

# COMMENT

## THE PORCH PIRATE PROBLEM\*

### ABSTRACT

As e-commerce has increased exponentially in recent years, so too has the porch piracy epidemic. One in five Americans claims to have had a package stolen from his doorstep. In an effort to combat this new crime trend, many states have recently adopted new criminal laws aimed at deterring porch pirates, including Texas in 2019. Despite these new laws and initiatives by state legislatures, there is little evidence that these laws are resulting in their desired deterrent effect. This Comment examines the source of the porch piracy problem as well as the economic, legal, and moral incentives and resources in play. This Comment argues that the law should facilitate more private action, rather than public prosecution, in combatting porch piracy because the private sector has stronger incentives and better resources to tackle a problem of its own doing.

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## I. INTRODUCTION

Imagine that you order a number of things you need from Amazon as you do almost every week. Your cart totals \$85.<sup>1</sup> A couple of days later, Amazon e-mails you with a notification that your package has been delivered. You walk outside, yet it isn't there. Confused and frustrated, you file a claim with Amazon because you never received your package.<sup>2</sup> Eventually Amazon gets back to you and says it will resend your \$85 order with no questions asked.<sup>3</sup> And why would it ask questions? Amazon is the tenth largest company in the world—it will hardly notice \$85.<sup>4</sup> Further, an Amazon Prime member spends on average \$1,400 per

1. See Stephanie Chevalier, *Global Online Shopping Order Value 2020, by Device*, STATISTA (July 7, 2021), <https://www.statista.com/statistics/239247/global-online-shopping-order-values-by-device/> [<https://perma.cc/9S77-CARW>]. The majority of Amazon orders are placed on a mobile device. Those mobile device transactions have an average cart value of \$84.69. *Id.*

2. *Request an A-to-Z Guarantee Refund*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GSZAYH7K2C2NVNC9> [<https://perma.cc/RM5Y-JGN2>] (last visited Oct. 15, 2021); see Kellie Hwang, *Here's What You Should Do If Your Amazon Package Is Stolen by a Porch Pirate*, INDYSTAR, <https://www.indystar.com/story/news/2018/12/14/amazon-package-stolen-porch-pirate-what-do-prevent-more-thefts/2289962002/> [<https://perma.cc/L2JQ-YGK5>] (Dec. 18, 2018, 2:58 PM).

3. Hwang, *supra* note 2; see Winnie Hu & Matthew Haag, *90,000 Packages Disappear Daily in N.Y.C. Is Help on the Way?*, N.Y. TIMES, <https://www.nytimes.com/2019/12/02/nyregion/online-shopping-package-theft.html> [<https://perma.cc/9EX4-LEEZ>] (Dec. 3, 2019) (“[O]nline retailers typically refund or replace items for free, often with few questions.”).

4. Andrea Murph et al., *Global 2020 How the World's Biggest Public Companies Endure the Pandemic*, FORBES (May 13, 2021), <https://www.forbes.com/global2000/#6ebdff d335d> [<https://perma.cc/MNL9-QRWH>].

year on Amazon, so it's worth it to keep you happy.<sup>5</sup> In the end, you are rationally apathetic: you receive your order a couple days later than expected, but it's not the end of the world because you're "addicted" to the convenience.<sup>6</sup>

Yet, you probably don't have to imagine this scenario because 36% of Americans have had a package stolen.<sup>7</sup> Today, more than 50% of Americans have a package delivered at least once each week.<sup>8</sup> As e-commerce has increased exponentially in recent years, so too has the porch piracy epidemic. A whopping 1.7 million packages are estimated to be stolen each day.<sup>9</sup> However, as consumer habits have changed, the law has failed to keep up.

In an effort to combat this new crime trend, many states have recently adopted new criminal laws aimed at deterring porch pirates, including Texas in 2019.<sup>10</sup> Despite these new laws and initiatives by state legislatures, there is little evidence that these laws cause their desired deterrent effect.<sup>11</sup> This Comment examines the source of the porch piracy problem as well as the economic, legal, and moral incentives and resources in play.<sup>12</sup> This Comment argues that porch piracy could be more effectively combatted if the law facilitated more private sector action rather than relying exclusively on public prosecutions.<sup>13</sup> The private sector has stronger incentives and better resources to tackle a problem of its own doing.<sup>14</sup>

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5. Jack Houston & Irene Anna Kim, *Prime Day Deals Aren't the Only Way Amazon Gets You to Spend More. Here Are 13 of the Company's Sneaky Tricks*, BUS. INSIDER (Oct. 13, 2020, 11:30 AM), <https://www.businessinsider.com/amazon-prime-members-spend-more-money-sneaky-ways-2019-9> [<https://perma.cc/E8F9-D5GD>]. The average Prime member spends \$1,400 a year on Amazon, while the average customer spends \$600 on the site. *Id.*

6. *Id.*

7. *2019 Package Theft Statistics Report*, C+R RSCH. [hereinafter C+R RSCH.], <https://www.crrresearch.com/blog/2019-package-theft-statistics-report> [<https://perma.cc/5W9L-F97D>] (last visited Aug. 17, 2021).

8. See Katie McEntire, *Best Video Doorbell Cameras of 2021*, SAFEWISE (July 15, 2021), <https://www.safewise.com/resources/smart-doorbell-buyers-guide/> [<https://perma.cc/8CN7-4WLV>]. Moreover, the problem could be that 50% of Americans surveyed said that the pandemic has made them more worried about package theft. *Id.*

9. Hu & Haag, *supra* note 3. Moreover, the problem could be increasing as 50% of Americans receive at least one package delivery per week. McEntire, *supra* note 8.

10. Hu & Haag, *supra* note 3; see also Rich Schapiro, *Is Mail Theft Surging in the U.S.? Postal Service Inspectors Don't Know*, NBC NEWS (Sept. 27, 2020, 5:00 AM), <https://www.nbcnews.com/news/us-news/mail-theft-surg-ing-u-s-postal-service-inspectors-don-t-n1241179> [<https://perma.cc/U5U5-57ZG>] ("It's not even a question. Mail theft has gone through the roof.")

11. See *infra* Part II.

12. See *infra* Section IV.B.

13. See *infra* Section IV.C.

14. See *infra* Section IV.B.

## II. SCOPE OF PORCH PIRACY PROBLEM

Porch piracy occurs when a package is stolen from a residence after it has been delivered by the carrier.<sup>15</sup> Despite the importance of e-commerce,<sup>16</sup> the accompanying porch piracy has been largely unexamined.<sup>17</sup> Thus, the true extent and impact of the porch piracy problem is largely unknown due to a few factors.

First, few porch piracy incidents are reported to police. Consumers have little incentive to report mail theft to the police because major online retailers are footing the bill for these thefts.<sup>18</sup> Rather than reporting these incidents to police, consumers report these thefts to online retailers instead.<sup>19</sup> This makes sense because online retailers readily refund or replace items with few questions asked,<sup>20</sup> so consumers gain little, if anything, from reporting package thefts to the police. Further, even if these incidents are reported to police, most departments don't track mail theft directly.<sup>21</sup> Instead, some police departments code these incidents as petit or grand larceny.<sup>22</sup> However, when police departments do code mail theft as a separate offense, their data shows notable increases.<sup>23</sup>

Second, government agencies that do track mail theft rely on unreliable data.<sup>24</sup> As much of the country's focus has been on changes to the U.S. Postal Service by Postmaster General Louis DeJoy,<sup>25</sup> increased package volume has also brought renewed

15. See Ben Stickle et al., *Porch Pirates: Examining Unattended Package Theft Through Crime Script Analysis*, 33 CRIM. JUST. STUD. 79, 79 (2020).

16. U.N., Conf. on Trade & Dev., *Global E-Commerce Hits \$25.6 Trillion—Latest UNCTAD Estimates* (Apr. 27, 2020), <https://unctad.org/news/global-e-commerce-hits-256-trillion-latest-unctad-estimates> [<https://perma.cc/9XLA-S8GC>] (finding e-commerce accounted for 42% of GDP in the U.S. in 2018).

17. See Stickle et al., *supra* note 15, at 81.

18. See Hu & Haag, *supra* note 3.

19. *Id.*

20. *Id.*

21. See *id.*

22. *Id.* For example, the New York Police Department (NYPD) codes these incidents as petit or grand larceny depending on the value rather than coding mail theft as a separate category. *Id.*

23. *Id.* The Denver Police Department started tracking mail theft in 2015 and has seen a 68% increase in four years. *Id.*

24. See Schapiro, *supra* note 10 (discussing the various data tracking issues limiting how effective both federal and local agencies can be in combatting package theft).

25. See Michael Warren & Kristen Holmes, *With Slower Mail and Election Concerns, Trump's Postmaster General Is in the Hot Seat*, CNN, <https://www.cnn.com/2020/08/16/politics/dejoy-post-office-hot-seat-election-2020/index.html> [<https://perma.cc/R4UJ-F7TK>] (Aug. 20, 2020) (“[P]ostal workers and election observers have been watching DeJoy closely and wondering to what extent he'll serve Trump's interests during the 2020 elections.”).

focus to the U.S. Postal Service's inability to deal with mail theft.<sup>26</sup> The U.S. Postal Service admits that “[i]t has no reliable system for tracking mail theft.”<sup>27</sup> Yet, the government agency is not alone. Even the largest names in e-commerce have largely thrown their hands up when it comes to dealing with mail theft.<sup>28</sup> But the U.S. Postal Service does have some data. Its incomplete data show that mail thefts have risen by 600% over the past three years.<sup>29</sup>

Third, to avoid losing customers, the largest shipping companies, like UPS and FedEx, and the largest online retailers, like Amazon and Walmart, decline to publicly share information on package theft.<sup>30</sup>

Despite the lack of concrete data, the scope of package theft is daunting. Researchers estimate that 1.7 million packages are stolen or go missing every day.<sup>31</sup> This results in a \$25 million loss of goods and services each day.<sup>32</sup> In New York City alone, 90,000 packages are stolen per day.<sup>33</sup> According to one estimate, 11 million Americans had a package stolen in 2016.<sup>34</sup> Not only is package theft a nuisance but it is also costly as well. Package theft victims have to “spend close to \$200 to replace each stolen package.”<sup>35</sup> This expense is magnified given that over 50% of U.S. homeowners receive deliveries at least once a week.<sup>36</sup> As porch piracy and its costs have grown, a number of states have enacted new laws aimed at combatting porch pirates.<sup>37</sup>

26. See Schapiro, *supra* note 10 (“But the nation’s mail system has also been plagued by a previously undisclosed problem: It has no reliable system for tracking mail theft.”).

27. *Id.*

28. See Hu & Haag, *supra* note 3. Online retailers typically refund or replace lost items for free. *Id.*

29. Schapiro, *supra* note 10. The Postal Inspection Service data shows 25,000 mail theft reports were filed in 2017, and 177,000 were filed through August 2020. *Id.*

30. Hu & Haag, *supra* note 3; see also Nick Wingfield, ‘Porch Pirates’ Steal Holiday Packages as They Pile Up at Homes, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/packages-holiday-season-porch-pirates-strike.html> [<https://perma.cc/H9ZN-XWTJ>].

31. Hu & Haag, *supra* note 3.

32. *Id.*

33. *Id.*

34. *Research: Package Theft Report*, AUGUST HOME INC. (Oct. 24, 2016) [hereinafter AUGUST HOME INC.], <https://august.com/blogs/home/research-package-theft-report> [<https://perma.cc/N83A-GTDJ>].

35. *Id.* The cost to retailers and carriers is estimated to be \$109 per package. See C+R RSCH., *supra* note 7.

36. McEntire, *supra* note 8. Estimates also show that in NYC, 15% of households have a package delivered every day. See Matthew Haag & Winnie Hu, *1.5 Million Packages a Day: The Internet Brings Chaos to N.Y. Streets*, N.Y. TIMES, <https://www.nytimes.com/2019/10/27/nyregion/nyc-amazon-delivery.html> [<https://perma.cc/NCH3-CZY7>] (Oct. 28, 2019).

37. See Hu & Haag, *supra* note 3.

### III. SURVEY OF RECENT LEGAL DEVELOPMENTS AIMED AT PORCH PIRACY

#### A. *Texas*

Texas is one of the hardest hit states when it comes to package theft.<sup>38</sup> In 2019, the Texas State Legislature enacted Texas Penal Code (TPC) § 31.20 codifying a new offense designed to deter mail theft.<sup>39</sup>

Prior to the enactment of this new law, Texas law provided few ways for law enforcement to deter porch pirates. Most frequently, in instances of mail theft, law enforcement could give porch pirates a citation or charge them with a Class C misdemeanor, an offense not warranting any jail time.<sup>40</sup> Law enforcement officials could also pass the information on to federal authorities where federal law has long made mail theft a felony.<sup>41</sup> This option has been used sparingly due to limited resources and the high bar for federal prosecution.<sup>42</sup> The federal mail action is typically only brought in conjunction with another felony.<sup>43</sup>

TPC § 31.20 provides that it is a Class A misdemeanor to steal mail if the mail is appropriated from fewer than ten addressees, and it is punishable with up to one year in jail and a maximum fine of \$4,000.<sup>44</sup> If mail is appropriated from ten to twenty-nine

38. McEntire, *supra* note 8. In fact, both Austin and San Antonio rank among the top ten U.S. metros for package theft. *Id.*

39. TEX. PENAL CODE ANN. § 31.20; see also David Williams, *Texas 'Porch Pirates' Will Face Felony Charges over Mail Theft Under New Law*, CNN, <https://www.cnn.com/2019/06/20/us/texas-mail-theft-trnd/index.html> [<https://perma.cc/CV8T-2XCH>] (June 20, 2019).

40. Patty Santos & Bill Caldera, *New State Law Would Mean Jail Time for Porch Pirates, Mail Thieves*, KSAT, <https://www.ksat.com/news/2019/06/14/new-state-law-would-mean-jail-time-for-porch-pirates-mail-thieves/> [<https://perma.cc/GJC2-QMHV>] (Nov. 27, 2019, 5:30 PM); TEX. PENAL CODE ANN. § 12.23.

41. 18 U.S.C. §§ 1708, 3559 (defining mail theft and classifying an offense with a maximum term of imprisonment of five years as a “Class E felony”); see also Meghan Lopez, *Debate Over Whether Increased Penalty for Porch Pirates in Some States Should Come to Colorado*, DENVER CHANNEL, <https://www.thedenverchannel.com/news/360/debate-over-whether-increased-penalty-for-porch-pirates-in-some-states-should-come-to-colorado> [<https://perma.cc/EN4J-LD4L>] (Dec. 9, 2019, 6:00 PM).

42. STATE OF TEX. H. RSCH. ORG., BILL ANALYSIS HB 37 (2ND READING), S.86-37, Reg. Sess., at 3 (2019) [hereinafter BILL ANALYSIS OF HB 37] (“[D]ue to the lack of state law on mail theft, law enforcement officers can only forward mail theft incidents to federal officers. This can allow some professional thieves to escape prosecution due to the ambiguity of federal statute and the high standard for federal prosecution.”).

43. See Troy Closson, *Stealing Packages Could Result in Jail Time in Texas After Gov. Greg Abbott Signs Bill*, TEX. TRIB. (June 20, 2019, 2:00 PM), <https://www.texastribune.org/2019/06/20/texas-stolen-packages-and-mail-theft-could-lead-years-prison-felony/> [<https://perma.cc/CA4B-3Z34>].

44. See *id.*; see also TEX. PENAL CODE ANN. § 31.20(c)(1).

addressees, the offense is a state jail felony punishable by 180 days to two years in state jail and a fine of \$10,000.<sup>45</sup> If mail is appropriated from thirty or more addressees, the offense is a third-degree felony punishable by two to ten years in prison and a fine of up to \$10,000.<sup>46</sup> TPC § 31.20 targets theft based on the number of victims or addressees, rather than the value of the goods. Additionally, this provision protects mail from any common carrier or delivery service.<sup>47</sup>

Importantly, the statute provides additional deterrence that goes beyond the typical \$85 value of a stolen Amazon package. First, the provision offers additional protection for some vulnerable populations.<sup>48</sup> TPC § 31.20 includes an escalation clause where the offense is escalated to a higher category offense if the defendant knew or should have known that the “addressee from whom the actor appropriated mail was a disabled individual or an elderly individual.”<sup>49</sup> Second, the provision also includes a subsection aimed at targeting the use of mail theft to commit identify fraud.<sup>50</sup> Under the mail theft identify fraud subsection, mail theft committed with the intent to facilitate identify fraud is punishable by at minimum a state jail felony and provides for a first-degree felony, punishable by up to ninety-nine years in prison, for serious offenses.<sup>51</sup>

Supporters of the new law argued that it would provide law enforcement a valuable resource to target professional mail thieves.<sup>52</sup> Opponents argued that the provision would provide for “inappropriately harsh penalties on certain offenders.”<sup>53</sup> Proponents countered that the new provisions were not overly harsh because the law “ensure[d] that mail theft offenses were prosecuted at an appropriate level by distinguishing between mail theft and the more serious offense of identity theft.”<sup>54</sup>

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45. PENAL §§ 12.35(a)–(b), 31.20(c)(2); *see also* Closson *supra* note 43.

46. PENAL §§ 12.34, 31.20(c)(3); *see also* Closson *supra* note 43.

47. *See* PENAL § 31.20(a)(3).

48. *See id.* § 31.20(e).

49. *Id.*

50. *Id.* § 31.20(d) (citing the Fraudulent Use or Possession of Identifying Information provision of the Penal Code, or § 32.51).

51. *Id.*; *id.* § 12.32.

52. BILL ANALYSIS OF HB 37, *supra* note 42 (statement of supporters).

53. *Id.*

54. *Id.*

The newly codified offense has been largely well-received. Most notably, Amazon has supported the bill.<sup>55</sup> In fact, the online retail giant even said it would continue to support similar laws in other states.<sup>56</sup> Many law enforcement officials also support the new law because they see mail theft as a gateway crime.<sup>57</sup> Mail theft can facilitate larger crimes such as identity theft and fraud.<sup>58</sup>

Following the enactment of this new law, one might expect a proliferation of porch pirate prosecution. Yet it took until August 2020 for the first prosecution under TPC § 31.20 to occur, almost a full year after it became effective in September 2019.<sup>59</sup> This may be due to the steep cost of prosecuting an offense compared to the relatively low value of the property stolen.<sup>60</sup> More recently, the Harris County District Attorney (D.A.) seems to be utilizing the statute more, and as a result, there has been an uptick of mail theft cases.<sup>61</sup> The increase in prosecutions also might be due to the large increase in package volumes caused by the COVID-19 pandemic.<sup>62</sup> It is also worth noting that many of the cases the Harris County D.A. is focusing on involve stolen postal keys and delivery vehicle robberies.<sup>63</sup>

Despite the recent increase in mail theft cases, the number of prosecutions for mail theft seems underwhelming relative to other crimes.<sup>64</sup> In Texas, a reported offense is classified as cleared when “a law enforcement agency arrests an offender for the offense.”<sup>65</sup> In 2019, Texas law enforcement cleared 15.1% of all offenses

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55. Marisa Saenz, *New State Law Make Stealing Packages, Mail a Felony*, KFOX 14 (June 18, 2019), <https://kfoxtv.com/news/local/new-law-makes-stealing-packages-mail-a-felony> [https://perma.cc/9QST-R2KD].

56. *Id.*

57. Closson, *supra* note 43.

58. *Id.* Notably, Texas is one of the hardest hit states in the nation for both identity theft and fraud. *Id.*

59. Phil Archer, *Man Accused of Being Prolific Porch Pirate Faces Several Charges*, CLICK 2 HOUS. (Aug. 11, 2020, 8:29 PM), <https://www.click2houston.com/news/local/2020/08/12/man-accused-of-being-prolific-porch-pirate-faces-several-charges/> [https://perma.cc/G4JL-U724] (noting that a Houston-area man was arrested after allegedly stealing packages from 19 homes).

60. *See* Chevalier, *supra* note 1.

61. *See* Phil Archer, *Prosecutor Says Caseload for Mail Theft on the Rise in Harris County*, CLICK 2 HOUS. (Sept. 30, 2020, 8:35 PM), <https://www.click2houston.com/news/local/2020/10/01/prosecutor-says-caseload-for-mail-theft-on-the-rise-in-harris-county/> [https://perma.cc/VMY2-WM95].

62. *See* McEntire, *supra* note 8.

63. *See* Archer, *supra* note 61. These two crimes are outside of the focus of this Comment.

64. Because of the previously mentioned data issues, the clearance rate of package theft is difficult and inaccurate to calculate. *See* Archer, *supra* note 61.

65. TEX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS 2019 8 (2019).



reported to them that year.<sup>66</sup> Additionally, 12% of all property crimes were cleared.<sup>67</sup> Given the enormous number of thefts reported each year, there would need to be thousands of arrests in order to reach a proportional clearance rate for package theft. And yet, there are not thousands of package theft arrests and prosecutions under the Texas framework.<sup>68</sup> Thus, there is strong evidence suggesting that package theft is dramatically underprosecuted.

### B. Other States

Texas is not alone in enacting laws aimed at targeting porch pirates. In December 2019, Michigan law changed to provide that first-time mail thieves are guilty of a misdemeanor punishable by up to a year in prison, and any violation that is a second or subsequent offense results in a felony punishable by up to five years in prison.<sup>69</sup> Like Texas, Michigan also provides for additional penalties if the mail is stolen with an intent to commit identity fraud.<sup>70</sup> Oklahoma continued the trend in November 2020 when the Porch Piracy Act of 2020 became effective.<sup>71</sup> It provides that mail theft is a misdemeanor punishable by up to one year in jail.<sup>72</sup> If the offender commits three or more separate offenses within a sixty-day period, the offender is guilty of a felony and punished with a minimum sentence of two years and a maximum of five years imprisonment.<sup>73</sup> South Carolina's Defense Against Porch Pirates Act was introduced twice in the state legislature; it provides that package theft is a felony with a mandatory minimum prison sentence of five years, even for first-time offenders.<sup>74</sup>

While many states have focused on enacting new, harsh laws aimed at deterring porch piracy and protecting the delivery industry, this Comment argues for another solution given the role

66. *Id.*

67. *Id.* Among the property crimes reported, burglaries had a clearance rate of 8.5%; larceny-theft, 13.0%; and motor vehicle theft, 10.9%. *Id.*

68. See Archer, *supra* note 61 (suggesting there is no hard data on the number of arrests and prosecutions for mail theft in Texas as of September 2020).

69. S.B. 23, 100th Leg., Reg. Sess. (Mich. 2019); Mich. Comp. Laws Ann. §§ 445.65–445.69.

70. Mich. Comp. Laws Ann. §§ 445.65–445.69. This offense provides for a five-year felony prison sentence. *Id.*

71. H.B. 2777, 157th Leg., 2d Sess. (Okla. 2020).

72. *Id.*

73. *Id.*

74. H.R. 3071, 2019–2020 Gen. Assemb., 123rd Sess. (S.C. 2019); H.R. 3286, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

that delivery companies play in the problem. Further, only delivery companies have a sufficient incentive to tackle the problem.

#### IV. ANALYSIS AND PROPOSAL

While increased penalties and increased criminalization have often been the reflexive impulses to solve many of the United States' problems,<sup>75</sup> this Part argues that because of the nature of porch piracy, it is uniquely positioned to be combatted through private action rather than increased government action. First, this Part examines current nonlegal remedies to package theft. Second, this Part probes the source of the porch piracy problem, specifically the private sector's role in creating this problem. Third, this Part examines how the public sphere is poorly positioned to ameliorate this problem. Finally, this Part argues how to rethink the law's approach to porch piracy and facilitate greater private sector participation in combatting the problem.

##### A. *Current Nonlegal Remedies to Porch Piracy*

As porch piracy has become prolific in recent years, both companies and consumers have tried to keep up. Package tracking programs have now become almost universal across the delivery industry.<sup>76</sup> Many carriers also allow customers to leave instructions on where to leave packages.<sup>77</sup> UPS even trains its drivers to leave deliveries in "inconspicuous locations like behind bushes" to deter porch pirates.<sup>78</sup> Importantly, Amazon, which relies heavily on unattended delivery, has gone even further.<sup>79</sup> Amazon has initiated a number of programs and guarantees to combat package theft and keep the orders coming.<sup>80</sup> Amazon has

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75. See Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 115 (2020) (discussing the seeds of increased criminalization and mass incarceration that began in the 1970s).

76. See Stickle et al., *supra* note 15, at 81.

77. See Sarah Halzack, *The Wrong Way to Fight Porch Pirates*, BLOOMBERG: QUINT, <https://www.bloombergquint.com/gadfly/porch-pirates-amazon-and-fedex-can-do-more-to-s-top-them> [<https://perma.cc/NZ7A-G9A3>] (Dec. 7, 2019, 6:35 PM). Both UPS and FedEx "have apps that allow residents to provide delivery instructions for a driver." *Id.*

78. See Hu & Haag, *supra* note 3.

79. This makes sense given that the average Prime member has fifty-one packages delivered each year. See C+R RSCH., *supra* note 7.

80. See Stickle et al., *supra* note 15, at 81. Amazon's "A-to-Z Guarantee" guarantees a full replacement or refund if the delivery is not successful. Its "AMZL Photo on Delivery" allows couriers to send customers a photo of their package once it has been delivered.

also pushed its “Amazon Hub Locker” service, which allows a customer to forgo unattended delivery and pick up her package from a secure locker.<sup>81</sup>

While many carriers have made innovations to combat porch piracy, consumers have also incurred significant costs and inconveniences. For example, sales of video doorbell cameras have increased from less than 100,000 cameras sold in 2014 to 1.2 million in 2019.<sup>82</sup> Consumers have also turned to more creative methods, such as sending their packages to corporate mailrooms<sup>83</sup> or to local facilities that charge a fee to receive and store packages safely for customers.<sup>84</sup>

Many of the innovations and programs incur a cost to the deliverer or the customer. For retailers and carriers, the average cost to replace a stolen item is \$109.<sup>85</sup> And many of the self-help remedies consumers have turned to either burden them with yet another delivery cost<sup>86</sup> or are potentially cost prohibitive.<sup>87</sup> These costs may not make sense if they detract from the convenience and consumers that come with unattended delivery.<sup>88</sup> Additional steps taken by the driver undoubtedly slow down deliveries and lead to not only longer days for drivers but also less efficient package

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Finally, “Amazon Key” gives couriers one-time access to a customer’s home to deliver packages. *Id.*

81. *Amazon Hub Locker*, AMAZON, <https://www.amazon.com/ulp/view> [<https://perma.cc/UB9K-LRHM>] (last visited Aug. 21, 2021).

82. Hu & Haag, *supra* note 3.

83. *Id.* “Corporate mailrooms in New York and other cities are overwhelmed by employees shipping personal packages to work for safekeeping, leading companies to ban packages and issue warnings that boxes will be intercepted and returned to the senders.” *Id.* JPMorgan Chase and Warner Media now prohibit employees from having personal packages delivered to the office. *Id.*

84. *Id.* New businesses have been created that will receive and store packages for worried customers. *Id.*

85. See C+R RSCH., *supra* note 7.

86. See Hu & Haag, *supra* note 3.

87. The Amazon Key Home kit is priced at \$290 plus an average installation cost of \$140. Megan Wollerton, *Amazon Key Took Over My Door for 3 Months. It Wasn’t as Creepy as I Expected*, CNET (May 25, 2018, 5:00 AM), <https://www.cnet.com/news/amazon-key-too-k-over-my-door-for-3-months-it-wasnt-as-creepy-as-i-expected/> [<https://perma.cc/AY3S-HD6W>]. Wireless Ring video doorbells start out at \$99. RING, *Video Doorbells*, <https://ring.com/collections/doorbell-cameras> [<https://perma.cc/G99K-TB32>] (last visited Aug. 21, 2021).

88. MARTIN JOERSS ET AL., MCKINSEY & CO., *PARCEL DELIVERY: THE FUTURE OF LAST MILE 10* (2016), [https://www.mckinsey.com/~media/mckinsey/industries/travel%20transport%20and%20logistics/our%20insights/how%20customer%20demands%20are%20reshaping%20last%20mile%20delivery/parcel\\_delivery\\_the\\_future\\_of\\_last\\_mile.ashx](https://www.mckinsey.com/~media/mckinsey/industries/travel%20transport%20and%20logistics/our%20insights/how%20customer%20demands%20are%20reshaping%20last%20mile%20delivery/parcel_delivery_the_future_of_last_mile.ashx) [<https://perma.cc/6G9X-LGP4>] (discussing how consumers are incredibly price sensitive).

delivery for customers.<sup>89</sup> Consumers that trek home with their package from a corporate mailroom or some alternate drop-off point miss out on the convenience that unattended delivery provides.<sup>90</sup> While online retailers, shipping companies, and consumers have adapted to porch piracy, none of those measures fully maintain the advantages of unattended home delivery: low cost and convenience.

Although porch piracy is “an emerging and unstudied crime,”<sup>91</sup> research emphasizes the importance consumers play in protecting their deliveries.<sup>92</sup> The best preventative measures proposed by researchers involve consumer package concealment and increasing the effort it will take for potential thieves to take consumers’ packages.<sup>93</sup>

Given the large scope of package theft, it’s paramount to examine why deliverers and retailers have adopted “unattended home delivery” in the first place.

### B. *Source of the Problem*

The answer is simple: companies have adopted unattended home delivery because it makes business sense. Unattended home delivery reduces delivery costs by 50%.<sup>94</sup> In other words, these companies have decided that financial benefits of unattended delivery are worth the accompanying risks and costs of package theft. They are willing to accept a degree of package theft, and its costs, in order to win over the consumer.<sup>95</sup> Research shows that cost of delivery is consumers’ primary consideration when choosing a carrier.<sup>96</sup> Further, most consumers are “highly price sensitive.”<sup>97</sup> Thus, Amazon and others have come to rely on

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89. See Ivan Sanchez-Diaz et al., *A Time-Efficiency Study of Medium-Duty Trucks Delivering in Urban Environments*, 12 SUSTAINABILITY 425, 425 (2020) (listing various driver activities and durations).

90. A McKinsey report concludes that customers see little appeal in a secure pickup point away from their homes. This shows “the high value consumers assign to home delivery.” JOERSS ET AL., *supra* note 88, at 12.

91. See Stickle et al., *supra* note 15, at 82.

92. *Id.* at 88–89.

93. *Id.* at 91. “All things being equal, offenders tend to select targets that require the least effort and fewest changes from their routine activities.” *Id.* at 88.

94. *Id.* at 80.

95. See Hu & Haag, *supra* note 3.

96. JOERSS ET AL., *supra* note 88, at 9–10.

97. *Id.* at 9.

unattended home delivery to keep delivery costs low and retain consumers.<sup>98</sup>

The end result is that neither companies nor consumers have fully internalized the social costs of unattended delivery.<sup>99</sup> This results in a classic prisoner's dilemma where both sides are willing to accept the status quo: inexpensive home delivery and a high degree of package theft. Despite this choice, both retailers and consumers are eager for the law to step in to ameliorate the porch piracy problem.<sup>100</sup>

While the package theft may be a dollars and cents issue for these companies, the end consumer may see the issue differently. Instead of imagining an \$85 Amazon cart,<sup>101</sup> now imagine you're waiting for UPS to deliver something less easily replaceable like medicine, a new form of identification, or perhaps even a loved one's ashes.<sup>102</sup> Many packages are more than just Amazon orders, as nearly one in four people aged fifty to eighty have medications delivered by mail.<sup>103</sup> Additionally, package thieves often target low-income people for a variety of reasons.<sup>104</sup> Thieves often target easily identifiable government checks.<sup>105</sup> Moreover, apartment buildings without doormen make for much easier targets.<sup>106</sup> Ultimately, this situation forces many people to rely on "a kind of honor system" to receive their packages.<sup>107</sup>

Despite the strong evidence that porch piracy is a retailer- and consumer-created problem, and thus a private

98. It's also worth noting that the cost savings of unattended home delivery may not be as great as it first appears. *See supra* Section IV.A–B.

99. *See* Hu & Haag, *supra* note 3.

100. *See* Saenz, *supra* note 55; *Bill Criminalizing 'Porch Piracy' Heads to Georgia Governor*, ASSOCIATED PRESS, Mar. 31, 2021, <https://apnews.com/article/legislature-georgia-trials-coronavirus-pandemic-crime-4dbd1d43beb34d6fb55cd108325d3bec> [<https://perma.cc/R3TT-PSCD>].

101. *See supra* Part I.

102. *See* Wingfield, *supra* note 30.

103. Kara Gavin, *Mail Delays May Affect Medication Supply for Nearly 1 in 4 Americans over 50*, MICH. HEALTH LAB BLOG (Aug. 24, 2020, 4:12 PM), <https://labblog.uofmhealth.org/lab-notes/mail-delays-may-affect-medication-supply-for-nearly-1-4-americans-over-50> [<https://perma.cc/E6CA-4BRY>]. As one New York City resident told the *New York Times* when discussing the increases in mail theft, "I can't have my medications delivered here [anymore] or anything that is essential." Hu & Haag, *supra* note 3. In addition to medications, there is also a potential risk that family keepsakes or other irreplaceable items are stolen. For example, a Tucson woman waited for urns containing her father's ashes that were never delivered. She believes the package was stolen. *See* Wingfield, *supra* note 30.

104. *See* Schapiro, *supra* note 10.

105. *Id.* One postal inspector in Arizona provided that the coronavirus pandemic increased mail theft because of the proliferation of stimulus checks. *Id.*

106. *See* Hu & Haag, *supra* note 3.

107. *Id.*

problem, the public sphere, including a number of state legislatures, has attempted to combat porch piracy by enacting new criminal statutes.<sup>108</sup>

*C. The Public Sphere Is Ill-Equipped to Combat Porch Piracy*

Despite its best efforts, the public arena has shown an inability to effectively deal with porch piracy. As previously mentioned, the police, prosecutors, and even the U.S. Postal Service have been ineffective in targeting or even tracking porch piracy.<sup>109</sup> Although this dynamic is undoubtedly frustrating to many, the public sphere is ill-equipped to tackle this problem fully.

Porch piracy is largely a crime of opportunity.<sup>110</sup> Further, the average package's value is relatively small compared to more complex schemes like fraud or substantial property crimes.<sup>111</sup> Thus, it makes sense that cash-strapped public agencies allocate their resources towards more expensive crime. Even when public agencies devote time and resources to porch piracy, they don't tend to focus on the \$85 stolen Amazon order. Instead, police focus on the more prolific or serial crimes like stolen postal keys and delivery vehicle robberies.<sup>112</sup> Further, when police departments allocate more resources to more mundane versions of porch piracy, they tend to do so during the holidays when there is an uptick in deliveries.<sup>113</sup> Therefore, the more mundane package thefts go largely uninvestigated and unprosecuted.

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108. *Id.*

109. *See supra* Part II–III.

110. *See* Stickle et al., *supra* note 15, at 87–88. Most of the effective deterrence methods for stopping porch pirates involve practical steps that “block opportunities for package theft.” *Id.* at 88.

111. *Compare* Chevalier, *supra* note 1, with LEXIS NEXIS HEALTH CARE, BENDING THE COST CURVE: ANALYTICS-DRIVEN ENTERPRISE FRAUD CONTROL (2011) <http://lexisnexis.com/risk/downloads/idm/bending-the-cost-curve-analytic-driven-enterprise-fraud-control.pdf> [<https://perma.cc/6LKS-3883>], and *Facts + Statistics: Auto Theft*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-auto-theft> [<https://perma.cc/6B46-7WE4>] (last visited Sept. 17, 2021).

112. Archer, *supra* note 61.

113. *See Porch Pirates Might Be Targeting Your Packages, but the Cops Are Now Targeting Them*, DALL. MORNING NEWS (Dec. 3, 2019, 8:00 AM), <https://www.dallasnews.com/opinion/editorials/2019/12/03/porch-pirates-might-be-targeting-your-packages-but-the-cops-are-now-targeting-them/> [<https://perma.cc/US7J-8B2W>]. In one extreme case, mail theft during the holidays was so bad that the East Vancouver Post Office had to change its policy so that if a package wasn't delivered to the customer, the customer would have to pick up the package at the post office rather than leave it unattended. This resulted in less than 10% of packages being delivered. *United States v. May*, 706 F.3d 1209, 1212 (9th Cir. 2013).

This failure of the public arena to combat porch piracy is perhaps predictable and rational if viewed through an economic lens. As previously noted, there is strong evidence that porch piracy is to some degree facilitated and accepted by the private sector.<sup>114</sup> In an effort to keep delivery costs down through unattended delivery and to retain consumers, retailers and deliverers have come to accept porch piracy as a social cost of modern e-commerce. One could view porch piracy as a private market imperfection caused by an externality.<sup>115</sup> An externality arises when the costs of one's actions are not fully internalized by the actor but are borne by another party.<sup>116</sup> The classic example of an externality is a factory that, in an effort to make more competitively priced goods, eschews pollution standards and pollutes its neighbors' air.<sup>117</sup> Like a factory looking to cut costs in order to price its goods more competitively, delivery companies have resorted to unattended deliveries to be more competitive in the marketplace.<sup>118</sup> And like the neighbors' air, delivery customers are left with a consequence of unattended delivery—porch pirates.<sup>119</sup>

When there is a market imperfection, either the public sphere or the private sphere can produce the remedy. The government can play an important role in correcting externality-producing problems like it has done in the environmental sphere through regulation.<sup>120</sup> As noted above, governmental efforts to regulate porch piracy through criminalization have not provided the desired effect.<sup>121</sup> Further, it is far from certain that the

114. See *supra* Section III.B.

115. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 235 (1984) (“Economists have long recognized that a free market system is not likely to maximize economic welfare due to the existence of market imperfections such as externalities and the problem of producing collective goods.”).

116. *Id.*

117. *Id.*

118. See JOERSS ET AL., *supra* note 88, at 7, 9, 12.

119. Amazon and any deliverer may bear the replacement or refund costs of the lost package. *Who to Blame When Your Package Gets Lost in the Mail*, FULFILLRITE, (Nov. 15, 2019), <https://fulfillrite.com/blog/who-is-liable-when-a-package-is-lost-in-the-mail/> [<https://perma.cc/9PK5-NXFU>]. Further, if Amazon or another deliverer insures their packages, they may “file a claim for a lost [package]” and “can be reimbursed for the loss.” *Id.* However, there are still transaction costs (inconvenience) and opportunity costs generated by porch pirates. See AUGUST HOME INC., *supra* note 34. Further, replacements or refunds do not occur in every case, and some goods are irreplaceable. See Wingfield, *supra* note 30. Therefore, these companies are not fully internalizing these externalities.

120. See Percival & Miller, *supra* note 115, at 235–36.

121. See *supra* Part II.

government should proactively seek to fix this externality. This is a problem created by deliverers' adoption of unattended delivery. That is, porch piracy is an externality created entirely by the private sphere. This fact should play an important role in the proposed solution.

With the public arena unable to provide the desired deterrent effect, another course would be to facilitate greater private sector participation in deterrence. In many contexts, “[p]rivate enforcement can supplement public efforts, picking up the slack where agency resources run out.”<sup>122</sup> Indeed, the retail industry has been successful using private enforcement to combat retail theft.<sup>123</sup> Additionally, the data and reporting problems of porch piracy make it a problem that can be targeted by private enforcement.<sup>124</sup> The question then becomes how to best incentivize more deterrence from the private sector.

It may seem like the obvious party to bring a suit would be the consumer. After all, in a typical criminal theft case in Texas, the State recognizes the property owner as the victim of the crime.<sup>125</sup> While the victim property owner may initially bring the case and evidence to the State, the State is ultimately responsible for investigating and prosecuting the claim.<sup>126</sup> Likewise, under the federal mail theft statute, the consumer is treated as the victim property owner.<sup>127</sup> Although both federal and Texas law treat the

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122. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 788–93 (2011) (surveying areas where Congress has created civil statutes to facilitate enforcement, such as qui tam actions).

123. See *infra* Section IV.D.

124. See Lemos, *supra* note 122, at 788 (“Private enforcement may be especially valuable in areas where statutory violations are hard to detect; individuals and firms may have access to information that is inaccessible to enforcement agencies.”).

125. See *Thomason v. State*, 892 S.W.2d 8, 9–10 (Tex. Crim. App. 1994) (en banc) (discussing how the property owner was the victim of the crime); see also *Peterson v. State*, 645 S.W.2d 807, 810–11 (Tex. Crim. App. 1983) (en banc) (laying out the basic elements of criminal theft in Texas).

126. While the public prosecutor is ubiquitous now, it appears to be a “uniquely American contribution” to law. Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100, 107 (1976). In fact, only five of the thirteen colonies referenced a public prosecutor. Colonial era victims of property crimes tended to hire private prosecutors to pursue their cases. The public prosecutor did not come to dominate the American legal landscape until the late-nineteenth century. This change was driven by democratic ideals of balanced government and fairness. Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673–79 (2010).

127. See *United States v. Bloom*, 482 F.2d 1162, 1163–64 (8th Cir. 1973) (per curiam) (holding that finding the victim’s credit card in the defendant’s possession was enough evidence to give rise to an inference of mail theft); *Blue v. United States*, 528 F.2d 892, 893–94 (8th Cir. 1976) (holding that possession of a mailed check by the defendant was sufficient



consumer as the victim, consumer victims rarely report package theft to the police.<sup>128</sup>

Even if victims do report the theft, there is a low probability that they have the financial ability or the willingness to pursue a civil theft action. Studies show that a very small percentage of tort victims discuss a potential suit with a lawyer.<sup>129</sup> In fact, one of the major problems with consumer fraud cases is that the individual consumer cannot financially justify initiating a suit because the median loss is \$220.<sup>130</sup> And there is no guarantee that an individual would even be able to find an attorney to pursue this action.<sup>131</sup> Further, even with counsel, the individual victim's willingness to see a case through might not be especially strong.<sup>132</sup>

Despite the seemingly blind eye turned to porch piracy by deliverers, the crime carries with it a social cost that is both monetary, in the form of replacement costs<sup>133</sup> and inactivity,<sup>134</sup> and nonmonetary.<sup>135</sup> Thus, porch piracy turns into a kind of collective action where no individual victim has sufficient incentive to pursue a claim.<sup>136</sup> While the overall goal of deterring porch piracy

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evidence to prove the mailing of the check); *United States v. Thomas*, 361 F. Supp. 978, 979 (N.D. Tex. 1973); *see also* Stickle et al., *supra* note 15, at 80–81 (noting in criminal cases in which offenders are charged with theft, “the consumer [is] the victim, instead of the retailer”).

128. *See supra* Part II.

129. Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 457–58 (2010). Only 6–10% of potential medical malpractice plaintiffs who are negligently injured file a claim. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1183 (1992). Presumably, bringing a medical malpractice claim would be easier than bringing a civil mail theft claim because the potential damages award is likely to be higher and in the medical context, the universe of potential defendants is much more knowable and smaller than in the mail theft context. Shapiro, *supra*, at 457–58; *see also* AUGUST HOME INC., *supra* note 34.

130. Shapiro, *supra* note 129, at 458 n.56.

131. *See* Lemos, *supra* note 122 at 790 (discussing how a plaintiff's low expected recovery “can make finding a lawyer difficult”).

132. Ultimately, this is because the lost package is likely to be refunded or replaced by the retailer. *See* Hu & Haag, *supra* note 3.

133. AUGUST HOME INC., *supra* note 34; Stickle et al., *supra* note 15, at 80–81 (“This cost to consumers is likely to increase as the average value of each package is also increasing.”).

134. According to one survey, 41% of respondents avoided buying items out of fear that they might be stolen. *The 2017 Package Theft Report: Porch Pirates, Purchase Habits, and Privacy*, SHORR, <https://www.shorr.com/packaging-news/2017-05/2017-package-theft-report-porch-pirates-purchase-habits-and-privacy> [<https://perma.cc/K52J-SK59>] (last visited Aug. 18, 2021).

135. *See* Wingfield, *supra* note 30.

136. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 n.72 (1982).

is socially desirable, an individual consumer is a “one-shotter” who is rationally apathetic to social goals like deterrence.<sup>137</sup>

However, Amazon, or any other deliverer or online retailer, may have much more of an incentive to pursue legal action as they are not “one-shotters.”<sup>138</sup> Amazon and others are potential repeat players who face many similar situations over time.<sup>139</sup> Repeat players may face low stakes in any single case, but they have the resources to fight these cases in an effort to pursue their long-run interests.<sup>140</sup> Because repeat players have different strategies and incentives than one-shot players, like a consumer victim, they “play the litigation game differently.”<sup>141</sup> This is because repeat players have several advantages over one-shotters. These advantages include: (1) expertise from having litigated similar cases before; (2) “economies of scale” that provide for “low start-up costs for any [one] case”; and (3) the need to establish credibility as a litigant.<sup>142</sup> The quintessential example of a repeat player is an insurance company.<sup>143</sup> While the stakes may be small in any one case, the insurance company’s institutional expertise and reputational incentives make each individual case worth fighting.<sup>144</sup> If Amazon and other carriers pursued porch piracy cases, they could employ those same repeat-player advantages to litigate relatively cheaply and with sharp expertise. Further, the

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137. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–98 (1974). While the social benefit of litigation might be outweighed by the cost of the lawsuit, the stake to the litigating party “may be too small to justify the cost.” See Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 525 (2016).

138. See Lemos, *supra* note 137, at 525 (suggesting that private actors are not “one-shotters” as they tend to overinvest in litigation seen as socially wasteful).

139. Galanter, *supra* note 137, at 97–98. Typical one-shotters include spouses in a divorce case, auto-injury plaintiffs, and criminal defendants. Repeat players include insurance companies, financial companies, and prosecutors. *Id.* at 97.

140. *Id.* at 98.

141. *Id.*

142. *Id.* at 98–100. Another advantage of repeat players is that they “can play the odds.” Thus, Amazon can more readily litigate higher dollar cases than smaller ones, which may undermine the deterrent effect of this regime.

143. John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1549, 1608 (2017).

144. See Lemos, *supra* note 137, at 558. In fact, the rise of the public prosecutor in the United States can be understood as a response to a kind of market failure. The first colonial courts primarily used private individuals, rather than public prosecutors, to try cases. However, this practice quickly faded as the population grew and crime rates increased. Local governments found that relying on “private prosecutions could not maintain public order in the rapidly industrializing society,” which led to an inefficient criminal justice system. With private prosecutors unable to generate an optimal level of deterrence, local governments created public prosecutor offices. *Id.* at 558–59.

reputational incentives may be particularly strong if would-be porch pirates knew Amazon was willing to litigate.<sup>145</sup> Whereas most other forms of theft are one-shotter versus one-shotter,<sup>146</sup> mail theft is repeat player versus one-shotter.<sup>147</sup> The repeat player's willingness to fight even small cases can be used by the law to create a deterrent effect.

Finally, Amazon and others may have an information advantage. First, when consumers report porch piracy, they usually report that information to Amazon rather than the police.<sup>148</sup> Second, given the proliferation of video doorbell cameras among consumers, they may be able to bargain for that information from consumers in exchange for a refund or replacement. This potential access to information gives Amazon and others a possible pivotal advantage in litigation. Moreover, serious constitutional questions may be avoided if Amazon, rather than public agencies, uses this information.<sup>149</sup>

In sum, Amazon and others have serious litigation and information resources and incentives that make them well-positioned to litigate mail theft cases. The question then is, how can the law encourage Amazon and others to litigate these cases?

#### D. Proposed Solution

Porch piracy is a new crime, but stealing from retailers is nothing new. Shoplifting has been a problem for centuries.<sup>150</sup> And for centuries, the universal impulse from Vienna to Paris to New York City was to combat the problem through increased

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145. Galanter, *supra* note 137, at 98–100. The repeat player's interest in his "bargaining reputation" provides a strong incentive to establish himself as a willing combatant. *Id.*

146. *Id.* at 97–98.

147. *Id.*

148. See Stickle et al., *supra* note 15, at 81 (discussing how customers usually only report to Amazon or whomever and not the police because there is not much to be gained by bringing criminal charges); see also *supra* Part II (discussing reasons why porch piracy is rarely mentioned to the police).

149. Yesenia Flores, *Bad Neighbors? How Amazon's Ring Video Surveillance Could Be Undermining Fourth Amendment Protections*, CALIF. L. REV. BLOG (June 2020), <https://www.californialawreview.org/amazon-ring-undermining-fourth-amendment/> [<https://perma.cc/UUA3-RDD9>].

150. See KERRY SEGRAVE, SHOPLIFTING: A SOCIAL HISTORY 3 (2001) ("Shoplifting is a practice that has been engaged in for centuries. Reports of theft from stalls and shops appeared in Elizabethan England.").

criminalization and increased prosecution.<sup>151</sup> As consumerism and big department stores became more widespread, shoplifting proliferated and grew to cost retailers billions of dollars.<sup>152</sup> In the 1980s, an alternative path emerged.<sup>153</sup> Today, all fifty states have adopted civil theft statutes that exist independently of criminal provisions.<sup>154</sup>

Under this model, retailers, usually based on video evidence, send suspected shoplifters a civil demand letter demanding a sum of money as restitution for the value of the goods stolen.<sup>155</sup> Retailers can also file a civil claim and potentially win restitution, punitive damages, and attorney's fees.<sup>156</sup> Under the Texas statute, one can sue for actual damages, punitive damages (up to \$1,000), and reasonable attorney's fees.<sup>157</sup>

Civil demand letters have proven to be a popular option with retailers. One reason is that the retailer doesn't have to worry about the reputational blowback that comes with bringing a criminal action against a consumer.<sup>158</sup> The primary reason retailers seem to prefer the civil route over pressing criminal charges is that they are able to recover more money.<sup>159</sup> While criminal prosecution results in at most the return of the stolen

151. See *id.* at 3–18 (providing a detailed account of how governments and retailers alike attempted to deter shoplifters); see also *supra* Part III (surveying the ways states have begun to increasingly criminalize porch piracy).

152. See SEGRAVE, *supra* note 150, at 9–13; see also Ryan P. Sullivan, *Survey of State Civil Shoplifting Statutes*, in NAT'L SURVEY OF STATE LAWS 729, 729 (Richard A. Leiter ed., 2019).

153. See generally Sullivan, *supra* note 152, at 732 tbl.40 (showing that in the 1980s, many states enacted civil shoplifting statutes).

154. See *id.*; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 122 (2004).

155. See Sullivan, *supra* note 152, at 730 (“Most states’ statutes expressly authorize, condone, or require retailers to send civil demand letters to alleged shoplifters prior to, or instead of, filing suit.”). Texas makes no mention of demand letters in its code. See *id.* at 738–39 tbl.40. However, these demand letters are not without their own faults. See Ann Zimmerman, *Big Retail Chains Dun Mere Suspects in Theft*, WALL ST. J. (Feb. 20, 2008, 12:01 AM), <https://www.wsj.com/articles/SB120347031996578719> [<https://perma.cc/C7ZP-H79S>].

156. See Sullivan, *supra* note 152, at 729–30.

157. TEX. CIV. PRAC. & REM. CODE § 134.005; see also *Alcatel USA, Inc. v. Cisco Sys., Inc.*, 239 F. Supp. 2d 660, 674 (E.D. Tex. 2002) (providing that actual damages are necessary to collect punitive damages).

158. Carolyn Hughes Crowley, *A Civil Alternative*, WASH. POST (May 24, 1994), <https://www.washingtonpost.com/archive/lifestyle/1994/05/24/a-civil-alternative/b570daaf-95a5-45b7-b0ab-aaa25c6f4065/> [<https://perma.cc/6KMB-GG9S>] (“With criminal prosecution, it’s a lose-lose situation because the store gets only negative publicity and the shoplifter gets the stigma of criminal penalty and forfeits employment requiring a criminal-background check.”).

159. Joh, *supra* note 154, at 122,

item, the civil theft action also allows for punitive damages and attorney's fees.<sup>160</sup> The civil route has proven so popular that one collection agency claimed to have sent out 1.2 million demand letters (on behalf of four dozen clients) in just one year.<sup>161</sup> In one year, Lord & Taylor collected over \$1 million from demand letters sent to suspected shoplifters.<sup>162</sup>

These civil statutes addressed a collective action problem similar to the one faced now in the porch piracy context.<sup>163</sup> While these statutes have faced their fair share of criticism,<sup>164</sup> they illuminate some key traits for a comparable porch piracy statute.

1. *Lessons from Shoplifting Civil Statutes.* Retailers' frequent use of civil theft actions shows that the law can be used to incentivize the private sector to take a greater role in policing its own victimization. One of the key reasons that retailers are so keen on bringing civil action is that these actions are financially viable because they provide for attorney's fees and punitive damages.<sup>165</sup>

Attorney's fees can be a huge obstacle to litigation.<sup>166</sup> Because a plaintiff typically pays his attorney's fees out of his compensatory damages, the plaintiff is left with less than full compensation at the end of even a successful lawsuit.<sup>167</sup> However, under both U.S. and Texas law, the winning litigant is usually not entitled to collect attorney's fees from the losing litigant unless it is specifically provided for by statute.<sup>168</sup> Texas law only allows for recovery of attorney's fees through contract or if specified by

160. *Id.*; see also CIV. PRAC. & REM. § 134.005.

161. See Zimmerman, *supra* note 155.

162. *Id.*

163. See *supra* Section IV.B.

164. See Sullivan, *supra* note 152, at 729. Although these civil statutes were designed as an alternative to criminal action, in practice, many retailers pursue both civil and criminal actions. See *id.*

165. See Sullivan, *supra* note 152, at 729–30.

166. See Shapiro, *supra* note 129, at 469–70.

167. *Id.* at 453–54. Frequently, the successful plaintiff has to “dig into” his damages award to pay the attorney's fees. See Lemos, *supra* note 122, at 790–91.

168. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (“In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.”). This is known as the “American Rule.” *Id.* This contrasts with the “English Rule” that prevails in most of the Western world where the law facilitates shifting the winning party's attorney's fees to the losing party. See Shapiro, *supra* note 129, at 454, 469. Under Texas law, attorney's fees are not recoverable “unless provided for by statute or by contract.” See *Dallas Ctr. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992); see also TEX. CIV. PRAC. & REM. CODE § 38.001(8). To recover attorney's fees in Texas, a party must (1) prevail on a cause of action that allows for recovery of attorney's fees and (2) recover damages. See *Dallas Ctr.*, 835 S.W.2d at 77.

statute.<sup>169</sup> Congress has recognized the impediment attorney's fees can provide when deciding whether to pursue litigation and has enacted over 150 attorney's fee-shifting statutes to incentivize particular kinds of private litigation that generate social benefits.<sup>170</sup> Fee-shifting statutes allow the successful plaintiff to shift the attorney's fees onto the unsuccessful defendant and thus encourage litigation by decreasing the plaintiff's costs of litigation.<sup>171</sup> Congress has recognized that fee-shifting statutes can be valuable when the private benefits of litigation do not fully outweigh the costs of litigation. In fact, the primary purpose of fee-shifting statutes is to make it easier for deserving plaintiffs to bring suit.<sup>172</sup> In this way, the federal fee-shifting statutes work to remedy a market imperfection.<sup>173</sup> A large hurdle to public interest litigation is that while the action may bring a large social benefit, the financial cost of a suit is a serious impediment to enforcing the law through litigation.<sup>174</sup> Thus, shifting attorney's fees remedies the imbalance between litigation costs and private benefits by compensating successful plaintiffs for bringing worthy suits.

Similarly, porch piracy can be seen as a market imperfection where delivery companies have failed to internalize all of their delivery costs.<sup>175</sup> Further, litigation costs substantially outweigh the average package value so there is less incentive to bring suit.<sup>176</sup> Fee-shifting could help to remedy this by lessening the "deterrent effect" of legal expenses a party faces when contemplating an action.<sup>177</sup> Given the desire to make the plaintiff whole, and the significant cost impediment of attorney's fees, the model statute, designed to encourage more litigation, ought to allow for recovery of reasonable attorney's fees like civil shoplifting statutes do.<sup>178</sup>

However, fee-shifting statutes are not without their flaws and will likely not lead to optimal deterrence. First, generally

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169. See *Dallas Ctr.*, 835 S.W.2d at 77.

170. See Percival & Miller, *supra* note 115, at 233.

171. *Id.*

172. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978).

173. See Shapiro, *supra* note 129, at 472. The most prominent examples of federal fee-shifting statutes are the Civil Rights Attorneys' Fees Awards Act and the Equal Access to Justice Act. See Percival & Miller, *supra* note 115, at 240.

174. See Percival & Miller, *supra* note 115, at 240.

175. See *supra* Section IV.B.

176. See *supra* Section IV.C.

177. H.R. REP. NO. 96-1418, at 1 (1980). Further, fee-shifting has the added benefit of encouraging only meritorious litigation because an unsuccessful plaintiff will not be able to recover his fees. See Percival & Miller, *supra* note 115, at 241.

178. See Shapiro, *supra* note 129, at 469-70.

speaking, compensation under fee-shifting statutes is usually capped at a below-market rate.<sup>179</sup> As a result, a prevailing party may not be able to recoup all of its legal expenses. Second, fee-shifting may not have as great of a deterrent effect as other forms of damages.<sup>180</sup> The fees are not generally tied to the plaintiff's recovery or the actual value of the harm done.<sup>181</sup> Finally, defendants can mitigate attorney fees by settling quickly.<sup>182</sup> Although statutorily providing for attorneys' fees can help incentivize litigation, it may not provide the requisite deterrent effect.

2. *Damages Multiple.* In order to remedy the plaintiff's litigation benefits calculus, the proposed statute should provide for a damages multiple. A damages multiple provides for a certain multiple, usually double or triple, of the actual damages suffered by the plaintiff from the defendant's wrongdoing.<sup>183</sup> Thus, if a plaintiff would have been awarded \$200 in compensatory damages, a triple damages multiple would award the plaintiff \$600. First, the damages multiple makes the remedy more "meaningful" because it helps offset "the difficulty of maintaining a private suit."<sup>184</sup> When an injury has a low dollar amount, the damages multiple helps encourage litigation by making more lawsuits financially feasible.<sup>185</sup> Further, there is evidence that because of the significant cost of attorney's fees, a damages multiple is actually necessary to fully compensate the plaintiff.<sup>186</sup>

Second, a damages multiple is particularly useful when the conduct is planned or thought-out and harder to uncover.<sup>187</sup> If a defendant only pays for detected violations, optimal deterrence would not be achieved because they are not paying for undetected

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179. *See id.* at 474–75.

180. *Id.* at 474.

181. *Id.* at 474–75.

182. *Id.* at 474.

183. *See id.* at 475.

184. Shapiro, *supra* note 129, at 476, 476 n.169.

185. *Id.* at 478.

186. *Id.* at 475.

187. *Id.* at 477. For example, federal law provides for multiple damages in many undetected or hard-to-detect contexts including qui tam, racketeering, and antitrust cases. *Id.*; Jason B. Freeman, *Civil RICO*, FREEMAN L., <https://freemanlaw.com/civil-rico/> [<https://perma.cc/3JLJ-N2JD>] (last visited Aug. 26, 2021); *False Claims Act Damages and Penalties*, BERG & ANDROPHY, <https://www.bafirm.com/practice-areas/qui-tam-litigation/overview/false-claims-act-damages-and-penalties/> [<https://perma.cc/EVM3-RBWG>] (last visited Aug. 26, 2021).

violations.<sup>188</sup> Thus, a damages multiple provides for greater optimal deterrence in many hard-to-detect areas. For example, federal law provides for multiple damages in many undetected or hard-to-detect contexts including *qui tam*, racketeering, and antitrust cases.<sup>189</sup>

These two rationales for a damages multiple are applicable to porch piracy. Because the average package value is relatively low, there is not a strong incentive to bring a suit. Additionally, porch piracy is frequently unreported and underdetected. Therefore, the proposed civil theft action ought to provide for a damages multiple in addition to attorney's fees.

#### V. CONCLUSION

The criminalization and prosecution of porch piracy have not resulted in the desired level of deterrence. Instead of following the instinct to criminalize and incarcerate, this Comment offers an alternative. This Comment argues that delivery companies like Amazon should play a larger role in combatting porch piracy because they have played a role in creating the problem. Further, these companies have stronger incentives and better resources than the public sphere does.

The law ought to facilitate greater private sector participation in combatting porch piracy by creating a civil cause of action that would allow delivery companies to play a larger role in the solution.

*Drew McKay*

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188. See Shapiro, *supra* note 129, at 477.

189. See *supra* note 187 and accompanying text.