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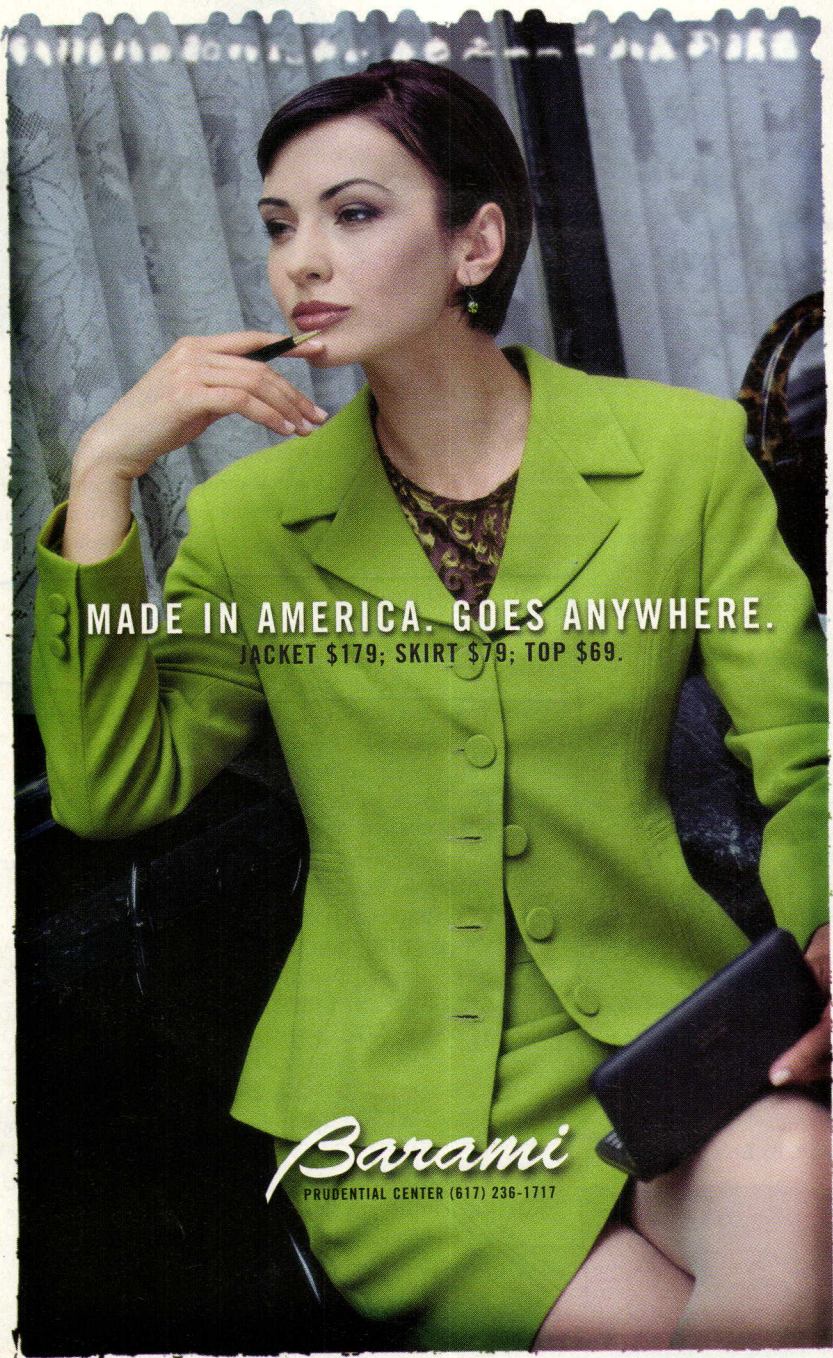
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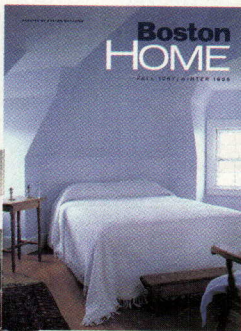
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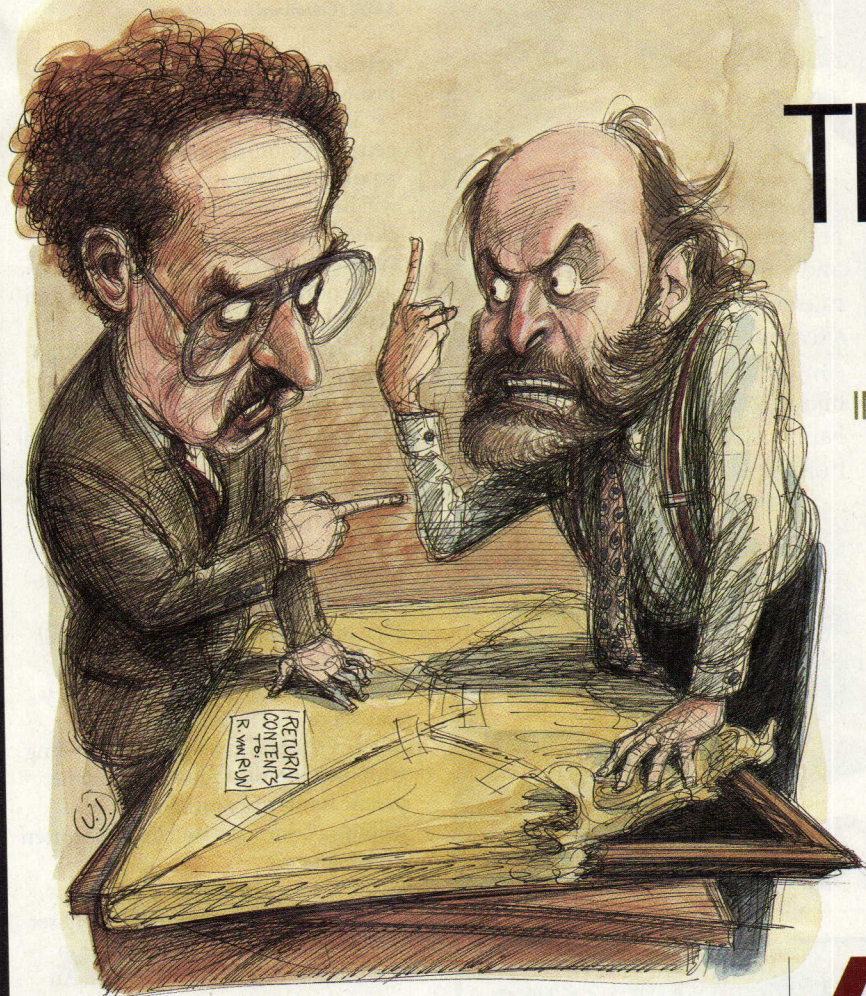
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# The DEAL of the Art

IN ITS COVERAGE OF ATTEMPTS TO RECOVER THE STOLEN TREASURES OF THE GARDNER MUSEUM, HAS THE *BOSTON HERALD* GONE TOO FAR? DERSHOWITZ SAYS YEA. SILVERGLATE SAYS NAY.

## ▲ COUNTERPOINT

BY HARVEY SILVERGLATE



*In the midst of negotiations to return several stolen masterpieces to the Isabella Stewart Gardner Museum, Alan Dershowitz accused the *BOSTON HERALD* and reporter Tom Mashberg of taking part in a conspiracy to ransom the lost treasures. Dershowitz's accusations were published late last August in a slightly different form in the *CAMBRIDGE CHRONICLE*. Here, for the first time, Harvey Silverglate, a veteran trial lawyer who is representing Mashberg, responds, after which both lawyers issue brief rebuttals.*

## ▼ POINT

BY ALAN DERSHOWITZ

**W**HAT DO YOU CALL A PERSON who agrees to help an art thief obtain ransom for the paintings he has stolen? A felon. Anyone who helps thieves obtain illegal financial benefits from their criminal conduct becomes an accessory after the fact.

But what if the person who is serving in this accessorial capacity is a journalist? Does the First Amendment protect such conduct?

That is the question that has been raised by the actions of a reporter for the *Boston Herald* who agreed to inspect a painting allegedly stolen from the Isabella Stewart Gardner Museum, knowing that he was offered the opportunity to inspect the painting as part of an elaborate criminal plot to obtain ransom for a return of the painting and others that were also stolen. This is how the *Boston Herald* itself described the object of the viewing: "The furtive viewing was offered to the *Herald*, as proof that the paintings stolen" on March 18, 1990, from Boston's Gardner Museum, are here "in the United States—ransomable for

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**A**LAN DERSHOWITZ makes the assumption that *Boston Herald* reporter Tom Mashberg is, in his words, "helping" an "art thief" to "obtain illegal financial benefits" from the theft. Put this way, of course, it sounds like a classic conspiracy to extort ransom, whether done by a newspaper reporter or anyone else. Dershowitz's problem is that he has drawn his legal conclusions from erroneous facts, even though the facts needed for a correct legal analysis have appeared in the pages of the *Herald* in recent weeks.

For example, Dershowitz accuses Mashberg of agreeing to view some of the art "as part of an elaborate criminal plot to obtain ransom for a return of the paintings." However, the Isabella Stewart Gardner Museum has long had outstanding an offer of a \$5 million reward for anyone who can lead to the recovery of the stolen art, and it has been made clear that the museum would not give the reward to anyone who was found to be involved in the theft itself. To inform the public (and hence the museum as well) of the existence of someone who has credibly (in the reporter's view) claimed to be able to accomplish this task is at the heart of the reporter's job and is fully protected by the First Amendment and the criminal law.

Furthermore, no responsible party to the drama—neither the museum nor the government—has publicly suggested there is evidence that anyone involved in the ongoing discussions actually took part in the theft. Dershowitz thus makes an unwarranted assumption when charging that Mashberg's reporting is somehow giving aid and comfort to

[Continued on page 33]

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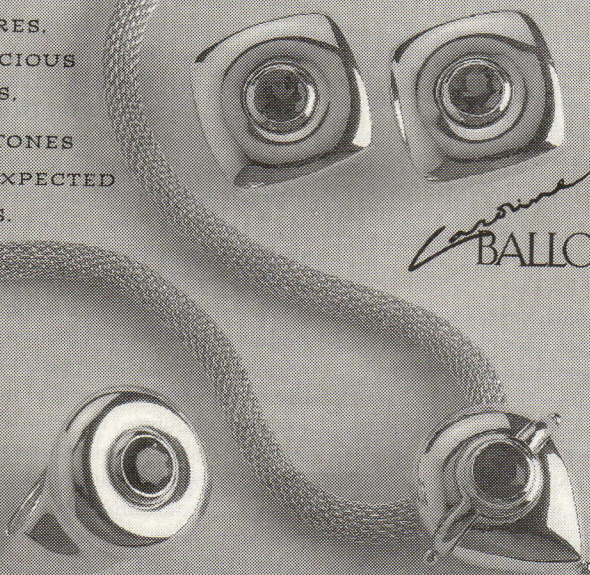
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## Law [Continued from page 29]

reward money and immunity from prosecution.”

The criminals must hope that by getting the journalist to inspect and report on the painting, the newspaper will help them get the ransom that has eluded them to date. The newspaper's cut of the ill-begotten gains? An exclusive report and increased revenue from newspaper sales.

Why did these criminals pick the *Boston Herald* as their accessories in this sleazy plot? Probably because no reputable newspaper would join a criminal conspiracy in the knowledge that they may be helping criminals secure ill-begotten gains.

The *Herald* and its reporter may have to pay a hefty price for their complicity. They may be subpoenaed or even indicted as accessories. They will try to hide behind the First Amendment, and it is even possible that they may succeed. The First Amendment covers the sleaziest of newspapers along with the most distinguished, and the precise limits of a journalist's role in helping a criminal to secure ill-begotten gains is unclear.

Some analogies may be helpful. Suppose criminals went to an appraiser and sought his or her expert opinion that the paintings were authentic. An appraiser who gave that opinion, knowing that it would be used to help secure a ransom, could be on the way to jail, despite any claims under the First Amendment. Nor would the First Amendment claim be frivolous, since art is as protected by the First Amendment as journalism and verifying the accuracy of a newspaper story. What if criminals came to a lawyer and asked him or her to negotiate on their behalf? A lawyer who came into possession of stolen goods would be obligated to return the contraband immediately. Nor could that lawyer negotiate for a ransom or certify the authenticity of the work. The Sixth Amendment right to counsel does not prevent the prosecution of a lawyer who assists a client in securing ill-begotten gains. A number of criminal lawyers now in prison can attest to that reality.

The journalist's privilege under the First Amendment is broad, but it is not a license to assist criminals in their nefarious endeavors. Lawyers have codes of professional conduct that set limits on what is and is not appropriate. Unfortunately, journalists are not as sensitive to ethical limits, and in the absence of peer-

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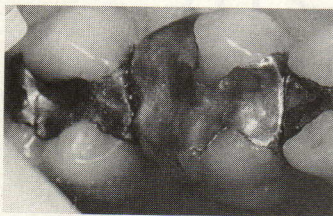
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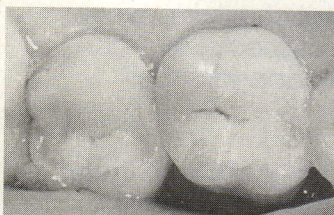
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## Un-Common [Continued from page 132]

the kind that mixed pupils from impoverished inner cities and affluent suburbs—had been the quietest, and the most successful. More than a million students in the South broached the line between the city and the suburbs every day, he told Lukas.

As the panel commenced, Orfield put the problem succinctly: “We’re putting the most disadvantaged kids in the worst schools, in the city, and all the most privileged kids in the best schools, in the suburbs, and it’s wrong.”

When Lukas’s turn came, he tried to address Orfield’s concerns. The situation Boston now faced, he said, reminded him of his favorite class at Harvard: Democracy and Its Critics. The final exam had been a single essay

**“We’re putting the most disadvantaged kids in the worst schools in the city and the most privileged kids in the best schools in the suburbs,” says Gary Orfield.**

question: Defend democracy.

“Garrity was prevented by *Milliken* from dealing with the real Boston,” Lukas said. “Which shows how courts are not ideal instruments for social policy. It wasn’t for nothing that Garrity was always compared with King George III. Over 10 years Boston’s elected officials abdicated responsibility for the schools and made palpably unconstitutional decisions—but that doesn’t mean we have to allow judges to keep doing our work for us.”

While panelists like Orfield were full of suggestions for elected officials—including expanding the Metco program—others were not so sanguine about politicians’ capacity to deal with desegregation. Author and former Boston public school teacher Jonathan Kozol pointed out that, historically, the Supreme Court and the NAACP had led the way. So long as the urban school districts were predominantly minority and the suburbs remained untouchable, he warned, American schools, and American society, would grow more polarized, and more angry.

“This is not just a problem in social policy,” Kozol said that day. “This is America’s sin. It’s going to take a theological upheaval in our nation to force us to deal with this—but I think that it also might take the other kind of upheaval. And I hope I live to see it.”

Anthony Lukas did not. **B**

## Law [Continued from page 34]

That is not to say that this strange situation does not pose legal and ethical challenges to all parties concerned: the museum, the government, the reporter and his newspaper, and the intermediary seeking to broker the return of the paintings. That is why all parties are repre-

**“How naïve! Are we to believe that those who showed the art to the *Herald* simply found it in the garbage pail?”**

sented by legal counsel. This is also why it is likely that Dershowitz’s doomsday scenario of criminal charges being brought against Mashberg and the *Herald* is so remote and even bizarre. Indeed, were charges to be brought, Alan Dershowitz, made aware of the facts, would doubtless prefer to be on the defense team rather than the prosecution.

### Dershowitz’s Rebuttal

**M**Y FRIEND HARVEY SILVERGLATE in his passionate defense of the *Herald*, falls into the trap of blinding himself to the obvious by denying that those who now possess the stolen art are in any way related to those who stole the art. How naïve! Are we to believe that those who showed the art to the *Herald* simply found it in a garbage pail? At the very least they are “fences” knowingly trying to sell or ransom stolen art. This makes them criminals. If Silverglate doesn’t realize this, those who now have the art certainly do: that’s why they are seeking immunity from prosecution. The question remains, are those who are journalistic accessories to the fencing accessories also criminals? For the sake of the First Amendment, I join with Silverglate in hoping that the answer is no. But no one should praise the *Herald* for pushing the First Amendment to its possible breaking point. Yes, racists have rights under the First Amendment, but we do not praise them for exercising those rights. The same is true of some paparazzi and, in my view, of the *Herald*.

### Silverglate’s Rebuttal

**I** AM NOT NAÏVE; RATHER, DERSHOWITZ remains uninformed. Any sane person would seek immunity from prosecution, not because they are complicit with the thieves, but, because the very process of shipping art back to the museum might arguably constitute the separate federal crime of interstate transportation of stolen property. **B**



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Law [Continued from page 33]

“intensely interested” in recovering the art and “will sit down with anyone, anytime who might have information on the stolen art.” Indeed, the *Herald* went on to state that an FBI agent, apparently spurred by Mashberg’s reporting and by the museum’s interest, arranged for the man offering to broker the return of the paintings, William P. Youngworth III, to make a telephone call to his friend, well-known imprisoned convict Myles Connor, to facilitate Youngworth’s role.

For Dershowitz to argue that Mash-

**“For Dershowitz to argue that Mashberg committed a crime leaves one breathless. If this be a criminal conspiracy, it is surely the oddest one on record.”**

berg, whose reporting made known to all of the parties and to the general public the positions of all sides, somehow committed a crime leaves one breathless at the giant leaps of logic and legal analysis involved. If this be a criminal conspiracy, it is surely the oddest one on record—where all parties are represented by legal counsel, and where federal law-enforcement people are intimately involved.

Dershowitz’s analogy demonstrates just how wrong he is. He raises the specter of an art appraiser who gives art thieves an opinion on the value of stolen paintings in order to enable them to set the amount of ransom. This is an obvious far cry from Mashberg’s very public reporting of the positions and activities of the parties, thereby helping the parties to get together and talk. Indeed, when the *New York Times* and the *Washington Post* agreed to publish the antitechnology manifesto of the Unabomber, they were performing a valuable public function, and they did so with the blessings of federal law-enforcement officials. Did Dershowitz accuse the newspapers of somehow conspiring with a terrorist to force the nation to comply with his demands that certain technological trends be reversed? When, years earlier, those same newspapers published the Pentagon Papers, knowing that they were taken from government archives without official authorization (some would say “stolen”), did Dershowitz claim that the newspapers were illegally furthering the agenda of the thief?

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**Law** [Continued from page 30]

generated codes of conduct, a Gresham's law operates under which the sleaziest newspapers create the rules.

This time the *Boston Herald* may have gone too far. The tragedy would be if the irresponsible actions of the *Herald* were to result in a setback to the First Amendment and to responsible journalists who understand the difference between reporting the news and becoming part of a criminal conspiracy. Those of us who support a broad view of freedom of expression will now be called on to defend the actions of the *Boston Herald*. Just as we must defend pornographers and racists in order to protect "good" speech, so too we must defend sleazy reporters in order to protect responsible journalists. It will not be an easy case to make, but we will have to try, lest a dangerous precedent be set that would constrain everyone's rights under the First Amendment. **B**

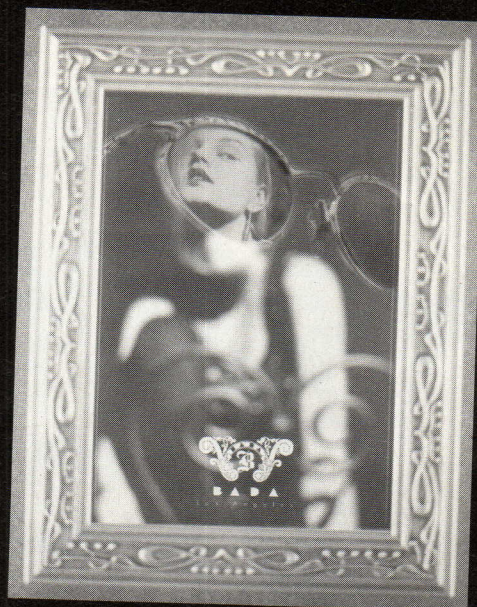
**Counterpoint** [Continued from page 29]

criminals, and pointing out that "the First Amendment . . . is not a license to assist criminals in their nefarious endeavors." Besides, even if it were the thieves who were seeking the reward, the notion that reporting the news and thereby communicating information among a museum, an individual who claims to be able to help the museum in its publicly announced quest in return for a publicly offered reward, and state and federal law-enforcement authorities, somehow constitutes part of a criminal conspiracy, is—coming from one of America's most knowledgeable criminal and First Amendment lawyers—startling.

THIS IS ESPECIALLY SO in view of some of the public pronouncements that have been made by the various parties. For example, after Mashberg reported that he had viewed what appeared to be one of the stolen Rembrandts, the museum was reported by the *Herald* to have "altered its public stance and announced that it was 'excited' by the possibility that the stolen works might truly be within reach." The museum, after several meetings with the reporter at its request, then hired a lawyer to assist it in negotiations.

Meanwhile, Boston's chief federal law enforcement official, United States Attorney Donald K. Stern, was quoted in the *Herald* as saying that his office and the FBI are

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