Rev. 167 (2002); Geraldine Szott Moohr, Federal Criminal Fraud and the Development of Intangible Rights in Information, 2000 U. Ill. L. Rev. 683.

[84]Motion Picture Association of America, Internet Piracy, available at <http://www.mpaa.org/piracy_internet.asp>; see also Recording Industry of America, Piracy: Online and on the Street, available at <http://www.riaa.com/physicalpiracy.php>.

[85]Geraldine Szott Moohr, Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws, 54 Am. U. L. Rev. 783, 808 (2005).

[86]Jared M. Hansen & Eric A. Walden, It's Not Stealing, It's Just Borrowing: Understanding Consumer's [sic] Perceptions of the Legal and Ethical Implications of Sharing Intellectual Property (Dec. 5, 2008), available at <http://ssrn.com/abstract=1311988>; John Fetter, Penny for Your Thoughts, Am. Demographics (Sept. 1, 2000), available at <http://www.encyclopedia.com/doc/1G1-67001140.html>; G. Stephen Taylor & J.P. Shim, A Comparative Examination of Attitudes Toward Software Piracy Among Business Professionals and Executives, 46 Hum. Rel. 419, 430 (1993).

seen, while the MPC treats the theft of services as equivalent to theft of goods, the English Theft Act treats it as a lesser offense. We therefore think it is worth asking whether the public regards a person's stealing a ride on a train or a seat at a performance as any more or less wrongful than a person's stealing a tangible object.

As noted previously, the modern trend has been to define the kinds of "property" subject to theft more broadly than at common law. The MPC defines property subject to theft as "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power."[87] Theft of services is also treated under the broad umbrella of Section 223's definition of theft and subject to the same punishment as theft of any other form of property.[88] The Theft Act defines property subject to theft as "money and all other property, real or personal, including things in action and other intangible property."[89] Theft of services is dealt with separately under Section 11 of the Fraud Act 2006, replacing the former offense of "Obtaining Services by Deception" under Section 1 of the Theft Act 1978,[90] and subjecting a convicted defendant to a maximum penalty of five years.[91]

1. Scenarios

We devised a story in which participants were asked to compare four pairs of scenarios that involved the stealing of property in one of four distinct forms: (1) in the form of a tangible good (a book); (2) in the form of an intangible good (a computer file downloaded from a website); (3) in the form of a service the supply of which was limited (attendance at a lecture in which the hall was full); and (4) in the form of a service the supply of which was not limited (attendance at a lecture in which the hall was half empty). In each case, the stolen property was described as a test preparation tool prepared by ABC Test Prep that had a price of $50.

Participants were presented with paired alternatives. Pair 1 asked them to compare theft of the physical book (a tangible good) and the electronic book (an intangible good). We predicted that the theft of the physical book would elicit more punishment. Having had its book stolen, ABC Company was deprived not only of the revenues from the sale of the book it otherwise might have made, but also of the investment it had made in the paper, ink, and glue from which the book was constructed.

Pair 2 asked participants to compare the theft of a physical book and a service, illicitly attending a lecture. We predicted that stealing the book would be seen as more

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[87]MPC § 223.0(6).

[88]MPC § 223.7.

[89]Theft Act 1968 § 4.

[90]Fraud Act 2006 § 11.

[91]Fraud Act 2006 § 11(3)(b).

blameworthy, reflecting the common-law distinction between goods and services. We decided to make it clear that the service had a limited and depleted supply, by saying that the lecture hall was full. This allowed us to conservatively test the strength of the good/service distinction by holding constant these potentially confounding factors.

In Pair 3, we tested whether it mattered that the service had been depleted through theft by comparing the empty seat lecture hall scenario to the full lecture hall scenario. In the empty seat story, illicitly attending the lecture does no immediate harm; no additional burden is placed on the test preparation company and no other customer is inconvenienced. In the full lecture hall scenario, illicitly attending costs the test company the admission fee of the person who otherwise would have attended and prevents that potential customer from obtaining the service. We predicted that the theft of the depleted service would be seen as more blameworthy because of the greater burdens it imposes.

Pair 4 compared the intangible (and effectively undepletable) good of the electronic book to the undepleted service, the lecture hall that had empty seats. Unlike theft of a physical book, theft of a computer file involves no obvious loss to the victim. The company still "has" the file on its webpage or server even after it has been downloaded by Sally. ABC incurs no additional costs by virtue of having the file taken by Sally. The only thing ABC has lost is the opportunity to sell the file to Sally herself. This parallels the undepleted service closely. All scenarios are printed in Appendix B.

These four paired comparisons were presented to participants on a single sheet of paper. They were asked to record whether they found one scenario more blameworthy than the other and, if so, which one. They also rated the scenarios' blameworthiness on a 1–9 scale.

2. Results and Discussion

The choice of blameworthiness data are presented in Table 2. In each pair, the predicted pattern was observed. In Pair 1, people thought that stealing the tangible good (physical book) was more blameworthy than stealing the intangible good (electronic book). This result can be understood in terms of the economic concept of rivalrousness. Sally (the thief) and ABC (the victim) are in a rivalrous relationship with each other when the book is stolen. If Sally possesses the book, then no one else, including its owner, ABC, can possess it at the same time. The electronic book does not present the same conflict. Although ABC has lost the income that it would have derived from Sally's purchasing the book, it still possesses the book.

Table 2: Percentage of Participants Choosing Each of the Blameworthiness Alternatives in Set 2

Pair 1		*Pair 2*		*Pair 3*		*Pair 4*	
Physical book	56%	Physical book	67%	Lecture, not full	7%	Lecture, not full	14%
Electronic book	3%	Lecture, full hall	10%	Lecture, full hall	55%	Electronic book	57%
No difference	41%	No difference	22%	No difference	38%	No difference	28%
Margin of error (+/–)	7.58%						

Table 3: Average Blameworthiness Scores for the Scenarios in Set 2

	Blameworthiness	
Lecture, not full	5.17_c	(2.30)
Lecture, full hall	6.01_b	(2.17)
Electronic book	6.30_b	(2.20)
Physical book	7.65_a	(1.71)

NOTE: Means (standard deviations in parentheses) for all scenarios from the second set. Higher numbers indicate higher blameworthiness scale scores. Means not sharing subscripts are significantly different at the $p < 0.05$ level.

In Pair 2, subjects report that stealing the tangible good (book) is worse than stealing a service (seat in the lecture), even if the service is depleted. This finding supports the old common-law distinction between goods and services even though both the theft of goods and the theft of services create rivalrous relationships. In Pair 3, we see that stealing a service is rated worse if the service is depleted. As in the first pair, here we are seeing a rivalrous distinction: it is worse when the theft prevents another from obtaining the good or service or deprives the owner not just of profit from the sale of the good or service to this particular individual, but of the good or service itself. Finally, in Pair 4 we see that stealing an intangible and undepletable good (the electronic book) is rated worse than stealing an undepleted service (a seat in the unfilled auditorium). This pair parallels Pair 2. The good and service are alike in not being rivalrous, yet still the theft of the good is rated as worse than the theft of the service. This last finding is surprising as one might have expected that stealing a lecture seat "in person" would be seen as a more direct theft than downloading the file from a distant computer terminal. In all cases, the number of people choosing the dominant option is significantly greater than the number saying there is no difference and over 50 percent.

Each of the four vignettes was used in two comparisons. The blameworthiness scores for each scenario were averaged across these two occasions and the resultant blameworthiness scores are presented in Table 3. Once again, those scenarios with different subscripts are significantly different from each other. As can clearly be seen, the blameworthiness scale data fully support the choice data in each of the four pairs.

V. General Discussion

This study was prompted by the idea that there is something more to the traditional common-law distinctions among various forms of theft and types of property stolen than historical accident. We wanted to know whether, despite the effects of more than 40 years of consolidation, lay subjects would nevertheless discern significant moral differences among various cases of theft. We found that they did.

We believe that the data obtained indicate a significant divergence between lay intuitions and at least some aspects of the current consolidated law of theft. Whereas the

consolidated law of theft tends to treat most forms of theft as interchangeable and deserving of the same punishment, and tends not to distinguish among the types of property stolen, our study suggests that most people do in fact make moral distinctions based on the means by which property is stolen and the type of property at issue.

With respect to the means by which the theft is committed, we observed seven basic "bands" of blameworthiness. The first band consisted of armed robbery, which was ranked by nearly every subject as significantly more blameworthy, and deserving of significantly more punishment, than every other theft offense. In this, our findings were more or less consistent with current law.

The second band consisted of extortion, which our subjects viewed as significantly more blameworthy than every other theft offense except armed robbery, but that the MPC treats as interchangeable with, and equivalent to, offenses such as theft by deception, receiving stolen property, and the like. In this, the MPC seems out of touch with lay intuitions. Under current law, the punishment assigned to extortion is either too lenient, or the punishment assigned to these other offenses is too harsh.

The third band consisted of burglary and simple robbery. Once again, our data were inconsistent with current law, at least in those jurisdictions (such as England) that fail to distinguish between simple and armed or aggravated robbery and in those jurisdictions (following the MPC) that fail to distinguish between simple robbery and larceny. On the other hand, current law can be viewed as generally consistent with our findings regarding intuitions about burglary to the extent that it treats burglary as a more serious offense than larceny, false pretenses, and embezzlement.

The fourth and fifth bands consisted of larceny and blackmail and embezzlement and looting, respectively. Our findings did tend to validate current law in treating these offenses as more or less equivalent to each other in terms of blameworthiness.

The sixth band consisted of the two kinds of fraud: passing a bad check and false pretenses. Contrary to the treatment under the MPC and Theft Act, our participants saw these crimes as significantly less blameworthy than baseline theft. As noted, one explanation for this result may be the sense that victims of fraud deserve some of the blame for the offender's act.

The seventh and final band consisted of receiving stolen property and taking possession of lost or misdelivered property and failing to look for its owner. These offenses were rated by our subjects as significantly less blameworthy than all the other offenses. To treat them, as both the MPC and English Theft Act tend to do, as equivalent to larceny, false pretenses, and extortion is to treat them in a manner that is very much out of sync with lay intuitions.

With respect to the types of property stolen, our data once again revealed clear distinctions in blameworthiness that are not reflected under current law. All else being equal, our subjects consistently ranked the theft of tangible goods as more blameworthy than the theft of intangibles, and the theft of intangible goods as more blameworthy than the theft of services. Current law reflects a very different paradigm: under the MPC, theft of tangibles, intangibles, and services are all subject to the same punishment, while the Theft Act subjects theft of tangibles and intangibles to the same punishment and theft of services to a lesser punishment.

We believe that our study provides the basis for a significant challenge to modern theft law. Under the principle of fair labeling, it is essential that the law respect and signal "widely felt distinctions between kinds of offences and degrees of wrongdoing." The data on lay intuitions we have obtained suggest that in certain important respects, the current law of theft in both the United States and England violates that principle.

We would like to close by briefly considering the alternatives to theft consolidation. There is no question that the common law of theft was, and remains, flawed: we have no intention of proposing a return to the convoluted system that existed at the time of Hale or Blackstone. But we believe that the most significant flaws in the common-law approach—namely, procedural loopholes, inconsistencies, redundancies, and overlaps—are flaws that can be remedied without undermining the essential moral character of theft law. The law of theft that applies in civil-law countries such as Germany, France, and Japan, for example, seems to pose few of the procedural problems found in the common law, but is at the same time more sensitive than the MPC to the kinds of moral distinction recognized by the subjects in our study.[92] We believe that such systems might provide an appropriate model for the reform of theft law in the United States and England.

Appendix A

Aggravated or armed robbery: While Owen was cleaning his bike in the driveway outside his house, Tom walked up to him, pointed a gun at him, and said, "Give me your bike or I will shoot you." Owen handed Tom the bike and Tom rode it away, intending to keep it.

Simple robbery: While Owen was cleaning his bike in the driveway outside his house, Tom walked up to him, grabbed the bike out of his hands, and rode it away, intending to keep it.

Extortion: While Owen was cleaning his bike in the driveway outside his house, Tom walked up to him and said, "Give me your bike or tomorrow I will burn down your house." Owen handed Tom the bike and Tom rode it away, intending to keep it.

Blackmail: While Owen was cleaning his bike in the driveway outside his house, Tom walked up to him and said, "Unless you give me your bike, I'm going to show your boss these embarrassing pictures of you from college." Owen handed Tom the bike and Tom rode it away, intending to keep it.

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[92]German Criminal Code § 242 (larceny), § 244(1)(3) (theft by housebreaking), § 253 (blackmail), § 257 (receiving stolen goods), § 263 (fraud), § 266 (embezzlement); French Penal Code § 311-1 (theft), § 312-1 (extortion), § 312-10 (blackmail), § 313-1 (fraudulent obtaining), § 314-1 (theft by breach of trust), § 321-1 (receiving stolen property); Japan Penal Code arts. 235 (larceny), 236 (robbery), 246 (fraud), 247 (breach of trust), 249 (extortion), 252 (embezzlement), 256 (accepting stolen property).

Theft following burglary: Owen put his bicycle in the basement of his house and then drove his car to the grocery store. While Owen was away, Tom climbed through a window into the basement, took Owen's bike, and rode it away, intending to keep it.

Larceny: Owen locked his bike with a chain to the front porch by his driveway and then drove his car to the grocery store. While Owen was away, Tom came up to the porch, picked the lock on the bike, and rode it away, intending to keep it.

Embezzlement: Owen's bike needed repairs, so he took it to the bike shop, where Tom works. At the end of the day, Tom took Owen's bike out of the shop and to his own apartment, intending to keep it for himself.

Looting: Owen left town because of an approaching hurricane. The storm was worse than expected: there was general chaos, flooding, and no electricity. Owen's garage door was damaged in the storm and the alarm system had no power. Tom walked into Owen's garage, took his bike, and rode the bike away even though he already had a bike. He planned to sell it for fast cash.

False pretenses: Owen realized that he didn't have enough time to ride his bicycle, and decided to sell it. He placed an advertisement in a local newspaper, to which Tom responded. Tom negotiated a price with Owen and said, "I'll bring you the money tomorrow after I'm paid." At the time he said this, Tom had no intention of keeping his promise. Tom rode the bike away, intending to keep it.

Passing a bad check: Owen realized that he didn't have enough time to ride his bicycle, and decided to sell it. He placed an advertisement in a local newspaper, to which Tom responded. Tom negotiated a price with Owen, gave him a check, and rode the bike away, intending to keep it. At the time he gave the check to Owen, Tom knew that he did not have enough money in his account and that the bank would not cover the check.

Failing to return lost or misdelivered property: Owen's bike needed repairs, so he took it to the bike shop, which agreed to have a service deliver it to Owen's house once the repairs were done. Because of a computer glitch, the bike was accidentally delivered to Tom's apartment even though the tag had Owen's proper address. Tom decided to keep the bike and not tell Owen or the delivery service about it.

Receiving stolen property: Tom was walking along a street. The previous day, Owen's bike had been stolen. A person Tom did not know rode Owen's bike up to him and said, "I stole this bike and I'll sell it to you for just $20." Tom bought the bike and rode it away, intending to keep it for himself.

Appendix B

Physical book: ABC Test Prep offers a test-preparation book for sale at a booth on campus. The book sells for $50. Sally went to the booth, put a copy of the book in her bag, and walked away without paying for it, intending to keep it.

Electronic book: ABC Test Prep offers a computer file of the test-preparation book which can be downloaded for a fee from its website at a price of $50. Sally figured out a way to download the file from the website without paying for it, and did so.

Lecture hall, full: ABC Test Prep offers a test-preparation lecture, which is held at an auditorium on campus. Seating is by general admission, which costs $50. When all of the seats are filled, ABC stops selling tickets. Sally walked in an open side door of the auditorium, sat in a seat, and listened to the entire lecture without paying for it. The auditorium that day was full. As a result, ABC could not sell Sally's seat to someone else who wanted to attend the lecture.

Lecture hall, not full: ABC Test Prep offers a test-preparation lecture, which is held at an auditorium on campus. Seating is by general admission, which costs $50. When all of the seats are filled, ABC stops selling tickets. Sally walked in an open side door of the auditorium, sat in a seat, and listened to the entire lecture without paying for it. The auditorium that day was not full: several seats remained empty.