

## THIEVING AND RECEIVING: OVERCRIMINALIZING THE POSSESSION OF STOLEN PROPERTY

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*Historically, Anglo-American law has treated the offense of receiving stolen property in a variety of ways: it has regarded it as no crime at all; subjected it to accessory-after-the-fact liability; and treated it as a free-standing offense, subject, depending on the jurisdiction, to less punishment than theft, the same punishment as theft, or greater punishment than theft. To develop an analytical framework for determining which of these various approaches makes the most sense, we need to ask exactly what receiving statutes are meant to censure and deter. From a backward-looking perspective, receivers can be said to perpetuate the wrongful deprivation of the victim owner's property rights, effected in the first instance by the thief. From a forward-looking perspective, the act of receiving can, at least in some cases, be said to encourage the commission of future thefts by helping to create a ready market for stolen goods. The problem is that the offense in its current statutory formulation reflects only the backward-looking perspective, requiring nothing more than that the offender possess or receive stolen property (knowing that it is stolen), and saying nothing about the future effects of his act. And because perpetuating an owner's loss of property is a lesser wrong than causing him to lose his property to begin with (or so it will be argued), the receiver deserves less blame and punishment than the thief. Yet many modern statutes subject receiving to at least as much punishment as thieving. To avoid such disproportionality, various reforms in the law of receiving are recommended.*

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Should the possession (or receiving or handling<sup>1</sup>) of stolen property be treated as a crime separate from that of theft; and if so, how should it be punished? Anglo-American law has responded to this question in a variety of ways. Until 1692, possessing stolen property was no crime at all. In that year, Parliament enacted legislation that subjected one who knowingly possessed stolen property to liability as an accessory after the fact, a less serious form of liability than being a principal in the first or second degree.<sup>2</sup> In 1827, new legislation was enacted making receiving stolen property a free-standing crime, but one that was still subject to lesser penalties than larceny and other theft offenses.<sup>3</sup> Twentieth century law took a different tack: Under the Model Penal Code, receiving stolen property was treated as interchangeable with various forms of theft and subject to the same penalties.<sup>4</sup> The Canadian Criminal Code also subjected theft and receiving to the same punishment scheme, though it treated them as distinct, noninterchangeable offenses.<sup>5</sup> The English Theft Act 1968 took yet another approach: it both continued to treat handling stolen goods as a separate offense and subjected it to the possibility of even harsher maximum penalties than theft itself.<sup>6</sup>

Which of these various approaches makes the most sense today? My intention in this article is to develop an analytical framework for answering this question. My interest arises because receiving is a commonly committed and widely prosecuted offense that has been virtually ignored in the theoretical literature, because it bears interesting comparison to

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1. The predominant term in the United States is “receiving,” in the United Kingdom, “handling,” and in Canada, “possessing.” I shall use all three terms interchangeably, except where specifically noted.

2. 3 & 4 Wm. & M., c. 9, § 4 (1692).

3. Larceny Act, 7 & 8 Geo. IV, c. 29, § 54 (1827).

4. Model Penal Code Article 233 (treating receiving as interchangeable, for purposes of proof, with, and subject to same penalty as, theft by unlawful taking, theft by deception, theft by extortion, and theft by failing to return lost or misdelivered property).

5. Under Canadian law, theft of property worth more than \$5,000 is subject to a term not exceeding ten years, and theft of property worth less than that is subject to a term not exceeding two years. Criminal Code of Canada §§ 322, 334. The same penalty scheme applies, *mutatis mutandi*, to possession of stolen property. *Id.* at §§ 354–55. See also Winifred H. Holland, *The Law of Theft and Related Offences* 285–97 (1998).

6. The maximum penalty for handling is fourteen years, Theft Act 1968, s. 22, whereas the maximum penalty for theft is seven years, s.7. For an explanation of why the scheme works this way, see *infra* note 53.

various possession offenses that *have* been the focus of recent literature, and because an understanding of receiving is essential to an understanding of theft law more generally.

Based on their history and rhetoric, it appears that receiving statutes are intended to punish and deter two distinct, yet complementary, forms of conduct, which I shall call “backward”- and “forward”-looking. From a backward-looking perspective, the receiver can be said to perpetuate the wrongful deprivation of the victim owner’s property rights, effected in the first instance by the thief, and perhaps to conceal the thief’s offense from discovery. From a forward-looking perspective, the act of receiving can, at least in some cases, be said to encourage the commission of future thefts by helping to create a ready market for stolen goods. In this latter sense, receiving would be viewed as similar to various other possession offenses.

The problem, as we shall see, is that the offense in its current statutory formulation reflects only the backward-looking perspective. Receiving statutes require nothing more than that the offender possess or receive stolen property (knowing that it is stolen); they say nothing about the future effects of his act. And because perpetuating an owner’s loss of property is a lesser wrong than causing him to lose his property to begin with (or so I shall argue), it appears that the receiver deserves less blame and punishment than the thief. To the extent that receiving, as currently formulated, is subject to the same punishment as theft, it is therefore overcriminalized.

This is not to say that receiving statutes could not be formulated differently. Such statutes could incorporate the forward-looking perspective by, say, requiring that the offender’s conduct not only perpetuate the owner’s loss of property but also that it make future thefts more likely. Or statutes could criminalize two degrees of receiving: a lesser offense that was solely backward-looking, and a greater offense that was both backward- and forward-looking. For statutes of this latter sort, enhanced punishment might well be justified.

## I. A BRIEF HISTORY OF RECEIVING

In the 1602 case of *Dawson*, the defendant was sued for slander after he allegedly said to the plaintiff, “Thou art an arrant knave, for thou hast bought stolen swine, and a stolen cow, knowing them to be stolen.”<sup>7</sup> The

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7. *Dawson*, 80 Eng. Rep. 4 (1602).

court dismissed the case, holding that the plaintiff had failed to state a claim. Merely making a statement that would harm the plaintiff's reputation was not sufficient to constitute slander. To be actionable, the statement had to attribute to the plaintiff the commission of a felony or serious crime involving moral turpitude.<sup>8</sup> In this case, the court said, the defendant had failed to make such a statement in that "the receipt or sale of goods stolen is not a felony, nor makes any accessory, unless it is joined with a receipt or abetment of the felon himself."<sup>9</sup>

Although occurring in a somewhat peculiar procedural context, the decision in *Dawson* accurately reflects the state of English law during most of the seventeenth century and earlier. Whereas it was a crime to harbor a *thief* or other felon as early as the middle ages,<sup>10</sup> there was no criminal offense of possessing stolen *property* until 1692, when Parliament enacted a law that made one who knowingly received stolen property an accessory after the fact, a less serious form of liability than being a principal in the first or second degree.<sup>11</sup>

The Industrial Revolution of the late eighteenth and early nineteenth centuries prompted yet more changes in the crime of receiving, culminating in the Larceny Act of 1827, which removed receiving "from its position as an appendage of theft and elevated [it] to the dignity of a separate substantive crime."<sup>12</sup> Passage of such legislation can be attributed to several factors: Proving that a defendant was in possession of stolen property could be considerably easier than proving that the defendant had actually stolen it.

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8. Or a loathsome or communicable disease, a matter inconsistent with the proper conduct of one's business, or unchastity (in the case of a woman). See *Fowler V. Harper et al.*, Harper, James, and Gray on Torts, § 5.10–13, at 376–87 (discussing four categories of slander actionable per se).

9. *Dawson*, supra note 7. Not only was receiving not a felony, it does not appear to have been a misdemeanor either.

10. See generally Wayne T. Logan, *Criminal Law Sanctuaries*, 38 Harv. C.R.-C.L. L. Rev. 321 (2003).

11. 3 & 4 Wm. & M., c. 9, § 4 (1692). One problem, however, was that an offender could not be convicted of being an accessory to handling unless the principal had already been convicted. 5 Anne c 31.

12. Wayne R. LaFave, *Criminal Law* 985 (4th ed. 2003); Larceny (England) Act, 7 & 8 Geo. IV, c. 29, § 54 (1827). The history and policies surrounding the offense of receiving stolen property are considered in detail in Jerome Hall, *Theft, Law, and Society*, ch.5 (2d ed. 1952).

As Bruce Smith has explained, for those of modest means, “wealth . . . frequently resided in humble goods such as wood, metal, rope, and vegetables, which were virtually indistinguishable from similar items held by others.”<sup>13</sup> Such nondescript goods were simply “too commonplace for property owners to identify credibly at trial as their own.”<sup>14</sup> Whereas prosecution for larceny required the prosecutor to prove whom the goods had been stolen from, prosecution for receiving did not. To be convicted of receiving, a defendant merely had to be in possession of goods suspected of having been stolen and unable to offer a “satisfactory account.”<sup>15</sup> Valuable goods as well, for the first time in history subject to mass production, also became harder to identify and therefore easier to sell.<sup>16</sup> In addition, the law of theft was burdened with fine distinctions, involving matters such as the kind of property involved, the relations between the offender and the owner, and the method by which the offence was committed—technicalities that did not apply to prosecutions for receiving.

Another factor that helps explain the emergence of receiving as a separate offense was the fact that during the eighteenth and nineteenth centuries, the sale and purchase of stolen property was becoming big business, the most spectacular evidence of which was the dramatic rise and fall of Jonathan Wild.<sup>17</sup> At a time when there was no professional police force, Wild ran an ingenious crime syndicate in which his agents would steal property, keep the goods, and wait for the crime to be announced in the press. Wild would then claim that his “thief taking agents” (who constituted a kind of private police force) had “recovered” the stolen merchandise. The property would then be returned to its rightful owners for a reward (ostensibly to cover the expenses of running his agents).

Until well into the twentieth century, receiving remained a distinct offense, subject to a lesser penalty than larceny, embezzlement, false pretenses, and other leading theft offenses. In mid-century, however, this began to

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13. Bruce P. Smith, *The Presumption of Innocence and the English Law of Theft, 1750–1850*, 23 *Law & Hist. Rev.* 133, 142 (2005).

14. *Id.*

15. *Id.* at 158.

16. G. Robert Blakey & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 *Mich. L. Rev.* 1511, 1512 (1976).

17. See generally Gerald Howson, *Thief-Taker General: Jonathan Wild and the Emergence of Crime and Corruption as a Way of Life in Eighteenth-Century England* (1970).

change as well, at least in the United States. Under the Model Penal Code, receiving stolen property was treated as an alternative means of committing theft and therefore subject to the same penalty as the other theft and theft-like offenses. The supposed justifications for such consolidation were the same ones that underlay the movement toward consolidation of theft offenses more generally. The first was a concern that a defendant charged with one form of theft or theft-related activity might be able to avoid liability by arguing that he had actually committed a different offense. The second was offense definitions that were so narrow and technical that a defendant might be able to argue that his conduct fell “between the cracks” of what constitutes criminal conduct and thereby avoid liability entirely. In the present context, this meant that a defendant charged with theft could argue that he had actually committed receiving, and vice versa.<sup>18</sup> The MPC avoids this “bait and switch” problem by means of Section 223.1: “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.”<sup>19</sup> In addition, the MPC avoids the kind of narrow offense definitions that would allow a defendant to argue not only that he did not commit receiving, but also that his borderline conduct constituted no theft offense of any sort.<sup>20</sup>

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18. E.g., *Coates v. State*, 229 N.E. 2d 640 (Ind. 1967) (where the charge was receiving, but the evidence was that the defendant had committed theft; case was unproved); Seymour [1951] 1 All E.R. 1006 (C.C.A.).

19. Model Penal Code § 223.1(1). Certainly, consolidation does put an end to such defensive ploys. Nevertheless, as elsewhere, there are much less blunt devices for dealing with them, such as allowing prosecutors to charge thieving and receiving “in the alternative.”

20. Another related development in twentieth-century law that deserves mention here is the proliferation of money laundering laws. As Peter Aldridge has explained:

Offences of handling have the obvious similarity to offences of laundering in that they are offences of disposal of unlawfully acquired property. There is a substantial overlap between handling and laundering offences and there have been suggestions that the laundering offences are little but an updated version of handling. In many ways the panic surrounding laundering now has echoes of that surrounding Wild and the other thief-takers in the eighteenth century.

Peter Aldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* 210 (2003).

## II. JUDGING THE BLAMEWORTHINESS OF RECEIVING

As part of a larger project on the moral content of theft law, my collaborator Matthew Kugler and I conducted an empirical study that examined how the “man in the street” views the relative blameworthiness of various means of committing theft and theft-related offenses.<sup>21</sup> The study consisted of asking 172 subjects to rank twelve hypothetical scenarios involving different means of misappropriating a \$350 bicycle: by armed robbery, simple robbery, extortion, blackmail, burglary, larceny, embezzlement, looting, passing a bad check, false pretenses, failing to return misdelivered property, and receiving stolen property.

The receiving stolen property scenario read as follows:

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.

Virtually all of the participants in the study ranked this scenario as significantly less blameworthy, and deserving of significantly less punishment, than all but one of the eleven other theft and theft-related scenarios that were part of the study (the exception was failing to return misdelivered property, which was rated as more or less equivalent to receiving stolen property in terms of blameworthiness).

The question is why. Why is it that, despite the Model Penal Code’s treatment of receiving as interchangeable with and subject to the same punishment as embezzlement, larceny, false pretenses, and the like, members of the public viewed this scenario as worthy of substantially less punishment? Informal, poststudy discussions with subjects revealed an intuitive, but not very well developed, judgment that receiving stolen property was somehow less wrongful than theft proper. Some more fully articulated, “critical” analysis seems called for.

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21. See Stuart P. Green & Matthew Kugler, Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation, 7 J. Empirical Legal Stud. 511 (2010). The study also asked subjects to rate the blameworthiness of theft of various forms of property (tangible, intangible, services, etc.). The larger project is a forthcoming book of mine entitled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

### III. FORMULATING THE OFFENSE

To understand the underlying moral content of receiving, we need first to understand the various ways in which the offense has been formulated. Under Section 223.6 of the MPC, a person is guilty of receiving stolen property “if he purposely receives, retains, or disposes of movable property of another knowing that it is has been stolen, or believing that it has probably been stolen.”<sup>22</sup> “Receiving,” in turn, is defined as “acquiring possession, control or title, or lending on the security of the property.”<sup>23</sup> Section 22 of the English Theft Act of 1968 says that a person handles stolen goods “if (otherwise than in the course of stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realization by or for the benefit of another.”<sup>24</sup> Under Section 354 of the Canadian Criminal Code, one commits “possession of property obtained by crime” if one “has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from . . . the commission in Canada of an offence punishable by indictment.”<sup>25</sup>

There is thus a significant variation in the way the offense is formulated in the various Anglo-American jurisdictions. The Canadian formulation is both broader and narrower than the MPC and Theft Act formulations. It is broader in terms of *actus reus*: the defendant need do nothing more than “possess” property (worth more than \$5,000) that has been stolen in order to be guilty of the offense,<sup>26</sup> whereas under the MPC the defendant must “acquir[e] possession, control or title” of the stolen property, and under the Theft Act the defendant must “receive” the goods or undertake or assist in their “retention, removal, or disposal.” The Canadian formulation is narrower, however, with respect to *mens rea*: the defendant must “know” that

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22. There is an exception if “the property is received, retained, or disposed with purpose to restore it to the owner.”

23. Model Penal Code § 223.6.

24. English Theft Act 1968 s. 22(1).

25. Canadian Criminal Code § 354.

26. Only theft of property worth more than \$5,000 is indictable as a felony, § 334(a), and only possession of property obtained by means of a felony constitutes criminal possession, § 354(1)(a).

the property has been stolen, whereas under the MPC and English Theft Act the defendant must “know” or “believe” that it has been stolen.<sup>27</sup>

Let us look first at the question of *mens rea*. Which approach makes more sense, the Canadian or the Anglo-American? Should a defendant have to “know” that the property has been stolen, or is it enough to “believe” that it is stolen in order to commit receiving? Presumably, the Anglo-American rule is more likely to encourage potential buyers to investigate the provenance of suspicious-looking goods, thereby reducing the market for stolen goods, and ultimately the incentive to steal. It is also more likely to prevent the transfer of stolen goods to third parties, thereby potentially making the recovery of such goods easier. On the other hand, the Anglo-American rule probably inhibits some lawful transactions that the Canadian rule does not (such as sales that might otherwise occur, at flea markets, antique stores, and garage sales). In that sense, the Canadian rule could arguably be said to promote economic efficiency.

What if one neither knows nor believes that goods are stolen, but is merely negligent with respect to their stolen-ness? Why not require those who are considering buying goods to ascertain their provenance before doing so, at least in circumstances that are suspicious? The conflict, as Victor Tadros has described it in the context of rape law, is basically between subjectivists, who argue that one should be criminally responsible only if one is actually aware of the risk that the *actus reus* might result from her conduct, and objectivists, who hold that criminal responsibility should properly be attributed on the grounds that the defendant ought to have been aware that *actus reus* would, or might, come about as a result of her action.<sup>28</sup> Whatever the right rule, it is striking how different the *mens rea* required in receiving is from that of rape, which, according to Tadros, says, in essence, that “I am not permitted to have intercourse with a person unless I have taken sufficient steps to ensure that the person I am having intercourse with is consenting.”<sup>29</sup>

As for the *actus reus* of the offense: By stating that anyone who “possesses” stolen property commits the offense, the Canadian Criminal Code

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27. Interestingly, “belief” is not a *mens rea* term that is even recognized by the general part of the Model Penal Code; see § 2.02(2).

28. Victor Tadros, *Wrongdoing and Motivation*, in *Philosophical Foundations of Criminal Law 206*, at 210 (R.A. Duff & Stuart P. Green eds., 2011).

29. *Id.* at 211.

presents the possibility that everyone who commits theft (at least of property worth more than \$5,000) will also automatically be guilty of possession, since one cannot steal property without coming into actual or constructive possession of it. The American provision seems to work the same way. The English provision, by contrast, avoids this problem of “double dipping” by expressly providing that a “person handles stolen goods if (*otherwise than in the course of the stealing*) . . . he dishonestly receives the goods,”<sup>30</sup> meaning that under English law one cannot be guilty of both theft and receiving simultaneously.

The Model Penal Code formulation, in fact, is doubly redundant. A separate theft provision, Section 223.2, entitled “Theft by Unlawful Taking or Disposition,” says that “a person is guilty of theft if he unlawfully takes, or *exercises unlawful control over*, movable property of another with purpose to deprive him thereof.”<sup>31</sup> Under this definition, we would have to conclude not only that every act of thieving constituted receiving, but also that every act of receiving also constituted thieving. Indeed, this is exactly the point made by the Commentary to Section 223.6, which states, “Analytically, the receiver does precisely what is forbidden by Section 223.2(1)—namely, he exercises unlawful control over property by another with a purpose to deprive.”<sup>32</sup>

As a matter of statutory construction, this approach is problematic. If the act of receiving really were intended to be covered by the broad language of Section 223.2, there would be no need for the separate provision of Section 223.6; it would be superfluous. In fact, the framers of the Code titled Section 223.2 “theft by unlawful *taking or disposition*,” and they presumably intended it to apply to cases in which a defendant actually takes or disposes of another’s property. I suspect that the real reason Section 223.2 used such broad language was to avoid the problems that arose out of the common law requirements of “caption” and “asportation,” including particularly the difficulties of distinguishing between attempted and completed theft.<sup>33</sup>

To avoid such redundancy and such superfluity, I propose that we follow the English approach and treat thieving and receiving as separate

30. Theft Act 1968 s. 22(1) (emphasis added).

31. Model Penal Code § 223.2(1) (emphasis added).

32. Model Penal Code Commentary, § 223.6, at 232.

33. Model Penal Code Commentary, § 223.2, at 163–64.

offenses. Under this approach, the crime of theft would require something more than merely possessing stolen property (we will talk below about what that something more might be), whereas the crime of receiving would consist in possessing stolen property that one has obtained by some means other than stealing it oneself. The paradigm case would thus be one in which the defendant bought or received property from another, knowing (or believing) that it had been stolen. The question is, why should this be a crime? What harms does such conduct cause? What forms of wrongfulness does it entail?

#### IV. TWO RATIONALES FOR THE LAW OF RECEIVING

To understand why we criminalize receiving, we need to consider how it both (1) perpetuates prior harms and (2) in some cases, arguably encourages future harms. Let us look at each phenomenon in turn.

Elsewhere, I have suggested that the harm in stealing consists in a substantial interference with an owner's rights in property, including, most significantly, a potentially permanent interference with the owner's right of possession.<sup>34</sup> Like the thief, the receiver of stolen property wrongfully deprives the owner of his rights in such property, and therefore deserves blame. I am skeptical, however, that the deprivation perpetuated by the receiver should be thought of as comparable to the deprivation initiated by the thief. It is, after all, the thief who has caused the radical, involuntary change in the owner's relationship to his property—from possession to nonpossession. Stealing is a specific kind of act, with a specific moral status. Stealing involves a transfer of property, not just an ongoing deprivation.<sup>35</sup> "Stolen" is an absolute modifier, like "unique" or "equal" or "dead": A piece of property cannot be more or less stolen any more than a thing can be more unique, more equal, or more dead.

Unlike the thief, the receiver does not cause any *change* in the status of the owner's rights. To be sure, he benefits from the change that the thief has effected by perpetuating the deprivation of the owner's rights. He may in some cases make it harder for the owner to recover her property (in this, the

34. Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* 89–90 (2006).

35. Cf. David Ormerod, *The Fraud Act 2006—Criminalising Lying*, *Crim. L. Rev.* 193, 206 (2007) (noting that "in theft there must actually be a transfer").

offense of receiving is like that of failing to return lost or misdelivered property<sup>36</sup>). No doubt the receiver has done a wrongful and dishonest thing. But he does not wrong the owner in the same way and, I would say, to the same extent, as the thief. His role, as I will explain below, is essentially a subsidiary one.

The fact that the receiver perpetuates the owner's loss of property, however, is not the only reason receiving is criminalized. In addition to the past harms that he perpetuates, the receiver is also said to encourage future harms. The dynamic works as follows: Many thieves steal property not to keep or make use of the property themselves but rather to sell it to a third party, known as a "fence," for a quick profit. The fence thus creates the market that makes theft profitable. Understood this way, receiving becomes the *raison d'être* of stealing.

Maimonides made this point more than 800 years ago: "It is prohibited to buy from a thief any property he has stolen, such buying being a great sin, since it encourages criminals and causes the thief to steal other property. For if a thief finds no buyer, he will not steal."<sup>37</sup> More recently, criminologists Duncan Chappell and Marilyn Walsh have argued that:

Once we have seen the fence as author of both the incentive and the opportunity for theft, we can appreciate more fully the compelling nature of his exchange relationship with the thief. We can also begin to see the thief as little more than an instrument of the fence—a highly visible but relatively minor cog in a giant distribution circuit.<sup>38</sup>

It has thus often been said that without receivers there would be no thieves,<sup>39</sup> and although this statement is obviously not literally true, it is certainly the case that, without an efficient and profitable market in which stolen goods could be bought and sold, we would have a lot less thievery.<sup>40</sup>

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36. See Stuart P. Green, *Theft by Omission*, *Essays in Criminal Law in Honour of Sir Gerald Gordon* 158, at 168 (James Chalmers et al. eds., 2010).

37. Maimonides Reader: *Mishneh Torah*, Book 11: *Torts* 156–57 (Isadore Twersky ed., 1972).

38. Marilyn Walsh & Duncan Chappell, *Operational Parameters of the Stolen Property System*, 2 *J. Crim. Just.* 113, 126 (1974).

39. A.T.H. Smith, *Property Offences* 944 (1994) (citing *Battams*, 1 *Cr. App. R.(S)* 15, 16 (1979)).

40. The extent to which even this is true will vary depending in part on the type of good stolen, some goods, such as personal electronics, jewelry, and automobiles, being "hotter"

It is important to note, however, that, viewed from this perspective, receiving causes not harm itself but merely the *risk* of harm. In this sense, receiving is reminiscent of other “proxy” crimes such as possession of illegal drugs, unlicensed firearms, tools for counterfeiting, tools for burglary, and things that can be used to commit terrorist acts.<sup>41</sup> Each offense is said to be justified by the risk it poses of some future harmful act, whether it be drug use, firearm use, counterfeiting, burglary, or terrorism, respectively.

Offenses of this sort have come under attack from a number of recent commentators.<sup>42</sup> First, they are said to be overly inchoate or anticipatory in character; rather than punishing actual harms, they punish the mere threat of harm, without even the “substantial step” or “dangerous proximity” requirement that is characteristic of attempt liability. Second, possession statutes have been said to do the work that was once done by now-disfavored vagrancy laws. They are easy to detect and easy to prove, and give police a pretext to stop, search, and incapacitate. Third, at least some possession statutes are overbroad in that they criminalize innocent conduct (a good example is possession of burglary tools).

I am sympathetic to these concerns, which seem particularly apt when the thing illegally possessed is stolen property. Indeed, one could argue that such criticisms are a fortiori true in this context. Although the probability that one who possesses tools designed for the commission of burglary or counterfeiting or terrorism will herself actually attempt to commit burglary or counterfeiting or terrorism seems fairly high, the probability that one who possesses stolen property will cause another to commit theft seems relatively low. The causal chain is more attenuated precisely because a second party—namely, the thief—is involved.

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than others. See Ronald V. Clarke, *Hot Products: Understanding, Anticipating and Reducing Demand for Stolen Goods*, Police Research Series Paper 112 (London: Home Office, 1999), <http://rds.homeoffice.gov.uk/rds/prgpdfs/fprs112.pdf>.

41. The term “proxy crime” is used by, among others, Larry Alexander & Kim Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (2009).

42. See, e.g., Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 44–45 (2007); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. Crim. L. & Criminology* 829 (2002); Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, in *Defining Crimes: Essays on the Special Part of the Criminal Law* 91 (R.A. Duff & Stuart P. Green eds., 2005); George Fletcher, *Rethinking Criminal Law* 197–202 (1978); Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Justice and the Limits of the Criminal Law*, in *Philosophical Foundations of Criminal Law* 279 (R.A. Duff & Stuart P. Green eds., forthcoming 2011).

## V. RECEIVING AS A FORM OF COMPLICITY

In addition to considering the harms that it causes or risks, it will be helpful to think about receiving as a form of complicity. To say that an accomplice is complicit in the act of a principal is to say that the accomplice's liability is derivative of the principal's act—that, in Sanford Kadish's words, it is “incurred by virtue of a violation of a law by the primary party to which the secondary party contributed.”<sup>43</sup> The accomplice, or secondary party, shares in the liability of the principal, or primary party, because he has contributed to the actions of the principal that gave rise to her liability.

So what would it mean to say that a receiver, *R*, was complicit in the act of a thief, *T*? Here, we can imagine at least three scenarios: First, consider a case in which *R* promises *T* that, if *T* steals a bike from its owner, *O*, *R* will purchase it from her; and imagine further that *T* does steal the bike from *O* and that *R* does in fact buy the stolen bike from *T*. Here we would say that *R* had specifically encouraged *T* in the commission of *this* theft, that he has influenced her decision to commit the crime, and that he therefore shares, to some degree, in the blameworthiness of *T*'s act.<sup>44</sup> In such a case, we should charge *R* as an accomplice to *T*'s theft.<sup>45</sup> But note that *R* would be an accomplice in *T*'s theft regardless of whether he ultimately bought, or even possessed, the stolen bike. At most, the fact that he bought the bike provides evidence of *R*'s contribution to the scheme.

Now consider a case of a different sort: Assume that *R* buys a bike from *T* that *T* stole, but that prior to *T*'s stealing the bike, *R* had no knowledge of *T*'s plan to steal it, and *T* had no knowledge of *R*'s interest in buying it. Assume, further, that this was the first bike that *T* had ever stolen, and the first stolen bike that *R* had ever purchased; both were “theft virgins.”

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43. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 *Calif. L. Rev.* 323, 343 (1985).

44. Cf. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 394 (3d ed. 1982) (referring to cases in which the receiver “induces misguided youths to steal and sometimes even teaches them the ‘tricks of the trade.’”). On the question, more generally, of whether an actor who commits the actual crime and the one who aids and abets in her act should be regarded as equally culpable, see Green, *supra* note 34, at 209.

45. See R.D. Hursh, *Annotation, Thief as Accomplice of One Charged with Receiving Stolen Property, or Vice Versa, Within Rule Requiring Corroboration or Cautionary Instruction*, 53 *A.L.R.2d* 817 (1957).

In fact, when *T* stole the bike, she planned to keep it for herself, but she subsequently changed her mind and sold it to the first person she could find who wanted to buy it, who happened to be *R*. *R* himself had never before contemplated buying stolen property. Moreover, neither *R* nor *T* has any intention of ever stealing or receiving again: going forward, both plan to be “theft celibate.”

A good example is provided by a recent case much in the news.<sup>46</sup> Brian Hogan was in a bar Redwood, California, in early 2010 when he found a cell phone lost by an Apple computer software engineer named Gray Powell. Hogan took the cell phone home and quickly realized that what he had in his hands was something quite valuable: a prototype of Apple’s 4G iPhone, not scheduled for commercial release for another six months. Hogan allegedly made no reasonable effort to return the lost property to Apple, and as such committed “theft” under California law. Instead, he allegedly got in touch with Sage Robert Wallower, a graduate student at Berkeley, who allegedly helped Hogan contact technology web sites that would be interested in buying the phone. Jason Chen, the editor of a technology blog called Gizmodo.com, paid \$5,000 for the phone and subsequently posted various photos of and articles about the device on Gizmodo’s web site.<sup>47</sup> As far as can be determined, this was the first (and presumably last) time that Hogan, Wallower, or Chen would be involved in such conduct.

In such one-off, after-the-fact, noncausative cases, can we say that receivers like Wallower and Chen have been complicit in the thief’s act? Following an approach suggested by Christopher Kutz in a somewhat different context,<sup>48</sup> I would say that Wallower and Chen could be viewed as

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46. Discussed in Stuart P. Green, iPhone, Gizmodo, and Moral Clarity about Crime, *Christian Science Monitor*, May 4, 2010, <http://www.csmonitor.com/Commentary/Opinion/2010/0504/iPhone-Gizmodo-and-moral-clarity-about-crime>.

47. Greg Sandoval et al., The People Involved in Sale of Lost iPhone Revealed, *CNet News*, April 29, 2010, [http://news.cnet.com/8301-13579\\_3-20003782-37.html](http://news.cnet.com/8301-13579_3-20003782-37.html).

48. Christopher Kutz, Causeless Complicity, 1 *Crim. L. & Phil.* 289 (2007). Kutz considers the case of the U.S. Department of Justice attorneys who wrote legal memoranda offering a rationale under which detainees captured in the so-called “War on Terror” could be deprived of their right under international law to be free from torture and other forms of abuse, and asks whether the lawyers could be held liable as accomplices to those who actually carried out the torture. In some cases, the memoranda were apparently written in advance of the acts of torture; in other cases, the acts of torture came first and the memoranda were written later, as a means to justify conduct that had already occurred. In the first sort of case, the basis for complicity is straightforward: the lawyers’ memoranda arguably

complicit insofar as they “ratified” or “endorsed” the acts of Hogan.<sup>49</sup> One who purchases property he knows to have been stolen benefits from the thief’s prior wrongdoing. By wrongfully possessing property belonging to another, the receiver says in effect that he does not respect the owner’s property rights, and he elevates his own interests about the owner’s.<sup>50</sup>

Even if *R* can properly be viewed as *morally* complicit in *T*’s act, however, I am skeptical that we would be justified in holding *R* *criminally* liable as an accomplice to *T*. *R* has not in any familiar sense “aided or abetted” *T* in the commission of any crime. The criminal law is concerned with punishing those who cause or risk harm, and that is something *R* has not done. To extend criminal liability to those who, after the fact, ratify or endorse the criminal acts of others strikes me as a significant and potentially dangerous expansion in the scope of accomplice liability.<sup>51</sup>

Finally, let us consider a third type of scenario exemplified in the extreme by the case of the notorious Toronto bike thief, Igor Kent, a kind of modern-day Jonathan Wild.<sup>52</sup> Kent was arrested in 2008 after a police sting operation uncovered 2,865 stolen bicycles that had been stashed in garages and warehouses throughout the city. Kent had bought the bikes from the thieves who had stolen them, often bartering for them with illegal drugs, and then resold them in his bike shop, in many cases to the very people from whom they had been stolen.

Let us assume, at least for purposes of discussion, that the Toronto bike thieves normally had no knowledge of Kent’s interest in buying any specific bike prior to the thefts, and that Kent in turn normally had no specific

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encouraged the commission of the acts. The question here, though, is whether the memo writers were morally complicit in the second sort of case as well.

49. *Id.* at 304.

50. I assume that, on this point, similar reasoning informs Jewish law, which prohibits charitable organizations from accepting contributions from convicted criminals, those under indictment, or those who are known to be involved in criminal enterprises. See Joseph Telushkin, *A Code of Jewish Ethics—II: Love Your Neighbor as Yourself* 230 (2009).

51. Kutz himself is unusual in his willingness to push the idea of criminal complicity well beyond what I assume most criminal law scholars would be willing to endorse. See, e.g., Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* 299–323 (2009); Joshua Dressler, *Reassessing the Theoretical Understandings of Accomplice Liability: New Solutions to an Old Problem*, 37 *Hastings L.J.* 91 (1985); Markus Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 *J. Int’l Crim. Just.* 977 (2007); John Gardner, *Complicity and Causality*, 1 *Crim. L. & Phil.* 127 (2007); Robert Weisberg, *Reappraising Complicity*, 4 *Buff. Crim. L. Rev.* 217 (2000).

52. Megan O’Toole, *Ballad of a Bike Dealer*, *National Post*, Dec. 16, 2009.

knowledge of the thieves' plan to steal it. That would make this case distinguishable from the first scenario, in which the receiver specifically promised *T* that, if *T* stole a bike from its owner, *O*, *R* would purchase it from her. But it would also be distinguishable from the second scenario in that *R* and *T* are not theft virgins: they are both veterans of the stolen property trade; they have dealt with each other on various occasions in the past and plan to do so again in the future. When *T* steals the bike from *O*, she is aware that there is a high probability that *R* (or others like him) will want to buy it. *R*, likewise, is always on the lookout for stolen bikes and other goods to buy. He has made it known to various thieves, including *T*, that he is a potential buyer of their stolen goods. And on this occasion he does in fact buy *T*'s bike.

Is criminal liability for *R* justified in such a case? It's a close call, but I believe that such a case can be made. Note that *R* does more than merely endorse *T*'s past wrongdoing; he encourages *T* in a continued course of wrongdoing. It should not be necessary for *R* to encourage a specific act of stealing to say that he has aided and abetted. Thief and receiver exist in ongoing and reciprocal, if informal, economic relationship to each other. In such circumstances, it makes sense to say that the receiver provides encouragement to the thief.

## VI. PUNISHING POSSESSION OF STOLEN PROPERTY

Having surveyed the moral content of receiving, we are now in a position to assess its appropriate level of punishment, particularly in comparison to the offense of theft. As noted, the modern trend is to subject receiving to the same (or, in the case of the English Theft Act, even greater<sup>53</sup>) punishment

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53. As noted, the under the Theft Act, the maximum penalty for handling stolen property (14 years; Theft Act 1968, s. 22) is greater than the maximum penalty for theft (7 years; *id.* at s. 7). From this, one might assume that the Theft Act regards handling as the greater wrong. In fact, the real rationale is somewhat more complicated. According to the Criminal Law Revision Committee Report, there might be cases in which a court is called upon to sentence an offender who receives property obtained in a robbery, rather than merely 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, s. 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).

than theft, though our empirical study indicated that most subjects believed that receiving should be punished less.

I argued above that, as the offense is currently formulated, the only legitimate retributive basis for punishing receiving is the backward-looking one—namely, the idea that the receiver perpetuates the wrongful deprivation of the owner's property. By contrast, the forward-looking rationale—the idea that the receiver encourages future acts of theft—should not be viewed as a legitimate basis for punishment, since the crime, as presently formulated, requires nothing more than the knowing possession of stolen property and is satisfied regardless of whether the thief or receiver have ever stolen or received before, or are ever likely to do so again.

Indeed, I assume that this is exactly how the subjects in our empirical study read the receiving scenario—specifying that Tom knowingly purchased, from a person he did not know, a bike stolen from Owen. Given that the focus of all of the other scenarios in the study was Tom's deprivation of Owen's property, it seems likely that the subjects focused on this backward-looking aspect of the crime rather than on the possibility that Tom's act would encourage future acts of stealing.

If I am right about the priority of the backward-looking perspective, then what are the implications for punishment? I believe that the relationship between thieving and receiving can be understood as closely analogous to the relationship between the production of certain kinds of contraband and their possession. Our criminal law often (though not always) treats those who sell or supply illegal goods more harshly than those who buy or possess them. For example, in New York, a person who merely possesses materials depicting an obscene sexual performance by a child is guilty of a class E felony (punishable by up to four years in prison), whereas a person who produces, directs, promotes, sells, or disseminates such material is guilty of a more serious class D felony (punishable by up to seven years imprisonment).<sup>54</sup>

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54. Cf. N.Y. McKinney's Penal Law § 263.11, § 263.16 with N.Y. McKinney's Penal Law § 263.10. A similar distinction is made under federal law. Cf. 18 U.S.C. §2251(e) (punishment for producing child pornography is fifteen to thirty years) with 18 U.S.C §2252(b) (punishment for possessing child pornography is five to twenty years). For an argument that the distinction between production and possession should be made even sharper, see Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U. L. Rev. (forthcoming 2010).

Like those who possess stolen property, it could be said that those who possess child pornography create a market for such material and thereby encourage its future production and dissemination. But as in the case of stolen property possession, such forward-looking effects do not figure in the formulation of child pornography possession statutes themselves. That is, an offender would be guilty of possessing child pornography even if no such material was ever again produced. Instead, the most appropriate rationale for child pornography possession statutes is the backward-looking one—namely, that such conduct perpetuates the exploitation of children initiated by the pornography maker. In the case of both stolen property and child pornography, possession of the banned substance is therefore subordinate to its creation. Under such a model, possession of stolen property should be subject to less punishment than theft.

There is also another possible approach. Assuming that we intend to take seriously the forward-looking aspect of receiving, we could enact statutes that criminalized two grades of the offense. Grade A would constitute simple receiving: it would require nothing more than that the offender possess property (otherwise than in the course of stealing) knowing or believing that it has been stolen, and it would be subject to a lesser penalty than theft proper. Grade B would be aggravated receiving: it would require that the defendant not only possess stolen property, but also that he do so in circumstances in which his conduct was likely to encourage the commission of additional thefts. And when would such circumstances properly be

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Similarly, possession of 2,880 mg of methadone is considered a class A-II felony (meriting, for first-time offenders, a prison term of three to ten years; N.Y. McKinney's Penal Law § 220.18), whereas the *sale* of the same amount of the drug is considered a more serious class A-I felony (meriting for first-time offenders a prison term of eight to twenty years; id. § 220.43). For sentencing provisions, see id. § 70.71(2)(b)(i)–(ii). Indeed, most states deem possession of drug paraphernalia a misdemeanor and sale a felony. Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 *Emory L.J.* 587, at 616 n.85 (1997). It should be noted, however, that a distinction could be made between drug possession and stolen property possession, in that the reason drug possession is prohibited is primarily to prevent future use of drugs rather than to punish their production. On the other hand, I take it that the criminalization of drug use itself is much more controversial than the criminalization of both theft and the production of child pornography. Cf. Peter Aldridge, *Dealing with Drug Dealing*, in *Harm and Culpability* 239, 253 (A.P. Simester & A.T.H. Smith eds., 1996) (mentioning the analogy between drug possession and receiving stolen property).

presumed? A receiver who engaged in a “pattern or practice” of receiving (say, a minimum of two or three such acts within a specified time period) might be presumed to have helped establish a market for stolen goods.<sup>55</sup> In such circumstances, a penalty equal to or even higher than that given to theft would be appropriate.<sup>56</sup>

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55. Cf. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(5) (defining a “pattern” of racketeering activity as requiring at least two acts of racketeering within a ten-year period).

56. This is essentially the approach taken in Spain and France. Under the Spanish Criminal Code, when the value of property received is relatively small, the only acts of receiving that are criminalized are those that are “habitual.” See Spanish Criminal Code Art. 299. (My thanks to Iñigo Ortíz de Urbina Gimeno for bringing this provision to my attention.) Under the French Criminal Code, habitual receiving is punished by ten years in prison, Art. 321-2, whereas nonhabitual receiving is punished by a term of five years, Art. 321-1.