Introduction

The crime of theft holds a prominent place in our law and in our culture. It claims more victims and causes greater economic injury, and it may well be committed by a larger number of offenders, than any other criminal offense.[1] The act of stealing—of unlawfully treating *tuum* as *meum*—entails one of the most basic wrongs a person can do to another. It seems likely that prohibitions on theft have been with us for as long as people have made laws and laid claim to property; it is hard to imagine any organized society without them.

Yet theft remains an enigma. For all its timelessness, it is striking that what constituted theft in early eighteenth century England is so different from what constitutes theft in the Anglophone world today. Despite the universality of theft, it is puzzling that different legal systems have sought to conceptualize and structure theft law in such apparently disparate ways. And despite theft's obvious status as one of criminal law's core offenses, there remain fundamentally unresolved questions about exactly what should count as stealing and exactly what types of things can be stolen.

This book seeks to give theft law the thoroughgoing normative analysis that it deserves and that, in recent years, it has failed to receive. The need for such a study has never been greater: In the fifty years since promulgation of the Model Penal Code, and forty-five years since enactment of the English Theft Act, the world has changed dramatically. Information and intellectual property have come to play an increasingly significant role in our economy; the means of committing

theft and fraud have grown increasingly sophisticated; and the gap between rich and poor has continued to grow. Meanwhile, criminal law theory has evolved, offering insights into the rationale for, and proper scope of, criminalization that simply could not have been foreseen at mid-century.

The offense of theft that emerges from this book constitutes a uniquely complex crime, encompassing a broad range of conduct, and reflecting two competing sources of normative content. On the one hand, it reflects a prelegal, universal, and naturalistic conception that stealing is in some sense morally wrong. On the other hand, it is dependent on a highly legalized, culturally specific, and positivist conception that turns on technical notions of property, ownership, abandonment, and the like. Indeed, theft law is dependent on the law of personal property, intellectual property, contract, and agency in ways that no other criminal offense is.

The theory of theft outlined in the pages that follow takes account of both retributive and consequentialist considerations. It offers original empirical research into how theft is viewed by the general public and seeks to explain the deeper conceptual thinking that might explain such intuitive judgments. It draws on insights found in moral and political philosophy, legal history, law and economics, social psychology, and criminology. It considers how theft is dealt with in a wide range of legal systems and offers a glimpse of how theft law would function in societies with radically different systems of property ownership. And it considers how the terms *theft* and *stealing* function in our legal and moral discourse, paying particular attention to the sometimes blurry line between literal and metaphorical usage, as when we talk about identity theft, theft of trade secrets, the federal Stolen Valor Act, and plagiarism as theft.

Along the way, the book offers solutions to a host of real-world puzzles arising out of cases such as those involving:

- the magistrate judge who failed to look for the owner of a Rolex watch he found on the floor of a supermarket, and instead gave it to his wife as a birthday gift;
- the Internet user who parked his car outside a Seattle coffee shop and, without ever buying anything, regularly accessed the shop's wireless network;

- the Internet activist who received copies of tens of thousands of confidential U.S. State Department documents, gave them to leading media outlets, and published them on his Web site, WikiLeaks;
- the doctors who, without their patient's permission, used his tissue to harvest a fabulously valuable cell line;
- the woman who wrote letters to the movie star Clark Gable demanding child support for a child she falsely claimed she and Gable had conceived, even though she knew they had never had sexual relations;
- office workers who take office supplies home from work for use on non-work–related projects;
- the editor of a technology blog who bought a lost prototype iPhone from a man who had found it in a Silicon Valley bar;
- the bootlegger who, during Prohibition, stole whiskey from another bootlegger;
- the elderly Florida man who was charged under the federal Stolen Valor Act with falsely telling others that he had won a Medal of Honor;
- the would-be john who falsely promised a prostitute he would pay for sex and then failed to do so;
- the Sardinian tourist, vacationing in London, who took a teddy bear that had been left as a memorial to Princess Diana from outside the gates of St. James's Palace;
- the college student who sneaked into a classroom to read an examination in advance of its administration and left after memorizing the questions but without ever physically taking the paper on which the exam was written; and
- the Internet entrepreneur who allegedly stole from several Harvard classmates the idea for a social network Web site, and turned it into Facebook.

The text will show that the resolution of each of these and other puzzling cases almost invariably depends on the resolution of deeper conceptual issues in the theory of theft.

A ROAD MAP

Chapter 1 offers a critique of twentieth century Anglo-American theft law reform. At the beginning of the century, reformers on both sides of the Atlantic had become convinced that the common law of theft was badly in need of revision. A series of judicial decisions, legislative enactments, and so-called historical accidents had created a piecemeal collection of seemingly arbitrary, overly technical, loophole-ridden legal rules. The reformers were determined to scrap the old law of theft and essentially start over. In the Model Penal Code, the English Theft Act 1968, the Canadian Criminal Code, and the law of several Australian statutes, they did away with supposedly archaic distinctions, such as those between larceny, embezzlement, and false pretenses, and replaced them with a streamlined and consolidated offense of theft. They also jettisoned age-old distinctions concerning the types of things that could be stolen and in their place formulated an all-encompassing definition of property that indiscriminately included tangible personal property, real property, services, and intangibles.

I argue that, in making such changes, the theft law reformers threw out the baby with the bathwater. What was lost were not only useless common law arcana but also key moral distinctions concerning the means by which theft is committed and the kinds of property stolen. If criminal law is to satisfy what has been called the principle of fair labeling—the idea that offenses should be divided and labeled so as to reflect widely held distinctions in the nature and magnitude of blameworthiness—it must take account of what ordinary people actually think about the law. To that end, I present the results of an empirical study designed to measure people's attitudes concerning theft. The study (which asked subjects to distinguish among various scenarios involving the theft of a bicycle) indicates that people do make sharp blameworthiness-based distinctions as to both the means by which theft is committed and the kinds of property stolen.

Chapter 2 begins the ground-up construction of a normative theory of theft law—in effect, an attempt to explain why people in our study might have made the intuitive judgments they did. The focus here is on three basic (and at times overlapping) elements that define the moral content of any crime: harmfulness, intent, and wrongdoing. The harmfulness in theft consists not only of losses to individual property

owners, but also to the system of property ownership more generally. Theft differs from lesser property crimes like trespass and unauthorized use in that it requires a more substantial and more permanent deprivation of rights in property, including, crucially, a deprivation of the right of use. The *mens rea* in theft typically consists of an intent to deprive another of property permanently, rather than just to borrow without permission. Crucial here is the requirement that the defendant have the intent to deprive at the same time the property is appropriated; it is this requirement of concurrence that ultimately distinguishes theft from mere breach of contract.

The third, and most complex, moral element in theft is wrongfulness. I begin by distinguishing between what I call theft's primary and secondary wrongs. The primary wrong consists of depriving the owner of property rights. Crucial here is the ability of theft law to distinguish between those takings that are wrongful and those that are not, depending on whether they are committed without consent, unlawfully, fraudulently, or dishonestly. The secondary wrong in theft consists of the means by which the theft is carried out. Here, I examine the moral content of thefts committed by means of force or violence (robbery), coercion (extortion and blackmail), housebreaking (burglary), stealth (larceny), breach of trust (embezzlement), deception (false pretenses and passing a bad check), and what I describe as exploiting the circumstances of an emergency (looting).

Chapter 3 asks why theft is a crime and when it shouldn't be. The chapter begins by considering the myriad ways in which theft law overlaps with the civil law of conversion, trespass to chattel, and fraud. It then turns to the question of criminalization itself, which is best approached not on the basis of a generalized and undifferentiated notion of theft, but rather with respect to specific forms of the offense. The analysis here is divided into five questions that need to be considered: (1) is the form of theft deserving of the kind of censure that criminal sanctions are intended to impose; (2) is there a significant advantage to be gained by having the prosecution of such conduct initiated by the state rather than or in addition to an action initiated by a private party; (3) does the state have a substantial interest in preventing the harm caused by the prohibited conduct; (4) does the criminal law provide an effective means of preventing such harms from occurring; and (5) would the benefits of criminalization outweigh its

costs, including not only the costs of prosecution and incarceration but also the costs of chilling otherwise socially beneficial conduct?

This framework is then applied to a collection of potentially problematic, borderline forms of theft and theft-related conduct, which the Model Penal Code treats as functionally equivalent to, and interchangeable with, larceny, but which, I argue, are deserving of more individualized consideration. The chapter considers *de minimis* thefts (including shoplifting and employee thefts), failing to return lost or misdelivered property, receiving stolen property, committing fraud by false promise or passing a bad check, and extortion where the defendant threatens to do an unwanted but lawful act unless paid. I conclude that most of these forms of conduct should either be decriminalized or subject to lesser penalties than other, core theft offenses.

The final chapter considers the difficult question of whether and in what way theft law should apply to various forms of property. I begin with the claim that, for some good or service to count as property for purposes of theft, it must meet two necessary and sufficient conditions: first, it must be commodifiable, meaning that it is capable of being bought and sold; and, second, it must be rivalrous, meaning that consumption of it by one consumer will prevent simultaneous consumption by others. Rivalrousness, in turn, entails that the thief's misappropriation of the owner's property will constitute a zero sum game, loosely defined: the victim/owner must lose all or substantially all of what the thief gains.

Proceeding, roughly, from more to less concrete forms of property, I begin by focusing on those forms of property that pose an issue with respect to commodifiability. These are things that are illegal to buy, sell, or possess (such as contraband drugs and weapons); things that are illegal to buy and sell, but not to possess (such as human beings, body parts and tissue, sex, and possibly animals); and things that are apparently incapable of being bought or sold (such as undeserved credit taken by the plagiarist or by the Stolen Valor Act offender). The focus then shifts to the rivalrous and zero sum dynamics. I first consider the theft of what I call semi-tangibles: electricity, cable television, and Wi-Fi. I then look at theft of services, both private (such as a haircut) and public (such as a concert in the park). Next, I consider the theft of a range of pure intangibles: information, identities, intellectual property (copyright, patent, trademark, and trade secrets), and

virtual property (such as Internet domain names and property generated in online computer role playing games). One of the basic questions here is the extent, if any, to which the illegal copying and sharing of copyrighted materials from the Internet should be regarded—as the Department of Justice and movie and music industries have consistently maintained—as stealing. I argue that, while in most cases misappropriation of intangibles fails to reflect the zero sum dynamic that is characteristic of theft, there are circumstances in which infringement of intangibles effects so significant a deprivation of the owner's property rights that it does amount to theft. The final part of the chapter returns to some of the issues of criminalization first dealt with in Chapter 3, this time in the context of problematic forms of property stolen. I argue that simply because some type of property qualifies as commodifiable and rivalrous, and is therefore theoretically subject to theft, does not necessarily mean that its misappropriation should be subject to criminal prosecution.

The book concludes with a brief "how-to" guide to drafting a better theft statute.