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Anticipating Prosecution of the Gardner Heist

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A recent arrest has brought the infamous 1990 Gardner Museum art heist back into the headlines. Unfortunately, art theft from museums is common, and the United States' patchwork of criminal laws inadequately deter or deal with such thefts. This article first explores the facts of the Gardner theft and then analyzes the potentially applicable criminal statutes. After a thorough analysis of the state law, here Massachusetts, the article dissects potentially applicable federal statutes, including the National Stolen Property Act the Theft of Major Artwork (TOMA) statute. TOMA is considered in depth. It was passed at least partially in response to the Gardner theft and fills some of the gaps in state and federal laws applied to the theft of artwork. The article concludes by analyzing how and when TOMA applies and provides a critique of potential challenges to TOMA as currently written.

Une arrestation récente a encore une fois attiré l'attention sur la célèbre affaire du vol au musée Gardner en 1990. Malheureusement, les vols d'art dans les musées sont trop communs et l'ensemble de mesures législatives disparates du gouvernement américain demeure inefficace pour dissuader ou sévir contre ce genre de vol. Les auteurs de cet article examinent d'abord les faits entourant l'affaire du vol Gardner et analysent ensuite les lois en droit criminel potentiellement applicables. Après une analyse poussée de la loi de l'État du Massachusetts, les auteurs se tournent vers les lois fédérales qui pourraient trouver application, notamment la National Stolen Property Act *et la* Theft of Major Artwork Act (TOMA). *La* TOMA *est considérée comme une loi exhaustive. Elle a été adoptée, du moins en partie, à la suite de l'affaire du vol Gardner et comble certaines lacunes présentes dans la législation des États ainsi que dans les autres lois fédérales appliquées en matière de vol d'œuvres d'art. Les auteurs concluent par un examen de la façon dont on doit appliquer la TOMA et quand il est approprié de le faire. Finalement, ils présentent une critique des déficiences potentielles de la*

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TOMA, compte tenu de sa rédaction actuelle.

Unfortunately, theft of art from a museum is all too common.[1] Thefts from museums and libraries amount to approximately eighteen percent of cases reported to the National Stolen Art File, a database of stolen art and cultural property maintained by the Federal Bureau of Investigation as part of its Art Theft Program.[2] Museums are particularly vulnerable because so many museums house objects commonly known to be valuable within reach of the public, without adequate security.[3] Furthermore, much art crime is under-prosecuted, with police often regarding it as "victimless."[4]

Legal tools to prosecute theft from U.S. museums comprise a patchwork of federal and state laws.[5] Accordingly, when prosecutors seek to punish art thieves,

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1 Just a few recent examples include Edward Colimore, *Guilty Plea in Theft on Historic Sale*, Phila. Inquirer (Apr. 5, 2007), online: <http://articles.philly.com/2007-04-05/news/25242742_1_civil-war-documents-archives-inspector-paul-brachfeld> (164 historical documents stolen from the National Archives); *State Libraries Must Work to Thwart Thieves*, Concord Monitor (July 23, 2007), online: <http://www.concordmonitor.com> (97 maps stolen from libraries such as Harvard and Yale); Allen Weinstein, *Statement by Archivist of the United States Allen Weinstein on the Sentencing of Howard Harner*, National Archives (Oct. 1, 2012, 9:03 AM), online: <http://www.archives.gov/press/press-releases/2005/nr05-71.html> (109 Civil War-era documents were stolen from the National Achieves and sold on eBay); Business First, *Louisville man charged with theft from Filson Historical Society*, (Oct. 1, 2012, 9:07 AM), online: <http://www.bizjournals.com/louisville/stories/2005/12/05/daily17.html> (documenting 70-year-old advertising executive charged with 9 counts of art theft after stealing history letters between 2003 and 2004 from the Filson Historical Society); *United States v. Allen*, 516 F. 3d 364 (6th Cir. 2007) (documenting 20-year-old college students who stole rare books, manuscripts, and sketches from the university library); The Associated Press, *Drew University college freshman, former Longmeadow resident William Scott admits theft of historic documents*, (Oct. 1, 2012, 9:31 AM), online: <http://www.masslive.com/news/index.ssf/2011/01/drew_university_college_freshm.html> (documenting University freshmen who worked in the library archives stole a number of historical documents).

2 Lynne Chaffinch, 38 J. Libr. Admin. 95 (2003) (theft from museums and libraries accounts for 18% of the cultural property theft reported to the National Stolen Art File).

3 For example, NPR Talk of the Nation, *Art Thieves Just Thugs, Not Thomas Crowns* (NPR radio broadcast May 27, 2010), available at 2010 WLNR 10966580 (quoting author Ulrich Boser as stating, "the incredible amounts of money paid for canvasses matched with the lax security at many museums around the world makes art theft really a given.").

4 Randy Kennedy, *His Heart Is in the Art of Sleuthing*, N.Y. Times, Jun. 7, 2010, at C1 (quoting Robert Wittman, former F.B.I. Agent, who noted that art theft is often "considered a victimless crime").

5 See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 Boston U. L. Rev. 559, 566 (1995) ("Effective cultural resource protection is further hindered by the fact that the law consists of a patchwork of common law property doctrines that were not developed to respond to these particular problems."); *cf.* Lawrence S. Bauman, Note, *Legal Control of the Fabrication and*

they often must rely on laws designed for other purposes that awkwardly apply to art theft, which often leads to unfortunate consequences. The first consequence is the art "going underground" for long periods of time while statutes of limitation potentially tick away. The second is downstream purchasers of stolen art purchasing the art without knowing its tainted past and limiting the possibility of recovery.[6]

While art crime is sometimes considered victimless, that absolutely was not the case when the Isabella Stewart Gardner Museum in Boston, Massachusetts was robbed on St. Patrick's Day, March 18, 1990, as discussed below.[7] Four years after the infamous Gardner heist, Congress passed the Theft of Major Artwork statute ("TOMA") to fill a significant gap in the patchwork of laws designed to prosecute art theft and recover stolen art.[8] This article will provide the first comprehensive analysis in academic literature of the laws potentially applicable to recover the art stolen during the Gardner heist.

Part 1 will provide limited background about the Gardner heist, including the current state of the investigation based upon publicly-available information. Part 2 will analyze Massachusetts criminal laws potentially applicable to the thieves and downstream possessors of the stolen artwork.[9] Part 3 will examine federal laws, including the *National Stolen Property Act* (NSPA) and TOMA. TOMA will be discussed thoroughly in connection to any potential museum theft, not just the Gardner heist, including the series of test cases brought pursuant to it.[10] This article concludes that, while TOMA closed significant gaps in the law applicable to the museum thieves and downstream possessors of stolen artwork, it also left open some avenues for it to be attacked.

1. THE GARDNER HEIST

The Isabella Stewart Gardner Museum robbery in 1990 was the largest museum theft by that date, with thirteen masterpieces by art's biggest names worth

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Marketing of Fake Paintings, 24 Stan. L. Rev. 930, 931 (1972) ("This Note contends that existing criminal statutes do not provide an adequate apparatus for preventing the fabrication and marketing of fake paintings because they are designed to deal with commercial paper and documents rather than paintings and thus do not allow law enforcement officials to prosecute the perpetrators of art frauds effectively.").

6 An example is the use of the civil forfeiture mechanism premised upon movement of antiquities illegally dug overseas across a national or state border in violation of the *National Stolen Property Act*, 18 U.S.C. ss. 2314 and 2315. See, for example, Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. Rev. 123 (2010).

7 See, generally, Ulrich Boser, *The Gardner Heist: The True Story of the World's Largest Unsolved Art Theft* (1st ed. 2009).

8 18 U.S.C. s. 668. See also Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 Boston U. L. Rev. 559, 566 (1995) ("the fact that cultural resource protection in the United States is the product of reactions to specific threats to cultural property.").

9 See Parts 1 and 2, *infra*.

10 See Part 3, *infra*.

approximately $300 million being ripped from the walls of the quaint Boston museum.[11] The unsolved mystery and circling rumor mill has a little of everything for a Hollywood movie — multi-million dollar art, criminal masterminds, gangsters, the Irish Republican Army, murder, and undercover FBI agents — and remains unsolved.[12] The FBI Art Squad, created in the wake of the theft,[13] has offered a $5 million reward for information leading to the recovery of the art and has listed the theft in its list of the top-ten art crimes.[14] More important than the monetary value of the art is the public value, as stated by Anne Hawley, director of the Gardner:

> These rare and important treasures of art need to be returned to the Gardner Museum so that they can be enjoyed again by the public. While people often talk about the monetary value of art, the value of these objects goes far beyond dollars and cents. These masterpieces have the power to inspire thinking and creativity, two processes essential to a civil society. Isabella Stewart Gardner, this museum's founder, understood that when she left them "for the education and enjoyment of the public forever."[15]

(a) The Robbery

As the Boston St. Patrick's Day activities wound down on March 18, 1990, thieves dressed as police officers convinced low-wage guards at the museum to allow them to enter to investigate reports of a disturbance.[16] The guards quickly realized their mistake when the thieves bound and gagged them in the basement of the museum.[17]

After entering the building, the thieves spent the next 64 minutes selecting thirteen paintings and other objects and then departed with their selections — some created by Vermeer, Rembrandt, Manet, and Degas — as well as the surveillance

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11 All facts in Part 1 can be verified in many sources, including Ulrich Boser, *The Gardner Heist: The True Story of the World's Largest Unsolved Art Theft* (1st ed. 2009). The FBI estimates the total value at $300 million (online: <http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/Isabella>), but Boser estimates that the value may be $500-600 million (p. 68-69). Another source also values the missing art at around $500 million. Robert M. Poole, *Ripped from the Walls (and the Headlines)*, Smithsonian Magazine, July 2005, online: <http://www.smithsonianmag.com/arts-culture/ripped.html>.

12 *Ibid.*

13 Chaffinch, *supra* note 2, at p. 96.

14 Sandra Laville, *Find Whitey: The Hunt for the Man with a $1m Price on His Head*, The Guardian (June 4, 2007), online: <http://www.guardian.co.uk/uk/2007/jun/04/artnews.topstories3> (also documenting the $5 million reward).

15 *Art robbery: Gardner Museum, Boston MA*, The Missing List (Dec. 4, 2008), online: <http://www.themissinglist.co.uk/police-appeal/art-robbery-gardner-museum-boston-ma/>.

16 Stephen Kurkjian, *Secrets Behind the Largest Art Theft in History*, The Boston Globe (March 13, 2005) online: <http://www.boston.com/news/specials/gardner_heist/heist/>.

17 *Ibid.*

possessed guns and were violent, they could be prosecuted under the *Hobbs Act*.[115]

Also, if the rumors connecting the thieves to organized crime are true, they probably could be charged under the *Racketeer Influenced and Corrupt Organizations Act* ("RICO").[116] Organized crime has led to the passage of many criminal statutes at the federal level,[117] but while federal jurisdiction often covers organized crime it is not so limited, a development not uniformly praised.[118] There appears to be no consensus on any definition of organized crime.[119] "Organized crime" is defined by one source as "a nonideological enterprise that involves a number of persons in close social interaction, organized on a hierarchical basis for the purpose of securing profit and power by engaging in illegal and legal activities."[120] Another source has defined "organized criminal groups" as "simply business organizations operating under many different management structures and dealing in illegal products."[121] If the rumors of Whitey Bulger's and other high level mobsters' involvement are correct, RICO provides a definite possibility for prosecution.

Nonetheless, just as was true for the state laws, the latest statute of limitations for these violations very well could have already expired if the criminals abandoned the art, completing their crimes long ago. There are two other ways, how-

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to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. s. 1343. Mail fraud falls under 28 U.S.C. s. 1341.

115 18 U.S.C. s. 1951.

116 18 U.S.C. ss. 1961–1968.

117 For example, John C. Jeffries & The Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095 (1995).

118 For example, William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relations*, 78 Va. L. Rev. 1657, 1660 (1992) ("[S]imple congressional self-restraint is called for . . . in the federalization of crimes . . .."); Lorie Hearn, *Trying Times Are Ahead: Justice O'Connor Says Federalization of Crime Could Overwhelm the Court*, San Diego Union-Trib., Aug. 17, 1994, at A4 ("Congress seems to be moving clearly in the direction of recognizing national problems and deciding that the way to deal with them is to federalize these issues . . . This is a change that should be of grave concern, in my view, to federal judges.").

119 Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. Chi. L. Rev. 41, 98 (2000).

120 Howard Abadinsky, *Organized Crime* 7 (Nelson-Hall 2d ed 1985).

121 Denny F. Pace and Jimmie C. Styles, *Organized Crime: Concepts and Control* 21 (Prentice-Hall 2d ed 1983). The Honorable Richard A. Posner defines organized crime as "criminals organized into illegal firms . . . operating in such criminal fields as loansharking, prostitution, gambling, and narcotics but also in legitimate fields as well, and employing violence and the corruption of police as key business methods." Richard A. Posner, *Economic Analysis of Law* 242 (Little, Brown 4th ed 1992). Diego Gambetta describes the Italian mafia as "that set of firms which (1) are active in the protection industry under a common trademark with recognizable features; (2) acknowledge one another as the legitimate suppliers of authentic mafioso protection; and (3) succeed in preventing the unauthorized use of their trademark by pirate firms." Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* 155 (Harvard 1993).

ever, that the Gardner thieves and downstream purchasers of the art could be prosecuted under federal law, even if the art in question had been stolen without the use of a gun or force. They could potentially be charged under the *National Stolen Property Act* ("NSPA") and the *Theft of Major Artwork Act* ("TOMA"), as discussed below.

(a) The National Stolen Property Act

Knowingly moving stolen property across a state line would subject the thieves and anyone else to prosecution under the *National Stolen Property Act* ("NSPA"),[122] seemingly regardless of how many years after the theft the interstate transportation occurs.[123] The NSPA was initially adopted in 1919 to provide federal jurisdiction to prosecute mob car thieves who stole a car in one state and drove it to another to avoid prosecution.[124] The crime triggering the statutory violation is the knowing interstate transportation of property, not the initial theft itself.[125]

The threat of federal prosecution under the NSPA looms seemingly indefinitely. For example, in 1999 a civil forfeiture[126] action premised, in part, upon a NSPA violation was filed to seize a painting stolen during the Nazi era.[127] In 2012, the U.S. government unsuccessfully sought to add a NSPA claim to a dismissed civil forfeiture complaint against the St. Louis Art Museum seeking the Ka Nefer Nefer mask, which allegedly was stolen in Egypt in the late 1960s.[128] A 1986 amendment to the NSPA specifically criminalized "possession" of stolen property and clarified that the statute applies only to stolen property that actually crosses a

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122 18 U.S.C. ss. 2314–2315. See, generally, Urice, *supra* note 6, at p. 123.

123 An interesting question not yet addressed in a meaningful way under U.S. law is whether title vesting under foreign law would preclude prosecution under the NSPA for possessing previously stolen property crossing a border into the United States. This concept differs from the *McClain* doctrine, which established that one can be prosecuted under the NSPA for possessing antiquities removed from foreign soil in violation of a clear statute vesting ownership in the state (which may need to be meaningfully enforced by that foreign state). See Urice, *supra* note 6; Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. Miami L. Rev. 997 (2010). The wisdom of this doctrine is at the core of a wide divide within the cultural property/heritage field. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831 (1986); Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 Conn. J. Int'l L. 197 (2001).

124 For example, George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archeological Materials: Criminal and Civil Approaches*, 6 Syracuse J. Int'l L. & Com. 77, 89–91 (1978).

125 18 U.S.C. s. 2314 (1994).

126 See, generally, Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Art Litigation*, 38 Vand. J. Transnat'l L. 1199 (1999).

127 *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (last opinion in the protracted litigation). The case ultimately settled. Carol Vogel, *A Schiele Going, a Schiele Staying*, N.Y. Times, May 6, 2011, at C28.

128 Ka Nefer Nefer forfeiture was sought initially under 19 U.S.C. s. 1595a, not under the NSPA.

state or national border.[129] Thus, conspirators and downstream possessors lacking good faith who did not actually participate in the theft or transportation also could be prosecuted.[130]

One is left to wonder, however, how a downstream possessor of the art who acquired it in good faith could be prosecuted today for possessing property stolen long ago if he in no way participated in the initial theft or moved the art across a state line since acquiring knowledge of the art's tainted past. Another statute, TOMA, fills this important legislative gap in some respects, but only if the property is an object of cultural heritage stolen from a museum, as discussed next.

(b) The Theft of Major Artwork Act

Senator Edward M. Kennedy proposed TOMA in 1994, three years after the unsolved Gardner theft, as part of the 1994 Omnibus Crime Bill that federalized many crimes previously commonly dealt with at the state level.[131] It is beyond the scope of this article to evaluate the important debate about whether widespread

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129 *Criminal Law and Procedure Technical Amendments Act of 1986*, Pub. L. No. 99-646, s. 76, 100 Stat. 3592, 3618 (1986). Some courts concluded under the pre-1986 version of the NSPA that one may not be prosecuted for mere possession of property that "came to rest" in a particular state, thereby falling out of interstate commerce — the justification for federal regulation. See *United States v. Tobin*, 576 F. 2d 687 at pp. 692-693 (5th Cir., 1978); see also *United States v. Trupin*, 117 F. 3d 678 (2nd Cir., 1997) at p. 683 (discussing evolution of NSPA and cases interpreting it); *Lee v. United States*, 363 F. 2d 469 (8th Cir., 1966) at p. 475 (holding that person found at airport with travel information on him was in interstate commerce); *Corey v. United States*, 305 F. 2d 232 (9th Cir., 1962) at pp. 236–238 (holding that jewelry mailed across state lines was in interstate commerce); *Pilgrim v. United States*, 266 F. 2d 486 (5th Cir., 1959) at p. 488 (defendant's knowledge that the car was likely stolen when he transported it across states lines violated NSPA); *cf. McElroy v. United States*, 455 U.S. 642 (1982) at pp. 652–654 (construing 18 U.S.C. s. 2314 in light of commerce clause decisions before 1919). The NSPA has been applied to museums. See generally, for example, Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 Notre Dame L. Rev. 1835 (2009).

130 A defendant's knowing and willing participation in a conspiracy may be inferred from, for example, her presence at critical stages of the conspiracy that could not be explained by happenstance or a lack of surprise when discussing the conspiracy with others. *United States v. Aleskerova*, 300 F. 3d 286 at pp. 292-293 (2nd Cir., 2002); *United States v. Gordon*, 987 F. 2d 902 at p. 907 (2nd Cir., 1993); *United States v. Nusraty*, 867 F. 2d 759 at p. 764 (2nd Cir., 1989); *United States v. Pedroza*, 750 F. 2d 187 at pp. 198-199 (2nd Cir., 1984). Additional circumstantial evidence might include evidence that the defendant participated in conversations directly related to the substance of the conspiracy, possessed items important to the conspiracy, or received or expected to receive a share of the profits from the conspiracy.

131 *United States v. Pritchard*, 346 F. 3d 469 at p. 472 (3rd Cir., 2003). When proposing the amendment, Senator Kennedy noted the growing art theft epidemic had forced museums "to undertake expensive measures to protect their treasures, and the burden is equally great on smaller and less established museums and galleries." 137 Cong. Rec. S9088 (June 28, 1991).

federalization of crime is wise,[132] but TOMA filled an important gap in the federal-state legal patchwork potentially applicable to the Gardner heist and other museum theft.[133]

The prosecution gap existing as a consequence of the limited coverage afforded by the NSPA and Massachusetts state statutes, although not mentioned in the extremely sparse legislative history concerning TOMA, undoubtedly was a driving concern in proposing it. TOMA helps to fill the gap between the NSPA and state larceny statutes in two ways. First, TOMA applies to offenses that affect interstate commerce,[134] but it does not require the stolen objects to actually cross state or national borders.[135] Second, TOMA's statute of limitations is a remarkable ten years,[136] and one can intuit that given the long recovery period typical after art theft, many thieves' acts will be construed as continuing offenses in determining when the ten-year period starts running.[137] Few other federal crimes have the equivalent or longer statutes of limitation, and encompass most of the worst offenses in civilized society, such as kidnapping, murder, treason, abuse of children, terrorism, and fleeing from justice.[138]

(i) Penalties Under TOMA

TOMA specifies a fine and/or imprisonment of not more than ten years for offending persons.[139] It lays out two offenses. The first offense occurs under 18 U.S.C. section 668(a) when "a person . . . steals or obtains by fraud any object of cultural heritage from the care, custody, or control of a museum."[140] The second occurs under section 668(b) when "a person who receives, conceals, exhibits, or

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132 See Victoria Davis, Note; *A Landmark Lost: The Anemic Impact of* United State v. Lopez, 115 S. Ct. 1624 (1995), *on the Federalization of Criminal Law*, 75 Neb. L. Rev. 117 (1996); see also John C. Jeffries & The Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095 (1995).

133 But, see Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1 (1997) (maintaining that federalization of crime "includes trivial crimes that clog the federal code, such as [TOMA]").

134 18 U.S.C. s. 668(a)(1) (1994).

135 *United States v. O'Higgins*, 55 F. Supp. 2d 172 (S.D.N.Y., 1998).

136 18 U.S.C. s. 3294 (1994).

137 It is commonly said in the art recovery world that, on average, artwork resurfaces every 30 years as a result of death, divorce, or debt.

138 The following offenses have no applicable limitations period: crimes punishable by death, such as kidnapping, murder and treason, 18 U.S.C. s. 3281, certain offenses against children, 18 U.S.C. ss. 3283 and 3299, terrorism resulting in or creating a foreseeable risk of death or serious bodily injury, 18 U.S.C. s, 3286, and fleeing from justice, 18 U.S.C. s. 3290 (1994). The limitations period for certain crimes committed during wartime is suspended until three years after the termination of hostilities (18 U.S.C. 3287). Finally, the statute of limitations does not begin to run on certain crimes where the defendant is implicated by DNA evidence until the person is identified (18 U.S.C. s. 3299 (1994)).

139 18 U.S.C. s. 668(b) (1994).

140 18 U.S.C. s. 668(b)(1) (1994).

disposes of an object of cultural heritage" stolen from a museum had knowledge that the object has been stolen or obtained by fraud.[141] Significantly, the person in the second instance need not know that the object of cultural heritage was stolen from a museum, only that it had, in fact, been stolen from someone, somewhere. It is also important to note that none of the original thieves can be prosecuted under TOMA specifically for their acts on March 18, 1990, because those acts predate TOMA's passage in 1994; thus, prosecution under TOMA will hinge on the conduct of actions after its effective date.[142]

(ii) TOMA Prosecution Challenges

TOMA is arguably ambiguous in its definitions, which may lead to disputes regarding whether a theft falls within its purview. These threshold definitions are discussed below. Also, as discussed below, there is greater uncertainty created as to those persons who may be found to commit an offense under 18 U.S.C. section 668(b), than under section 668(a).

(A) Defining Objects of "Cultural Heritage" and Addressing Valuation

TOMA defines an object of cultural heritage as an object that is either "over 100 years old and worth in excess of $5,000, or worth at least $100,000" regardless of its age.[143] While these threshold values and age requirements may lead to disputes over the valuation and age by experts for either side, the definition removes the debate of what is "art," a notoriously difficult question for courts,[144] and provides a fairly clear line of what is major artwork covered under 18 U.S.C. section 668. Defendants commonly contest valuation during sentencing under section 2B1.5 of the Sentencing Guidelines for the United States Courts.[145]

The United States Court of Appeals for the Third Circuit addressed the issue of whether cultural property had a value independent of its fair market value in *United States v. Medford*.[146] Medford worked as a custodian for the Historical Society of Pennsylvania for approximately eighteen years and at some point he met Csizmazia, a collector of antiques. Medford agreed to steal objects from the museum and sell them to Csizmazia.[147]

In a ten-year period, Medford stole over 200 items that he sold to

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141 18 U.S.C. s. 668(b)(2) (1994).

142 Sutherland Statutory Construction ss. 33.6, 33.9, 44.2 and 44.4 (7th ed. 2011).

143 18 U.S.C. s. 668(a)(2)(A-B) (1994).

144 For example, Amy Adler, *Against Moral Rights*, 97 Cal. L. Rev. 263 (2006).

145 U.S. Sentencing Guidelines Manual s. 2B1.5 (2011). The Sentencing Guidelines allow for an upward departure that is directly proportional to the valuation of the stolen object(s) from the base offense level of 8. *Ibid.*; see also Travis McDade, *Codifying Cultural Heritage: Why United States Law Suddenly Treats Our Rare Materials with Respect*, 9 RBM: A Journal of Rare Books, Manuscripts, and Cultural Heritage 205 (2008).

146 *United States v. Medford*, 194 F. 3d 419 at p. 425 (3rd Cir., 1999).

147 *Ibid.*

Csizmazia.[148] The court allowed an "upward departure" from the base sentencing guideline based on an estimated value that included both commercial and intrinsic cultural value.[149] The court found that the "price set by the commercial market is insufficient to fully capture the harmfulness of the defendant's conduct. The [objects] stolen in this case unquestionably have historical and cultural importance."[150] The court also aggregated the value of the individual items to determine the appropriate sentence.[151] This aggregation during sentencing appears unchallenged; however, for purposes of TOMA's definition of object of cultural heritage,[152] it is unclear whether each object's value should be considered individually or if it can be aggregated if the theft encompasses multiple objects. According to the Supreme Court interpreting the NSPA, the value of all transactions that are substantially related can be aggregated to meet the statutory limit.[153] Extending this reasoning to TOMA, the value of all objects stolen may be aggregated to meet either the $5,000 or $100,000 limit. It is presently unknown, however, whether TOMA may be applied to subsequent possessors who come to possess only individual items valued below the threshold limits.

(B) Defining "Museums"

TOMA also defines "museum." A museum is "an organized and permanent institution situated in the United States, established for an essentially educational or aesthetic purpose, has a professional staff, and owns, utilizes, and cares for tangible objects that are exhibited to the public on a regular schedule."[154] The definition of museum has been liberally construed to apply to various institutions. In *United States v. Pritchard*,[155] the court emphasized the particular institution's permanence and ownership.[156] The Hunt-Phelan Home ("the Home") in Memphis, Tennessee, housed a collection of Civil War-era items.[157] The Hunt-Phelan Foundation, owner of the Home, entrusted Russ Pritchard, Jr., with various objects for authentication purposes.[158] Pritchard lied about the objects' authenticity and sold some of them — an officer's frock and coat — on eBay without the consent or knowledge of the owner or the Foundation.[159] Pritchard argued that TOMA did not apply because the

148 *Ibid.*

149 *Ibid.*; *United States v. Spiegelman*, 4 F. Supp. 2d 275 , 292 (S.D.N.Y., 1998) (stating that regarding the theft of the cultural objects at issue as "being of the same gravity as the theft of $1.3 million in cash would be to deny the unmistakable importance of the undiscovered knowledge likely buried within the items he stole").

150 *Ibid.* at p. 425.

151 *Ibid.*

152 18 U.S.C. s. 668 (a)(2) (1994).

153 *Schaffer v. United States*, 362 U.S. 511 at p. 517 (1960).

154 18 U.S.C. s. 668(a)(1)(A–D) (1994).

155 *United States v. Pritchard*, 346 F. 3d 469 (3rd Cir., 2003).

156 *Ibid.*

157 *Ibid.*

158 *Ibid.* at p. 471.

159 *Ibid.*

Hunt-Phelan Home was not a museum due to the fact that it was not permanent (as it had been closed) and did not own the frock and coat.[160] The court quickly dismissed the permanence argument, holding that permanence referred to the intent rather than ultimate success of the Hunt-Phelan Home.[161] The court then identified that the crucial element to the instant case was whether the Hunt-Phelan Foundation owned, utilized, and cared for tangible objects as required by 18 U.S.C. section 668 (a)(1)(D).[162] The Hunt-Phelan Foundation did not own any of the objects in the collection, including the officer's frock and coat in question.[163] These items were owned by the descendants, who inherited the home and its contents, and then established the Hunt-Phelan Foundation.[164] The court held that an institution is not required to own all of the objects it displays[165] and it is not required that the institution own the particular stolen object either.[166] Ultimately, the *Pritchard* court found that because the foundation owned the Hunt-Phelan Home itself, a tangible object and part of the overall display, the Hunt-Phelan Home met the ownership requirement and thus amounted to a museum under 18 U.S.C. section 668 (a)(1).[167] This liberal type of construction has been applied to hold a library,[168] presidential centers,[169] and historical societies[170] to be museums[171] under TOMA.

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160 *Ibid.* at p. 472.

161 *Ibid.*

162 *Ibid.* at p. 473.

163 *Ibid.*

164 *Ibid.* at pp. 470-471.

165 *Ibid.* at p. 473.

166 *Ibid.* at p. 475.

167 *Ibid.*

168 *United States v. Spiegelman*, 4 F. Supp. 2d 275 (S.D.N.Y., 1998).

169 *United States v. McCarty*, 628 F. 3d 284 (6th Cir., 2010).

170 *United States v. Medford*, 194 F. 3d 419 (3rd Cir., 1999).

171 While most art is not stolen from museums, (Michael Kilian, *To Catch an Art Thief Wielding Her Data File, Lynne Chaffinch Tracks Thousands of Stolen Works*, Chi. Trib., April 18, 2001), the museum limitation serves to provide federal protection only when necessary and maintain a manageable caseload for federal courts. See, generally, Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 4 (1997) ("The more crime is federalized, the more the potential exists for an oppressive and burdensome federal police state"); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. Pa. L. Rev. 1309, 1324 (1997) ("The potential for constitutional abuse due to increased federalization of criminal law requires a reexamination of the justifications for the broad grant of prosecutorial discretion . . ."); Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499, 534 (1996) ("With respect to criminal jurisdiction in particular, the Committee suggests that criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount.").

(iii) Downstream Possessors under TOMA

"A person who steals an object of cultural heritage from a museum shall be fined and/or imprisoned not more than ten years" under 18 U.S.C. section 668(b)(1).[172] All reported cases implicating 18 U.S.C. section 668 deal with a defendant who is the thief of the artwork or an obvious conspirator. In these situations it is clear that the person involved should be charged under the first subsection of TOMA.

In contrast, 18 U.S.C. section 668(b)(2) is not so clear. It provides: "A person who — knowing that an object of cultural heritage has been stolen or obtained by fraud, if in fact the object was stolen or obtained from the care, custody, or control of a museum (whether or not that fact is known to the person), receives, conceals, exhibits, or disposes of the object, shall be fined under this title, imprisoned not more than 10 years, or both."[173]

The remainder of this subpart of this article concentrates on the effect of TOMA on persons other than the initial thief or conspirators. They contemplate someone downstream who comes to possess the objects without necessarily initially knowing their tainted history. With high-profile objects stolen in the Gardner heist, this admittedly is difficult to imagine; however, most museum objects are not so readily identifiable. This is particularly true in the middle market where duplicate objects not readily distinguishable from one another are quite common, such as books, Civil War uniforms, medals, and flags, and the dollar value of the typical objects dictates that the market buys and sells with little or no investigation of title.[174]

18 U.S.C. section 668(b)(2) applies to a person or persons other than the initial thief, and encompasses seemingly anyone who might come into contact with an object stolen from a museum, regardless of initial good or bad faith. These persons could receive the object of cultural property from the thief, from a second possessor, or even someone further removed who may not have known the object's status. Such persons present unique problems for prosecution. When does the requisite knowledge attach to the possessor? Is ignorance a defense? When does the statute of limitations begin to run? What can or should the possessor do with the stolen object upon discovering its tainted history?

(A) U.S. Law Defining "Knowledge"

The technical language of the statute creates potentially unlimited criminality upon notification that an object had been stolen in the past. For example, once a prosecutor, police, or FBI officer knows who has the object and calls that person to inform him that he possesses stolen property, that person is potentially subject to prosecution under TOMA unless he or she immediately turns over the objects (and arguably even then for "disposing" of the object although such an interpretation would be absurd). While TOMA's broad nature seems to insure the return of ob-

172 18 U.S.C. s. 668(b)(1) (1994).

173 18 U.S.C. s. 668(b)(2) (1994).

174 See, generally, Alia Szopa, *A Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. Miami Bus. L. Rev. 55 (2004).

jects to museums and prosecution of anyone who does not immediately forfeit them upon receiving notification of their history, such breadth also implicates criminal law doctrines that could undermine the statute if a court were to find that it overreaches. This is particularly true in regard to the knowledge requirement, discussed next. U.S. Law Defining "Knowledge"

18 U.S.C. section 668 (b)(2) requires the offending person to know the object of cultural heritage is stolen, but does not require that the person know the object was stolen from a museum. Many criminal statutes requiring that the defendant have had certain intent or knowledge have been surprisingly difficult for courts to apply.[175] "Knowing" is defined commonly as having or showing awareness or understanding,[176] and "knowledge" is commonly defined as "an awareness or understanding of a fact or circumstance."[177] Actual knowledge has been defined as "direct and clear" knowledge.[178]

In a case under TOMA against the present day possessor of the art, how the jury is instructed is likely to be a contentious issue because of the lack of federal jury instructions for the statute and the wide variety of instructions concerning a defendant's knowledge and intent under various other statutes. Although there is no way to guarantee any particular federal jury instruction would be used, it is worth noting one commonly employed instruction that a "person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case."[179]

If the person ignorantly receives a stolen object without knowledge that it is stolen at the moment of receipt, that person could potentially be liable under TOMA once that knowledge is acquired. Generally, most courts would agree that a person who unknowingly receives the stolen object does not meet the knowledge requirement — but only at first. One case applying the NSPA speaks to this issue. The Second Circuit in *United States v. Trupin*[180] held that the defendant's after-acquired knowledge would complete all the necessary elements under the NSPA

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175 See, for example, Robert Batey, *Judicial Exploitation of* Mens Rea *Confusion, at Common Law and under the Model Penal Code*, 18 Ga. St. U. L. Rev. 341 (2001). "A majority of the states and the federal system continue to apply the framework developed by the common law, allowing courts to construe crimes as requiring specific intent, general intent, strict liability, or one of the seemingly infinite shades of meaning along the continuum upon which these three concepts reside." *Ibid.* at p. 341. "A substantial minority use the structure reflected in section 2.02 of the *Model Penal Code*, which deploys five discrete levels of culpability — purpose, knowledge, recklessness, negligence, and strict liability — according to relatively strict rules of judicial construction." *Ibid.* (internal citation to *Model Penal Code* omitted).

176 Black's Law Dictionary 950 (9th ed. 2009).

177 Black's Law Dictionary 950 (9th ed. 2009).

178 Black's Law Dictionary 950 (9th ed. 2009).

179 Leonard B. Sand, Federal Jury Instructions s. 3A.01 (Scienter) (1984).

180 *United States v. Trupin*, 117 F. 3d 678 (2nd Cir., 1997).

and subject him to legitimate prosecution.[181] Similarly, while a federal criminal statute dealing with money laundering has been interpreted such that after-acquired knowledge does not satisfy the knowledge requirement, if the person proceeds with further transactions after gaining knowledge, then the scienter requirement is met.[182] These concepts also could apply to stolen art, as discussed next.

(B) Knowing Versus Innocent Purchasers in the Art Market Context

The issue of an innocent or good faith purchaser often arises in the context of whether the possessor has valid title to art.[183] Under TOMA, to be an innocent purchaser or receiver an individual must overcome the prosecutor's attempts to show knowledge that the art was stolen.

Art market practices stir debate on whether an innocent purchaser should be prosecuted under TOMA. Purchasers often do not research the provenance or title of the object.[184] Purchasers might conduct a quasi-cost-benefit analysis based on the lack of provenance versus the value, ultimately ignoring that the lack of provenance may prove the item is stolen, smuggled, or both.[185] Novices and seasoned purchasers rely on the reputation of dealers, collectors, and auction houses instead of making their own inquiries.[186] Many art dealers, museum curators, and collectors may not investigate or may turn a blind eye to any suspicion[187] in order to avoid embarrassment, avoid scaring off customers, minimize questions regarding legitimacy of other objects, and facilitate resale.[188] Reliance on the dealers and collectors may be misplaced if the "top echelon" of the illicit trade is made up of collectors, museum curators, dealers, and scholars as one commentator points out.[189] While provenance or evidence of clear title often increases the value of the

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181 Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, N. M. L. Rev. 123, 158 (2010).

182 Randall D. Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 Wm. & Mary L. Rev. 1291, 1313-1314 (1993).

183 "Even though . . . a purchaser may be treated as having title and the right to possession as against everyone but the rightful owner, a sale by the thief or by any person claiming under the thief does not vest any title in the purchaser as against the owner, although the sale was made in the ordinary course of trade and the purchaser acted in good faith." Romualdo Eclavea, 63C Am. Jur. 2d property s. 34 (2012).

184 Robin M. Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 How. L.J. 17, 27 (1993).

185 See *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 850 (2004) citing Richard M. Murphy, *A Corrupt Culture*, New Leader, Feb. 23, 1998 at p. 15 ("Ninety percent of the pieces that pass through auction houses in London and New York are of unknown provenance, meaning they are almost certainly stolen, smuggled, or both").

186 *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 852 (2004).

187 Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 Cardozo Arts & Ent. L.J. 447, 464 (1999).

188 *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 851 (2004).

189 Jason C. Roberts, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico, and the United States*, 4 Tulsa J. Comp & Int'l L. 327 (1997).

object, lack of provenance or other records often does not deter buyers.[190]

While it may be generally accepted that purchasers of art and objects of cultural heritage often do not perform due diligence into the property rights of the seller,[191] should this lack of due diligence be presumptive as to the defendant's knowledge? Buyers and sellers alike make claims of difficulty and expense of researching an object's origins. However, a prospective purchaser should perform at least minimal due diligence as to title of the object if the purchaser expects lack of knowledge to be a viable defense.[192]

Currently, there are many inexpensive resources for potential purchasers. The FBI maintains the National Stolen Art File which is easily searchable at its website.[193] Items must be valued at $2,000 or more, which would encompass any objects that fall under TOMA. The Art Loss Register maintains a database of over 300,000 stolen objects[194] that can be searched by request through its website.[195] The Getty Research Institute created the Getty Provenance Index which currently contains over 1.1 million records from sales, auction catalogs, inventories, and dealers' stock books, all of which are available through its website.[196] These are only a few examples that even the beginner could use to complete a minimum investigation into the rightful ownership of the object. Purchasers of real property are expected to perform a thorough title search before closing a sale. Purchasers of realty are also held to have constructive notice of ownership if the title is properly recorded in the jurisdiction.[197] Therefore, a purchaser of an object recorded as stolen, or at a minimum one that is listed on an easily accessible database or website of the kind as those listed above, should be charged with constructive knowledge

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190 See Lincoln S. Jalelian, *Theft of Art, Antiquities, Cultural Property and the "Deliberate Ignorance" Defense*, 48 No. 1 Crim. L. Bull. 5 (2012).

191 For example, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631 (2000) (arguing against imposition of a due diligence obligation on purchasers); see also Alan Schwartz and Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 Colum. L. Rev. 1332 (2011) (same from economics perspective). The authors of this article disagree with both of these proposals.

192 *Cf.* Richard G. Singer, *The Proposed Duty to Inquire As Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 Buff Crim. L. Rev. 701 (2000) (non-art context).

193 The FBI National Stolen Art File, online: <http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file> (last visited April 21, 2012).

194 The Art Loss Register, online: <http://www.artloss.com/services/loss-registration> (last visited April 14, 2012).

195 The Art Loss Register, online: <http://www.artloss.com/services/searching> (last visited April 14, 2012).

196 The Getty Research Institute Collecting and Provenance Research, online: <http://www.getty.edu/research/tools/provenance/index.html> (last visited April 14, 2012).

197 "[O]ne purchasing land is charged with notice of the terms of the recorded deed to his grantor and with the terms of all prior recorded deeds in the chain of title." George G. Bogert, et al., *Bogert's Trusts and Trustees* s. 893 (2011).

that the object was stolen whether the purchaser actually researched or not.

Unfortunately, charging purchasers with constructive notice of these lists may encourage certain dealers, auction houses, museum curators, and collectors not to report stolen items at all. But most institutions and persons interested in protecting the cultural heritage of the object, or at least their personal ownership rights, will readily report stolen objects to these various outlets.[198] Additionally, the art trade's lower-level continued general practice of not inquiring into the provenance or title of an object encourages deliberate ignorance[199] among its participants which should also serve as the requisite knowledge for prosecution under TOMA.[200]

In the unique context of the hazy art market and its standard practices, the line between a knowing and an innocent purchaser is often blurred, especially when the purchased art is not high-profile stolen art. It would be difficult for one to claim such status in regard to the Gardner art, however. Two other doctrines may also help prove the requisite knowledge: constructive knowledge and deliberate ignorance.

(C) Possessors with Constructive Knowledge

Constructive knowledge is knowledge that one using reasonable care or diligence should have and is attributed by law to a given person.[201] Often, constructive knowledge is sufficient to meet the knowing requirement of criminal statutes.[202] Returning to the *Portrait of Wally* case,[203] the Leopold Museum was charged with knowledge either because it knew the painting was stolen or at least had reason to believe the painting was stolen due to its questionable transfer during the Nazi-era and subsequent claims by the dispossessed owner.[204] Since the museum was charged with at least constructive knowledge the painting was stolen, the burden of proof shifted to the museum to prove it did not know it had been stolen.[205] Therefore, similar to the NSPA, a posessor may be charged under TOMA with constructive knowledge if he reasonably should have known the object was stolen. Although not clear what would be required, based on *Portrait of Wally*[206] the possessor would have a chance to prove that he did not know or could not have

198 See Lynne Chaffinch, *The Federal Bureau of Investigation's Art Theft Program*, 38 Library Admin, 99-100 (2003).

199 See *United States v. Schultz*, 333 F. 3d 393 (2d Cir., 2003) at pp. 412-413 (holding that for prosecution purposes of the NSPA, conscious avoidance of information that goods are stolen constitutes actual knowledge).

200 18 U.S.C. s. 668(b)(2) (1994).

201 Black's Law Dictionary 950 (9th ed. 2009).

202 "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Model Penal Code* s. 2.02(7) (2010).

203 *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y., 2009).

204 *Ibid.* at p. 271.

205 Lincoln S. Jalelian, *Theft of Art, Antiquities, Cultural Property and the "Deliberate Ignorance" Defense*, 48 No. 1 Crim. L. Bull. ART 5 (2012).

206 *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 at p. 251 (S.D.N.Y., 2009).

known the object was stolen.

(D) Deliberately Indifferent Possessors

Ignorance of the fact that the object was stolen may be a defense;[207] however, the doctrine of deliberate ignorance, or willful blindness, may provide the requisite knowledge under 18 U.S.C. section 668(b)(2). The doctrine of deliberate ignorance imputes guilty knowledge of a fact if the person was aware of a high probability of the existence of the fact and in order to avoid criminal liability deliberately avoided learning of the existence of the fact.[208]

Constructive knowledge and deliberate ignorance will raise many of the same questions regarding TOMA and its application. Often either may be implicated, but the actions of the particular defendant will ultimately determine which, if either, should be applied.

(E) Innocent Purchasers

This is not to suggest that an innocent purchaser cannot exist, only that there should be a minimum of due diligence on the part of the purchaser before claiming he did not know the object was stolen. This concept is easier to apply when the object is of a significant value or the type that normally is accompanied by provenance, authentication,[209] or the like. But TOMA applies to objects valued as low as $5,000, if over 100 years old, and many of these objects that fall within that scope probably do not have any formal record of ownership. Objects worth more than the $100,000 threshold may lack provenance or other record of ownership. This will provide the judge or jury with a question of fact whether the stolen object is of the value or type that would normally have provenance, authentication, or the like. The trier of fact most likely will apply a subjective standard based upon the reasonable expectations of persons familiar with the market.

Consequently, a claim of innocent purchaser would be a three-step process. First, if the defendant had actual knowledge that the object was stolen at the time of receipt then he obviously could not claim to be an innocent purchaser. If actual knowledge is absent, then it must be determined whether the object of cultural heri-

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207 *Model Penal Code* s. 2.04(1) (2010).

208 *United States v. Ebert*, 1999 WL 261590 at p. 10 (4th Cir. July 9, 1999). See also *United States v. Whittington*, 26 F. 3d 456 (4th Cir., 1994) at pp. 461-462 ("If . . . the defendant or defendants did not learn about the true nature of an existing fact and that the only reason he or she did not learn it was because he deliberately chose not to learn it for the very purpose of being able to assert ignorance at a later time, then you may infer and find that he had the full equivalent of knowledge because one's self-imposed ignorance cannot protect him from criminal liability."); Justin C. From, *Avoiding Not-So-Harmless Errors: The Appropriate Standards for Appellate Review of Willful Blindness Jury Instructions*, 97 Iowa L. Rev. 275 (2011). See, generally, Kevin F. O'Malley, et. al., IA Fed. Jury Prac. instr. s. 17:09 (deliberate Ignorance-Explained) (5th ed. 2008, pocket part).

209 Authentication presents other problems because of the unavailability, unwillingness, and fraud of art experts in the authentication process. See *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 851-852 (2004).

tage is of the type or value that a reasonable person in the market would expect the object to be accompanied by provenance, provenience, authentication, title, or the like. Second, if a reasonable person would expect such proof or records of ownership, then the defendant must show that he conducted the amount of due diligence into the rightful ownership of the object that is proportional to its value or type.[210] Third, absent an expectation of provenance, title, etc., the defendant must make reasonable efforts to ascertain the seller's right to transfer the object(s). If the defendant did not perform at least the minimal amount of due diligence, or it can be proved that the defendant could have easily ascertained the fact the object was stolen but chose to ignore the facts, then the defendant should be charged with constructive knowledge the object was stolen and will meet the knowledge requirement for TOMA at the time of receipt.

As noted above, it would be difficult to imagine an innocent purchaser defense applicable in the Gardner case. Unless someone was a complete ignoramus and paid virtually nothing for the art, the paintings at stake are the type of object that one would expect provenance. Therefore, it would be quite difficult to successfully claim innocent purchaser status without having proof of provenance research, which would have provided reasonable suspicion that the painting(s) were stolen. Constructive knowledge, at a minimum, would be applied to this purchaser.

(F) Downstream Innocent Possessors

Let us imagine a present-day possessor who did not have actual knowledge, did not discover, and could not reasonably discover facts that the object was stolen prior to acquiring it. It is unclear what this innocent purchaser must do with the stolen object when knowledge is acquired. Even though this possessor would not be guilty at the time of receipt, under TOMA it is also a crime to "conceal, exhibit, or dispose of" the stolen object.[211] Therefore, the possessor with after-acquired knowledge must proceed cautiously and with no clear direction from the court cases to date. There is no guarantee that the government will come out on top if a downstream purchaser challenges the status of the property as "stolen" after a significant amount of time. This is particularly true in an era where there is a resurgence of such theories as excusable ignorance triggered by concern for defendants facing prosecution for conduct many would not presume to be criminal as a result of the explosion of federalization of crime.[212] Moreover, some of the test cases

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210 The amount or degree of due diligence would also be a question of fact. Based upon the type and value of the object, what would a reasonable purchaser under similar circumstances do to determine the title of the object?

211 18 U.S.C. s. 668(b)(2) (1994).

212 See, for example, Sharon L. Davies, *The Jurisprudence of Willfullness: An Evolving Theory of Excusable Ignorance*, 48 Duke L.J. 341 (1998); see also Thomas L. Fowler, *Ignorance of the Law: Should It Excuse Violations of Certain Federal Restrictions on the Possession of Firearms?*, 23 Campbell L. Rev. 283 (2001) ("Ignorance of the law is generally held not to excuse criminal conduct, but can such ignorance ever be so reasonable and predictable to constitute a legitimate excuse? Are some laws so obscure, technical, counterintuitive or hard to discover that ignorance of the law will be a defense?") (internal citations omitted); *Staples v. United States*, 511 U.S. 600 (1994)

have involved objects of relatively low dollar value, which may colour a judge's view of the level of due process protections that should be read into a TOMA defense.

The term "stolen" is commonly defined as "acquired or possessed as a result of some wrongful or dishonest act or taking whereby a person knowingly obtains or retains possession of property which belongs to another without or beyond any permission given and with the intent to deprive the owner of the benefit of ownership or possession."[213] The unpredictable nature of civil litigation seeking restitution of stolen art potentially could infect a court's application of this term in future TOMA prosecutions.[214] To explain requires a very brief entrée into civil art litigation.

Although the United States generally adheres to the mantra that one cannot get title from a thief,[215] a civil law claim can still be barred by the applicable statute of limitations.[216] To illustrate the dilemma, take the following two examples. First, "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods."[217] Second, many of the Nazi-era cases have been found to be barred on statute of limitations grounds.[218] Because TOMA applies only to thefts from U.S. museums, it is worthwhile to highlight one recent domestic claim brought by a domestic museum that was found to be barred. In *Keim v. La. Historical Ass'n Confederate War Museum*, the court held that the museum was barred from reclaiming a Civil War era flag stolen from it sixteen years after the original theft.[219] Even if this case had not been decided, it is unclear what the relevance of the statute of limitations applicable to a possible civil case brought by the museum against

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(holding that government must prove beyond a reasonable doubt that the defendant knew he possessed a weapon that had the characteristics that brought it within the statutory definition of a machinegun although the statute did not expressly so provide); *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (applying seldom used "rule of lenity" urging a lenient interpretation of vague criminal statutes).

213 Kevin F. O'Malley, et al., 1A Fed. Jury Prac. & Instr. s. 16:04 ("Stolen" — Defined) (2008 pocket part).

214 It could hardly be said that possessing stolen art is akin to possessing drugs or illegal weapons because there is nothing "inherently wrongful" in possessing art not obviously stolen. *Cf.* Tai Park, *The "Inherently Wrongful" Doctrine in Federal Law*, N.Y.L.J., Mar. 7, 2000, at p. 1 (providing overview of increasing federal criminalization of acts the defendant likely did not know were illegal).

215 See generally, for example, Simon R.M. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities* 108 (2004) (discussing rule).

216 For example, Steven A. Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 Yale L.J. 2437, (1994).

217 Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II*, 32 Vand. J. Transnat'l L. 1511, 1534 (1999), cited with approval by *Bakalar v. Vavra*, 619 F. 3d 136 (2nd Cir. 2010) at p. 141.

218 For example, Jennifer Anglim Kreder, *Chart of Dismissed Federal Holocaust Claims* (Oct. 26, 2012), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295>.

219 48 F. 3d 362 (8th Cir., 1995).

the present-day possessor should be.

The final forbidden action in 18 U.S.C. section 668(b)(2) is "disposing of" a stolen object of cultural heritage. "Dispose" means "transferring something to another's care or possession; the relinquishing of property."[220] While including disposition within the statute helps ensure that all offenders in the chain of possession or sale will be culpable, its inclusion presents another dilemma for the innocent purchaser.

The court in *Trupin*,[221] applying the NSPA, indicated methods of disposing of the object once the defendant knew his continued possession was illegal.[222] The court reasoned that Trupin could have avoided conviction if he returned the stolen painting within a reasonable time after he acquired the requisite knowledge.[223] The court suggested "[h]e could have returned the painting to its owners anonymously or through his attorney, or delivered it to a legitimate custodian of lost and stolen art. His failure to take any such remedial steps after the change in the federal law subjects him to conviction."[224]

Similarly, additional transactions after acquiring knowledge that the property in question was stolen may subject the once innocent purchaser to penalty. A comic art dealer sought to buy back over $31,000 of comic art he sold and later discovered was stolen.[225] He discovered the art was stolen when the thief's family approached him for his assistance in regaining possession of the comic art as part of the restitution agreement with the Museum of Cartoon Art.[226] Shortly after buying the art back, the police confiscated all of it, and the dealer filed an insurance claim.[227] Although the dealer did not face criminal charges, he lost the insurance case because he was no longer an innocent purchaser once he bought back the art with knowledge it was stolen.[228] This is in accord with the interpretation of the money laundering statute[229] noted above that any transaction after acquiring knowledge the funds are a product of criminally derived property will subject the person to criminal penalties under the statute.[230]

Therefore, bona fide innocent purchasers may still find themselves as a defendant attempting to prove a defense to a TOMA prosecution. One defence suggested by the *Trupin* court would be proving that the stolen object was returned to the rightful owner within a reasonable time.[231] This subjects the innocent purchaser

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220 Black's Law Dictionary 539 (9th ed. 2009).

221 *United States v. Trupin*, 117 F. 3d 678 (2nd Cir., 1997).

222 *Ibid.* at p. 686.

223 *Ibid.*

224 *United States v. Trupin*, 117 F. 3d 678 , 686 (2nd Cir., 1997).

225 *Richard Halegua Fantastic Things, Inc. v. Crum & Forster Commercial Ins.*, 88 Ohio App. 3d 391 (Ohio Ct. App., 1993).

226 *Ibid.*

227 *Ibid.*

228 *Ibid.*

229 18 U.S.C. s. 1957 (2009).

230 *Supra* note 188 and accompanying text.

231 *United States v. Trupin*, 117 F. 3d 678 at p. 687 (2nd Cir. 1997).

defendant to a question of fact before the judge or jury as to what is a reasonable amount of time. Additionally, the *Trupin* court's suggestions of returning the object anonymously, through an attorney or custodian of art,[232] could present further problems. Potentially, the defendant's argument may fail if he transfers the object to a party other than the rightful owner. This disposition could be construed as a subsequent transaction after acquiring knowledge the object was stolen and provide all the elements required by TOMA for conviction. This possibility is further exaggerated if the rightful owner never receives the object from the intermediary. Consequently, the concept of return within a reasonable time is a shaky defense.

To avoid this clash between the civil and criminal law, it would be better if TOMA expressly preempted the relevance of the state law civil limitations period on the grounds that it serves a different purpose than the criminal law enforceable by the federal government. Expressing the separation of the criminal and civil statutes of limitation also would preclude arguments that a failed TOMA prosecution should defeat any civil claim that could be brought by the museum.[233]

In order to effectively protect a true bona fide innocent purchaser of the stolen object, TOMA could have been drafted to allow defendants the affirmative defense of innocent possession. The judge-made doctrine of innocent possession has been invoked since at least 1908,[234] but has evolved from a defense showing the defendant lacked requisite knowledge to a showing that, even though defendant had the requisite knowledge, the possession was temporary and lacked criminal intent.[235] The innocent possession defense is most often raised in firearms or drug cases.[236] To assert innocent possession of carrying a pistol without a license, for example, a defendant must show the lack of any criminal purpose and that possession was justified because possession was an affirmative effort to aid social policy and law

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232 *Ibid.* at p. 686.

233 See, generally, notes 76-77, *supra* (discussing retroactivity); Gregory J. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio N.U. L. Rev. 253 (1983). Generally, statutes are presumed to take effect upon publication and not to strip previously existing property rights. For example, Sutherland Statutory Construction Relating to Procedure s. 67:1 (Statutes not affecting long-established personal or property rights) (7th ed. 2012).

234 *Miles v. State*, 52 Tex. Crim. 561 (Tex. Crim. App. 1908).

235 *Bieder v. United States*, 707 A. 2d 781 (D.C., 1998). See, generally, *United States v. Johnson*, 459 F. 3d 990 (9th Cir., 2006) at pp. 996-997 (declining defense); *United States v. Gilbert*, 430 F. 3d 215 (4th Cir., 2005) at p. 218 (same); *United States v. Teemer*, 394 F. 3d 59 (1st Cir., 2005) at pp. 64-65 (same); *United States v. Hendricks*, 319 F. 3d 993 (7th Cir., 2003) at p. 1007 (same); *United States v. Reynolds*, 215 F. 3d 1210 (11th Cir., 2000) at p. 1214 (same); *United States v. Adkins*, 196 F. 3d 1112 (10th Cir., 1999) at p. 1115 (describing federal firearms laws as imposing "something approaching absolute immunity"). But, see *United States v. Mason*, 233 F. 3d 619 (D.C. Cir., 2000) (recognizing defense).

236 See *United States v. Baker*, 523 F. 3d 1141 (10th Cir., 2008); *People v. Banks*, 76 N.Y. 2d 799 (N.Y. Ct. Apps., 1990); *Logan v. United States*, 402 A. 2d 822 (D.C., 1979); *Blango v. United States*, 335 A. 2d 230 (D.C., 1975); *Hines v. United States*, 326 A. 2d 247 at p. 248 (D.C., 1974).

enforcement.[237] To assert innocent possession in the drug context in those jurisdictions that recognize such a defense, the defendant must show the possession was inadvertent and subsequent actions were taken to destroy the drugs immediately or deliver to law enforcement.[238] The Supreme Court of Kentucky agreed that an innocent possession defense was implicit in its drug trafficking statute,[239] holding that the defendant was entitled to jury instructions of the defense "where there is evidence that the possession was incidental and lasted no longer than reasonably necessary to permit a return to the owner, a surrender to authorities, or other suitable disposal."[240]

The illegal trade in drugs and firearms reportedly are the only illicit trades that are larger than the illegal art market, and it may only be coincidence, but the innocent possession defense should be available in art cases as well to avoid incarceration or large fines so long as the stolen art is returned. If a bona fide innocent purchaser, as described above, acquires the knowledge the object is stolen, this downstream possessor should be able to avoid penalty by acting promptly to return the art. Admittedly, this approach is similar to the *Trupin* court's suggestion,[241] but identifying the affirmative defense of innocent possession allows legislation, not judges or juries, to provide clearer direction to would-be defendants and allow prosecutors or courts to determine a person's innocence as a matter of law instead of relying on jury instructions. Although the Kentucky Supreme Court noted in *Adkins* that an innocent possession defense was implicit, the court also pointed out that the statute at issue codified the same result.[242] In contrast, many federal courts have refused to recognize an innocent possession defense if the statute requires knowing possession, rather than willful possession.[243] Therefore, it would be preferable had TOMA expressly included the affirmative defense of innocent possession for those who receive the stolen object absent actual knowledge, constructive knowledge, or deliberate ignorance to prevent fines and imprisonment — so long as the defendant promptly returned the art.

It would have been preferable had TOMA also expressly identified a reasonable range of time to act measured from the point the purchaser knows the object is stolen, acceptable actions the purchaser may take, and acceptable disposition of the object. A reasonable time to act should have been codified because a technical reading of the current statute would make the innocent purchaser guilty the moment

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237 *Bieder v. United States*, 707 A. 2d 781 (D.C., 1998) at p. 783, citing *Hines v. United States*, 326 A. 2d 247 at p. 248 (D.C., 1974).

238 57 C.J.S. *Military Justice* s. 124 (2012); *United States v. Angone*, 54 M.J. 945 (Army Ct. Crim. Apps., 2001); *United States v. Kunkle*, 23 M.J. 213 (Army Ct. Milit. Apps., 1987).

239 *Commonwealth v. Adkins*, 331 S.W. 3d 260 p. 264 (Ky., 2011).

240 *Ibid.*

241 This proposal also reinjects the distinction between "knowing possession" versus "willfulness," which requires the defendant have acted with "bad purpose." See *Bryan v. United States*, 524 U.S. 184 at pp. 191 and 193 (1998); *United States v. Gilbert*, 430 F. 3d 215 at pp. 218-219 (4th Cir., 2005).

242 *Ibid.* at pp. 265-266.

243 *United States v. Baker*, 508 F. 3d 1321 at pp. 1325–1327 (10th Cir., 2007).

he gains knowledge the object is stolen — and hence effectively strictly liable. This does not serve the purpose of TOMA and one would have to depend on prosecutorial discretion to avoid this absurd result.[244] The reasonable amount of time should be sufficient to allow the purchaser to research any claims or allegations the object is stolen. During this time, the purchaser should notify appropriate law enforcement or prosecutor that he is in possession of the object[245] and safeguard the object. After a reasonable investigation, if it is determined that the object is stolen and subject to TOMA, the purchaser should turn over the stolen object to the appropriate law enforcement agency to return to the rightful owner. Again, currently, turning over the object to the prosecutor would technically constitute disposing of the object, producing a foolish outcome.

Changing TOMA's language accordingly would make the purchaser's duties clear. First, the purchaser has a duty to investigate the origins of the object prior to purchase or receipt to preserve any status as an innocent purchaser. If after receipt the innocent purchaser comes to know the object is stolen, he would be on notice of how to handle the object[246] or be subject to criminal liability.

Advocating for an innocent possession defense brings to light the fact that language criminalizing possession of a stolen object is surprisingly absent from TOMA. 18 U.S.C. section 668(b)(2) penalizes the person who knowingly "receives, conceals, exhibits, or disposes" of the stolen object. Therefore, it is unclear on the surface whether possession alone is criminal under TOMA.

(iv) The Reality of "Possession" under TOMA

Understanding TOMA's untreated treatment of "possession" is illuminated by digging deeper into the other verbs expressly delineated in the statute. "Disposal" has already been discussed.[247] "Conceal" means "the act of removing from sight or notice; hiding."[248] The Black's Law Dictionary definition implies an affirmative

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244 For information on prosecutorial discretion generally, see Nancy Petro, *Tipping Point: Is America Finally Saying No to Prosecutorial Overreach?*, Blog Post, Wrongful Convictions Blog (online: <www.wrongfulconvictionsblog.org>), Feb. 18, 2012; Wayne R. LaFave, et al., Criminal Procedure s. 13 (1999); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021, 1058 (1999). An absurd result does not necessarily prevent prosecution. See *United States v. Santistevan*, 39 F. 3d 250 (10th Cir. 1994) at p. 255 n.7 (finding that Congress intended to criminalize a "Good Samaritan" private citizen who finds drugs on the street and takes them to the police station, which the court characterized as "absurd" and that would be insulated "in the sound exercise of prosecutorial discretion").

245 This notification helps protect the purchaser, because once notified the prosecutor can no longer allege the object is concealed and should preserve an innocent possession defense.

246 Note that the innocent purchaser should have a cause of action against the seller. See *Menzel v. List*, 24 N.Y. 2d 91 (N.Y., 1969) at pp. 97-98 (good faith purchaser should receive the benefit of the bargain and recover the current value of painting from the dealer not the purchase price).

247 *Supra* note 220, and accompanying text.

248 Black's Law Dictionary 327 (9th ed. 2009).

act to hide the stolen object. The Restatement (Second) of Contracts is in accord, stating that "[c]oncealment is an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned."[249] As the term is not specifically defined in TOMA, the scope of "concealment" under TOMA is unclear. Arguably, if it is not concealed, then it is exhibited, which is also forbidden by TOMA. "Exhibit" means "to show publicly or display for public inspection."[250] Based on this "either/or" proposition, commentators have stated that TOMA makes it illegal to "possess" an object of cultural property knowing it is stolen.[251] The presence of both "exhibit" and "conceal" will suffice in most cases, but it is naive to blindly accept the proposition that what is not concealed is exhibited and what is not exhibited is concealed. How would TOMA apply to a person who received the object of cultural heritage without the requisite knowledge it was stolen, and displays the object in a private residence? The object is not available for public viewing by anyone without access to the residence, but is the object concealed? Is it exhibited? The answer is not clear, and since 18 U.S.C. section 668(b)(2) does not expressly make it a crime to possess a stolen object of cultural heritage, it may provide a gap for a defendant to exploit. The absence of "possess" in the statute may allow defendants to argue for a less expansive interpretation of "exhibit" or "conceal." Including the term "possession" and acknowledging the innocent possession defense would eliminate this argument.

The 1986 amendment to the NSPA added "possession" to that statute to avoid jurisdictional problems that would arise if prosecution required proof the object was received in the jurisdiction of prosecution.[252] Adding "possession" to TOMA would not only serve the same jurisdictional issue, but fill any potential gap between "conceals" and "exhibits," and, based on the doctrine of continuing offense, delay the beginning of the statute of limitations as to the current possessor until he disposes of the stolen object.[253]

18 U.S.C. section 668(b)(2) is a common statutory scheme to dry up the market. "The dry-up-the-market theory is . . . a time tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods."[254] The strategy behind dry-up-the-market statute is that by punishing those persons who would engage in the trade of stolen items, it will deter persons from buying or receiving these stolen items and thus eliminate the thief's incentive for

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249 Restatement (Second) of Contracts s. 160 cmt. a (1979).

250 Merriam-Webster Dictionary, online: <http://www.merriam-webster.com/dictionary/exhibit> (last visited April 12, 2012).

251 Michael Kilian, *To Catch an Art Thief Wielding Her Data File, Lynne Chaffinch Tracks Thousands of Stolen Works*, Chi. Trib., April 18, 2001 ("if a piece of art is stolen, is worth more than $5,000 and is more than 100 years old, it's a federal crime to possess it."); *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 853 (2004) ("[TOMA] penalizes possession of an object known to be stolen or fraudulently obtained.").

252 131 Cong. Rec. 14,183 (1985).

253 *Supra* note 220, and accompanying text.

254 *Bartnicki v. Vopper*, 121 S. Ct. 1753 at p. 1773, Rehnquist, Chief J. dissenting (2001).

stealing the object in the first place.[255]

As described above, TOMA provides recourse against a receiver without the requisite knowledge at the time of receipt. Absent specific definitions in the statute, there is a potential gap between "exhibiting" the object and "concealing" the object. Following the lead of the 1986 NSPA amendments, adding "possession" to 18 U.S.C. section 668(b)(2) would better achieve all of the goal of getting back the art while avoiding potential challenges to TOMA as being overreaching, particularly if truly innocent possessors face the sole penalty of forfeiting the art, rather than steep fines and jail time. Adding "possession" clearly penalizes the innocent purchaser if he retains possession after acquiring knowledge of the theft, and prevents defendants from exploiting the semantics between "exhibit" and "conceal." Adding "possession" would facilitate the application of the innocent purchaser test and an innocent possession defense described above. Finally, adding possession ensures that the knowing individual may be penalized under TOMA in accordance with the dry-up-the-market theory. Therefore, it would have been desirable had TOMA specifically prohibited "possession" of a stolen object of cultural property.

In sum, TOMA fills important gaps in the U.S. jurisprudence applicable to thefts from museums. Nonetheless, there are still significant gaps after TOMA's passage and important aspects that remain to be developed as the case law interpreting it develops. TOMA could be improved both to prevent criminal prosecutions from failing to achieve that objective and to avoid overreaching in punishing truly innocent purchasers beyond simply losing possession of the stolen object in question.

4. CONCLUSION

Hope remains that the art stolen from the Gardner museum is returned and the criminals behind the theft are brought to justice. The ability to prosecute the Gardner thieves and anyone downstream from them possessing the stolen art is likely under either Massachusetts or federal law, but there is absolutely no guarantee that either will result in convictions. This article's in-depth analysis of the legal gap filled by (and presented by) TOMA is provided in the hopes of maximizing the return of artworks to their museums without over-criminalizing truly unknowing possession of stolen property.

255 "Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms." *Bartnicki v. Vopper*, 121 S. Ct. 1753 at pp. 1773-1774, Rehnquist, Chief J. dissenting (2001).