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Note

Organized Prime: Should Amazon Be Responsible for its Sellers' Criminal Activity?

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The thief takes no title and gives none.

*"Behind every successful fortune there is a crime."
Mario Puzo, The Godfather*

Introduction

The big-screen heist tends to be exciting. After weeks of planning, a handsome antihero breaks into a bank. As his accomplices keep watch, he uses homemade acid to burn through the vault and skirts an intricate security system before racing off into the night. When he arrives at the safe house, he counts his bounty as the screen fades to black—he has pulled off the perfect crime. By the time the credits roll, the audience is clamoring for a sequel.

But today's stickups wouldn't make it to post-production. As the Wall Street Journal and other news outlets have reported, the contemporary "heist" goes more like this: a middle-aged drug addict pulls into a CVS parking lot.¹

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1. See, e.g., Rebecca Ballhaus & Shalini Ramachandran, *Ben Dugan Works for CVS. His Job Is Battling a \$45 Billion Crime Spree*, WALL ST. J. (Sept. 1, 2021, 10:31 AM), <https://www.wsj.com/articles/cvs-home-depot-theft-organized-crime-11630505851> [<https://perma.cc/B8PU-XVT4>]; *Major San Francisco Bay Area Retail Theft Ring Busted; Five Suspects Arrested; \$8 Million In Stolen Merchandise Recovered*, CBS SF BAY AREA (Oct. 6, 2020, 7:31 PM), <https://sanfrancisco.cbslocal.com/2020/10/06/major-san-francisco-bay-area-retail-theft-ring-busted-five-suspects-arrested-8-million-in-stolen-merchandise-recovered/> [<https://perma.cc/QG63-TMFU>]; *Video store owner accused of hiring shoplifters, selling stolen*

He enters the store, puts hundreds of over-the-counter allergy medications into a trash bag, and walks out the front door without a problem. He then sells the products at an extreme markdown to a local “fence.” In turn, the fence sells the products to a larger scale criminal syndicate, which then sells the goods to unsuspecting customers on Amazon Marketplace.²

Why do these criminals bother?³ Well, it seems that when “the goods” are sold in bulk, they don’t need to be individually valuable for criminals to turn a huge profit. In fact, by some estimates, these schemes, known in law enforcement circles as “organized retail crime,” are costing the United States over \$68 billion per year.⁴ And brick-and-mortar stores are feeling the bite—

items online, CNN (May 14, 2021, 2:03 PM) <https://abc17news.com/news/national-world/2021/05/14/video-store-owner-accused-of-hiring-shoplifters-selling-stolen-items-online/> [https://perma.cc/KF9F-MAGE]; *Seattle police make more than 50 arrests in citywide retail theft operation*, MYNORTHWEST (June 10, 2021, 1:00 PM), <https://mynorthwest.com/2960915/seattle-police-arrests-citywide-retail-theft-operation/> [https://perma.cc/6M5F-FLBA]; Sara DiNatale, *How the Home Depot’s stolen tools are fueling Florida’s drug trade*, TAMPA BAY TIMES (Aug. 28, 2019), <https://www.tampabay.com/news/business/2019/08/28/how-the-home-depots-stolen-tools-are-fueling-floridas-drug-trade/> [https://perma.cc/49MM-Y29M]; Michael Kan, *Crime ring used Amazon, eBay to sell stolen printer ink*, PCWORLD (Mar. 16, 2017, 7:50 AM), <https://www.pcworld.idg.com.au/article/616022/crime-ring-used-amazon-ebay-sell-stolen-printer-ink/> [https://perma.cc/V7QT-D42S]; Kevin Stone, *Gilbert couple allegedly sold nearly \$3M in stolen goods on eBay, Amazon*, KTAR NEWS (Nov. 4, 2019, 1:15 PM), <https://ktar.com/story/2830176/gilbert-couple-allegedly-sold-nearly-3m-in-stolen-goods-on-ebay-amazon/> [https://perma.cc/SX25-9FM8].

2. Amazon Marketplace is an online network of third-party sellers permitted to use Amazon.com as a platform to sell their products for a percentage of the profits.

3. Simone Weichselbaum & Andrew Blankstein, *‘It’s an easy fast dollar’: How organized retail theft rings in one Ohio town use Facebook Marketplace to sell stolen goods*, NBCNEWS (Dec. 30, 2021, 1:18 PM), <https://www.nbcnews.com/news/crime-courts/organized-shoplifting-rings-work-police-one-ohio-town-are-fighting-bac-rcna9802> [https://perma.cc/42PZ-NU7Y] (“‘You make more money than you do selling drugs, and it’s less jail time,’ Skrepenski said from inside . . . prison where he is serving four years for theft. . . . Skrepenski said, he could make \$2,500 a day swiping power tools and selling the loot to ring leaders. ‘It’s an easy fast dollar.’”).

4. Press Release, Buy Safe America Coalition, *Study: Retail Theft Balloons to over \$68 Billion as Organized Retail Crime Spawns Massive Criminal Enterprises Online; More Brazen Attacks in Stores* (Nov. 18, 2021), <https://www.buysafeamerica.org/retail-theft-balloons-to-over-68-billion> [https://perma.cc/LLF4-TEWF]; cf. *Organized Retail Crimes Cost U.S. Economy Nearly 47 Billion Dollars in 2018*, CBS SACRAMENTO (Sept. 23, 2019), <https://sacramento.cbslocal.com/2019/09/23/organized-retail-crime-2018-national-retail-federation-survey/> [https://perma.cc/F8NK-AH8B] (noting the figure at \$47 billion in 2019); *Organized Retail Theft*, FED. BUREAU OF INVESTIGATION (Jan. 3, 2011), <https://www.fbi.gov/news/stories/organized-retail-theft> [https://perma.cc/SW7J-QRQ8] (noting that the FBI estimated that organized retail theft cost the United States “about \$30 billion a year” as of 2011). Some outlets have suggested that the problem is not nearly as widespread as retailers have indicated. See, e.g., Sam Dean, *Retailers say thefts are at crisis level. The numbers say otherwise*, L.A. TIMES (Dec. 15, 2021, 5:00 AM), <https://www.latimes.com/business/story/2021-12-15/organized-retail-theft-crime-rate> [https://perma.cc/8H74-M7XP]; Amanda Mull, *The Great Shoplifting Freak-Out*, ATLANTIC (Dec. 23, 2021), https://www.theatlantic.com/health/archive/2021/12/shoplifting-holiday-theft-panic/621108/?utm_campaign=the-atlantic&utm_medium=social&utm_content=edit-promo&utm_term=2021-12-26T23%3A26%3A55&utm_source=twitter [https://perma.cc/5ZHC-9MVC]. However, the precise scope of the problem has no bearing on the legal arguments expanded

CVS's internal investigations indicate that the company lost \$104 million to organized retail crime in 2020 alone.⁵ Retailers and law enforcement all over the country have amped up efforts to stop these criminal networks with some success.⁶ Over the last year, state and federal investigations have led to several high-profile busts of syndicates that made millions selling stolen products online.⁷ But still, organized retail crime has not slowed down, and law enforcement and retailers have struggled to keep up.

In April 2021, both chambers of Congress introduced bipartisan legislation that would compel online platforms like Amazon to get more identifying information from any third-party seller (TPS) and make some of this information available to the public.⁸ Policymakers, law enforcement, and retailers hope that increasing access to TPSs' contact information will speed up investigations and help shut down criminal syndicates.⁹

This solution has a major flaw: it leaves the burden of stopping organized retail crime on its victims. But Amazon, not retailers, should be stopping bad actors on its platform. Not only does Amazon facilitate organized retail crime through its Marketplace, but it also profits from it—Amazon made over \$120 billion in advertising, transactional, and fulfillment fees from its TPSs last year.¹⁰ Making Amazon liable for the effects of organized retail crime appears to be the most fair and efficient way to address this growing problem.

To that end, this Note suggests a simple solution: Amazon should be held liable as a converter when stolen products are sold in Marketplace. Conversion, essentially civil theft, is a common-law tort involving the intentional exercise of control over personal property that seriously interferes with another's right to the property where damages are normally the full value of the converted property.¹¹ Historically, all kinds of entities have been liable for conversion.¹² But in forty-eight states, auction houses can be liable as converters when stolen goods are sold at auction, even if the auctioneer is entirely innocent.¹³ The theories of conversion that underpin auctioneer

upon in later sections of this Note—even a single instance of stolen goods being sold online can give rise to a common-law cause of action.

5. See Ballhaus & Ramachandran, *supra* note 1.

6. See *infra* Part II.

7. See Ballhaus & Ramachandran, *supra* note 1.

8. See *infra* notes 59 and 62 and accompanying text.

9. See *infra* notes 53–56 and accompanying text.

10. See *infra* note 51 and accompanying text.

11. See *infra* Part IV.

12. See, e.g., *Welch v. Kosasky*, 509 N.E.2d 919 (Mass. App. Ct. 1987) (pawnshops); *Cross v. Berg Lumber Co.*, 7 P.3d 922 (Wyo. 2000) (lumber yard); *Fireman's Fund Ins. Co. v. Wagner Fur, Inc.*, 760 F. Supp. 1101 (S.D.N.Y. 1991) (fur store); *Swim v. Wilson*, 27 P. 33 (1891) (stockbrokers).

13. See R.P. Davis, Annotation, *Personal liability of auctioneer to owner or mortgagee for conversion*, 96 A.L.R.2d 208, at § 2 (Originally published in 1964) (noting only “Tennessee and Mississippi[] have ruled that the auctioneer is not liable for conversion in selling goods or personal property for one who either had no title to them or had no authorization to sell” them).

liability are just as applicable to Amazon. Therefore, when TPSs sell shoplifted goods, victimized retailers have a common-law tort claim against Amazon. They should assert it.

To advance that argument, this Note will: (1) overview organized retail crime and its connection to Amazon; (2) discuss the ways that Amazon, retailers, and Congress have addressed the problem up to now; (3) suggest that Amazon is uniquely capable of stopping organized retail crime in Marketplace; and, therefore, (4) conclude that Amazon should be liable as a converter under the same theories that have subjected auction houses to civil damages for centuries.

I. Amazon facilitates illegal activity in its Marketplace.

In September 2021, the Wall Street Journal reported a shocking story. Apparently, law enforcement and CVS investigators uncovered a criminal network in San Francisco that made over \$50 million selling stolen products online.¹⁴ The authorities estimated the network likely lifted more than \$39,000 in goods from various stores every day, which it would then sell on at least two Amazon storefronts. According to the California Attorney General's Office, after raiding the suspects' "residences, warehouse, and storage facilities," law enforcement agents "seized and recovered approximately \$8 million of stolen merchandise from retailers such as CVS, Target, and Walgreens," including \$1.6 million worth of disposable razors.¹⁵

Other reporting shows this remarkable problem is not limited to San Francisco. For example, a man in Massachusetts employed at least twenty-six shoplifters to "steal items at stores such as Home Depot, Target, Lowe's, Walmart, [and] CVS" in exchange for cash payouts.¹⁶ He would then list the stolen goods on websites like Amazon, where police estimate he made over \$1 million.¹⁷ Likewise, Seattle police arrested fifty-three shoplifters in a single day as part of a larger effort to crack down on syndicates that set up Amazon storefronts to sell stolen goods like "Tide Pods, utility knives, small appliances, backpacks, sunglasses, and bottles of alcohol."¹⁸ Identical

14. Ballhaus & Ramachandran, *supra* note 1; *see also Major San Francisco Bay Area Retail Theft Ring Busted; Five Suspects Arrested; \$8 Million In Stolen Merchandise Recovered*, *supra* note 1.

15. Press Release, Off. of Cal. Attn'y Gen., Attorney General Becerra Announces Arrests and Charges in Major Bay Area Theft Ring (Oct. 6, 2020) <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-arrests-and-charges-major-bay-area-theft-ring> [<https://perma.cc/DSF6-HQNX>]; Jac Brittain, *Operation Proof of Purchase: The Story Behind a \$50 Million ORC Case*, LOSS PREVENTION MAGAZINE (Oct. 14, 2020), <https://losspreventionmedia.com/story-behind-a-50-million-organized-retail-crime-case/> [<https://perma.cc/F9KA-3SPV>].

16. *Video store owner accused of hiring shoplifters, selling stolen items online*, *supra* note 1.

17. *Id.*

18. *Seattle police make more than 50 arrests in citywide retail theft operation*, *supra* note 1.

schemes have been uncovered in New York,¹⁹ Georgia,²⁰ Maryland,²¹ North Carolina,²² Arizona,²³ Florida,²⁴ Texas,²⁵ and at least twenty other states.²⁶ Indeed, it seems that organized retail crime has found its footing all across the country—thanks to e-commerce platforms like Amazon.

Of course, criminal networks have operated in America since the founding, and retail crime is not a recent trend—petty thieves have been selling stolen goods to pawnshops and other unsuspecting buyers for centuries.²⁷ Nevertheless, the recent uptick of organized retail crime is unique because of the kind of shoplifted goods (low value) and the scale at which they are being stolen and sold (massive). Before e-commerce, a crime boss would have little interest in organizing the resale of allergy medications, laundry detergent, or vacuums. For one thing, they are not worth enough to steal. And for another, he would have nowhere to sell them. Pawnshops accept goods like watches and gold chains, but there has never been a

19. Press Release, Dep’t of Just., Rochester Pawn Shop Owner Pleads Guilty To Selling More Than a Million Dollars Worth Of Stolen Goods (June 23, 2021), <https://www.justice.gov/usao-wdny/pr/rochester-pawn-shop-owner-pleads-guilty-selling-more-million-dollars-worth-stolen-goods> [https://perma.cc/946S-C3D5].

20. Marcus K. Garner, *Father-Daughter Duo Sentenced For Selling Stolen Goods Online*, PATCH (Oct. 13, 2021, 9:55 AM), <https://patch.com/georgia/atlanta/father-daughter-duo-sentenced-selling-stolen-goods-online> [https://perma.cc/L9U4-PUUD].

21. Timothy Young, *Man arrested for buying and selling stolen merchandise*, WDVM (Feb. 11, 2021, 11:44 PM), <https://www.localdvm.com/news/maryland/man-arrested-for-buying-and-selling-stolen-merchandise/> [https://perma.cc/F7M5-9U65].

22. Mike Andrews, *‘You name it, it’s in that house’: Stolen items removed from Harrisburg home could be worth \$250,000+, sheriff says*, FOX 46 CHARLOTTE (Sept. 20, 2021, 8:41 AM), <https://www.fox46.com/crime-and-public-safety/you-name-it-its-in-that-house-stolen-items-removed-from-harrisburg-home-could-be-worth-1-million-sheriff-says/> [https://perma.cc/5Q2T-TWDC].

23. Stone, *supra* note 1 (noting the couple made “\$2.7 million by hawking stolen products on eBay and Amazon in the last four-plus years”).

24. DiNatale, *supra* note 1.

25. *Texas DPS Working to Return Stolen Items Recovered in Organized Austin Theft Ring*, KXAN (Nov. 5, 2021), <https://www.kxan.com/news/crime/texas-dps-working-to-return-stolen-items-recovered-in-organized-austin-theft-ring/> [https://perma.cc/4SQV-98LH].

26. See Kan, *supra* note 1 (noting that a group recruited “people to steal the goods from retail stores across 28 states” for later sale on Amazon and eBay).

27. See *Smith v. State*, 208 N.W. 126, 128 (Neb. 1926) (finding pawnshop broker guilty of conversion of goods despite lacking knowledge that the goods were stolen); *Ghen v. Rich*, 8 F. 159, 160–62 (D. Mass. 1881) (awarding damages to the rightful owner of a whale against a merchant who unknowingly purchased the stolen whale from a thief and used its fat to make oil and various other by-products). Notably, for the last few decades, stolen goods have also routinely popped up in online listings. See, e.g., James C. Howell & John P. Moore, *History of Street Gangs in the United States*, 4 NAT’L GANG CTR. BULL. 1, 1–2 (2010), <https://www.nationalgangcenter.gov/content/documents/history-of-street-gangs.pdf> [https://perma.cc/X5V3-8WJQ]; Alaa Elassar, *A woman who stole goods for 19 years and sold them on eBay has been sentenced to prison and ordered to pay \$3.8M*, CNN (Oct. 3, 2020), <https://www.cnn.com/2020/10/03/us/kim-richardson-ebay-federal-prison-trnd/index.html> [https://perma.cc/HV69-PK5W].

secondary market for bulk quantities of low-value goods like disposable razors—much less Amazon’s 214 million customers.²⁸

Today, this market is likely costing the United States over \$68 billion per year.²⁹ And according to a 2021 National Retail Federation (NRF) report, 69% of brick-and-mortar retailers said they have been impacted by the recent increase in organized retail crime.³⁰ In fact, an NRF survey from 2020 noted that organized retail theft has seen a nearly 60% increase from 2015, now averaging \$719,548 in stolen goods for every \$1 billion in sales.³¹ This figure was almost surely higher in 2022.

But the cost of organized retail crime is more than monetary. Retail employees are the ones on the front line when bands of shoplifters attempt to steal products—in 2020, retailers “averaged 560 employee theft apprehensions [non-merchandise robbery] per retailer surveyed (up from 323 [in 2019]) and 689 shoplifting[] apprehensions (up from 509 [in 2019]).”³² And an increase in employee apprehensions also means that employees are increasingly exposed to violence and even death.³³ Thus, organized retail crime is not only exacting economic consequences, but human ones as well.

A. Amazon uniquely facilitates these crimes.

Admittedly, it is impossible to nail down the precise amount of stolen goods being sold on Amazon. However, there are a number of compelling

28. See J. Clement, *Most visited multi-platform U.S. web properties 2021*, STATISTA (Aug. 19, 2021), <https://www.statista.com/statistics/271412/most-visited-us-web-properties-based-on-number-of-visitors/> [<https://perma.cc/VC5U-VW7Z>] (noting graphically that Amazon has 214 customers in the United States).

29. See *supra* note 4 and accompanying text.

30. *2021 Retail Security Survey*, NAT’L RETAIL FED’N, 1, 4 (2021), <https://cdn.nrf.com/sites/default/files/2021-08/2021%20National%20Retail%20Security%20Survey%20updated.pdf> [<https://perma.cc/H5W5-UCPF>].

31. Press Release, Nat’l Retail Fed’n, Retailers report rising cases and increased losses from organized thefts (Dec. 15, 2020), <https://nrf.com/media-center/press-releases/retailers-report-rising-cases-and-increased-losses-organized-thefts> [<https://perma.cc/8VG7-EATK>].

32. Press Release, Nat’l Retail Fed’n, Retail shrink totaled \$61.7 billion in 2019 amid rising employee theft and shoplifting/ORC (July 14, 2020), <https://nrf.com/media-center/press-releases/retail-shrink-totaled-617-billion-2019-amid-rising-employee-theft-and> [<https://perma.cc/J6Q2-BJH7>].

33. See Press Release, D&D Daily, Retail Fatalities & Violent Incidents Up 40% in the U.S. in 2020, According to D&D Daily Reporting (Jan. 19, 2021), <https://www.retaildive.com/press-release/20210118-retail-fatalities-violent-incidents-up-40-in-the-us-in-2020-according/> [<https://perma.cc/72YL-UXN6>] (reporting over 485 fatal retail incidents last year, resulting in 523 deaths across the United States, reflecting 256 customers, 128 suspects, 123 employees/associates, and 16 law enforcement/security officers). The same source reported that “[i]n 2020, a record 70% of violent retail fatalities occurred during the commission of a crime (robberies, burglaries, thefts).” *Id.*

reasons to believe that Marketplace is the primary online venue contributing to the rise in organized retail crime.

First, Amazon's grip on online shopping in the United States is hard to overstate. The New York Times has reported that, as of 2021, Amazon "captures 41 cents of every dollar Americans spent online in the United States."³⁴ Amazon recently passed Walmart to become the world's largest retailer outside of China.³⁵ Nearly half of all Americans have an Amazon Prime account.³⁶ If criminals want to sell stolen products, it makes sense to sell them where customers already do their shopping: Amazon.com. Further, by Amazon's own admission, "bad actors" make millions of attempts every year to create TPS accounts.³⁷

It's also more likely that criminal sellers are turning to Amazon than other e-commerce platforms. In the competition over the country's digital consumers, Amazon has captured an astonishing 41% share of the U.S.'s e-commerce market (some estimate the number is closer to 50%).³⁸ And of companies with more than 1% of the e-commerce market share, Amazon, Walmart (6.6%), and eBay (4.2%) maintain the most significant marketplaces that permit TPSs to sell products.³⁹

However, Walmart is still primarily a brick-and-mortar institution, and the company sells mostly its own products online.⁴⁰ And while eBay, like

34. Karen Weise & Michael Corkery, *People Now Spend More at Amazon Than at Walmart*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/technology/amazon-walmart.html> [https://perma.cc/3CSF-F6DC].

35. *Id.*

36. The U.S. population was 331,963,788 as of July 22, 2021. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (Oct. 25, 2021), <https://www.census.gov/popclock/> [https://perma.cc/X9XH-YJ4S]. Amazon Prime has "153 million Prime members in the U.S. as the end of the second quarter of 2021, up from 124 million a year earlier." Don Davis & Fareeha Ali, *Most Amazon shoppers have eyes only for Amazon*, DIGITALCOMMERCE360 (Nov. 3, 2021), <https://www.digitalcommerce360.com/article/amazon-prime-membership/> [https://perma.cc/C89A-9CLQ].

37. *Brand Protection Report*, AMAZON 3 (May 2021), <https://assets.aboutamazon.com/96/a0/90f229d54c8c5a5072b2c4e021f7/amz-brand-report.pdf> [https://perma.cc/TW2U-FS35].

38. Stephanie Chevalier, *Market share of leading retail e-commerce companies in the United States as of February 2021*, STATISTA (Aug. 24, 2021), <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/> [https://perma.cc/7QSA-Q5YR] [hereinafter Chevalier, *Market share*]; Stephanie Chevalier, *Projected Retail E-commerce GMV Share of Amazon in the United States from 2016 to 2021*, STATISTA (Oct. 13, 2021), <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/> [https://perma.cc/8MHY-4UF2].

39. Chevalier, *Market share*, *supra* note 38.

40. Walmart has around 130,000 TPSs, allowing them to sell a relatively narrow range of products, and its seller application process is more rigorous than Amazon or eBay's. *See, e.g., Number of Sellers on Walmart Marketplace*, MARKETPLACE PULSE, <https://www.marketplacepulse.com/walmart/number-of-sellers> [https://perma.cc/2EYD-NQFX]; *What types of items can I sell on Walmart Marketplace?*, WALMART MARKETPLACE, https://marketplace.walmart.com/resources/?src=hw_additems#1525757785127-5855602e-df36

Amazon, is a true online marketplace, Amazon's TPSs outsell eBay's three to one.⁴¹ Further, consumers are more likely to visit Amazon to purchase the types of goods being stolen. Over-the-counter medications, cleaning supplies, and beauty products are among Amazon's bestselling items. Conversely, consumers are more likely to use eBay to buy big ticket items like electronics, which are significantly harder to steal in bulk.⁴²

II. What's being done? Amazon's approach, retailers' complaints, and legislative efforts.

A. Amazon does not appear to meaningfully address the sale of stolen goods in Marketplace.

Amazon is at least aware that some of its TPSs sell stolen goods. When Jeff Bezos appeared before Congress in July 2021, Representative Lucy McBath asked if the company allowed stolen goods to be sold on its

[<https://perma.cc/39FH-ZB7A>]; Jordan McGee, *Walmart vs. Amazon: Where Should You Sell?*, PATTERN (Aug. 16, 2021), <https://pattern.com/blog/walmart-vs-amazon/> [<https://perma.cc/YD23-78BS>]. Additionally, common sense would suggest that Walmart, with more than 5,000 retailer stores throughout the United States, is itself susceptible to being victimized by organized retail crime, and, thus, has more incentive than eBay or Amazon to minimize the number of TPSs selling illicit goods in its marketplace. *United States Quick Facts*, WALMART.COM, <https://corporate.walmart.com/our-story/locations/united-states> [<https://perma.cc/MRX7-YTNQ>].

41. eBay doesn't produce or sell many of its own products. So, its total gross merchandise value, \$100 billion in 2020, reflects mostly thirty-party sales of products made (and possibly shoplifted from) elsewhere. *eBay Gross Merchandise Volume (GMV)*, MARKETPLACE PULSE, <https://www.marketplacepulse.com/stats/ebay/ebay-gross-merchandise-volume-gmv-17> [<https://perma.cc/M7J3-AQXK>]. By comparison, last year Amazon's TPSs sold \$295 billion worth of non-Amazon products. Daniela Coppola, *Amazon gross merchandise volume 2018-2020, by seller type*, STATISTA, (Aug. 11, 2021), <https://www.statista.com/statistics/591317/amazon-gross-merchandise-value/> [<https://perma.cc/R742-GKKC>].

42. Daniela Coppola, *Net sales value of selected product categories on Amazon worldwide in 2021 and 2026*, STATISTA (Sept. 16, 2021), <https://www.statista.com/statistics/591317/amazon-gross-merchandise-value/> [<https://perma.cc/2UMK-2KRS>]; Alf Alferez, *What Sells Best on eBay? Top Selling Items in 2021*, ECOMMERCE NEXT (Apr. 7, 2021), <https://www.ecommerce-next.org/what-sells-best-on-ebay-top-selling-items-in-2021/> [<https://perma.cc/48FP-PHRL>]. Compare Brian Connolly, *Top Amazon Product Categories*, JUNGLE SCOUT (June 10, 2021), <https://www.junglescout.com/blog/amazon-product-categories/> [<https://perma.cc/EW4Y-PYFA>] (noting that home and kitchen supplies account for 40% of Amazon's sales, sports and outdoors account for 21%, beauty and personal care account for 19%, office products 15%, and tools and home improvement 14%) *with Best Selling Items*, EBAY EXPORT, <https://export.ebay.com/en/marketing/analytics/top-selling-categories/> [<https://perma.cc/6WSU-B9JZ>] (listing eBay's top selling items in categories such as "Jewelry & Watches, Computers/Tablets & Networking, Cellphones & Smartphones, Video Games & Consoles, Clothing, Shoes, & Accessories, and Digital Cameras"). Note also that Amazon and eBay have engaged in contentious legal battles over TPSs. Karen Weise, *EBay Accuses Amazon Managers of Conspiring to Poach Its Sellers*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/technology/ebay-amazon-lawsuit.html> [<https://perma.cc/3ZJ6-U8P6>]. Specifically, "eBay says [] Amazon managers directed dozens of workers to illegally use eBay's private messaging system to solicit sellers onto Amazon's platform." *Id.*

platform.⁴³ “Not to my knowledge,” Bezos replied, before acknowledging, “I’m sure there have been stolen goods sold on Amazon.”⁴⁴

Despite this admission, it is difficult to determine precisely what action (if any) Amazon has taken to address organized retail crime.⁴⁵ The company has not announced plans to assess the volume of stolen goods being sold via Marketplace, nor has it publicized any consistent efforts specifically aimed at detecting or preventing the sale of stolen products.

By contrast, Amazon boasts about its efforts to stop the sale of counterfeit goods, like fake designer bags and wrist watches.⁴⁶ In May 2021, the company issued its Brand Protection Report where it announced that it “invested over \$700 million and employed more than 10,000 people” to prevent “fraud and abuse.”⁴⁷ And while the Report spends sixteen pages overviews initiatives like “robust proactive controls” that “blocked more than 10 billion suspected bad listings” and “6 million attempts to create new selling accounts,” it never mentions stolen products.⁴⁸

Indeed, for the last year and a half it seems that Amazon has used carefully worded statements to conflate its efforts to stop the sale of counterfeit goods with yet-unrealized efforts to stop other kinds of fraud. For example, in September of 2021, in response to a reporter’s questioning about organized retail theft, an Amazon spokesperson stated that Amazon “spent \$700 million last year to combat fraud.”⁴⁹ He did not clarify that the “fraud” the money was intended to target was the sale of counterfeit—rather than stolen or defective—goods.

Perhaps a generous reading of this commentary might be that Amazon’s anti-counterfeiting efforts also curtail the sale of stolen products. But given the public scrutiny the company has faced, and the level of detail Amazon has provided about its anti-counterfeiting efforts, a more skeptical reading is probably appropriate. Amazon has likely obfuscated its efforts to address Marketplace fraud because combating the sale of counterfeit goods is far

43. Sissi Cao, *Does Jeff Bezos Know What Happens at Amazon? Bad Congressional Hearing Suggests Not*, OBSERVER (July 30, 2020, 12:04 PM), <https://observer.com/2020/07/amazon-jeff-bezos-first-congressional-big-tech-hearing/> [<https://perma.cc/TT24-TNHC>].

44. *Id.*

45. Kiri Masters, *Bezos Admits to Serious Issues for Retail Brands In Antitrust Inquiry. What Will Change?*, FORBES (July 30, 2021, 12:09 AM), <https://www.forbes.com/sites/kirimas-ters/2020/07/30/bezos-admits-to-serious-issues-for-retail-brands-in-antitrust-inquiry-what-will-change/?sh=31a35e7f7a84> [<https://perma.cc/2Y64-DGEV>] (noting that Jeff Bezos testified about stolen goods being sold on Amazon during a congressional hearing).

46. Amazon did release a sixteen-page “Brand Protection Report” in May 2021, but this report, like the comments outlined below, only explicitly references efforts to curtail the sale of counterfeit goods. *Brand Protection Report*, *supra* note 37, at 3.

47. *Id.*

48. *Id.*

49. Ballhaus & Ramachandran, *supra* note 1.

cheaper than addressing organized retail crime.⁵⁰ Additionally, the sale of stolen goods is unlikely to draw customer attention. If someone pays full price for a Gucci belt that turns out to be fake, they are likely to notice and complain. If they buy Tide Pods at a light mark down and then receive Tide Pods—how would the customer ever know (or care) that they were stolen?

Finally, Amazon is probably silent about organized retail crime because it has good reason not to stop it: the company makes big money from its TPSs. Amazon benefits from the low prices that criminal TPSs can offer (thanks to the sellers' nonexistent unit costs), which drives further transactions on the platform. That is, a customer buying stolen Tide Pods for 20% less than they can find anywhere else is more likely to continue using Amazon. Further, last year, Amazon made more than \$120 billion from TPSs' transaction fees (\$45 billion), fulfillment costs (\$30 billion), and advertising payments (\$45 billion).⁵¹ In fact, Amazon probably makes more money from these fees than it makes selling its own consumer products.⁵² By all accounts, Amazon and criminal TPSs appear to have a mutually beneficial relationship.

B. Retailer's push for legislative intervention.

Understandably, retailers and law enforcement officials have not been satisfied by Amazon's approach. When organized retail crime picked up after the start of the COVID-19 pandemic, retailers made unsuccessful attempts to persuade Amazon to help them combat the sale of stolen goods in Marketplace.⁵³ For example, investigators for companies like CVS and Home Depot say they struggled (and still struggle) to obtain TPSs identifying information from Amazon without subpoenas or warrants, while platforms like eBay are more willing to cooperate without legal intervention.⁵⁴

50. In 2020, the federal government estimated the value of counterfeit goods sold online “would have been worth nearly \$1.3 billion had they been genuine.” Press Release, U.S. Customs and Border Control, *This Mother's Day – Be Alert for Counterfeit Goods Sold Online* (May 3, 2021), <https://www.cbp.gov/newsroom/local-media-release/mother-s-day-be-alert-counterfeit-goods-sold-online> [<https://perma.cc/98VY-36FR>]. That is, the true value of counterfeit products sold across all e-commerce platforms in 2020 was probably far less than \$1 billion—strikingly less than the more than \$45 billion of stolen products sold online during the same time frame.

51. See Pamela N. Danziger, *Amazon's Third-Party Marketplace Is Its Cash Cow, Not AWS*, FORBES (Feb. 21, 2021, 9:55 AM) <https://www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/?sh=5a1b081c21c0> [<https://perma.cc/NSW4-YVY4>].

52. *Id.*

53. Ballhaus & Ramachandran, *supra* note 1.

54. *Id.*

Advocacy groups say companies like Amazon have “largely ignored this growing problem,”⁵⁵ and some investigators have stated that the company has, on at least one occasion, failed “to hand over financial details of transactions or internal notes about suspicious activities[] despite repeated requests by law enforcement.”⁵⁶ Eventually, fed up state attorneys general, city mayors, retail organizations, and the FBI created coalitions to tackle these problems on their own.⁵⁷ Despite these efforts, organized retail crime has not abated. So, groups like the National Association of Chain Drug Stores, the Toy Association, and Buy Safe America Coalition have lobbied Congress to adopt regulatory measures that compel Amazon to join their fight.⁵⁸

C. The INFORM Act provides a decent battle plan, but ultimately cannot be used to win the war against organized retail crime.

Federal policy makers have responded by introducing the bi-partisan INFORM Consumers Act (The INFORM Act) in both chambers of Congress.⁵⁹ Specifically, the INFORM Act “directs online marketplaces to

55. The Problem, BUY SAFE AMERICA COALITION <https://www.buysafeamerica.org/the-problem> [<https://perma.cc/ZP4S-G7QB>].

56. *Id.*

57. *See, e.g.*, Press Release, Off. of Ill. Attn’y Gen., Attorney General Raoul Announces Public-Private Partnership Aimed at Disrupting Organized Retail Crimes (Sept. 13, 2021), https://illinoisattorneygeneral.gov/pressroom/2021_09/20210913.html [<https://perma.cc/872Y-AVU7>]; Bay City News, *S.F. unveils initiative to tackle rise in retail thefts*, SAN FRANCISCO EXAMINER (Sept. 22, 2021, 4:00 PM), <https://www.sfxaminer.com/news/s-f-unveils-initiative-to-tackle-rise-in-retail-thefts/> [<https://perma.cc/6FA3-TG2M>]; Jim Lee, *A National Shoplifting Prevention Coalition: Driving Change Together as an Industry*, LOSS PREVENTION MAGAZINE (Feb. 10, 2020), <https://losspreventionmedia.com/a-national-shoplifting-prevention-coalition-driving-change-together-as-an-industry/> [<https://perma.cc/UX7T-LWHN>]. According to a recent report, “retail fatalities still increased 5 percent, with violent incidents up 14 percent,” despite most stores being closed or operating at a diminished capacity because of the COVID-19 pandemic. Alexander Snyder, *The Impact of Covid-19 on Organized Retail Crime* (Mar. 30, 2021), LOSS PREVENTION MAGAZINE, <https://losspreventionmedia.com/the-impact-of-covid-19-on-organized-retail-crime/> [<https://perma.cc/B7UP-JHNJ>].

58. Press Release, Nat’l Ass. Of Chain Drug Stores, NACDS Applauds Introduction of INFORM Consumers Act in U.S. House of Representatives (Oct. 6, 2021), <https://www.nacds.org/news/nacds-applauds-introduction-of-inform-consumers-act-in-u-s-house-of-representatives/> [<https://perma.cc/XTG7-9MCZ>]; Press Release, The Toy Ass’n, Toy Association Praises House Introduction of INFORM Act (Oct. 5, 2021), <https://www.toyassociation.org/PressRoom2/News/2021-news/toy-association-praises-house-introduction-of-inform-act.aspx> [<https://perma.cc/D7QC-8C7Z>]; About the Coalition, BUY SAFE AMERICA COALITION <https://www.buysafeamerica.org/about-coalition> [<https://perma.cc/7LHU-5TG2>].

59. Committees, INFORM Consumers Act, S. 936, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/936/committees> [<https://perma.cc/SR5R-JPDX>]; H.R. 5502, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5502/cosponsors> [<https://perma.cc/KA42-N4DG>]. In addition to this legislation, there are state legislative efforts

verify high-volume third-party sellers by acquiring the seller’s government ID, tax ID, bank account information, and contact information,” and ensures “that consumers can verify basic identification and contact information,” like email address and phone numbers, for these sellers in online marketplaces like Amazon and eBay. The legislation has been considered “a win-win for consumers and legitimate businesses in the online marketplace.”⁶⁰

But the Act’s likelihood of becoming law appears uncertain. The House version, which recently secured Amazon’s endorsement, was reported out of the Energy and Commerce Committee in November 2021 but has not been scheduled for a full-Chamber vote.⁶¹ The Senate version, despite being introduced in March 2021, has not been referred out of committee.⁶²

Assuming INFORM Act eventually passes, it would undeniably provide retailers with a win: the legislation will allow law enforcement and retail investigators to track down criminal TPSs without needing warrants or subpoenas.⁶³ But bolstering external investigations still saddles retailers with the responsibility of cleaning up a mess that Amazon made—and profits from. A better solution would place the burden of stopping organized retail crime on Amazon itself.

aimed at organized retail theft and another federal proposal called the SHOP Safe Act, which proposes regulations concerning solely counterfeit goods. Press Release, H. Judiciary Comm., Nadler, Johnson, Issa & Cline Introduce Bipartisan SHOP SAFE Act (May 20, 2021), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4566> [<https://perma.cc/Q9XT-ST6C>]. For state proposals see, for example, *Lang Introduces Bill to Curtail Organized Retail Crime*, OHIOSENATE (May 20, 2021), <https://ohiosenate.gov/senators/lang/news/lang-introduces-bill-to-curtail-organized-retail-crime> [<https://perma.cc/82QU-N23N>]; Lauren Lyster, *Newsom signs bill to combat crime, retail theft across California*, KTLA (July 21, 2021, 4:29 PM), <https://ktla.com/news/california/newsom-signs-bill-to-combat-crime-retail-theft-across-california/> [<https://perma.cc/25KY-479M>].

60. Press Release, Off. of Rep. Jan Schakowky, Schakowsky Introduces Bill to Protect Consumers Making Online Purchases (Oct. 5, 2021), <https://schakowsky.house.gov/media/press-releases/schakowsky-introduces-bill-protect-consumers-making-online-purchases> [<https://perma.cc/9KVF-3A6H>].

61. H.R. 5502, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5502/all-actions> [<https://perma.cc/5JTR-EQH8>]; Brian Huseman, *Amazon supports the U.S. House version of the INFORM Act*, ABOUTAMAZON.COM (Oct. 27, 2021), <https://www.aboutamazon.com/news/policy-news-views/amazon-supports-the-u-s-house-version-of-the-inform-act> [<https://perma.cc/H8RF-MK44>].

62. Summary, INFORM Consumers Act, S. 936, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/936/summary> [<https://perma.cc/N48B-TYBM>].

63. *Id.* See also Adriana Lee, *EBay, Etsy, Mercari, OfferUp, Poshmark Announce PASS Coalition*, YAHOO! NEWS (Mar. 29, 2021), <https://www.yahoo.com/now/ebay-etsy-mercari-offerup-poshmark-232403506.html> [<https://perma.cc/6M5M-EPR9>] (reporting retail opposition to the INFORM Act).

III. Amazon should proactively combat the sale of stolen goods.

Luckily, the answer is hiding in plain sight. If stolen goods are being sold in Marketplace, Amazon is liable in tort. Exposing Amazon to this kind of liability requires only that the claim be asserted. But, in some ways, individual judgments will be the least of the advantages to be gained. Instead, judicial recognition of Amazon's tort liability will ensure that the company does everything it can to address organized retail crime—and its Brand Protection Report suggests that it could be doing a lot more.

First, Amazon fully controls the best data and technology to detect illicit activity: TPSs' inventory, selling patterns, and contact information.⁶⁴ Second, unlike retailers and law enforcement agencies, Amazon is not constrained by the Fourth Amendment: it can react to potentially illicit activity *ex ante*, without the delay of legal bureaucracy.⁶⁵ Importantly, Amazon is not only in the best position to use its resources to stop organized retail crime—it already uses its resources to stop the sale of counterfeit goods. The company has used “advanced machine learning to analyze hundreds of data points and signals to detect and block bad actors” that rip off luxury brands like Ferragamo and Hermes.⁶⁶

Specifically, Amazon surveils billions of “attempted changes to product detail pages daily for signs of potential abuse,” scans product codes to verify their authenticity before shipping goods to customers, and “seized and destroyed more than 2 million products” that were detected as counterfeit.⁶⁷ Further, if Amazon suspects that a TPS has sold a counterfeit product, it will “immediately close their account, withhold funds disbursement, [] determine if this new information brings other related accounts into suspicion,” and then “report the bad actor to law enforcement.”⁶⁸ The same technology used to protect luxury brands could be used to protect Walgreens and CVS.

IV. Amazon is a converter and, therefore, is liable to retailers for the value of their stolen goods.

There is nothing new or controversial about conversion. Here, the only analytical step required is to show that Amazon's operation of Marketplace brings the company within the established definition of “converter.” Among the countless merchants that have been held liable as converters, the closest analog to Amazon is the auctioneer. Thus, this section will set out the elements of conversion, address Amazon's potential defenses to a conversion

64. *Brand Protection Report*, *supra* note 37, at 5.

65. *United States v. Jacobsen*, 466 U.S. 109, 113–14 (1984).

66. *Brand Protection Report*, *supra* note 37, at 5.

67. *Id.* at 6, 8.

68. *Id.* at 6.

claim, and ultimately suggest that centuries of conversion claims against auctioneers provide a helpful framework for bringing similar lawsuits against Amazon.

A. Amazon is a converter.

Generally, conversion is the intentional exercise of control over personal property that is inconsistent with its owner's rights.⁶⁹ When courts consider conversion claims they often look to: (1) the extent and duration of the actor's exercise of control; and (2) the actor's intent to assert such control. Importantly, conversion is a strict liability tort, so thus, the converter is liable to a true owner for the full value of personal property without regard to the converter's notice, good faith, or negligence.⁷⁰

The most familiar version of conversion arises from purportedly legitimate transfers of personal property. For example, A steals a ring and sells it to B, who might in turn sell it to C. If the ring's true owner discovers that C has the ring, he might sue any one of A, B, or C to recover the ring's full value. Although both B and C might have paid a fair market price for the ring without knowing the ring was stolen, A, as the thief, never acquired good title to the ring, and, therefore, could give none. Accordingly, every person in the purported chain of title was a converter.

Here, Amazon is a converter if a retailer can persuade a court that Amazon's operation of Marketplace sufficiently involves Amazon in the disposition of the retailer's stolen goods. In considering Amazon's involvement, Amazon: (1) provides the criminal TPS with a venue to sell his goods; (2) solicits customers; (3) brings every buyer and seller together; (4) collects the purchase price of goods and remits (some of) it to the TPSs; and (5) carries out the fulfillment of these sales on behalf of the seller, including warehousing, logistical support, and shipment. In many cases, Amazon performs additional functions for TPSs, such as advertising and customer service. Courts have often found that innocent intermediaries are converters when their involvement in transactions of stolen goods was far less direct.⁷¹

B. Amazon's rejoinder.

But Amazon will likely respond that it is not a converter because it merely acts as TPSs' agent and never purports to pass title to the stolen property. Instead, Amazon will propose that the criminal TPS selling the stolen goods is the converter. But these ideas are not mutually exclusive.

69. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971).

70. *Voris v. Lampert*, 446 P.3d 284, 290 (2019); Davis, *supra* note 13 at § 3.

71. *See infra* Part IV(C).

Indeed, the shoplifter, the “fence,” the criminal TPSs, and Amazon, like A, B, and C with the ring, are *all* converters.

That said, Amazon is concededly not the paradigmatic seller-converter, which does pose a relevant question: what kind of converter is Amazon? Amazon cannot be a converter solely because it facilitates the sale of stolen goods. For example, a newspaper is not a converter simply because stolen goods are advertised in its classified section. Likewise, a commercial landlord (assuming he is innocent of any wrongdoing) would not be liable for illegal sales made by his tenants. Further, common carriers are not converters for simply transporting stolen goods.

But, as a party’s control over stolen property increases, the more likely it becomes that he will be liable for conversion—even if he derives no profit from exercising control at all. For example, a logger who refuses to return another’s road grader will be liable for conversion, even if the road grader sat unused for most of the time it was in the logger’s possession.⁷² Likewise, if a storage facility misdelivers furs belonging to one of its clients, the store to which the furs were delivered can be liable for conversion even if it did not profit from the misdelivery.⁷³

Perhaps then, Amazon might be a converter because, as some have suggested, it is “the largest unregulated pawnshop on the face of the planet.”⁷⁴ Consignment stores, antique merchants, and pawnshops are routinely subjected to civil damages for conversion.⁷⁵ But although this analogy gets closer than the other examples, Amazon is different from a pawnshop in important ways. Amazon does not, for example, lend money on the security of a pledge of personal property, and it does not take a share of TPSs’ profit from the sale of stolen goods.

C. Amazon is an auctioneer.

Instead, the closest analogy to Amazon’s role in a Marketplace transaction is that of an auctioneer. Since antiquity, auctioneers have provided third parties with venues to sell their goods in exchange for fees.⁷⁶ Since 2000, Amazon has provided that same service.⁷⁷ Auctioneers that

72. *Cross v. Berg Lumber Co.*, 7 P.3d 922, 922, 932 (Wyo. 2000).

73. *Fireman’s Fund Ins. Co. v. Wagner Fur, Inc.*, 760 F. Supp. 1101, 1105 (S.D.N.Y. 1991). *See also* *Cerkel v. Waterman*, 63 Cal. 34, 35 (1883); *Swim v. Wilson*, 27 P. 33, 34 (1891).

74. *Ballhaus & Ramachandran*, *supra* note 1.

75. *E.g.*, *Welch v. Kosasky*, 509 N.E.2d 919, 920 (Mass. App. Ct. 1987); *Shaw’s D.B. & L., Inc. v. Fletcher*, 580 S.W.2d 91, 93 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

76. *See generally* PAUL KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* (2004).

77. *Matt Day & Jackie Gu. The Enormous Numbers Behind Amazon’s Market Reach*, BLOOMBERG.COM (Mar. 27, 2019), <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/> [<https://perma.cc/748A-T47G>].

conduct the sale of stolen property are almost invariably held liable as converters.⁷⁸ Thus, Amazon should be liable as well.

To appreciate this analogy, first consider the case of *Hoffman v. Carow*.⁷⁹ In January 1833, Carow's general store in New York City was burglarized, and an unknown number of thieves made off with a significant quantity of dry goods. Several months after the robbery, Carow discovered these goods for sale at an auction house in Baltimore. At Carow's urging, the auction house produced an invoice from the good's seller, and upon inspecting the document, recognized the distinctive handwriting of a man named Pye who kept his books at the time of the robbery. Carow immediately alerted authorities, who arrested Pye and charged him with felony robbery.

Afterwards, Carow sued the auction house, which argued that the only proper civil suit was against Pye, i.e., the one who stole the goods and offered them for sale. But despite Pye's eventual conviction, and various documents tending to show the auction house did not have reason to know the goods were stolen, the Court for the Correction of Errors of New York (then the highest law court in the state) held that the auction house was a converter and, therefore, liable to Carow for \$610—the full value of his stolen goods.

In reaching this decision, which was a matter of first impression in the United States, the New York court's reasoning was rich, multi-dimensional, and elaborate. However, the consensus was most clearly expressed in Senator Verplanck's opinion. He began with first principles of property law:

[T]he owner of personal property cannot be divested of his rights, unless by his own act or his own assent; and that it is no defence against such superior and original title for a subsequent possessor, that he honestly purchased the goods in the course of trade from a person not authorized to sell them, though otherwise in lawful possession.⁸⁰

78. See, e.g., *Eureka Springs Sales Co. v. Ward*, 290 S.W.2d 434, 437 (Ark. 1956); *Rogers v. Huie*, 1 Cal. 429, 433 (1851); *Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp.*, 34 P.2d 139, 143 (1934); *Frank v. Repp & Mott*, 161 P.2d 279, 279–80 (1945); *Greer v. Newland*, 78 P. 835, 835 (Kan. 1904); *Coles v. Clark*, 57 Mass. 403, 401–02 (Mass. 1849); *Hills v. Snell*, 104 Mass. 173, 177 (Mass. 1870); *Robinson v. Bird*, 33 N.E. 391, 392 (Mass. 1893); *Kearney v. Clutton*, 101 Mich 106, 59 N.W. 419, 421 (Mich. 1894); *Pasley v. Ropp*, 334 S.W.2d 254, 256 (Mo. Ct. App. 1960); *Miller Bros. v. Jas. H. Laws & Co.*, 6 Ohio Dec. Reprint 736 (Ohio Ct. App. 1879).

79. 22 Wend. 285 (N.Y. 1839). This opinion, while often cited as establishing auctioneer liability in the United States, does not provide a centralized statement of the facts. However, John Anthon, Carow's attorney, compiled the relevant facts in JOHN ANTHON, 2 THE LAW OF NISI PRIUS 323–25 (Banks & Brothers, Law Publishers 1858), which is where most of the facts in this section are drawn from.

80. *Hoffman*, 22 Wend. at 318.

He then laid out the novel legal question by noting that Carow sought “to recover the value of his goods, not from one having them in possession and refusing to deliver them, or from one who sold for his own benefit, or otherwise converted them to his own use.” Instead, Carow sought to recover from a merchant that “received the goods without knowledge that they had been stolen, sold them and transmitted the proceeds to their supposed owner, who was in fact the felonious taker of the property.”⁸¹

In light of the auction house’s innocence, Senator Verplanck expressly questioned whether it should be liable to Carow at all, and if so, whether Carow’s remedy should be “for the amount of his loss” or “limited to . . . the goods themselves.” Ultimately, the Senator, and the court, landed on the former:

The policy of our law is to make every man look to the character of those with whom he deals, and who are responsible for the title of property in the articles bought and sold. If he does not do this, he must take the consequent risk . . . If in this they are negligent, or have been deceived, they must take the consequences whenever their rights come into conflict with those of any innocent sufferer by the act of the same guilty third party.⁸²

The Senator noted that these principles applied with equal force to anyone that had stolen goods “in [their] possession and refus[ed] to deliver them up, or who has applied them to his own use, or has in any other way converted them, i. e. has changed the substance of the things in question, their character, use or ownership, to the injury of the real owner.” He was careful to note that the foundation of this cause of action was *not* the auction house’s physical possession of Carow’s dry goods, “but some wrongful act relating to them . . . which is proved by a sale without authority.”⁸³ On this reasoning, the auction house’s liability for conversion was affirmed by a vote of 16–5.⁸⁴

It is hard to deny the similarities between Carow’s case and a potential case against Amazon. And there are many other cases that bolster the notion

81. *Id.*

82. *Id.*

83. *Id.* at 319. Senator Verplanck concluded this discussion by appealing to Lord Coke: “in the oldest leading case on this head, which still preserves its authority, *Isaac v. Clark*, 1 Bulst. 312, ‘there must be an act done to convert one thing into another,’ and a converting into money by sale has always been held to be within this definition.” *Id.*

84. *Id.* at 324. Many contemporary state supreme courts expressly embraced the holding in *Carow v. Hoffman*. See, e.g., *Hickman v. Alpaugh*, 21 Cal. 225, 226 (1862); *Merchants’ & Planters’ Bank v. Meyer*, 20 S.W. 406, 407 (Ark. 1892); *Marks v. Robinson*, 2 So. 292, 298 (Ala. 1887); *Thompson v. Rose*, 16 Conn. 71, 79 (Conn. 1844); *Lofton v. Vogles*, 17 Ind. 105, 107 (Ind. 1861).

that Amazon can be liable for conversion as an auctioneer. While such decisions rarely canvas the origins of conversion as thoroughly as Senator Verplanck, his rule is nearly unquestioned across all U.S. jurisdictions: the auctioneer is liable to the victim of theft for the value of his stolen goods sold at auction.

For example, where an auctioneer sells stolen items of nominal value in bulk, such as rugs, carpets, and bed sheets, it is liable for the cost of the goods converted.⁸⁵ If an auctioneer sells stolen clothing, all that must be proven is that the clothing was stolen from the claimant's store and that the auctioneer sold the clothes. The auctioneer's knowledge of the theft is irrelevant; just like the Baltimore auction house, he is a converter.⁸⁶ Likewise, if an auctioneer sells prescription glasses, personal telephones, or address books, it does not matter that it derived no profit from the sale of the goods themselves, only that it received a fee from the third party that delivered the products and exercised sufficient possession over the goods.⁸⁷

And although the case law in each state is unique, a sampling of representative decisions is enough to illustrate the law's basic contours—though textbooks and digests would furnish many more to the same effect:

- ***Eureka Springs Sales Co. v. Ward*, 290 S.W.2d 434, 437 (Ark. 1956).** Auctioneer selling stolen cattle was liable for conversion. After a cattle thief was arrested, the cattle's true owner sued auctioneer for the full value of his cows. Here, the Supreme Court of Arkansas stated the general rule that a purchaser from a thief acquires no title against the true owner of stolen goods, and thus, the auctioneer did not escape liability. Indeed, the court had no trouble

85. *Ricketts v. Liberty Mut. Ins. Co.*, 194 S.E.2d 311, 313 (Ga. Ct. App. 1972).

86. *Courtis v. Cane*, 32 Vt. 232 (Vt. 1859); *see also* 7 AM. JUR. 2D *Auctions and Auctioneers* § 68; *Mills v. Commercial Bank & Tr. Co. of Ocala*, 255 So. 2d 532, 533 (Fla. Dist. Ct. App. 1971). Restating the elements of auctioneer liability for conversion upon the sale of stolen goods, the court noted:

The rule of liability on the part of the auctioneer applies where he innocently sells stolen property; where he sells property in behalf of a vendee under a conditional sale in whom title has not yet vested; where he sells property in behalf of a mortgagee under a void mortgage; and in some cases, where the auctioneer, even though without actual knowledge of the mortgage, sells mortgaged goods at the instance of the mortgagor.

Mills, 255 So. 2d at 533.

87. *Strasberg v. Odyssey Group, Inc.*, 51 Cal. App. 4th 906, 912, 59 Cal. Rptr. 2d 474, 477 (1996); *White v. Boyd*, 124 N.C. 177, 32 S.E. 495, 496 (1899); *cf.* *Piper v. Gooding & Co. Inc.*, 334 F. Supp. 3d 1009, 1018 (D. Ariz. 2018) (implying, without holding, that a defendant may incur no liability if he acts as a "mere conduit" in transferring items if he derives no personal gain from the transfer and delivers the items pursuant to the bailment before "notice of the rights of the real owner").

reaching its conclusion: “The authorities are practically unanimous in holding that an auctioneer who sells property [on] behalf of a principal having no title thereto is personally liable to the true owner for conversion, regardless of whether he had notice of the true owner’s title, or whether he acted with . . . good faith.”

- ***Piper v. Gooding & Co. Inc.*, 334 F. Supp. 3d 1009, 1018–19 (D. Ariz. 2018)**. Conversion claim is valid against an auction house for the sale of a stolen car. Motion to dismiss the claim was denied because the auction house stood to financially benefit from the sale and, therefore, did not act as a “mere conduit” in transfer of items, which would have precluded liability under Arizona state law.
- ***Cerkel v. Waterman*, 63 Cal. 34, 35 (1883)**. Innocent commission merchants were liable to true owner for conversion of wheat sacks mistakenly delivered by an intermediary. Defendant merchants and plaintiff’s agents were expecting separate deliveries of dry goods from the same shipping service. Through a logistical error defendant merchants received plaintiff’s wheat sacks. Although there was no fraud or bad faith, the Supreme Court of California referenced the case in a later opinion to support the notion that “it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss,” he should have “satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal.”⁸⁸
- ***Angiolillo v. Christie’s, Inc.*, 103 N.Y.S.3d 244, 259–61 (N.Y. Sup. Ct. 2019)**. Descendants of a U.S. Senator had a timely conversion claim against a storied auction for its attempted auction of a rare family diamond. After the Senator’s death, the diamond was bequeathed to his wife and subsequently stolen by her son. Eventually, a high-end jewelry corporation in New York acquired the diamond and entered a contract with Christie’s to auction it off. On appeal, Christie’s asserted that because the goods were stolen abroad, the transaction should be subject to the laws of Switzerland. But the Supreme Court of New York noted that the state had “an overarching concern that New York not become a marketplace for

88. *Swim v. Wilson*, 27 P. 33, 34 (1891) (referencing *Cerkel v. Waterman*, 63 Cal. 34 (1883)).

stolen goods.”⁸⁹ Thus, “New York courts do not concern themselves with the question of where the theft took place,”⁹⁰ and so the court remanded the case for trial in light of well-established New York law that “an agent is liable for conversion, even if committed for the benefit of the principal or without intent.”⁹¹

- ***Allred v. Hinkley*, 328 P.2d 726, 728 (Utah 1958)**. “A purchaser of stolen goods or an auctioneer who sells them in good faith becomes a converter since his acts are an interference with the control of the property or in other words, a claiming of the ownership in such property and taking it out of the possession of someone else with intention of exercising dominion over it is a conversion. Thus a bona fide purchaser of goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods.”
- ***Solomon v. Cutler*, No. 2:07-CV-645-RLH-PAL, 2010 WL 3909980, at *5 (D. Nev. Apr. 8, 2010)**. Auctioneer was not liable for conversion of a Norman Rockwell painting where the true owner consented to painting’s sale and did not wrongfully acquire the painting. The court noted that in a federal action for conversion against an auctioneer, courts are to apply the law of the state in which the auction took place.
- ***Great Am. Ins. Co. v. Nextday Network Hardware Corp.*, CV No. TDC-14-1451, 2016 WL 828094, at *5 (D. Md. Feb. 29, 2016)**. Company that purchased stolen computers on eBay and then re-sold them was liable to the true owner for the full value of the stolen computers. Here, there was no dispute that a thief stole the equipment that the company purchased and resold, and “[a] thief, for example, ‘gets’ only void title and without more cannot pass any title to a good faith purchaser.”⁹² The court noted that even if the company “had no

89. *Angiolillo v. Christie’s, Inc.*, 103 N.Y.S.3d 244, 259 (N.Y. Sup. Ct. 2019) (quoting *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010)).

90. *Id.* at 260 (quoting *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 846 (E.D.N.Y. 1981), *aff’d*, 678 F.2d 1150 (2d Cir. 1982)).

91. *Id.* at 261 (quoting *Weyant v. Phia Grp. LLP*, No. 17 CIV. 8230 (LGS), 2018 WL 4387557, at *8 (S.D.N.Y. Sept. 13, 2018)).

92. *Great Am. Ins. Co. v. Nextday Network Hardware Corp.*, No. TDC-14-1451, 2016 WL 828094, at *5 (D. Md. Feb. 29, 2016) (quoting *Inmi-Etti v. Aluisi*, 492 A.2d 917, 921 (Md. Ct. Spec. App. 1985) (quoting JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 3–11 (2d ed. 1980) (footnote omitted))).

knowledge that the seller had no valid right to the property, the transfer of the property would be a direct conversion.” Thus, the company’s argument, which was that plaintiff’s claims failed as a matter of law because “they received no formal demand for the return of the property[,] necessarily fail[ed].”

- ***Courtis v. Cane*, 32 Vt. 232, 232 (Vt. 1859)**. Merchants were liable to store owner for sale of stolen silk. A store owner was robbed of “a large quantity of dress silks,” which was later sold by silk merchants. Here, the common-law claim was proper even though the merchants did not have the silks in their possession at the time suit began. Instead, the plaintiff could recover the full value of his silks merely because (1) “the goods in question were stolen from the plaintiff’s store” and “he had not otherwise parted with them,” and (2) the merchants sold them (3) despite the fact that the merchants were totally innocent.⁹³
- ***James v. Klar & Winterman*, 118 S.W.2d 625, 627 (Tex. Civ. App.—Dallas 1938, no writ)**. Pawnbrokers who sold plaintiff’s rings at auction were liable for conversion. The court noted that the pawnbrokers had no valid title to the rings, and the plaintiff’s cause of action accrued at the time of the illegal auction—not her agent’s first attempt to convince the pawnbrokers to return the rings.
- ***Antoniak v. Armstrong*, CV No. 18-1263, 2020 WL 2539194, at *2, 7–9 (E.D. Pa. May 19, 2020)**. Auction house was not liable for conversion, and was entitled to attorney’s fees, for agreeing to cease sale of potentially stolen coins when their provenance was challenged in federal court. In 2014, a day laborer found a box of coins while clearing out a home and sold them to coin dealers for \$6,000. The coin dealers then entered an agreement to sell the coins with an auction house that valued them at \$2.5 million. Afterward, an incarcerated financier claimed title to the coins, but the court held that the coins belonged to a receivership set up to restore assets the financier embezzled in 1999. Even though the coins were stolen, the

93. Although *Courtis* technically involved an action for trover, trover is considered the “original form of the modern action in tort for conversion of goods. . . . The old form of action has disappeared, but its name is still sometimes used as a synonym for conversion.” *Trover*, Oxford Reference (2021), <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803105903349> [https://perma.cc/MW9U-RW4N].

auction house was not liable for conversion in part because it never sold the coins and the plaintiff's claims were deemed frivolous.

- ***Morris v. Pearl St. Auction Co.*, 22 N.E.2d 740, 741 (Ohio Ct. App. 1939)**. Auction house was liable to owner of furniture store for the full value of household furniture it sold at auction. Noting that under Ohio law, “[t]he measure of damages recoverable in an action for the wrongful taking of property is ordinarily the market value of the thing converted, fixed as of the time and place of the conversion, with interest from the date to the time of trial.”⁹⁴
- ***Augusta Nat’l, Inc. v. Green Jacket Auctions, Inc.*, CV 117-096, 2018 WL 3429714, at *1–4 (S.D. Ga. July 16, 2018)**. Cause of action was brought against auctioneer for the value of Byron Nelson’s 1966 Masters “Green Jacket.” In 2012, Augusta National Golf Club discovered that employees had stolen several Green Jackets, including Byron Nelson’s 1966 championship jacket. The jackets were listed for sale on an auction website and purchased by English buyer who attend the Masters and played golf at the club. Counsel for Augusta was unable to establish the court’s jurisdiction over the auctioneer or the English buyer and dropped the case.⁹⁵

Despite the near unanimity of courts’ holdings, auctioneers will occasionally protest that their role in a transaction was so indirect and insubstantial that any theoretical interference with the true owner’s right of possession should not be considered tortious.⁹⁶ Amazon will likely make

94. *Morris v. Pearl St. Auction Co.*, 22 N.E.2d 740, 741 (Ohio Ct. App. 1939) (quoting 13 Ohio Jurisprudence 14 § 65).

95. *Lawsuit between Augusta National, auction company over for now*, AUGUSTA CHRON. (Jan. 25, 2019, 6:42 PM), <https://www.augusta.com/masters/story/news/2019-01-25/lawsuit-between-augusta-national-auction-company-over-now> [<https://perma.cc/4SHF-5S55>].

96. *See* *Rezac Livestock Comm’n Co., Inc. v. Pinnacle Bank*, 255 F. Supp. 3d 1150, 1170 (D. Kan. 2017) (rejecting defendant auctioneer’s argument “that a debt cannot provide the basis for conversion under Kansas law” because plaintiff’s conversion claim was actually based on defendant’s “failure to deliver possession of the [cattle] to [plaintiff] or to pay [plaintiff] for the [cattle]”); *Great Am. Ins. Co. v. Nextday Network Hardware Corp.*, CV TDC-14-1451, 2016 WL 828094, at *4–5 (D. Md. Feb. 29, 2016) (“Defendants argue that their purchase of the goods was rightful because they did not know at the time that the goods were stolen . . . Defendants’ argument fails because . . . [i]f a defendant takes possession of property with ‘no legal justifica[t]ion’ or without ‘any possessory interest in the property,’ there is a direct conversion.” (citation omitted)); *von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866, 2015 WL 12910626, at *8–9 (C.D. Cal. Apr. 2, 2015) (rejecting defendant’s contention that its sale of the plaintiff’s property was not tortious because “the fact that the statute of limitations may have expired as to an owner’s claim against the thief (or prior possessor) is irrelevant”).

similar assertions. But the answer to these objections was given by the Supreme Court of North Carolina in 1899:

The question is: Did the defendants, when, at the request and under the direction of Crowder, they took possession of the tobacco conveyed in the mortgage, and sold it in the manner set out in the evidence, become mere intermediaries,—mouthpieces of Crowder,—or did they become Crowder’s agents, for the purpose of selling and delivering the tobacco to the purchaser? Their possession of the tobacco was complete. It was on their floor. It was “cried off” by their auctioneer. They delivered it to the purchaser. They collected the price from the buyer, and paid it to Crowder himself, who had no right to receive it. All this was done under the direction of Crowder. The agency was as complete as it could possibly be made.⁹⁷

Amazon compels TPSs to list their items on Marketplace’s digital floor so that potential customers can wander through web-based stalls before heeding the cry off that Amazon assigns to every product sold on its platform: “Buy Now.” Then Amazon collects the price from the purchaser who has connected the relevant information to the company’s credit card processing service and remits payment to the TPS, who, in the case of stolen goods, has no right to receive it. All of this is done because the TPS has directed and compensated Amazon by virtue of its user services agreement.⁹⁸ But is the agency as complete as it could possibly be made?

One difference between Amazon and brick-and-mortar auctioneers might seem to remain: traditionally, auction houses physically delivered products to buyers in a public market. So, while Marketplace is undisputedly a public market (anyone can shop there), some skeptics might think the auctioneer analogy is incomplete because Amazon does not physically deliver TPSs’ goods to customers. But it does: over 90% of Amazon’s TPSs have used the company’s fulfillment services (FBA), which is a service through which TPSs grant Amazon the right to package, ship, and store their products for a fee.⁹⁹ That is, Amazon not only offers TPSs web-based stalls

97. *White v. Boyd*, 32 S.E. 495, 496 (N.C. 1899).

98. See, e.g., *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US [<https://perma.cc/C4CU-FE9V>].

99. *Fulfillment by Amazon*, AMAZON.COM, <https://sell.amazon.com/fulfillment-by-amazon> [<https://perma.cc/G52T-2DBA>]; Stephanie Chevalier, STATISTA (Aug. 6, 2021) <https://www.statista.com/statistics/1255966/amazon-third-party-seller-fulfillment-methods/> [<https://perma.cc/DUK5-3QJK>]. TPSs that opt-in to Amazon’s FBA program give Amazon the right

to connect consumers but also takes frequent, physical “possession of the goods for the very purpose of transferring title.”¹⁰⁰

This kind of possession gives rise to precisely the sort of agency that courts have found warrants treating auctioneers differently from mere common carriers that “do not deal with the title. . . . [and] are not put upon inquiry as to the title. . . . [,] [i]t [being] none of their business who owns the goods.”¹⁰¹ For example, if a person pays to ship a three-pound box, the post office will ship it without regard to whether the box contains three pounds of stolen books or three pounds of family photos. Amazon only ships three-pound boxes if someone has purchased the box’s contents on Marketplace; thus, its shipments are never made for any purpose other than fulfilling the transfer of title. Like the auctioneer, Amazon sells and delivers.

D. Section 230 will not bar the claims.

But Amazon does have at least one potential defense that is unavailable to physical auction houses: Section 230 of the Communications Decency Act.¹⁰² Since 1996, Section 230 has provided internet-based platforms like Amazon and Facebook with an affirmative defense to civil liability arising from user-generated content on their websites.¹⁰³ Practically speaking, this means that Amazon cannot be liable, for example, if one of its customer slanders another in a product’s comment section. Notably, the inverse is true as well: Amazon cannot be sued for exercising “a publisher’s traditional

to receive and store inventory, process and ship customer orders, and process customer returns. It is essentially a supply chain service.

100. Davis, *supra* note 13 at § 5. Note also that stockbrokers can be liable for conversion when re-selling intangible property interests like stocks. *See* *Swim v. Wilson*, 27 P. 33, 34 (1891) (citing *Bercich v. Marye*, 9 Nev. 312 (Nev. 1874)). Thus, the exact degree of possession might be less important than the act of facilitating the sale of stolen personal property.

101. *Miller Bros. v. Jas. H. Laws & Co.*, 7 Am. Law Rec. 606, 607, 1879 Ohio Misc. LEXIS 99 (Ohio Super. Ct. 1879). Additionally, auctioneer liability arises in part from the distinction between auctioneers and common carriers. Common carriers, although they may transport stolen goods, do not profit or otherwise benefit from the actual sale of the good itself. Conversely, “auctioneers . . . have possession of the goods for the very purpose of transferring title. . . . [and] [i]t is their right and duty to assure themselves as to the title.” *Id.*

102. Auction houses have invoked other federal statutory provisions, like the Packer’s Stockyard Act, as defenses to conversion suits, which courts have summarily held do not supersede state law conversion claims. *See, e.g., Commercial Bank at Alma v. Hales*, 665 S.W.2d 857, 858 (Ark. 1984) (“[T]he Packers and Stockyards Act does not absolve the [] auctioneer from liability for wrongful conversion for selling cattle subject to a [bank’s] security interest.”). Further, the Uniform Commercial Code has been held not to bar claims against auctioneers. *Michigan Nat’l. Bank v. Michigan Livestock Exch.*, 439 N.W.2d 884, 885 (Mich. 1989) (“We hold that § 7–404 does not apply to the defendant, and we reject the latter defense as it is based upon a misapplication of the Restatement provision.”).

103. Eric Taubel, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J.L., SCI. & TECH. 365, 376–77 (2011).

editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.”¹⁰⁴

While Amazon has asserted Section 230 as a defense in numerous lawsuits,¹⁰⁵ common-law actions for conversion would not be based on user-generated content in Marketplace or Amazon’s editorial functions. Rather, common-law conversion claims would arise from the tangible sale of stolen goods. Thus, Section 230 would provide no defense in this context. Importantly, recent case law involving product liability suits against Amazon support this conclusion. The Third Circuit, the Supreme Court of California, and Wisconsin courts have all found that Section 230 did not bar claims that “rely on Amazon’s role as an actor in the sales process.”¹⁰⁶ Claims, that is, like conversion.

Conclusion

In conclusion, Amazon can—and should—be liable as a converter of stolen goods. While Amazon’s sales and business model are exceptional, no company, not even the nation’s largest retailer, is above the law. Of all the relevant actors, Amazon is best situated to address organized retail crime and, therefore, should be liable for failing to stop it. Undoubtedly, organized retail crime isn’t going away any time soon. But imposing liability on Amazon for conversion would alleviate the burden that currently saddles retailers and law enforcement agencies—mostly because it would ensure that Amazon’s formidable resources are directed towards addressing organized retail crime. Although we cannot predict the specific tools Amazon will employ to prevent the sale of stolen goods, we can assume that holding the company liable for conversion will be effective and efficient.

104. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

105. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019).

106. *Id.* at 153; *see also* Jay Greene, *Burning laptops and flooded homes: Courts hold Amazon liable for faulty products*, WASH. POST (Aug. 29, 2020), <https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses/> [<https://perma.cc/B3DE-W6QF>]. Conversely, some courts have held that Amazon was not liable under state products-liability statutes. However, these courts have not found that Section 230 precluded the lawsuits. Instead, those holdings rested on the fact Amazon was not a “seller” within the meaning of the state statutes. But as discussed above, conversion does not require that Amazon be a “seller,” and conversion is a common-law, rather than statutory, claim. Greene, *supra*.