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THE SURPRISINGLY COMPLEX CASE AGAINST THEFT

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Explaining the efficiency of laws against theft is a more complicated matter than it first appears to be. Fred McChesney (1993), responding to a 1990 IRLE article by Lewin and Trumbell, argues that theft is "inevitably" inefficient when the indirect costs of the activity are considered. McChesney traces his analysis to a 1967 paper by Gordon Tullock, in which Tullock discussed the inefficiency of theft, rent-seeking, and monopolies. Richard Posner (1985; 1992) provides a different line of reasoning that focuses on the direct costs of theft. He claims that, because the market is adept at transferring goods to their highest valued use, those who bypass the market -- thieves -- on average value the goods they steal less than the owners.

Neither analysis of theft, however, is entirely sufficient to explain its inefficiency. As Part I of this paper explains, the Tullock-McChesney resolution is flawed. Notwithstanding the existence of indirect costs, theft is efficient if incurring those costs avoids incurring larger transaction costs from a voluntary sale and the thief values the good more than the owner does. More generally, an efficiency analysis requires comparing the indirect costs of legalized theft with the transaction costs of market sales. In Part II, we make this comparison. Unsurprisingly, theft is inefficient, though for more complex and less certain reasons than the Tullock-McChesney thesis suggests: because indirect

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costs usually would exceed transaction costs and because indirect costs often would not avoid incurring transaction costs. The surprising result of our model is that Posner's theft thesis, while correct in a static model, turns out not to matter much to the dynamic inefficiency of theft. In equilibrium, very little of the costs of theft would be from transfers to lower valued users. Thus, we ultimately agree with Tullock and McChesney that the real problem with theft is its indirect costs. Finally, in Part III, we discuss how this analysis bears on the criminal rules that define when involuntary takings constitute theft.

I.

Gordon Tullock (1967) first formally identified the dynamic or indirect costs of theft.[1/] These costs are "the investments of capital and labor in the activity of theft and in protection against theft." Thieves acquire technology and skills for stealing; owners respond with locks, alarms, guards, etc. Investment by one prompts countermeasures by the other. In equilibrium, these investments "would be extremely costly to the society in spite of the fact that the activity of theft only involves transfers. . . Transfers themselves cost society nothing, but . . . [t]hese largely offsetting commitments of resources are totally wasted from the standpoint of society as a whole." (Tullock, 1967: 230).

Fred McChesney (1993) elegantly restates Tullock's theory. He begins by describing a "static" analysis of criminal law. Suppose there is a possible trade between A and B that would be either Pareto efficient (making B better off and A no worse off) or Kaldor-Hicks efficient (B's gains would

[1] We say "formally" because we would credit Thomas Hobbes with the basic insight that the absence of state protections of property or persons would lead to a condition in which individuals spent most of their time protecting themselves against the predations of others, or preparing to engage in such predations. THOMAS HOBBES (1651). The economic question regarding theft, however, focuses more narrowly on whether property protections alone are efficient. Thus, when we discuss "legalized" theft, we assume that the state would continue to prohibit crimes other than theft, including the use of force (even if) for the purpose of taking property.

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more than outweigh A's losses). The static analysis indicates that, at least in the presence of high transaction costs for a sale, it would be efficient for B to take what she wants from A. The flaw in this analysis, McChesney argues, is that it fails to take into account "theft's dynamic effects over time" (McChesney, 1993:227; see also McChesney, 1991:284-285), namely theindirect costs of theft. "Rearrangements of surplus or gains from trade among various parties . . . are truly (tautologically) mere transfers. As with any transfer, benefits to winners can be counted, but would be offset by losses to victims." (McChesney, 1993: 227 (our emphasis)). We must then subtract fromB's gain the indirect costs of the transfer: the amount potential victims invest "to avoid takings" and the amount potential thieves invest in "seeking, stealing, and concealing others' assets rather than producing new goods." (Ibid.) McChesney therefore concludes that "criminals' gains must inevitably fall short of crime's costs." (McChesney, 1993: 228)(our emphasis).

Tullock and McChesney are surely right that the indirect costs of preventing and facilitating crime make it generally an inefficient activity. (See also Posner, 1985: 1196-97). The problem with the Tullock-McChesney thesis, however, is that---as McChesney recognizes in his static but not his dynamic analysis---a movement of non-cash goods from A to B will not always be a mere transfer creating neither efficiency losses or gains. In fact, it is possible that greater social wealth will be created by a theft transfer than a market transfer. Accordingly, it is misleading to say that "the optimal amount of crime is a corner solution" (McChesney, 1993: 228; see also McChesney, 1991: 285), if one includes all involuntary transfers.[2/]

This point follows from McChesney's Edgeworth box analysis. An Edgeworth box illustrates

[2] McChesney recognizes that when enforcement costs are considered, the optimal amount of crime may well be more than zero. We agree, but this point safely may be ignored here.

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the exact contours of the contractual surplus between two parties with two goods. Given the parties' indifference curves, the box shows a "contract curve" representing distributions of goods that are Pareto-superior to certain distributions off the curve.[3/] McChesney points out that a theft that moved the parties from a distribution not on the contract curve to certain distributions on the curve would, with compensation, make both parties better off and would, without compensation, still be Kaldor-Hicks superior. (McChesney, 1993: 226-27). But when he later introduces the dynamic (indirect) costs of theft, he no longer considers this benefit of theft; nor does he acknowledge that this benefit of theft must be weighed against the dynamic costs of theft. Instead, immediately before introducing the dynamic costs, he says: "If the dimensions of the Edgeworth box (i.e., the amount of wealth) are given, reallocation of resources between A and B inside the box are unimportant for overall wealth maximization." (227). From this account, it appears that any indirect costs will then make theft necessarily inefficient.

This claim, however, is incorrect. If a theft merely moves the parties from one point on the contract curve to another, the transfer can be ignored in a dynamic efficiency analysis. But if the theft moves the parties from a point not on the contract curve to certain points on the curve, the transfer will create a benefit for the thief that exceeds the cost to the owner. And this transfer gain can, in theory, also exceed the dynamic costs. Thus, whether the parties actually achieve a surplus does matter to efficiency. Some "reallocation[s] of resources between A and B inside the box" are

[3] Because the parties do not value the goods identically, some distributions are better for both parties than other distributions. The contract curve represents distributions at which the opportunity for mutual gain is exhausted. For any given initial distribution not on the contract curve, at least one point on the curve will make both parties better off. From the viewpoint of efficiency, any point on the curve maximizes wealth and is as good as any other point on the curve. But the parties will bargain not only to reach the curve and achieve the potential surplus but also to maximize their share of it.

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important to "overall wealth maximization," even if the "dimensions of the Edgeworth box . . . are given."

To illustrate our argument, consider one example involving the theft of cash, and a second example involving the theft of a non-cash good:

(1) A has $200 cash in her wallet. Suppose the cost to steal A's wallet is $30, representing the opportunity cost to B of planning and carrying out the theft---these are the indirect costs of theft in this example (ignoring for now A's defensive measures and third-party effects). If B is rational, she chooses to steal A's wallet, because B stands to gain $200 at an expected cost of $30.[4] Following McChesney, the movement of the $200 from A to B is a mere transfer, having no effect on efficiency. However, the $30 in indirect costs in carrying out the theft make it a necessarily inefficient activity.[5]

(2) A values her bicycle at $200, and therefore she would prefer any amount over $200 in exchange for her bicycle. B values A's bicycle at $300. Suppose transaction costs for a market sale are relatively high, say $40. But for the possibility of legal theft, A would sell B her bicycle at some amount between A's reservation price of $200 and B's reservation price of $300. Given the $40 in transaction costs, the sale will create $60 in wealth, with the surplus divided between A and B. Now suppose theft is legal and suppose again that the indirect costs of theft are $30. B can either steal the bicycle at a cost of $30, or can purchase the bicycle at a cost of at least $200. The rational, income-maximizing B steals the bicycle. A suffers a loss of $200, and B gains $270. The social gain in the

[4] Note that if B has moral qualms about stealing, as many people would, then the cost of B's theft would be higher than $30, reflecting these moral qualms. But that is not the case here. Conversely, this analysis also ignores any benefits B obtains from the act of stealing itself, such as the "thrill" or "game" of theft.

[5] This conclusion would not necessarily follow if we assumed that B could value the $200 more than A does, but, like others in this debate and those who use economic analysis of law generally (e.g., Posner, 1992: 11-14), we put aside (for now) this issue of wealth effects, and return to it in note 14 below.

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transaction is $70. The theft is not a mere transfer: it has efficiency gains. Thus, McChesney is incorrect in stating that thefts are necessarily mere transfers.[6/]

Why is theft necessarily inefficient in the first example but not necessarily inefficient in the second example? In the first example, we assume A and B value cash equally. Having put aside wealth effects, there is no reason to believe that the $200 has a different value for the thief or victim. Indirect costs must be subtracted from a wealth gain of zero, leading to a loss in social wealth. In the second example, by contrast, there is no a priori reason to believe that A and B do value the bicycle equally. When B bypasses the market through theft, we obviously cannot use the usual willingness-to-pay criterion to measure B's value of the good (see Posner, 1985: 1196 fn. 9). If B values the good more than A does, and B's gains are greater than A's losses and the indirect costs, theft will cause an efficiency gain.

This outcome is driven by the size of transaction costs of a market sale relative to the size of the indirect costs of theft. When B values the good more than A, and theft and sale are alternatives, promoting efficiency requires a transfer by whichever method of transfer is cheaper; where transaction costs exceed indirect costs, theft is the cheaper method. In the second example, theft is $10 cheaper than a sale. If the theft had created $10 more in indirect costs on A and other potential victims of theft, the indirect costs would then equal the size of the transaction costs and theft's efficiency would disappear. Theft would also be inefficient whenever B does not value the good more than A does,[7/] or if incurring the indirect costs somehow does not avoid incurring the

[6] Posner's argument (1985; 1992) against theft supplies a parallel example. If the facts are the same as above except that B values the bicycle at only $35, he will steal it. The result is also not a "mere" transfer but a wealth loss of $165 (aside from the indirect costs) because the owner values the bicycle that much more than the thief does.

[7] If A and B value the good equally, Example (2) looks like Example (1) and we have an efficiency loss. The same result occurs of B values the good less than A does. (See Posner, 1985, 1992.)

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transaction costs. But no matter: the point is that theft is not always a mere transfer and in theory theft may lead to efficiency gains. Specifically, theft is a more efficient method of exchange than the market whenever (i) the thief values the good at some amount greater than the owner does, (ii) the indirect costs of the theft are less than the transaction costs of a sale, and (iii) the theft avoids the transaction costs.

In sum, the Tullock-McChesney thesis fails because we cannot treat the direct gains and losses from theft as mere transfers. Instead, some theft transfers may increase overall social wealth.[8/] If the only argument against theft is that each theft is necessarily inefficient, the result is troubling because it raises the theoretical possibility that theft is generally efficient. Not surprisingly, we reject this possibility, though the reasons are more complicated than the Tullock-McChesney thesis suggests.

II.

Although the mere existence of dynamic, indirect costs is not sufficient to prove theft inefficient, the probable quantity of those costs is sufficient to justify a theft ban. We offer alternative grounds for believing that theft is only rarely efficient. In Part II.A, we argue theft is commonly inefficient because, on average, the structural differences in market and non-market interactions ensure that indirect costs exceed transaction costs. In Part II.B, we argue that theft incurs some specific indirect costs that are necessarily inefficient because they exceed or fail to avoid transaction costs. Because these specific cases would predominate in a world of lawful theft, they also

[8] The same may be said of rent seeking through the political process, one of Tullock's and McChesney's other examples. When rent seeking involves cash transfers through a tax or regulation, the activity generally will be inefficient for the same reason theft of cash is inefficient: there are mere transfers with indirect costs. But rent seeking involving a transfer of non-cash goods may be efficient. For example, land redistribution would be efficient whenever those receiving land value it at some amount more than those having their land taken away and the indirect costs of the rent seeking are lower than the transaction costs of the land sales. Jones and Cullis (1990: 251-252) suggest that counting gains to public sector employees also may lead to instances of efficient rent seeking.

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demonstrate the average inefficiency of theft. In combination, these arguments make it quite likely that a general ban on theft is efficient. As we explain in Part II.C, our model reveals why Posner's claim -- that thieves will on average value the goods they steal less than owners -- is not as important to the inefficiency of theft as the dynamic indirect costs.

A.

To our knowledge, no one has explicitly compared the indirect costs of theft to the transaction costs of voluntary sales, but the reasons that the former generally exceed the latter are quite straightforward. The indirect costs of theft include two components: the investment thieves make in theft (e.g., time and resources spent acquiring technology and skills for stealing)[9] and the defensive measures taken by owners (e.g., deadbolt locks, burglar alarms, guard dogs). These indirect costs tend to exceed the transactions-cost savings of theft because the structure of market interactions works to reduce transaction costs whereas the structure of theft interactions works (as Tullock originally noted) to increase the thieves' investment and owners' defensive measures in response to each other.

The lower the transaction costs, the greater the surplus for two contractual parties to divide. The process of reducing transaction costs between buyers and sellers is therefore cooperative; both sides have an interest in coordinating their behavior to reduce their joint costs. Thus, in the market, the party who minimizes transaction costs gains more and better trades. Competition prompts sellers to advertise, offer standardized products, locate near buyers, provide credit, etc.; prompts buyers to seek scale economies in "shopping," share information, develop brand loyalty, etc.; and prompts

[9] The thief's investment allocated to a particular transfer might be called the "transaction cost" of a theft, but in the text we use "transaction cost" only to refer to the cost of voluntary sales.

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brokers to match buyers and sellers.

When theft is permitted, however, the interaction between owners and potential thieves is one of conflict. Owners invest in defensive measures to lower the productivity of the thieves' investment and, thereby, to impede theft; thieves invest in theft to lower the productivity of the owners' defensive measures and, thereby, to facilitate theft. If one round of expenditures on defensive measures blocked all theft, we would gain none of the advantages of theft, but suffer the costs of investment in defensive measures. More likely, defensive measures prompt some thieves to increase their investment in the skills and technology of theft. These thieves gain scale economies by specializing in theft (as they do in the real world of imperfect criminal sanctions); those who do not specialize have fewer theft opportunities. This investment prompts further defensive measures and then greater specialization. Competition tends to "ratchet up" the total expenditures on indirect costs. For this reason, the indirect costs of theft will on average exceed the transaction costs avoided by theft.

B.

The case against theft is strengthened by three specific cases where legalizing theft is necessarily inefficient. Because of the dominance of these cases, theft could only rarely be efficient.

(1) First, in response to legalized theft, owners would sometimes incur one set of costs that necessarily exceeds the transaction costs of a sale. When defending a good from theft is expensive and largely ineffective, many owners would chose to forgo future consumption of the good (by selling it immediately or by not spending on defensive measures and not replacing the good once it is stolen or consumed). Thus, in a world of lawful theft, many (more) people would cease purchasing items like lawn ornaments and car radios. Forgoing their consumption prevents their theft. As demand fell, so would the quantity supplied. The effect is like that of an excise tax: decreased consumption harms

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the consumer without creating an offsetting benefit. Of course, the fact that there are fewer lawn ornaments also means society will incur fewer transaction costs in the sale of lawn ornaments. But the indirect costs are necessarily larger than these savings: if individuals presently incur transaction costs it is because the goods they buy create a consumer surplus. Because the lost surplus is the indirect cost of theft for these goods, the indirect cost necessarily exceeds the transaction costs.

(2) Regardless of the relative size of transaction costs and indirect costs, a theft is inefficient if the expenditures on indirect costs do not avoid expenditures on transaction costs. This result occurs in two cases. One is where defensive measures work, and there is no theft. Sometimes defensive measures are cheap and effective, and the owner raises the cost of theft to the point where a thief can no longer profit by bearing the costs necessary to steal the good. When this happens, the indirect costs owners incur do not save any transaction costs. If the surplus from a sale is less than the transaction costs, then the regime banning theft does not incur transaction costs because there is no sale. But if the surplus from sale is greater than the transaction costs, then a regime permitting theft also would incur the transaction costs because, given the owner's successful defensive measures, the would-be thief will now obtain the good by buying it. In either case, where defensive measures prevent an actual theft, there are no transaction costs savings to offset these indirect costs.

(3) The final case is the most important: where theft occurs but results in a sale, the indirect costs do not avoid transaction costs. Thus, whenever a thief steals a good for purposes of selling it and does sell it, society incurs both the indirect costs of the theft---any futile defensive measures plus the thief's investment costs---and the transaction costs of the thief's subsequent sale. Conservatively

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assuming that the thief faces the same transaction costs as the owner (assisted by market brokers),[10] the theft merely adds one more costly step in the transfer of the good from the owner to the person who values it most. Again, there is no possible transaction costs savings to offset the indirect costs.

This point may be better understood as a situation where the transfer of the good from owner to thief is, in McChesney's words, a "mere transfer." In Part I, we said a thief can gain more than the owner loses only when the item stolen is not cash or a "cash equivalent." Whenever the thief takes a good solely for resale, the good is a "cash equivalent" (as long as the thief faces transaction costs no less than what the owner faces). An owner values a good at least by (and often more than) the cash it will fetch in the market, its "exchange value." If the thief values the good only for its exchange value, he can gain from theft no more than the owner loses. Thus, for thefts that occur for resale, the indirect costs make this category of transfers necessarily inefficient.

If theft were legal, theft-for-resale would represent a very large proportion of all thefts. Defensive measures will be most effective against "amateur" or opportunistic thieves who have made no investment in theft capital,[11] but they will be less effective the more a thief has invested in the

[10] Obviously, if theft were legal, thieves would not incur the extraordinarily high transaction costs that now cause them to sell their goods to "fences" at only a fraction of their market value. With lawful theft, there would be little or no value to "title." Possession alone would matter and thieves would be able to convey possession.

Nonetheless, given market brokers who match buyers and sellers, it is unlikely that transaction costs for the thief/third party sale would be lower than transaction costs for the owner/third party sale. When the owner can provide credible and valuable information about the good (e.g., regarding existing warranties, repair history, means of operation), the owner actually faces lower transaction costs and the inefficiency of theft is greater. On the other hand, the thief might sometimes have lower transaction costs. For example, theft may avoid the "lemons" problem in the sale of used goods. See Akerlof (1970). Because the thief does not know which goods are lemons, he does not adversely select lemons for sale. But such cases are probably rare. In particular, the lemons problem does not apply to new goods nor to used goods whose quality is observable. Even for lemons, the problem will partly persist because consumers will take less care to prevent theft of lemons than of properly functioning goods. Thus, thieves would probably have higher average transaction costs than owners and, at least, would not have lower average transaction costs.

[11] Almost any defensive measure should make it difficult for amateurs to steal a good, though not impossible because some thefts may occur when an individual exploits an infrequent opportunity, as when the owner must unexpectedly relinquish custody of a good and leave it temporarily unprotected.

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knowledge or technology of theft. Thus, professional thieves would dominate the legal theft industry. As "Blackmail, Inc." would arise in a world of lawful blackmail (Epstein, 1983), legalizing theft would create an industry of firms specializing in theft. Private security firms, for example, would enter the theft market to exploit an obvious synergy: knowledge of security techniques requires knowledge of theft techniques, and vice versa.

These professionals would steal primarily for purposes of resale; achieving scale economies requires that they steal more than they can use personally. Thus, if theft were legal, most thefts would require a resale, and thereby incur indirect costs without avoiding transaction costs. Indeed, after stealing a good, professional thieves would frequently minimize their transaction costs by going right back to the person whose prior possession evidences the value he places on the good: the original owner. The activity of stealing goods and selling them back to the owner is obviously inefficient.

Of course, the owner may fear that a thief who stole the good once may be able to steal it again; he will be unwilling to repurchase a good he expects to be immediately restolen. To avoid this problem, professional thieves would seek to establish reputations (or contractually promise[12]) not to re-steal the good they sold back to an owner. Various problems might impede the development of such reputations (or minimize the value of such promises): should the good be restolen, the owner may not know (or be able to prove) the second thief was the same as, or an agent of, the first. Or the owner may simply fear that some other thief will be equally good at taking the good and demanding another payment. But there is an easy solution: were theft lawful, the private security firms that would

[12] Legalizing theft might simply mean eliminating criminal sanctions, in which case contracts would still be enforceable. But legalizing theft might also mean eliminating any civil liability for property loss, including liability now based on contract. In general, our arguments (like those of Tullock and McChesney) do not require distinguishing between these meanings because they merely affect the amount indirect costs. For the one issue of professional theft, however, we consider both the possibility that professionals would make contracts not to steal and, alternatively assuming contracts are unenforceable, that they would establish reputations for keeping their promises.

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sell owners protective measures would also invest in stealing from non-clients. Stealing an individual's prized possession would become a standard foot-in-the-door (so to speak) sales technique: having proved the individual's defensive measures inadequate, the company would now offer to sell the good back to the owner along with security measures it might fully or partially warrant would prevent any future theft. Because this kind of theft would produce enormous indirect costs, but avoid no transaction costs, it is necessarily inefficient.

The combination of these three cases demonstrates why legalized theft would very probably be inefficient. When the productivity of defensive measures is so low that the consumer forgoes consuming the good, the result is inefficient. When the productivity of defensive measures is so high that the defensive measures prevent theft, the result is inefficient. When the productivity of defensive measures is between these points, it generally means that the theft that occurs will be by professionals who will, after the theft, sell the good. And this case is also necessarily inefficient. Though there remain some cases where an amateur or professional steals for personal use, these cases are likely to be exceptional. And even where such a case occurs, for the reasons stated in II.A, the average case will still be inefficient because the indirect costs exceed the transaction costs.

C.

We wish here to explain the effect of our model on Posner's claim that thieves frequently would value the stolen good less than the owner.[13] The possibility exists, but the dynamic analysis reveals why this concern is far less important than the size of indirect costs. Were theft legal, it is certain that owners would spend more preventing theft, but it is not certain that there would be more

[13] Posner (1992:208) states: "The thief is unlikely to set a higher value on the good than the owner does." Similarly, Rasmusen (1996:6) states: "This kind of judgement is universal in criminal law. We believe that the thief values the television less than the owner . . . Otherwise, the theft . . . would be [an] efficient way[] of minimizing transaction costs."

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theft. In many cases, the defensive measures would work and in others, because of the risk they would not work, consumers would avoid theft by foregoing the good. Even if more theft did result, most of it would be professional theft for resale, and where the owner is the party who values the good the most, the thief would sell the good back to the owner. The important effect then is not the temporary deprivation of one's property but the resources wasted incurring both indirect costs and transaction costs. Indeed, in many cases a theft firm would not even steal the good, but be paid off in advance for providing protection from theft.

The intuition that theft is inefficient because thieves would value goods less than owners is flawed, or at least incidental to the important result. The intuition probably arises from thinking about theft in status quo terms. Because theft is now criminal, thieves must sell goods discretely, without the advertising or promotion necessary to minimize transaction costs and to ensure the good ends up in the hands of the person who values it most. But if theft were legal, we would not simply have more of the same; rather, thieves would become owners of what they stole and would, like owners today, use market mechanisms to sell their goods. The market would still tend to move goods to their highest valued use (though for reasons explained, the market would contain fewer goods).

There is one important qualification to this claim, though it only emphasizes the importance of indirect costs. With lawful theft, the post-theft market would work less well at moving goods to their highest valued use because defensive measures tend to raise the transaction costs of voluntary sales. A retailer combats shoplifting, for example, by restricting the opportunity of buyers to inspect the items for sale, by concentrating costly security measures in fewer stores or during more limited hours, or by requiring customers to check their bags while they peruse the store. A homeowner prevents theft by limiting the information potential thieves can obtain about his property---for

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example, concealing his goods in his home, allowing fewer people inside that home, and concealing disposal of old goods to prevent signaling his acquisition of new goods. These defensive measures raise not only the cost of theft, but the transaction costs for sales between retailers or consumers and potential buyers. The measures deprive buyers of information they require to determine what, if any, offer they will make. Thus, one of the many indirect costs of theft is increased transaction costs. If legalizing theft misdirects goods to lowered valued users, it is primarily for this reason: after a theft, higher transaction costs make it more likely that the most efficient sale will not occur.[14]

[14] There is another reason not to rely on the claim that theft is inefficient because it transfers goods to "lower valued" uses: it requires ignoring wealth effects precisely where they may matter most. A common justification for using willingness-to-pay as a criterion for value is that it is usually a good measure of utility; wealth maximization is then a proxy for utility maximization. (Posner 1992:15-16.) But this generalization is questionable in the context of theft, where the those with less wealth often steal from those with more. A person with less wealth might be "willing" (able) to pay less and still gain more utility than the owner. Thus, Posner's claim requires ignoring these highly plausible wealth effects, or advancing other arguments to shore up the connection between wealth and utility, or advocating wealth as an independent value. Our argument concerning indirect costs, however, is not subject to this objection. Diminished production of goods, expenditures that prevent theft, and professional theft firms all present deadweight losses regardless of what one thinks about the connection between wealth and utility.

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III.

Thus far, we have followed other economic accounts in avoiding a precise definition of "theft." A moment's reflection will confirm, however, that what is said about "theft" in this and other papers applies generally to any involuntary taking of property. But not every involuntary taking is treated by criminal law as theft. In this Part, we discuss how our probabilistic argument against theft helps to explain which involuntary takings incur criminal liability.

Tort law requires compensating owners for virtually all involuntary takings of their property.[15] Requiring compensation undoubtedly deters some involuntary transfers, but the standard view is that tort liability alone is insufficient. Inevitably, some owners value their property more than the amount a court would require the taker to pay, and takers sometimes pay nothing because they elude detection or are judgment-proof. Criminal punishment is therefore necessary to avoid the substantial indirect costs that would result from many otherwise undeterred involuntary takings. The difficult question is why the property rule against takings is sometimes set aside in favor of a mere liability rule. (Calabresi and Melamed 1972).

The standard rationale for creating exceptions to criminal liability is high transaction costs. Calabresi and Melamed (1972), for example, teach that liability rules govern cases of negligent harming rather than property rules because transaction costs prevent the relevant parties from bargaining with each other for due care. The state's power of eminent domain similarly is said to be efficient where the costs of bargaining with large numbers of owners, each behaving strategically,

[15] The tort of conversion is a strict liability offense. Maye v. Tappan, 23 Cal.3d 306 (1863). Even under the tort necessity defense, a person who takes another's property without permission under emergency circumstances still must compensate the owner for the losses caused. Vincent v. Lake Erie Transportation Co. , 124 N.W. 221 (Minn. 1910). The only exception is when property is taken to protect the interests of the community at large; but there the takings clause of the Fifth Amendment may require compensation. (Epstein, 1995:61-64.)

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otherwise prevent an individual from obtaining property he values more than the owners. (Cooter & Ulen, 1988:193-194.) More obviously relevant to criminal law, Posner (1992:242) explains the defense of necessity, as applied to theft,[16] with transaction costs: only when transaction costs are high do we listen to arguments that the property taker actually gained more than the owner lost. Thus, the lost hiker may value essential supplies he takes from another's mountain cabin more than the owner, but high transaction costs prevent him from gaining the owner's consent at the relevant time. We note a similar point about some of the rules defining larceny. The common law intent requirement---that one who takes (and carries away) property of another intend to permanently deprive the owner thereof[17]---frequently works to screen from criminal liability cases where it is most likely that transaction costs would prevent a negotiated sale.[18]

Parts I and II demonstrate, however, that the explanations for these exceptions are not complete. High transaction costs may justify permitting an involuntary transfer, but not merely because the barrier to a voluntary sale makes it plausible that the taker values the property more than

[16] Most modern recodifications follow the Model Penal Code formulation of § 3.02 that provides a broad choice-of-evils defense for all crimes. 1 LaFave and Scott (1986:628). The MPC Commentaries (1980) to § 3.02 list examples including theft.

[17] Model Penal Code and Commentaries (1980:§ 223.2, at 174).

[18] Given the required intent, one who takes fungible property or property offered for sale, intending to pay for it later, is not guilty of larceny. See, e.g., Bongfeldt v. State , 639 S.W.2d 70 (Ark. 1982)(gasoline); Lee v. Virginia , 105 S.E.2d 152 (1958)(tire). See also Model Penal Code § 223.1(3)(c) (providing a defense to theft where the actor "took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented."). Nor is the actor guilty of larceny if he takes property of another with the intent (and substantial ability) to return the item in a reasonable time. See cases cited by 2 LaFave and Scott (1986:359, n.13). If one is apprehended before paying for or returning the good, it will usually be difficult for a defendant to convince a jury he intended to pay for or return the property he took without permission, unless the costs of transacting a sale or lease agreement were high at the time of the taking (as where the owner was not available and the costs of waiting were significant). The property taker remains liable in tort, but the release from criminal sanctions converts a property rule to a liability rule precisely where a property rule, in combination with transaction costs, would have deterred an efficient transfer. Of course, the mental element required for larceny will not exculpate the taker in every case where, or only in cases where, the transfer is efficient. But given the costs of a perfectly discriminating rule, some under- and/or over-inclusiveness is inevitable.

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the owner. Even if the taker values the property more and the transaction costs prevent a sale, the involuntary taking remains inefficient if the indirect costs exceed the transaction costs. Where the transaction costs exceed the surplus from a transfer (thereby blocking a sale), if indirect costs exceed transaction costs, then the indirect costs also necessarily exceed the surplus and the transfer is inefficient. Unusually high transaction costs thus matter for a second reason: the higher the transaction costs, the more plausible it is that they exceed the indirect costs.

Of course, even if transaction costs are high, indirect costs may be higher. We should permit involuntary takings only where indirect costs are low relative to transaction costs. The actual exceptions to theft liability fit this requirement. Because the market ensures that transaction costs are usually low, any exception requiring high transaction costs will tend to be rare; in turn, their rarity will invoke only low indirect costs because owners will anticipate few applications of the exception. For example, if the owners of mountain cabins know that their property may be taken when a hiker's life is in jeopardy, we can expect only trivial defensive responses simply because, for any given cabin, the odds of such a justified break-in are so low. Because the marginal risk is low, an owner is not likely forgo his cabin or its contents, and the costs of effective defensive measures probably exceed their benefit.

On the other hand, were high transaction costs common, they would no longer justify permitting involuntary takings. Consider two examples. First, imagine that some external shock caused transaction costs to rise sharply throughout the economy: hyperinflation or war, for example, might cause people to abandon the use of currency and rely on bartering. There would be many cases where one person valued a good more than the owner but where very high transaction costs prevented a sale. But once these circumstances became common, they would no longer justify an

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exception from criminal liability. Frequent involuntary takings would cause the high indirect costs described in Part II.

Second, even where high transaction costs are rare, they do not justify permitting an involuntary taking if the exception itself would cause the frequency of high transaction costs to rise. For example, because retailers cannot perfectly anticipate the timing of demand, shoppers sometimes encounter long lines for customer assistance or check-out that raise transaction costs to the point where they block a sale. Despite the high transaction costs, and their infrequency, we do not permit involuntary takings in these circumstances. If an exception were recognized, potential buyers would engage in strategic behavior that could make involuntary takings quite common. Once long lines developed, buyers would flood the store (further raising the costs of voluntary transactions) and take a substantial amount of the store's inventory (until the few items remaining could be purchased with an insignificant wait). To minimize the risk of this result, retailers would likely adopt any number of defensive measures that worked (for example, by only allowing a few customers in the store at a time and keeping any line outside), and therefore would incur indirect costs without creating any offsetting benefit. Contrast the case of the hiker lost in the woods. The conditions defining the necessity exception induce little or no strategic behavior; hikers do not have the incentive to become dangerously lost and hungry so they can break into mountain cabins.[19]

Thus, we exempt from criminal liability only those involuntary takings in which the indirect costs are likely to be less than transaction costs. Indirect costs will remain low only if there are few such exceptions (as by requiring high transaction costs in a well-functioning economy) and only if the

[19] Even though the necessity defense might slightly reduce precautions taken by hikers, the exception does not cause significant number of involuntary transfers.

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exceptions themselves do not induce behavior that raises transaction costs. In sum, the comparison of indirect and transaction costs is useful for explaining why the criminal law treats some, but only some, involuntary takings as theft.

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