Fall 1996

Book Reviews

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

This Book Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.
IS JUSTICE JUST US? USING SOCIAL SCIENCE TO INFORM SUBSTANTIVE CRIMINAL LAW

CHRISTOPHER SLOBOGIN*


The relationship between popular opinion and law is a complicated one, especially in a society like ours that is both democratic and concerned about individual rights and moral justice. In this country the tension has been apparent at least since the eighteenth century, when James Madison and Alexander Hamilton clashed with the antifederalists over how “representative” the people’s representatives should be. Ought law to be a reflection of the people’s will, a distillation of the best theoretical insights, or some combination thereof and, if the latter, how does one titrate the mixture of lay and theoretical input?

In Justice, Liability and Blame, Paul Robinson, a well-known law professor, and John Darley, a respected social scientist, force one to ponder this question, in the stimulating context of fashioning criminal law doctrine. The book is primarily a description of eighteen studies aimed at probing community opinion about a wide range of criminal law issues, including the act requirement for attempt, omission liability, accomplice liability, the felony-murder rule, and the in-

* Professor of Law & Alumni Research Scholar, University of Florida College of Law. I would like to thank Frank Allen, Stephen Morse and the members of workshops at Florida and Villanova Law Schools for their helpful comments on this article. Of course, all blunders are my own.

1 See, e.g., The Federalist No. 10 (James Madison) (discussing the difference between a “democracy” and a “republic,” with the latter comprising a “delegation of the government . . . to a small number of citizens elected by the rest”).
toxication and insanity defenses. In presenting these studies, the authors subscribe to two key premises. First, they believe that lay opinion should influence substantive criminal law. Second, they believe that they can accurately ascertain that opinion. After briefly describing the most intriguing findings of their research, this review analyzes these two premises and concludes that both may require significant caveats. The overall conclusion, however, is that the book is a major breakthrough in the application of the scientific method to criminal law issues, and should be viewed both as a rich source of ideas for criminal theory and as a model for interdisciplinary work.

I. The Results

All of the studies in Justice, Liability and Blame followed the same format. First, a group of lay subjects, usually around forty in number, was selected. The group was then asked to read a series of scenarios depicting variations on a core fact pattern. For instance, in the study designed to plumb attitudes toward the act requirement for attempt, the subjects read about Ray, a locksmith. In one scenario, Ray tells a friend of his that he has decided to rob a safe in a coin shop, but does nothing to implement this plan. In other scenarios he undertakes various steps before his plan is discovered, from reconnoitering the store to opening the safe door. In the final scenario, he completes the crime. After reading these scenarios, the subjects were asked to assign to each a liability rating, on a thirteen-point scale that the authors used throughout the research. The authors then report the average liability score of the group, as well as related information, for each scenario.

Recounting all of the interesting findings discussed in Justice, Liability and Blame would take up too much space. Instead, this review canvasses the results which most directly challenge accepted common law or Model Penal Code positions, since those results have the greatest potential implications for the criminal law. Perhaps the most important overall finding in this regard is the significant conflict between the lay subjects' opinions and the theory undergirding the Model Penal Code (MPC). The Code generally endorses a "subjective" defendant-centered approach to assessment of criminal liability; the subjects, in contrast, tended to evaluate liability from an "objec-

---

2 The scale ranged from 11, representing the death penalty, to 0, representing liability but no punishment, and in addition had a thirteenth choice of "N", or no liability.

3 This review will not provide citations to the common law and Model Penal Code positions to which it refers. Robinson and Darley do an excellent job of providing a summary of, and citations to, these positions, and the relevant citations can be found on the pages of their book that are discussed (and cited) herein.
tive" harm-oriented perspective, similar to that found in traditional common law. A second important finding is the tendency of the lay people in these studies to recognize fine gradations in determining punishment. This tendency stands in contrast to the all-or nothing approach to liability generally found in the criminal codes.

Illustrations of both types of attitudes are found in Study 1, involving attempt.4 The MPC provides that any "substantial step" toward completion of a crime that is corroborative of intent is sufficient conduct for an attempt conviction. In contrast, Robinson and Darley's subjects would impose little or no liability in such a situation, even when the person has the purpose of committing the crime. Instead, they reserved significant punishment only for those who, acting with the intent to commit the crime, have engaged in conduct which demonstrates an unequivocal purpose or which comes dangerously close to completing the offense (which is the common law approach). The subjects also strongly rejected the Model Penal Code stance that the punishment for attempt should be identical to the punishment for the completed offense; instead, as under the common law, they indicated that attempt should be graded much lower than the completed crime. Further, contrary to both the MPC and the common law, the subjects believed that renunciation of a completed offense should result in significant mitigation. At the same time, they indicated that renunciation of an attempt should not be a complete defense to attempt liability, as it is under the Model Penal Code, but rather should be only a mitigating factor.

The subjects in Studies 2 and 3 also evidenced discomfort with the Model Penal Code's subjective approach and with the law's preference for rigid categories of liability. In Study 2,6 the subjects were given a series of scenarios in which the actor intended to kill someone else through poisoning, but which varied the risk of harm and the degree of harm that could occur. The subjects indicated that the key determinants of liability should be the actual probability the crime will occur (rather than the probability perceived by the actor) and the seriousness of the actual harm posed (rather than the harm intended by the actor). Similarly, in Study 3,7 the subjects required actual encouragement for accomplice liability, thus rejecting the Model Penal

5 In the following description of the results, I will make statements like "the subjects would impose" or "the subjects thought..." without specifying the precise percentage of subjects who thought that way and without attempting to delve into the strength of that belief. Methodological issues of this sort are dealt with in Part III.
6 Robinson & Darley, supra note 4, at 28-33.
7 Id. at 33-42.
Code's imposition of punishment for unsuccessful encouragement. Further, in contrast to both the MPC and the common law, they recognized gradations of accomplice liability depending upon the actual assistance provided, and under no circumstances were willing to give the accomplice the same punishment as the principal.

In Study 4, which looked at lay attitudes toward omission liability, the lay subjects felt that even a person with no duty toward a drowning person should be liable for a failure to save (except when there is significant danger in doing so). Conversely, even a person with a significant duty to act and an ability to do so in an easy and safe manner was not punished as severely as one with the same mental state who affirmatively commits the act. Again, these results are contrary both to the MPC and to the common law.

The subjects were also much more willing to provide a "justification" defense than most codes. For instance, in Study 5, the subjects were reluctant to punish a person who has the ability to retreat from an attack. In Study 6, the subjects recognized a complete defense for use of nondeadly force in defense of property, and assigned only minimal liability to those who use deadly force in defense of property. Similarly, in Study 7, the subjects seemed to believe that use of deadly force should be permitted in effecting an arrest even if no officer is involved, and that negligently killing an innocent person in the course of an arrest should result in little or no liability. All of these results are in conflict with the Model Penal Code and, to a lesser extent, the common law.

Differences between the subjects and the law were apparent in connection with mental state issues as well. Study 8 indicated that subjects were willing to assign liability based on negligence; at the same time, the subjects in Study 11 believed that negligence should be individuated (that is, reasonableness should be viewed from the perspective of a person "in the actor's situation"). While acceptance of negligence as a basis for liability is closer to the common law than the MPC (which recognizes such liability only in connection with

---

8 Id. at 42-50.
9 Id. at 54-64.
10 Id. at 64-72.
11 Id. at 72-79.
12 Id. at 84-96.
13 Id. at 116-23.
14 This phrase is found in several provisions of the Model Penal Code, see, e.g., MODEL PENAL CODE §§ 2.02(2)(c)-(d) (1985) (defining recklessness and negligence); id. § 210.3((1)(b) (defining manslaughter), and is designed to permit the factfinder to consider some (usually unspecified) individual aspects of the offender and his or her environment. See id. §§ 2.02 cmt. 4, 242.
homicide and a few other areas), the individuation of negligence is closer to the MPC position in those cases when it does permit punishment for negligent acts. Indeed, the subjects in Study 11 appeared willing to go further than the MPC in this regard. They indicated that a person’s heredity and intelligence should be considered part of the actor’s “situation”; even the MPC, while generally open to individuation, specifically labels these factors irrelevant in its commentary. A third study about mental state, Study 9, found that lay people were willing to impose accomplice liability (albeit at a minimal level) even in cases where a person is only reckless as to the outcome of his or her encouragement. This result also diverges from the legal view, which requires the accomplice to have either purpose or knowledge as to the principal’s conduct (perhaps because, in contrast to what the subjects in Study 3 would do, the law punishes the accomplice like a principal). Finally, Study 10, on voluntary intoxication, found that a person’s intentions as to causing death at the time of becoming intoxicated (as opposed to at the time of the death) is a very important variable to lay subjects, whereas it is irrelevant under the MPC and the common law.

Two of the three studies on excuses produced interesting divergences between lay and legal opinion. Study 12 found that, in contrast to the federal insanity test, but consonant with the MPC’s approach, volitional dysfunction due to mental illness is considered a ground for exculpation by the subjects. In Study 14 the subjects indicated that entrapment depends upon the degree of coercion by the government agent, not the target’s predisposition or the immoral nature of the police conduct (the two competing legal criteria for an entrapment defense). Thus, while the MPC and the common law make entrapment a separate defense, to the subjects entrapment is synonymous with duress and could be folded into that doctrine.

The final four studies have to do with what the authors categorize as “grading” issues. Not surprisingly, given the fact that they were drafted in the 1950s, the MPC’s provisions on rape are viewed as outdated by the subjects. In Study 15 the subjects indicated that spousal rape and rape involving homosexual couples deserved approximately equal punishment, contrary to the three-decade-old MPC provisions,

15 ROBINSON & DARLEY, supra note 4, at 96-105.
16 Id. at 105-15.
17 Id. at 128-39.
18 Id. at 147-55.
19 Study 13, id. at 139-47, studied lay reactions to immaturity and involuntary intoxication.
20 Id. at 160-69.
which treat spousal rape more leniently and homosexual rape more harshly. A similar rejection of traditional doctrine occurred in Study 16,21 where the subjects were unwilling to subscribe to the common law felony-murder doctrine. While the common law elevates to murder any killing which occurs in the course of a designated felony, the subjects assigned the felon only manslaughter liability when he negligently kills during a robbery, and only negligent homicide liability when a bystander kills a co-felon. (Further, consistent with the results in Study 3, this study found that subjects gave accomplices to felony murder much less punishment than the perpetrator.) In Study 17,22 the subjects did not see causation as an all-or-nothing construct, as the codes do, but rather correlate degree of liability with the extent of causation. Finally, in Study 18,23 when asked to sentence an individual who committed numerous similar offenses in a short period of time, subjects rejected both consecutive and concurrent sentences equivalents, instead opting for a sentence in-between these two traditional sentencing patterns.

In addition to the specific findings in these eighteen studies, the authors offer a few overarching conclusions,24 two of which have already been noted. As demonstrated in Studies 1, 2, 3, and 9, the type and probability of harm risked by the actor’s conduct are very important determinants of liability as far as the people in this research are concerned. Further, as illustrated in virtually all the studies, the subjects tended to grade liability on a continuum, rather than dividing the scenarios between those which demonstrated no liability and those which merited full liability. Two other relatively common findings are mentioned by the authors at the end of the book. First, a large percentage of the subjects were willing to assign a verdict of “liability but no punishment” in a number of situations (e.g., when the actor merely took a “substantial step” or when a stranger failed to save a drowning victim), suggesting to the authors that these subjects believe the moral message of the law may be important to enforce even when they think the particular person involved is “blameless.”25 Secondly, in a number of scenarios involving defenses (Studies 5, 6 and 7), the subjects were reluctant to impose punishment on defendants. The authors suggest this leniency might be due to a belief that the criminal justice system is ineffective in protecting citizens, who are thus entitled to take the law into their own hands; alternatively, the

21 Id. at 169-81.
22 Id. at 181-89.
23 Id. at 189-97.
24 Id. at 204-12.
25 Id. at 209-11.
authors speculate, it may reflect the belief that defenders of property and of other people should not have to make complex calculations as to what kind of threat is present and what kind of response to the threat is reasonable.\textsuperscript{26}

II. Relevance

A criminal law theorist might respond to the foregoing findings with a dismissive “So what?” Of what relevance to criminal law are the musings of unsophisticated lay people?

Robinson and Darley offer two answers to this question. First, they say that public opinion might help inform the retributive judgments that many think should dominate the culpability structure of the law. As the authors put it, “if a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person’s moral blameworthiness, at least suggesting that closer scrutiny of the reasoning behind the rule is required.”\textsuperscript{27} In other words, while community sentiment should not be considered dispositive of the issue, it can at least be “one source of determining what counts as the just desert.”\textsuperscript{28} Further, Robinson and Darley assert, when code drafters disagree about the “moral intuitions” of the community, “empirical findings . . . should be of considerable utility in resolving the controversy.”\textsuperscript{29}

The second reason the authors consider their empirical work useful is utilitarian in nature. Relying on other empirical work that suggests that people obey the law not just out of fear of punishment but because they want to be law-abiding citizens,\textsuperscript{30} the authors claim that a substantial gap between community sentiment and the criminal law may reduce the latter’s “moral credibility,” and thus people’s willingness to comply with it. In the authors’ words:

The legal system that the community perceives as unjustly criminalizing certain conduct is one that is likely to cause the society governed by those laws to lose faith in the system—not only in the specific laws that lead to the unjust result, but in the entire code and criminal justice system enforcing that code. The reverse is also true. A rule that is strongly and persistently supported by the community as accurately reflecting moral blameworthiness but that is not followed by the criminal justice system raises similar destructive possibilities. The community is likely to engage in extralegal vigilante actions, with all of the dangers that that

\textsuperscript{26} Id. at 207.
\textsuperscript{27} Id. at 6.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 214.
\textsuperscript{30} Id. at 6.
suggests.\textsuperscript{31} Thus, the authors argue, research such as theirs identifying differences between lay and legal opinion can assist in the utilitarian aim of ensuring compliance with the law, not only by the public at large, but also by those involved in the criminal process, such as offenders, witnesses and jurors.\textsuperscript{32}

The desert-based and utilitarian arguments offered by Robinson and Darley persuasively demonstrate why empirical research can stimulate thought about criminal law. But the authors sometimes sound as if they have been seduced by these arguments into believing that findings such as theirs are worth even greater attention. Consider, for instance, the conclusions they draw from the four general findings described at the end of the previous section. They state that the subjects' repeated preference for the harm-oriented approach to liability "suggests that codes ought to distinguish and punish more severely instances where the prohibited harm actually occurs or the prohibited conduct is actually consummated, as compared to instances where the harm or evil is only intended (but not carried to completion)."\textsuperscript{33} Given the subjects' consistent view of blameworthiness as a continuum,\textsuperscript{34} they argue that the substantive criminal law should recognize more grades of offenses than it does, and that even eight or nine grades might not be enough.\textsuperscript{35} They propose a third verdict in addition to guilty and not guilty, which they suggest could be called a "blameless violation," to reflect more accurately the subject's desires in those situations where they chose the "liability but no punishment" option;\textsuperscript{36} they add that, "In future research, one could allow for such verdicts from subjects and test the conditions under which they would use each,"\textsuperscript{37} presumably to see when the verdict should be used. Finally, the authors state that the studies on defense of property and person "suggest different grading than current law for most of the doctrines that concern errors in justification."\textsuperscript{38} With the exception of the third proposal,\textsuperscript{39} the authors do not explicitly advance any reason, other than the data, for adopting their suggestions.

\textsuperscript{31} Id. at 7 (footnotes omitted).
\textsuperscript{32} Id. at 6.
\textsuperscript{33} Id. at 206.
\textsuperscript{34} Id. at 208-09.
\textsuperscript{35} Id. at 198.
\textsuperscript{36} Id. at 212.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 206.
\textsuperscript{39} They note that the "blameless violation" verdict would avoid both the jury's "dilemma" in situations where the conduct is inappropriate but the act was blameless, and the "perversion" of the law that might occur in these cases, id. at 211-12, and also cite to Paul Robinson, Rules of Conduct and Criminal Adjudication, 57 U. CHI. L. REV. 729 (1990).
Given statements elsewhere in the book, it is clear that the authors do not adopt the position that their findings should necessarily drive the content of the criminal code. Nonetheless, the assuredness with which they offer these four changes is disconcerting. When the law explicitly or implicitly asks empirical questions (e.g., about what people believe, or about how they act), survey research of the type carried out here is highly germane. However, when the law is attempting to settle normative-moral issues, as it does when developing substantive criminal law, lay opinion should not be considered more than tenuously relevant, much less dispositive. Both of Robinson and Darley’s arguments, to the extent they are relied upon to suggest otherwise, are subject to serious challenge.

A. Relevance to Retributive Aims

There is no way to escape the fact that, at a very basic level, the values of the community govern the content of the criminal law: murder, rape and robbery are crimes because we, as a community, find these acts reprehensible. Indeed, the criminal law would not exist were it not for the “moral intuitions” of society. Further, when it comes to finetuning the scope of these laws (which is essentially what Robinson and Darley’s work is aimed at), there is no doubt that descriptions of community sentiment can provide theorists with useful food for thought; for example, for those readers who teach or practice criminal law, the brief description of Robinson and Darley’s findings set out above undoubtedly triggered numerous stimulating speculations as to why the subjects responded the way they did.

But to say that the results are interesting is not to say they should be adopted as policy, or even that they should help battling code-drafting groups decide which option to choose. Beyond establishing the fundamental issues upon which virtually everyone agrees (e.g., that unjustified homicide should be a crime), lay opinions about the content of the criminal code are of questionable value. In Robinson

---

40 For instance, in addition to those statements already noted, the authors describe the question as to whether legal codes should “be modified to match ... community standards or at least to move in their direction” as “an extraordinarily complex question.” ROBINSON & DARLEY, supra note 4, at 81. Robinson’s many other writings reflect the same view. See, e.g., Paul Robinson, Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 Va. L. Rev. 1 (1985).


42 Cf. Emile Durkheim, The Division of Labor in Society 102 (1960) (arguing that crime helps define and is defined by the “collective conscience” of the community).
and Darley’s vernacular, a good argument can be made that community rejection of a particular position of the criminal law—even if it is “overwhelming”—should generally not “count” in determining just desert.

The argument is simply this: the community upon which Robinson and Darley rely for their input on moral intuitions is generally uninformed—both in the sense that it has not thought deeply about the relevant issues, and in the sense that it does not know the legal context in which a given legal provision operates. Therefore, contrary to Robinson and Darley’s apparent suggestion, even knowledge that the community resoundingly disfavors a particular legal formulation should usually be irrelevant to deserts analysis; while such knowledge might trigger reconsideration of a given rule, it should not carry any weight in deciding whether that rule is morally defensible.

An anecdotal example may be the best way of illustrating this point. Each year on the first or second day of criminal law class I poll my brand new law students on the issue of whether the penalty for attempt should be the same as for the completed crime. Invariably, the vast majority answer no, in agreement with Robinson and Darley’s subjects in Study 1. This year I decided to ask the class the same question seven weeks into the semester. This second vote indicated that roughly 75% of the class now believed the penalty for attempt should be identical to the penalty for the completed crime. Presumably the students changed their minds because they understood that luck and fortuity do not diminish culpability, and because they recognized that a penalty differential is not necessary to “deter” attempters from completing the crime in jurisdictions which recognize a renunciation defense. The first reason for the change in position reflects a deeper appreciation of the blameworthiness assessment associated with the criminal law, while the second reason stems from knowledge of how different sections of the criminal codes interact with each other. Lay subjects are unlikely to have either perspective. Thus their answer to the penalty question cannot be taken seriously as a normative matter.

One might object that the students’ second vote is not necessarily any more correct than the first vote. After all, prominent scholars have sought to justify, on theoretical grounds, a penalty differential between attempt and the completed crime. Accepting this point

43 E.g., GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 67 (1988):

The imperative to do justice requires that we heed the suffering of the victims, that we inquire at trial whether the defendant is responsible for that suffering, and we adjudge him guilty, if the facts warrant it, not for antiseptically violating the rules of the system, but for inflicting a wrong on the body and to the dignity of the victim.
does not thereby resurrect the usefulness of opinion surveys, however. The very argument that one position is more correct than the other renders community sentiment irrelevant, or at least of only rhetorical value; if theoretical arguments are necessary for determining when lay opinion should influence retributive judgments, one doesn't need the opinion in the first place.\textsuperscript{44}

This example suggests a related reason for distrusting lay opinion as a basis for retributive judgments: its variability. The change in vote on the part of my students illustrates that one's position depends upon the information at one's disposal; thus, "overwhelming" community support for a particular stance may in fact be quite fragile. Further, the effect of more "information" is not always felicitous. An approach relying even partially on community sentiment is subject to significant changes based on dramatic events or political fads that may distort lay reasoning. The justification studies in Robinson and Darley's book—all of which registered a permissive attitude toward acts committed in defense of self or property—may be a prime example of this phenomenon. More specifically, they may be an artifact of recent "self-help" attitudes birthed during an era of routine harping on the "crime problem" by the media and politicians. Robinson and Darley themselves express surprise at their subjects' stance on the use of deadly force to effect an arrest; as they state "[w]e had expected that the use of deadly force would be more widely condemned in cases where . . . the damage is already done and the force is being used aggressively (rather than defensively) to arrest the offender."\textsuperscript{45} Yet the only way to justify giving this finding less credence in determining just deserts than any of the other findings of their research is to make judgments based on policy and theory, once again rendering secondary the empirical results.

None of this is meant to diminish the authors' initial statements about the importance of empirical work to deserts analysis. Their findings certainly could, and probably will, make theorists, especially adherents of the MPC, rethink their positions. This cautionary effect is all to the good. The primary criticism, again, is that the authors seem to forget this relatively collateral role for empirical research

\textit{Id.} at 67.

\textsuperscript{44} Lest the attempt example seem too anecdotal (i.e., isolated), I did the same "experiment" with accomplice liability. In the first vote the vast majority of students indicated that accomplices who merely attempted to assist (but were unsuccessful in doing so) were either not liable or only minimally so (analogous to the results in Study 3); several weeks later, after having studied accomplice liability (but without having discussed the penalty issue), virtually the entire class indicated it thought such a person should be punished, and roughly one-quarter thought he should be punished at the same level as the principal.

\textsuperscript{45} ROBINSON & DARLEY, supra note 4, at 79.
when they come to the last part of the book and jump into making recommendations.

B. RELEVANCE TO UTILITARIAN AIDS

The second argument that Robinson and Darley make for paying attention to empirical results like theirs is the utilitarian notion that compliance with the criminal law is most effectively encouraged by ensuring that it does not stray too far from community mores. As with the first argument, this contention can only be pushed so far. To the extent it is used to justify changing theoretically sound law because of community sentiment, it needs to be advanced with caution.

The assumption that a gap between lay opinion and law will undermine willing compliance is open to question on a number of grounds. First, of course, it is not clear whether people are aware of the types of gaps that Robinson and Darley identify. Second, even if they were, it is not clear that the effect would be disobedience to the criminal law. Most of the research which supports the legitimacy-compliance correlation looks at the extent to which people will obey the laws they find illegitimate (e.g., prohibitions against use of marijuana or gambling), not at whether the presence of laws viewed as illegitimate increases disobedience to all laws. Other research suggests that one's willingness to obey the law depends to some extent on one's respect for legal authorities, as opposed to the law itself. Thus, the research on the legitimacy-compliance correlation presumably says very little about whether disagreements over relatively arcane aspects of the law of homicide, rape or theft (the crimes that are found most frequently in Robinson and Darley's scenarios) will affect compliance either with respect to those laws or to criminal laws generally. One would like to know, for instance, whether there is any evidence of increased disrespect for the law in those jurisdictions which follow the MPC approaches so disfavored by Robinson's and Darley's subjects. At the least, one would expect that the gap would have to be fairly significant and well-known for it to have this effect.

46 I have cited Robinson for the proposition that law which follows community sentiment is more likely to be followed. Christopher Slobogin, Dangerousness as a Criterion in the Criminal Process, in LAW, MENTAL HEALTH, & MENTAL DISORDER 365-66 (Bruce Sales & Daniel Shuman eds., 1996). But the further proposition that theoretically sound law should be changed so that it is more likely to be followed is more problematic.
47 ROBINSON & DARLEY, supra note 4, at 202-03.
48 Id. at 203.
49 Indeed, Tyler, who is the leading researcher in this area, states at several points in his book that people usually obey laws with which they disagree. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 45-46, 64 (1990) ("People generally feel that law breaking is morally wrong, and that they have a strong obligation to obey laws even if they disagree with them.")
Further, as Robinson and Darley recognize, even assuming that a gap between lay opinion and the law could create disrespect for the law and that this disrespect would substantially affect compliance, changing the law is not the only option. Properly explained, the law can affect public opinion as well as jury behavior, as the history of Brown v. Board of Education demonstrates. Thus, on this view, empirical work is again only marginally relevant to the normative enterprise of devising criminal law. Rather, its main importance would lie in alerting policymakers to those rules which most need to be explained to be public, both as a way of facilitating deterrence and of ensuring compliance. On the assumption that the average jury would have similar views to the community as a whole, information about a "gap" would also be very useful to litigators, who could use the information in making arguments to and proposing instructions for the jury.

If this educational endeavor fails, we may be faced with a stark choice between two rules: a rule that reflects sensible just desert principles, and a rule that does not but that is more likely to be followed and less likely to create disrespect for the system as a whole. Perhaps we should choose the latter. It appears that the drafters of the Model Penal Code made just such a choice when they veered from their usual subjective approach by creating a differential in penalty between attempted murder and murder and by retaining a harm element in many crimes. On the other hand, perhaps the drafters should have had the courage of their convictions. If a criminal law class can have its collective mind changed, perhaps the populace as a whole can as well.

III. Weight

The argument to this point has been that, while Robinson and Darley's findings can suggest hypotheses for theoreticians, and can also help policymakers and litigants pinpoint those situations where...
lay persons are most likely to misunderstand the purpose of the crimi-
nal law, they are rarely of assistance in deciding whether a given rule
should be promulgated. It appears that Robinson and Darley disagree
with this position; perhaps others do as well.\textsuperscript{55}

However one comes out on the relevance issue, one still needs to
address the weight issue, which can be posed as follows: How much
credence, for any purpose, should be given results like those pro-
duced by Robinson and Darley? To social scientists, the answer to this
question reduces to an assessment of methodology. Here, as with the
relevance issue, Robinson and Darley recognize possible problems,
but occasionally are less self-critical than they could have been. A few
of these potential flaws will be noted here.

First, as pointed out earlier, the size of the sample in each study
was relatively small, hovering around forty.\textsuperscript{56} If the samples had been
randomly selected, this number might have been barely sufficient as a
statistical matter. However, Robinson and Darley state that they
"grabbed whomever [they] could get their hands on,"\textsuperscript{57} which is
hardly a random selection process. At the same time, this sampling
flaw probably was not decisively damaging. The authors’ report on
the demographic traits of 307 of the subjects suggests a fairly diverse,
representative group overall (although the socioeconomic status of
these subjects is probably above the national median).\textsuperscript{58} Moreover,
the authors emphasize that these are merely “pilot” studies, designed
to test the efficacy of a larger project.\textsuperscript{59}

A second problem with ascribing any moral importance to the
types of results obtained by Robinson and Darley is that we do not

\textsuperscript{55} Fletcher does, at least sometimes. See, e.g., \textit{Fletcher}, \textit{supra} note 43, at 66 (where, in
connection with the penalty-for-attempt issue, he describes with disapproval “[t]he modern
approach to crime [which] dismisses as subrational the argument that people simply feel
that actually killing someone is far worse than trying to kill”). Similarly, Holmes is well-
known for his statement that the “felt necessities of the time,” among other things, “have
had a good deal more to do than the syllogism in determining the rules by which men
should be governed.” \textit{Oliver Wendell Holmes, The Common Law} 1 (1881). Yet, of
course, both men have constructed elaborate theories of the criminal law, relying on much
more than their interpretation of community sentiments.

I must admit that I too have suggested that community sentiment might be relevant in
determining the content of the criminal law, specifically in fixing the scope of the insanity
rely heavily on justification principles in determining the criminal responsibility of men-
tally ill offenders, a case for replacing traditional insanity tests with a “quasi-subjective”
justification defense might be bolstered). This review serves as a caveat to that assertion.

\textsuperscript{56} \textit{Robinson} & \textit{Darley}, \textit{supra} note 4, at 223.
\textsuperscript{57} \textit{Id.} at 222.
\textsuperscript{58} \textit{Id.} at 223.
\textsuperscript{59} \textit{Id.} at 10-11.
know if the subjects were basing their liability assessments on “moral intuiton,” as Robinson and Darley assert, or on some other ground. Conceivably, deterrent, incapacitative or “irrelevant” concerns could have been driving their decisions. The finding in study 15 that subjects thought homosexual acts should not be criminalized may be attributable to a belief that such acts are not blameworthy, or it may merely reflect the assumption that, while immoral, the acts are not deterrable, or would divert too much of society’s resources or pry too seriously into privacy if prosecuted. The finding in Study 16 that felony perpetrators should not suffer as much punishment when the victim of the felony, rather than the perpetrator, kills another may reflect a conclusion that the perpetrator in the former scenario is less dangerous, rather than less blameworthy.

Third, because it used written scenarios, the research may suffer in terms of what social scientists term “external validity,” or the extent to which the subjects’ responses would be replicated in the real world. In this regard, scenarios are better than conclusory questions (which might merely ask, for example, whether the penalty for attempt should be the same as for the completed crime). But they clearly cannot simulate an actual offense, with all the added emotional and factual elements. In the authors’ defense, there is an inherent tension between external validity and “internal validity”—the more realistic one’s experimental framework becomes, the less control one has over the independent variables because there are so many of them. The scenario-approach allowed the researchers to modify only the variables in which they were most interested. Perhaps more importantly, in one significant sense the external validity of this research was quite high; like Robinson and Darley’s scenario-readers, policymakers usually consider criminal law provisions in relatively abstract terms as well.

A fourth potential problem with the research is that it used a “within-subjects” design. In other words, rather than giving different versions of the same scenario to different subjects, the same subjects received all variations of the scenario. The authors note that this design allowed them to avoid the distortion of results that might occur in a between-subjects design, when everyone exposed to one version

---

60 See Robinson & Darley, supra note 4, at 178-79.
62 For example, in the omission study it allowed them to vary the inconvenience of saving the victim and the relationship between the victim and the potential rescuer, with all else held constant.
of a scenario could be more “conservative” (or more “liberal”) than those exposed to a second version of the scenario. But this problem can easily be avoided by adequate randomization of the samples that receive the various scenarios. At the same time, the within-subjects approach creates a problem of its own; as the authors note, the variables being tested will be very obvious to the subjects, who may conclude that they should therefore register some difference between the scenarios even if they in fact see no difference. Although the authors assured the subjects that it was acceptable to find no liability differences between the scenarios, and also report that the subjects “frequently” gave “no difference” responses to clearly different scenarios, the problem cannot be easily dismissed. Using a between-subjects design, I gave my students—before we had discussed the relevant topics—most of the scenarios in Study 1 (on attempt), Study 3 (on accomplice liability) and Study 4 (on omission liability). Although the results I obtained were, for the most part, very similar to those obtained by Robinson and Darley, a couple of them were significantly different, in the hypothesized direction of finding less of a liability difference between scenarios than did Robinson and Darley’s within-subjects design.

A fifth possible problem with the research is the use of a ratings scale with uneven intervals. One of the innovations of Robinson’s and Darley’s empirical project is their thirteen-point liability scale. Rather than forcing the subjects to choose between two or three options, as is common in most research about the criminal law, this scale allowed subjects to indicate their beliefs along a continuum ranging from no liability to the death penalty. In an effort to track the typical offense classification scheme in the United States, however, the points on the scale do not represent equal time increments (e.g., 2 years, 4 years, 6 years), but rather are heavily loaded on one end toward minimal penalties (no liability, liability without punishment, 1 day, 2 weeks, 2

63 ROBINSON & DARLEY, supra note 4, at 221.
64 Id. at 222.
65 Id.
66 The two significant differences: in the attempt study, my students assigned almost the same liability to the “unequivocality” scenario as they did to the “dangerous proximity” scenario, contrary to what Robinson and Darley found (see id. at 20 tbl. 2.2), and in the accomplice study they assigned almost the same liability to the “minimal help” scenario as they did to the “necessary help” and “mastermind” scenarios, again contrary to what Robinson and Darley found (see id. at 36 tbl. 2.9). On the other hand, as the text notes, my students’ other liability ratings were very similar to those produced by Robinson and Darley’s, not just in relative but in absolute terms. Furthermore, I only had 9 students in each “cell,” well below what a good sample should be. My only point is that a between-subjects approach can produce different results than a within-subjects approach, with the latter perhaps exaggerating ratings variations between different scenarios.
months, 6 months, 1 year) and "geometrically" increasing penalties on the other (3 years, 7 years, 15 years, 30 years, life imprisonment, and the death penalty). Other research suggests that subjects using this type of scale may treat the intervals as equal rather than uneven.\textsuperscript{67} If so, any findings about absolute liability may be significantly distorted. Since Robinson and Darley were primarily interested in relative liability assessments, this artifact, if it exists, is not a significant problem for them, but it does call into question one aspect of their research, to be noted below.

A final observation has to do not with the methodology of the research but with the interpretation of the results. In general, Robinson and Darley do a superlative job presenting and describing their results through tables, charts and text. One concern, however, is that their interpretations of the results rely heavily on the averages (i.e., means) of the subjects' liability ratings. Using an average as a unit of measurement can be misleading, for a number of reasons. For instance, it may mask an "even" distribution, in which there is no clustering of ratings, but rather all parts of the liability spectrum are represented. Or it may mask "bimodal" distributions, i.e., distributions which occur when subjects are roughly evenly split between a high and a low liability rating. One way of discovering whether the former, and to some extent the latter, type of distribution has occurred is through computing the standard deviation, which provides a measure of the "variance" from the mean. Robinson and Darley report that for many scenarios the standard deviation was around 1.39, which suggests high agreement among the subjects, but that for about 20 percent of the scenarios it exceeded 3.50, a figure which suggests considerable disagreement among the subjects.\textsuperscript{68} Since the authors do not report the standard deviations for any given study, we cannot be sure how much confidence to give any particular results.

Did these various characteristics of the authors' research methodology skew their findings? There is no way of knowing until research using other methodologies is undertaken. Consider for a moment, however, the possible effect these characteristics may have had on the four primary findings described in this review. The finding that the subjects view harm to be more important than subjective liability could be due to the sterile nature of the scenarios, which may fail to

\textsuperscript{67} Paul Slovic & John Monahan, Probability, Danger, and Coercion: A Study of Risk Perception and Decision Making in Mental Health Law, 19 LAW & HUMAN BEHAV. 49, 61-62 (1995) (in comparing results using an even-interval scale and a uneven-interval scale, the numbers on the latter scale "appear to have been meaningless in an absolute sense, though they were consistent and meaningful in a relative sense.").

\textsuperscript{68} ROBINSON & DARLEY, supra note 4, at 226.
get across the evilness of a non-harmer or the extent to which luck contributed to the absence of harm. The subjects’ penchant for grading on a continuum might reflect the variable-enhancing effects of the within-subjects design. The selection of the “liability but no punishment” option might not have been a conscious decision to recognize inappropriate but blameless conduct, but merely an effort to assign liability at the low end of the scale. And, as with the subjects’ rejection of the subjective liability approach, the apparent findings of vigilante tendencies on the part of the subjects might reflect problems with external validity (is it really O.K. to use deadly force to defend property or arrest?). Alternatively, as the authors themselves recognize, the averages reported in the justification studies might mask a bimodal distribution caused when subjects who are asked whether a defense should be recognized split relatively evenly in their answers.

Again, the foregoing comments are speculation, offered merely as a way of demonstrating the difficulty of obtaining a true reflection of the community’s views. In general, Robinson and Darley’s methodology is meticulous and one that should be emulated by others, with only small adjustments. Some specific positive aspects of their approach included “manipulation checks” (i.e., asking questions to determine whether the subjects’ understanding of the scenarios conformed with the researcher’s intent) and randomizing the presentation of the scenarios, so as to avoid order effects. The scenarios themselves, although sparse, cleverly presented the relevant legal issues in factual form. In short, the authors’ methodology is far superior to that used by other researchers in the criminal law area.

IV. CONCLUSION

It may be, as Roscoe Pound stated, that “[i]n all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end.” But, at least in the context of finetuning criminal law, it will usually be preferable to eliminate any divergence by changing the public’s standard rather than changing well-reasoned legal provisions, both because the public’s uninformed “moral intuition” is suspect, and because we cannot be sure what that intuition is. Even if we cannot change the public’s standard in such a situation, we should still resist any tendency to adopt it; in the usual case, rather than construct a criminal code based on the unschooled, variable intuitions of the

---

69 Id. at 294 n.7.
70 Id. at 220-22.
community, we should let the jury and the sentencing process operate as occasional safety valves.\textsuperscript{72}

The conflict between democracy and justice is a large subject and has only been hinted at here. It is worth thinking about at length.\textsuperscript{73} Robinson and Darley’s \textit{Justice, Liability and Blame} provides an excellent springboard for doing so. At the same time, it generates numerous interesting hypotheses for criminal theoreticians. Finally, it teaches useful lessons to all those who would do social science in the service of the law.

\textsuperscript{72} Robinson and Darley do not like this solution. They argue that reliance on jury nullification violates the principle of legality, and has other damaging effects as well. \textsc{Robinson & Darley, supra} note 4, at 213. But all of their arguments assume that what the jury decides is morally correct. Changing a law so that the jury won’t nullify is no better than changing a law simply because the community doesn’t like it. With respect to using sentencing as a safety valve, they correctly point out that, in many jurisdictions, sentencing guidelines are too rigid to allow much flexibility and that, in any event, judges may not reflect community sentiments in the way the jury does. \textit{Id.} at 213-14. Whether these constraints on sentencing are good or bad depends, again, on what one thinks about democratic influences on punishment and whether the punishment scheme, whatever it is, can be rationalized on desert and other principled grounds.

\textsuperscript{73} \textit{Cf.} \textsc{Lon L. Fuller, Anatomy of the Law} 48 (1968) (describing the difference between “made” law and custom as “pervasive and perennial in legal philosophy” but avoiding saying which of these viewpoints is “‘right’”).
CRIMES INVOLVING ART

JOHN A. BARRETT, JR.*


Art crime is big business. It is estimated that thieves steal over $1 billion worth of art each year.1 Combining these losses with additional losses from other types of art crime, such as fraud, forgery, vandalism, and lost productivity in the workplace due to violence arising in connection with art crime, makes art crime the second largest international criminal endeavor—only drug smuggling involves more money.2 John Conklin’s Art Crime attempts to bring a framework to the study of art crime.

Professor Conklin defines “art” as those types of objects typically displayed in a museum of fine arts.3 Obviously, this narrow definition ignores a number of types of art that are also subject to criminal behavior.4 “Art crimes” are defined as “criminally punishable acts that involve works of art.”5 However, Professor Conklin frequently strays from this strict definition by giving examples of various types of behavior that, although not criminal, some would argue should be criminal.6

* Assistant Professor of Law, University of Toledo College of Law. B.A. 1985, Amherst College; J.D. 1988, Harvard Law School.


3 See CONKLIN, supra note 1, at 4.

4 E.g., Conklin’s definition does not cover performing artists, and he does not discuss the significant trade in pirated recordings.

5 Id. at 3.

6 See, e.g., id. at 101-07.
This book is at its best when describing how the art world works, the various types of art crimes, as well as specific art crimes that have been committed. Overall, Conklin's numerous anecdotes and insights into the art world make Art Crime an enjoyable book that is sure to educate all but the most knowledgeable members of that mysterious world.

Unfortunately, the depth of analysis in Conklin's book is inherently limited by the paucity of research on this subject. This lack of research forces the author to rely on news articles and other reports about particular art crimes in lieu of studies about the subject as a whole. The result is a compendium of anecdotes regarding behavior in the art world and types of art crimes. Professor Conklin concedes that he has not prepared a cohesive theory of art crime, in part due to lack of available data and in part due to the variety of art crimes. However, he hopes that drawing attention to the scope and types of art crime will stimulate further research.

The weaknesses of this book are its lack of statistical information, which precludes a meaningful understanding of art crime as a whole (and of particular types of art crime); and the superficial treatment of the applicable legal standards, which leaves the reader with a sense of hopelessness as to what can be done to combat the sociological forces causing the proliferation of art crimes. In fact, many of Conklin's suggestions for curbing art crime seem unrealistically naive after reading the rest of the book. The first weakness is not the fault of the author, given the lack of information available in this area of inquiry. In fact, he frequently notes the need for additional data and study in this area and acknowledges the difficulties presented by a lack of meaning-

---

7 Several notable exceptions relied upon by Professor Conklin include BONNIE BURNHAM, THE ART CRISIS (1975); DARIO GAMBONI, UN ICONOCLASME MODERNE: THÉORIE ET PRATIQUES CONTEMPORAINES DU VANDALISME ARTISTIQUE (Zürich, Institut Suisse Pour L'Étude de L'Art; and Lausanne, Les Editions D'En-Bas 1983); Gary Allen Fine, Cheating History: The Rhetories of Art Forgery, EMPIRICAL STUDIES OF THE ARTS I 75-93 (1985); and Gary Allen Fine and Debra Shatin, Crimes Against Art: Social Meanings and Symbolic Attacks, EMPIRICAL STUDIES OF THE ARTS III 135-52 (1985).

8 CONKLIN, supra note 1, at ix. Unfortunately, when Conklin is discussing these ethically questionable actions, he rarely opines as to the desirability of criminalizing them.

9 Id. at 2.

10 Id. at 3-7. Unfortunately, even though this book calls attention to the need for more study of art crime, data will remain difficult to obtain due to the difficulties in dealing with multiple jurisdictions' different approaches to what constitutes art, crime against art, and methods for keeping statistics on art crime. Another barrier to obtaining reliable data is a reluctance by collectors, museums, and others to report art crimes out of fear of exposing the vulnerability of their collections, fear of being perceived as fools (for purchasing a forgery) and fear of scaring away potential donors (if an art museum's collection appears overly vulnerable). Id. at 3-4, 261.
ful statistics. The second weakness may be nothing more than the author's choice as to what the book should focus on, but various legal scholars have addressed the flaws in current laws pertaining to art crime and have suggested ways in which these laws can be improved.

If Conklin had chosen to examine these laws more closely, he might have found not only better potential solutions for curbing art crime but also a better understanding of the sociological structure of art crime. A final problem with *Art Crime* is that Conklin, as a sociologist, tends to focus on organizational structures, which, when coupled with the lack of data in this area, leads to a simplistic, common sense treatment of certain subject matters, such as how thieves steal art.

Conklin begins with a discussion of how art obtains value. Next, he covers various types of art crime and then discusses art vandalism. In the final chapter, he recommends ways to reduce art crime. With limited exceptions, the book is an exhaustive collection of anecdotes describing various art crimes, from the theft of several Dutch Masters paintings from Amherst College to illicit trade in Zuni war god statues. Current laws and international conventions affecting trade in art and art crime are handled in a cursory manner. Although Conklin points out that there are few convictions, sentences are light and some countries make "laundering" stolen artwork relatively easy, he rarely looks at the laws at a level of detail that would permit one to evaluate where such laws could be improved. When he refers to the legal treatment applied to a dispute, he tends to focus on the outcome of the case, rather than the legal standard being applied. Conklin prefers to discuss the general behavior one encounters in both the legitimate and illegitimate art world.

---

11 Id. at 6 (suggesting that data should be collected on art crimes instead of just on art works).
13 See Conklin, *supra* note 1, at 153-85 (describing robbery, burglary, larceny, looting, casing the site, use of insiders).
14 Id. at 185.
15 Id. at 201.
16 See, e.g., id. at 128-29, 161, 202, 205.
17 Given that Conklin is a sociologist, his tendency to focus on behavioral tendencies is not surprising. However, even when describing various types of behavior in the art world (both legal and illegal), including possible motives for such behavior and arguments for
II. THE VALUE OF ART

In Chapter One, Conklin explains how art obtains value. According to Conklin, art has both economic and cultural value.

As proof that art has cultural value, Conklin uses the example of an icon of St. Irene stolen from a Greek Orthodox church in Queens, New York, in 1991. The parishioners were overwhelmed by the return of the stolen icon, even though it had been stripped of its gold, silver, and jewels valued at over $800,000. Thus, the congregation attributed a cultural or spiritual value to the work of art independent of the economic value of the adornments previously attached to it.

In addressing the issue of economic value, Conklin argues that the value of art depends more on a "shared belief in value rather than on the law of supply and demand." Although economists may dispute this claim (because a change in the shared belief in value could be seen as a change in demand), it is clear that a significant increase or decrease in public confidence in the value of art can dramatically affect prices. As a result, auction houses, dealers, and others involved in the art world have developed strategies to maintain public confidence in the value of art, and thereby the prices of art.

Conklin lists a number of factors that affect the economic value of art. These include the artist that produced the piece, collectability, freedom of enjoyment, the perception of art as a good and against prohibiting such behavior, Conklin frequently avoids taking a position regarding whether such behavior should be legal. See, e.g., id. at 102-106, 128.

However, this example may be flawed in light of the recent debate surrounding the actual value of such adornments and whether the priests in charge of the church were engaged in a scheme to defraud an insurance company by overstating the value of adornments (many of which may have been worthless). See Fred R. Bleakley, Questions of Belief Arise Once Again Over "Weeping Icon", WALL ST. J., July 15, 1994, at A1. In spite of the controversy surrounding this particular example, there can be little doubt that art has cultural as well as economic value.

Conklin, supra note 1, at 16.

Interestingly, Burnham has argued that, unlike classic supply and demand analysis, an increase in the supply of quality art can actually raise prices (through increased publicity that thereby increases demand). Burnham, supra note 7, at 208. However, Conklin points out that a decreased supply of quality art can also raise prices by creating pressure for increased bidding on the quality pieces available.

People collect art not only for investment purposes, Conklin, supra note 1, at 26, but also because it is enjoyed as an end in itself and because of the thrill in making acquisitions. Id. at 21. "The act of building a collection legitimizes acquisitiveness by giving it a noble purpose..." Id. at 22. Collectors enjoy completing a gestalt. Id. "Art collectors see their possessions as extensions of themselves, as a way to measure and present themselves to the world." Id. However, if this analysis is correct, to the degree art reflects one's good taste and aesthetic insight, a fake or forgery might serve the same function as an original (but would not have the ego-enhancing attribute of allowing the owner to say he or she has an original). However, once a piece of art is found to be a fake or a forgery, it becomes...
JOHN A BARRETT, JR.

investment, and the distribution network.

Perhaps the most interesting of these factors is the artists themselves. During the Renaissance, people began to perceive artists as "creative geniuses," and as a result, the public started giving artists individual recognition. \(^{24}\) This belief, that great artists are particularly gifted, has led to people judging art more by who produced it than by its intrinsic aesthetic quality. \(^{25}\) This premise is evidenced by the change in value of a work of art that has been reattributed to a lesser or greater artist. \(^{26}\) Obviously, this is in part due to art’s function as a potential investment vehicle and people’s perception that art created by a well known artist will maintain a higher value.

Conklin notes that because of the potential change in value that can occur after a reattribution, there can be significant pressure on historians and critics “not to reattribute works to” lesser known artists and that “museums have occasionally rejected or ignored reattributions by even highly esteemed scholars.” \(^{27}\) Conklin, however, does not indicate the frequency of such occurrences, nor does he examine whether the failure to reattribute or to recognize a reattribution has any criminal implications. On the one hand, failure to reattribute a work or rejecting a reattribution based on such pressures would appear to be a fraud on potential buyers or the viewing public. In the context of a sale, significant damage can easily be shown (the poten-

---

23 Conklin notes that some people collect art so they can enjoy it without some of the impediments present in museums, and as a form of conspicuous consumption allowing the merchant class to obtain the trappings of wealth. Conklin, supra note 1, at 23-24. Conklin downplays the significance of the latter idea by stating that although auction sales receive considerable publicity, most art is sold privately and many buyers try to avoid publicity due to a fear of potential thefts (therefore, he contends for most collectors consumption is not conspicuous). Id. at 24. However, Conklin is not very persuasive in his argument. Even private unpublicized acquisitions are almost always conspicuous in a limited sense because the works of art are displayed in the collector's home or office. The circle of people the collector most desires to impress, his or her colleagues and social acquaintances, are therefore made aware of such consumption.

24 Conklin, supra note 1, at 18.

25 Id. at 17.

26 Id. at 18-19. A number of factors affect the reputation of a particular artist: whether the artist produced a critical mass of work; the total output of the artist; whether survivors of the artist are hoping to perpetuate his or her reputation; whether the artist is linked to a particular school, period or style; and whether the artist was connected to any historical or other controversies. Id. at 20-21 (citing GLADIS ENGEL LANG AND KURT LANG, ETCHED IN MEMORY: THE BUILDING AND SURVIVAL OF ARTISTIC REPUTATION xi (1990)). However, some artists never become famous simply because they do not play the game. See JOHN B. MYERS, TRACKING THE MARVELOUS: A LIFE IN THE NEW YORK ART WORLD 157 (1983).

27 Conklin, supra note 1, at 20.
tial change in price), and the buyer is almost certainly relying to some degree on the attribution (as opposed to the piece's aesthetic qualities) in buying any old, extremely expensive work of art. However, given the inherent uncertainty involved with the attribution process, "fraud" by a party choosing not to reattribute would be nearly impossible to prove.

One could also argue that the buyer at some level knows or should know about the uncertainties of attribution anyway. Certainly, when museums purchase art they are fully aware of such risks. With regard to museums or auction houses ignoring reattributions by noted scholars, one can argue that the museum should be required to disclose any such controversy. The problem, of course, is when a controversy arises—does it occur when one crackpot announces a reattribution or does a controversy concerning reattribution require a consensus among a group of scholars?

Also of interest is that people buy art based on the general perception that art is a good investment. However, a number of studies have shown that this is not the case. In fact, most art has no real resale value. However, the fact that people perceive art as a good investment attracts more people (and money) to the world of art. Not surprisingly, museums add value to works of art by legitimating the artists and enhancing their reputation. Additionally, museums have historically competed for some of the best pieces, thereby driving up prices in the market as a whole.

Less obvious (and more questionable) is how the distributional network affects economic value. Participants are art dealers, auction houses, and scholars/critics. Dealers try to educate their potential customers to increase awareness about art and the desire to buy it. Additionally, scarcity helps increase value, so some dealers try to restrict the output of artists whose works they display. Dealers also face the challenge of pricing art high enough so that it appears desirable, but not so high as to be out of reach to the potential consumer. Conklin discusses a common practice of dealers of giving discounts to prominent collectors. Although at first glance this appears no dif-

---

28 Id. at 63.
29 Id. at 32; see also Kelly, supra note 2, at 50.
30 Conklin, supra note 1, at 31-32.
31 Id. at 32.
32 Id. at 33.
33 Id. at 34.
34 Id. at 36.
35 Id. at 37-38.
36 Id. at 38.
37 Id.
ferent from procedures employed by merchants in other lines of business, having a prominent collector own a particular artist’s work can enhance the value of that artist’s work in general. Thus, by encouraging a renowned collector to purchase, at a discount, a piece of work by a particular artist, the dealer increases the value of the artist’s other pieces the dealer is trying to sell.\textsuperscript{38}

Conklin does not address the ethics of such dealer discounting, but he does mention that some commentators have argued that art should be regulated in much the same way securities are regulated in the United States.\textsuperscript{39} The first problem with this idea is that it invades the privacy of the well known collector. Most people would not want the gallery from which they bought a work of art from to discuss with complete strangers what they paid, especially considering the pride of ownership usually associated with art collecting.\textsuperscript{40} The same goal, of protecting the future buyers from “overpaying,” could just as easily be met by prohibiting galleries from disclosing to prospective purchasers who has already bought pieces by a particular artist. This rule would serve the additional goal of combatting the artificial price inflation current disclosure practices create and would protect the privacy of well-known collectors. Obviously, such an approach will not prevent prospective purchasers from learning about ownership of an artist’s work by particularly high profile people (those who are hanging their works in museums or being written about by gossip columnists). However, how would a price discount on acquisitions by such people be disseminated? It is hard to imagine a regime forcing such benefactors of the arts to disclose the purchase price of a painting on the wall of the museum where it is hanging.

Auction houses possibly have been the most visible contributors to the perception of art as a valuable investment. Newspaper articles touting record sales prices for works of art and describing people who have become rich selling items found in attics have called considerable attention to the potential value of art.\textsuperscript{41} Auction houses have also given legitimacy to collecting objects previously thought of as uncollectible.\textsuperscript{42} Auction houses have engaged in a number of promotional strategies to help increase the value of art. One of these strategies is to establish an affiliated publishing house that publishes monographs

\textsuperscript{38} Id.

\textsuperscript{39} \textit{I.e.}, the fact that a painting was sold at a discount to a known collector should, arguably, be disclosed to other potential “investors.” \textit{Id.} at 270.

\textsuperscript{40} \textit{See supra} notes 29-32 and accompanying text.

\textsuperscript{41} CONKLIN, \textit{supra} note 1, at 39.

\textsuperscript{42} \textit{Id.} at 40.
to attract attention to the types of works the auction house sells.\textsuperscript{43}

While not all people will view these activities as unethical, many people would consider a number of the activities in which auction houses engage as, at the least, questionable. For example, in a $53.9 million sale of Van Gogh's \textit{Irises}, Sotheby's, a respected auction house, agreed, prior to the sale, to lend one bidder "half of whatever he bid" for the painting, using the work of art as collateral for the loan.\textsuperscript{44} Auction houses also use price guarantees and set secret reserves below which they will not sell the object.\textsuperscript{45} Although a secret reserve may not itself be objectionable, the fact that auction houses frequently pretend that they have sold paintings to fictitious bidders when the secret reserve has not been met can be seen as a method of creating the impression that art is selling for more than people are actually willing to pay for it. This artificial price inflation helps reenforce the perception that art is both valuable and a good investment. Additionally, it can be characterized, potentially, as a form of fraud.\textsuperscript{46} There seems to be no legitimate reason for an auction house to not openly disclose that a painting was not sold because its reserve was not met.

Probably the most troubling issues raised by Conklin in this chapter are the practices of some scholars, who affect value by performing scholarship on works of art and by attributing works to particular artists. One such undertaking is to perform scholarship on lesser known artists with the financial backing of a dealer. The dealer provides such backing since the artist's work becomes more valuable based on the research and publications about the artist.\textsuperscript{47} Even worse, dealers and artists have at times given works to critics. The artist is subsequently praised by the critic, thereby increasing the value of the artist's work and concurrently the value of piece given to the critic. Although Conklin discusses these activities, he does not suggest whether these activities should be outlawed or, at least, disclosed.

To prohibit gifts from artists or dealers to critics, persons that presumably have a love of art, seems unduly harsh and hard to justify legally. The illegitimate price escalation can be prevented simply by requiring the critic to disclose any such gifts in his or her review of a particular artist. Given a critic's ability to influence that value of any work he or she owns (regardless of how it was acquired), it seems prudent to require similar disclosure by a critic in any review of an artist.

\begin{itemize}
\item \textsuperscript{43} Id. at 42.
\item \textsuperscript{44} Id. at 41.
\item \textsuperscript{45} Id. at 42-43.
\item \textsuperscript{46} See infra notes 75-91 and accompanying text.
\item \textsuperscript{47} CONKLIN, supra note 1, at 44.
\end{itemize}
when the critic owns one of the artist’s pieces. Furthermore, if it appears, upon further inquiry, that critics rave about artists at a gallery from which the critic receives free or discounted works, even though the critic does not own any art by the artist being reviewed, such pecuniary ties should also be disclosed.

III. FAKES AND FORGERIES

The sale of counterfeit art generates tens of millions of dollars a year, and makes the public wary of buying art. Thomas Hoving of New York’s Metropolitan Museum of Art stated he believes that 60% of the art he has seen has been faked or forged. Fakes are reproductions made to resemble existing works of art, and forgeries are original pieces someone attributes to another artist.

Although the anecdotes in this chapter are quite interesting, the crimes of faking and forging works of art are relatively self-explanatory, and there is little to say about these crimes. Of more interest is a discussion of the differences certain cultures have placed on the value of originality.

Also of interest is the fact that a fake or forgery has little economic value once discovered, even if it has tremendous aesthetic value, because of the deceit attached to it. As noted, the reattribution of a work of art to a different artist can dramatically affect its value, but not nearly as much as the discovery that the work is a forgery. Conklin argues that the difference in the price change caused by a reattribution, as opposed to the discovery of a fake or a forgery, is due to the fact that there is no intent to deceive attached to the work that has been reattributed. However, it appears the more important issue may in fact be that reattributed works (which are generally older pieces where the full body of work of a particular artist is not accurately known) will still have value because of age, attribution to another well known artist (or a school), and other factors that usually give value to works of art that endure the test of time. In fact, given the past practice of artists signing works of art prepared by their students, one could argue an intent to deceive may have originally

48 Id. at 47.
50 CONKLIN, supra note 1, at 48.
51 Id. For example, in Egypt and certain parts of the Orient, copying has historically been a sign of respect.
52 Id. at 49.
53 See supra notes 24-28 and accompanying text.
54 CONKLIN, supra note 1, at 49.
55 Id.
56 Id. at 55.
been present in certain "well-aged" works of art (although such behavior would not have been perceived as inappropriate at the time). However, such deceit does not taint the value of these pictures.

With regard to discovering forgeries, various scientific methods such as x-rays and chemical tests can prove that a work of art is not what someone claims it is; such tests, however, cannot definitively prove that the work is legitimate. Therefore, connoisseurship and scholarship remain essential to uncovering forgeries, and to the attribution process. Yet, since scientific tests can detect many forgeries, forgers have learned that it is frequently better to copy less valuable pieces where such tests are less likely to be employed.

Conklin devotes considerable time to the social organization of faking and forging but recognizes that "profit is the primary motive of forgers and the dealers who sell their works." Of greater interest, however, are the methods used to help create a provenance for a forged or fake work of art. Methods include: creating false sales invoices; creating or stealing gallery labels; stealing other supporting documents; auctioning the work in an out-of-the-way auction house so that a legitimate bill of sale is attached to it; and, with regard to antiquities, "discovering" a site after the site has been previously seeded with works of art.

Surprisingly, some experts who have detected counterfeit works have decided not to disclose that knowledge out of a concern that, by betraying how they can detect whether a work is counterfeit, forgers might learn ways to avoid such mistakes in future endeavors. However, Conklin questions whether this behavior truly serves the art community. By not disclosing that a work is counterfeit out of a fear forgers may improve their techniques, such experts win the battle but lose the war. Failure to disclose renders moot the need for superior techniques, since forgeries will continue to be passed off as originals. It seems preferable to denounce forgeries whenever possible even though in the future new methods may be needed to uncover counterfeits.

Restoration also raises significant issues with regard to the originality of a work of art because restorers must change the work from what it currently is and almost certainly cannot make it exactly what it

---

57 Id. at 63.
58 Id.
59 Id. at 64.
60 Id. at 65.
61 Id. at 76-78.
62 Id. at 83.
originally was. Although Conklin does not attempt to define when a restored work of art ceases to be an original, the controversy is a thought-provoking one that leads to a second, largely unexplored question of whether it is preferable to let art works deteriorate over time (even under the best of conditions) or to restore them so that future generations may enjoy their original appearance (or a close approximation). In terms of appreciating the aesthetics of a work of art, it is possible to argue that a significantly deteriorated 500-year-old work of art is further removed from the work of art in its original condition than a restored piece (or even an excellent fake). Once again, the true issue with regard to the "originality" of restorations seems to be economics, not aesthetics. An unrestored, deteriorated work of art may be aesthetically less pleasing (and farther removed from the original state of the work) but more economically valuable than the restored piece. In terms of aesthetics, once a piece has deteriorated significantly, there is little reason not to restore it as closely as possible to its original condition.

One of the final issues addressed in this chapter is the growth of legitimate companies producing extremely convincing fake works of art, which are identified as such. Although these companies are discussed due to a concern that they may innocently add to the passing of fakes as originals in the art world, it shows that there is a market for art based on its aesthetic value. To eliminate this type of art is to prevent all but the wealthiest from enjoying the aesthetics of great works of art, except in museums. This seems unduly restrictive since the only time a problem should arise is when an unscrupulous dealer tries to pass off such a fake as an original or someone tries to sell a fake or forgery to a dealer. The first problem can be addressed more directly through regulating dealers. The second problem can be addressed through the use of art registers that allow dealers to check to see if a work has been attributed to a particular artist, thereby making it hard to sell a forgery. A dealer purchasing a fake is less of a concern since the dealer should know or be able to discover that the vendor is not the legitimate owner of a given well known work of art. Similarly, forged antiquities could be dealt with through the use of registers listing what has been discovered. Even without such information, dealers are acting questionably, and should be on notice, if they

63 Id. at 57.
64 Id. at 84.
65 The author recognizes that even excellent fakes do not have the same aesthetic value as original works of art.
66 See infra notes 149-152.
are buying antiquities without the proper export permits.67

IV. FRAUD

To an even greater degree than the chapter on fakes and forgeries, the chapter on fraud is tied together by a laundry list of different incidents of fraud that have occurred in the art world. Most of the types of fraud Conklin discusses either occur outside the art world as well or are quite well known: owners of art writing bad checks to dealers; owners inflating the value of art in insurance claims for stolen art, for tax deductions, or for use as collateral in a loan; dealers underpaying artists; dealers engaging in consignment fraud; and dealers misrepresenting their merchandise to potential purchasers.68 However, Conklin also discusses less obvious forms of fraud, including: the use of art to launder money and to avoid paying income tax;69 dealers acting in concert to keep bids down when buying at auctions;70 and scholars assisting in the sale of a work of art to a museum where the scholar has an undisclosed financial interest in the sale.71

The most interesting part of this chapter is the detailed description of auction house practices that appear to be legitimate but may in fact be “deceptive and even border on fraudulent.”72 However, criminal courts rarely deal with these activities.73 To increase interest in a work of art up for auction, auctioneers will “accept” bids from fictitious bidders.74 Also, many works of art are subject to a secret reserve, and auction houses will frequently say a fictitious buyer bought a work of art that did not meet its reserve.75 In 1986, New York passed a law requiring auction houses to mark any objects subject to a secret reserve, and auction houses began marking every item in the catalogue so that potential bidders gained no additional information.76

Conklin presents two arguments auction houses make for engaging in such practices: trying to avoid having a stigma attach to a work of art that does not reach its reserve; and preventing dealers from acting in a collusive manner to keep sales prices low.77

67 See infra note 123.
68 Conklin, supra note 1, at 87-97.
69 Id. at 91.
70 Id. at 96.
71 Id. at 99-100. Since these activities constitute criminal behavior, no discussion is undertaken with regard to their desirability.
72 Id. at 101.
73 Id.
74 Conklin, supra note 1, at 102-03.
75 Id. at 103.
76 Id. at 104.
77 Id. at 104-05.
Once again, Conklin fails to take a position as to whether additional reform should be made.\(^7\) The stigma argument seems unpersuasive: a seller has the right to set a minimum price at which he or she is willing to sell, and disclosing that the auction price failed to reach that level should in no way lower the work's value. The value was already lower than the seller had hoped, and to pretend it sold for the reserve amount is artificially inflating its perceived value for the sole purpose of a future sale. Although fictitious buyers can help deter dealer collusion, they also artificially raise prices. A less intrusive deterrent would be for auction houses to disclose the existence of a secret reserve at the end of the bidding, rather than the beginning, which encourages bidders to bid the true market value of the piece or risk not getting it. The only harm that would come from waiting to disclose secret reserves is that some bidders will not purchase a piece even though they offered more than anyone else for it. On the one hand, this is not problematic because the seller obviously places a higher value on the piece than the amount bid. On the other hand, the result is somewhat inequitable since it allows the seller to avoid the downside risk of a low market valuation while allowing him or her to participate in any upside valuation. However, this same inequality would exist even if the existence of the secret reserve were announced before bidding begins and does exist under the current practice of using fictitious bidders.

Conklin further notes that members of boards of directors of auction houses have been known to bid on and purchase art works at their respective auction houses.\(^7\) Conklin raises the question whether this should be seen as insider trading, since the board members might have inside information on reserves or prearranged orders for bids that give them an unfair advantage.\(^8\) Although Conklin does not take a position on this potential problem, it becomes a problem only when the active bidding does not exceed the reserve or the prearranged bid. If active bidding exceeds these levels, the board member must compete with the other bidders on an equal basis. Therefore, the solution to any insider trading is either to require procedures that prohibit a board member planning to participate in an upcoming auction from receiving such information or to prohibit board members from buying items being auctioned unless unrelated bids exceed both the reserve and any prearranged bids.

The most shocking section of this chapter is the anecdotes involv-

\(^{78}\) Id.

\(^{79}\) Id. at 107.

\(^{80}\) Id.
ing erroneous appraisals. In an incident involving an alleged Faberge egg, the same appraiser made several appraisals regarding the originality of the egg and reached opposite conclusions depending on which side of the transaction the auction house he worked for was on.  

Although one would be hard-pressed to describe such action as fraudulent, assuming the appraiser acted in good faith and merely changed his mind, one must question whether an auction house should be required to warrant its appraisals or to use an independent third party in obtaining appraisals. Independent appraisals provide the minimal protection of removing the bias that an in-house person might have if he or she knows which side of the transaction the auction house is on, but they would not prevent auction houses from choosing different appraisers (with appropriate predispositions) depending on which side of the transaction the auction house is on. Obviously, warranting an appraisal of authenticity provides significantly more protection to the purchaser, but it creates significant liability exposure for the auction house for future reattributions, even if the auction house has undertaken due diligence.  

Given the potential exposure such a regime would create, and given the fact that reappraisals are an inherent risk for collectors of certain pieces of art, such a requirement seems hard to justify because of both its cost and the overprotection it provides to purchasers; especially since the less burdensome concept of requiring an independent appraisal would largely serve the same purpose of removing auction house bias.

Unfortunately, fraud convictions are uncommon. This is partially because they are hard to prove, but also because, when faced with a strong potential case against an auction house, museum, or dealer, the parties generally prefer to settle out of court.

---

81 Conklin, supra note 1, at 107-08.
82 See generally Borodkin, supra note 1, at 386.
83 Similarly, there often appears to be no general duty on the part of auction houses to check the provenances of the works of art they sell. See Conklin, supra note 1, at 110; Collin, supra note 12, at 19. A faulty provenance can affect both attribution and title to the work. To what degree should auction houses have to check the provenances of the works of art they sell? The auction houses claim extensive checks are unduly burdensome given the volume of items sold. However, since auction houses are frequently used by forgers, counterfeiters and thieves to create a false provenance, requiring an adequate investigation could help deter a number of art crimes. Conklin, supra note 1, at 269. Alternatively, auction houses could be required to warrant title (which is the case in the United States but not in Europe). Id. at 111. Use of warranties provides the greatest protection to purchasers, gives the auction house the maximum incentive to be careful, and makes returning stolen art to its rightful owner easier, since its purchaser will be compensated for the return of the piece. Obviously, the potential liability is significant, and will therefore be heavily resisted by auction houses.
84 Conklin, supra note 1, at 116-17.
V. ART THEFT OPPORTUNITIES AND MOTIVES

As previously noted, art theft is estimated to total $1 billion per year. However, estimates reveal “that only 10% of all stolen art is recovered” (although up to 50% of well-known pieces may be recovered since their disappearance tends to be more publicized and they are therefore harder to dispose of). Of this amount, approximately 10% is stolen from private owners such as museums, churches and galleries. Most theft is in the form of looting ancient sites. The analysis in this chapter is relatively straightforward, with Conklin discussing the suitability of various types of targets for theft, the relative levels of security at various places where art is housed, and the reasons why thieves are motivated to steal.

Most thefts of art in the United States are from galleries or individual owners, whereas most thefts elsewhere in the world are from individual owners or churches. Conklin recognizes there may be as much gallery theft abroad, in terms of total volume, as in the United States. However, as a relative percentage, gallerly theft is lower abroad given the high number of thefts from churches. Not surprisingly, museums have lower theft rates worldwide than other locations because of better security, including guards.

An interesting point made by Conklin concerns the prohibition on the sale of religious artifacts in most countries. Given the demand for these artifacts, he suggests that allowing the sale of lesser items may both help financially strapped churches and help satisfy demand. However, the question remains whether permitting such sales would increase the overall demand by attracting new purchasers to the market that had previously shied away due to the illegality of obtaining such objects.

Antiquities are perceived as a particularly suitable target for theft because: it is difficult to determine who owns the pieces; conflicting

---

85 See supra note 1 and accompanying text.
86 CONKLIN, supra note 1, at 129.
87 Id. at 119, 123, 128.
88 Id. at 121.
89 Id. in other words, the dollar value of gallery theft in the United States and abroad may be about the same, but since there is very little church theft in the United States and a large volume of church theft abroad, gallery thefts constitute a lower percentage of all thefts abroad than in the United States. Thefts from churches are the least common type of art theft in the United States, which is not surprising since U.S. churches generally have far fewer significant works of art on display than their European counterparts. Id. at 121.
90 Id. at 121-22.
91 Id. at 128. For a similar argument concerning the sale of antiquities, see Borodkin, supra note 1, at 411.
92 Several different countries can produce substantially similar artifacts, making it unclear where an artifact came from.
legal systems are frequently involved; and there is no way to catalog all the pieces in existence. In fact, it has been estimated that illicit trade in ancient artifacts may support one percent of Turkey's total work force. The enforcement of laws prohibiting trade in antiquities is further complicated by the fact that many museums oppose repatriation of ancient pieces, given that many of their collections could be seriously depleted by such a practice.

Considering the unique nature of most art, a major problem arising with regard to art theft is that many people would prefer to recover the art than to bring charges against thieves. In addition, art criminals traditionally receive incredibly light sentences, and, occasionally even immunity has been granted for returning an important work of art. When light sentences are coupled with the perceived high value of art, it is easy to see how thieves are motivated to steal art.

However, most stolen art is resold for only 10 to 20 percent of its true market value, which may mean that thieves are more likely to engage in art crime if they have the necessary connections to liquidate the art they steal effectively.

VI. THE SOCIAL ORGANIZATION OF ART THEFT

The chapter on the social organization of art theft, like the prior

93 The laws of countries that customarily import antiquities often ignore the concerns of looted countries.
94 See CONKLIN, supra note 1, at 122. See also Borodkin, supra note 1; Fox, supra note 12; Kelly, supra note 2, at 47-48; Lenzner, supra note 1; McGuire, supra note 12.
95 See BURNHAM, supra note 7, at 113.
96 See CONKLIN, supra note 1, at 134; but see Kelly, supra note 2 (indicating a growing trend among museums to cooperate with repatriation efforts and the increasing success of antiquities exporting nations in reobtaining such objects).
97 See CONKLIN, supra note 1, at 129.
98 See id. at 148, 156, 183, 200, 214.
99 See Fox, supra note 12, at 226.
100 See CONKLIN, supra note 1, at 142.
101 Thefts of art can be for personal possession, on commission for an interested buyer (for a particular piece of art), for consignment to an auction house, or on speculation that the thief will be able to resell the art. Id. at 130-43; see also Kelly, supra note 2, at 51. Additionally, art is sometimes taken for ransom since many insurance companies will pay up to 10 percent of the insured value of the art for its safe return. Conklin, supra note 1, at 144. Unfortunately, paying ransoms for art increases its liquidity and therefore makes it a more attractive target to steal. Id. at 145. However, the exchange of the object for the ransom money can be difficult to arrange. Id. at 146. Finally, some thieves are not motivated by personal profit but rather by political purposes. Id. at 149. This final category is related to several types of terrorism, where the thief demands political prisoners be released in exchange for a work of art that is culturally important to the society. Unfortunately, Conklin provides no breakdown as to the relative frequency of the various reasons for theft.
chapter on opportunities and motives for art theft, continues with a relatively common sense description of many of the types of art thefts that occur: larceny, burglary and robbery. It also discusses the use of insiders to gain information and thefts by employees and acquaintances of the art owner. Stolen art is then “laundered” by creating a provenance for the art with stolen certificates, forged bills of sales, exhibitions in museums or purchases by the thief/owner at an auction.

Conklin notes that it appears organized crime is heavily involved in art theft as a way to make a profit, to launder drug money and to enhance social status (as the owners of important works of art). Additionally, compared to the risks in drug trafficking, the poor security and light sentences connected with art crime make engaging in such activities a low risk endeavor for persons already involved with organized crime.

VII. DISTRIBUTION OF STOLEN ART

Given that only 10 to 12 percent of stolen art is recovered, how stolen art is distributed is largely a matter of speculation. Obviously, some stolen art will still be with thieves, some makes its way to collectors, and some has been recovered or returned via payment of a ransom.

Unfortunately, the illegitimate art market is tightly intertwined with the legitimate art market, making it all the harder to stop. This interconnection poses nearly intractable difficulties for trying to stem the flow of art crime, since few art dealers appear to be above reproach. Conklin highlights Burnham’s suggestion that most art dealers do not tell everything they know to law enforcement agencies because even the most legitimate of dealers do not always investigate the provenances of the works of art they sell as thoroughly as possible.

The general attitude of most U.S. museum curators is that they have no option but to deal in illicit antiquities if they wish to build their collections at all. One museum curator went so far as to say

---

102 Id. at 154-58.
103 Id. at 168-77.
104 Id. at 181.
105 Id. at 182, 184.
106 Id. at 183.
107 Id. at 187.
108 Id.
109 See Burnham, supra note 7, at 37.
110 See Conklin, supra note 1, at 195.
111 Id. at 191-93.
that if U.S. museums began sending all their illicit material back to the countries from which such antiquities came, U.S. museums would be empty. In spite of the occasional controversy surrounding an acquisition, the view of many curators is that such controversies will fade but "a museum's collection will endure." Since museums are major purchasers of antiquities, their lax attitude regarding the legality of what they purchase creates a significant incentive for continued looting. However, many museums will continue in this manner unless faced with the prospect of losing antiquities for which they have spent substantial sums.

Conklin does a cursory job of describing the relevant legal norms applicable to stolen or looted art. Without an understanding of the problems presented by each of these norms, one cannot formulate suggestions as to how the legal system can be improved to help deter art crime. Generally, most of the applicable laws of a given country will apply equally to both looted artifacts and stolen fine art, although there are some additional laws for dealing with looted antiquities. However, each type of stolen art presents different factual difficulties for legal systems to deal with. In the United States, several somewhat contradictory principles affect title to stolen artwork. Although the

112 See John L. Hess, The Granting Acquirers 148 (1974). The current inflexibility of the laws of antiquity producing countries which fuels this view has led some commentators to suggest that antiquity rich countries should auction off some of their lesser pieces to help fill the demand for artifacts and to raise money to better care for those artifacts that remain. See Borodkin, supra note 1, at 411-14.

113 See Conklin, supra note 1, at 191.

114 Id.

115 But see Kelly, supra note 2, at 31-32 (indicating a growing trend among museums to attempt to acquire only legitimately exported antiquities).

116 Most antiquity producing countries claim ownership of all antiquities in their territory, but few antiquity importing countries have laws requiring imports to have been legally excavated from their source country. See Conklin, supra note 1, at 187-97; see also Kelly, supra note 2, at 32-33. Additionally, many antiquities exporting countries are signatories to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership Of Cultural Property, but the only art importing countries to sign are the United States and Canada, subject to certain qualifications. See Conklin, supra note 1, at 280; Borodkin, supra note 1; Fox, supra note 12; Kelly, supra note 2, at 44-45; Lenzner, supra note 1; McGuire, supra note 12. For discussion of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, a more recent international agreement attempting to fill the gaps in the UNESCO Convention, see generally, Fox, supra note 12; Lenzner, supra note 1. For a discussion of recent European Community directives on the transnational shipment of cultural objects, see generally, Vitrano, supra note 12, at 1164.

117 First, a thief cannot pass good title to a stolen item, even to a good faith purchaser. Second, the original owner of a stolen item may proceed against a good faith purchaser on an action in replevin for return of the item without compensation to the purchaser. Originally, replevin actions had to be brought within a statute of limitations that began running when the theft occurred. The theory behind this rule was that it would encourage the original owner to act diligently to recover his or her chattels and the rule would promote
trend in common law countries has been to protect the interests of the original owner, each of the approaches has been criticized for placing a disproportionate burden on the good faith purchaser that stands to lose the money spent on the work of art if the item has to be returned. In contrast, most civil law countries protect a good faith purchaser, which is often seen as unfair to the original owner and as encouraging art theft.\(^{118}\) The civil law protection of good faith purchasers not only encourages theft, but also allows stolen art to be laundered by creating good title for a stolen object in a civil law country before bringing it into a common law country.\(^{119}\) Thus the primary difficulty in dealing with stolen fine art is in reconciling the civil and common law approaches in a way that is perceived as fair to participants in both systems.

The illicit trade in antiquities faces additional problems. Many nations that import antiquities do not have laws prohibiting the importation of objects illicitly exported from other countries,\(^ {120}\) which

---

\(^ {118}\) See Conklin, supra note 1, at 271. See also Collin, supra note 12; Eisen, supra note 2; Fox, supra note 12; Hayworth, supra note 12; Joshua E. Kastenberg, Assessing The Evolution And Available Actions For Recovery in Cultural Property, 6 DePaul J. of Art & Entertainment Law 398 (1995); Kelly, supra note 2.

\(^ {119}\) Conklin, supra note 1, at 271-75. See also Collin, supra note 12; Eisen, supra note 2; Fox, supra note 12; Hayworth, supra note 12.

\(^ {120}\) See Conklin, supra note 1, at 197.
weakens to a considerable degree the national patrimony laws\textsuperscript{121} of antiquities producing countries. Additionally, it is frequently hard to prove the source country for a particular antiquity.\textsuperscript{122} Without knowing an object's country of origin, it is difficult to prove it was illegally excavated or exported.\textsuperscript{123} Conklin argues that requiring proof an object was legally excavated and exported from its country of origin could help curb the trade in illicit antiquities.\textsuperscript{124} Although this suggestion would help if implemented, the fact that not all antiquities in the possession of collectors are catalogued means that such a requirement would be overbroad by reaching antiquities that were exported prior to national patrimony laws and export license requirements.

VIII. Vandalism

Unlike art theft, which can be dealt with by museums through various security measures that do not necessarily impair the aesthetic enjoyment of art, art vandalism forces museum curators and others who maintain and display art collections to decide between maximizing public access to and enjoyment of art against protecting and safeguarding such art.\textsuperscript{125} Conklin engages in more analysis in this chapter than any other in the book, except the final chapter, and raises several interesting points.

The first issue on Conklin's list is broadening the definition of vandalism beyond intentional destruction or illegally damaging art to include negligent damage or destruction.\textsuperscript{126} This definition would include damage caused by pollution over time, damage by thieves in the course of stealing or storing art, poor restoration of art and deliberate destruction of art works by their owners. As will become clear, attaching criminal penalties to some of these activities would be highly controversial.

Conklin compares vandalism occurring in the course of an art theft to the felony murder rule.\textsuperscript{127} He suggests a new category of crime called "felony vandalism" for vandalism that occurs in connection with a theft of art. Felony vandalism is a form of aggravated vandalism which would be punished more severely than ordinary vandalism. Although this concept makes sense within the broad defi-

\footnotesize{\textsuperscript{121} These laws declare that antiquites belong to the state.  
\textsuperscript{122} See Conklin, supra note 1, at 122. See also Borodkin, supra note 1; Fox, supra note 12; Kelly, supra note 2, at 47-48; Lenzner, supra note 1; McGuire, supra note 12. 
\textsuperscript{123} See Conklin, supra note 1, at 197.  
\textsuperscript{124} Id. at 258.  
\textsuperscript{125} Id. at 227.  
\textsuperscript{126} Id.  
\textsuperscript{127} Id. at 228.}
nition Conklin employs for vandalism, the felony vandalism concept does not work easily within the traditional definition of vandalism. This is because unintentionally damaging a work of art is not generally perceived of as a form of vandalism, and is, therefore, not subject to punishment.

If the concept of vandalism is expanded, Conklin's analogy appears sensible. Just as armed robbery carries with it a significant risk of deadly force being used, art theft frequently carries a significant risk of serious damage occurring to the work of art being stolen. Thus, it may be desirable to have penalties above and beyond those for stealing works of art for the damage caused to the work in the course of such theft. However, since presumably both the theft and the vandalism are already punishable, having a crime of felony vandalism would serve no purpose unless it eliminates an existing mens rea requirement for the vandalism charge.

More objectionable is Conklin's discussion of restoration as a potential form of vandalism to art. Since deterioration due to pollution is also a form of vandalism, given Conklin's definition, one may well be "damned if you do and damned if you don't." Obviously, either one of these two actions must be removed from the scope of vandalism or standards have to be established to determine when deterioration and when restoration are so extreme as to constitute vandalism. However, to label either of these acts as criminal vandalism is to radically alter an owner's ability to use his or her property as he or she sees fit.

Conklin also discusses the "vandalism" committed by certain modern artists who have used replicas of art and modified them in such a way that some people have seen the modified "works of art" as degrading or demeaning. Provided a replica is being modified, it seems hard to classify such an action as vandalism both since an original art work is not being damaged and since some will argue the modified replica is art. In a similar vein, Conklin advocates the growing movement of giving artists the right to prevent those who own or control their works of art from altering, damaging or destroying such works. However, this leads to an irresolvable conflict between different artists in certain instances.

---

128 So vandalism in the course of commissioning a felony is more severe than negligent damage to a work of art by an art owner caused by poor storage conditions.
129 Id. at 229.
130 Id. at 230.
131 For example, in the United States, the 1990 Visual Artists Rights Act protects works commissioned for display that are commissioned or completed after 1991 from mutilation, distortion or other modification.
132 An example of such a conflict occurred when the architect who designed a plaza in
In spite of the potential conflicts, Conklin’s concern over the rights of artists raises important issues with regard to whether owners of art should be allowed to destroy such art. Although such destruction has historically been permitted, art is viewed by certain members of the public as part of a society’s joint cultural heritage, and some would argue that the owners of art are “caretakers” of it with “no moral right to destroy it.” Obviously, granting such rights conflicts with the general concept of private property ownership in the United States. It also raises commercial (“takings”) concerns if the “work of art” could be broken up and sold for substantially more in pieces than as a whole. Although Conklin does not explicitly resolve these potential conflicts, he seems disposed to favor the argument against destruction of such items. However, how far should this analysis be taken? If a signed and numbered print in an edition of thousands is subjected to negligent care should the owner be liable for vandalism? As interesting as these philosophical issues may be, they are clearly beyond the current definition of art crime.

Finally, Conklin attempts to explain deliberate vandalism in a social context. Deliberate vandalism is often explained as the act of an unbalanced personality, but Conklin believes this is not always the case. His first example, vandalism as social protest (where the vandalism is deliberately undertaken in furtherance of a political cause), is a credible explanation for why someone who is not “mentally ill” might engage in vandalism. However, several of his other attempts to distinguish vandalism from mental imbalance are not so persuasive.

Manhattan (arguably an artistic act) was later “defaced” by the addition of a sculpture by Richard Serra. Serra was unwilling to allow the sculpture to be removed and exhibited elsewhere claiming that the piece was designed specifically for that space. However, the architecture of the plaza had not been designed with that sculpture in mind. See Conklin, supra note 1, at 237-38; see also Carter v. Helmsley-Spear, 71 F.3d 77 (2nd Cir. 1995) (holding that the Visual Artists Rights Act did not prevent the removal of a work of art from the building it was commissioned for since the artwork was created while the artists were employees; thereby rendering the piece a work for hire), cert. denied, 116 S. Ct. 1824 (1996).

Examples of this are “antiquarian books that contain drawings, prints, or maps.” On the other hand, the power of modern mass marketing may have created a situation where the combined market value of tiny fragments of a Rembrandt is worth more than the intact painting. It seems likely many would see the fragmentation of such an item as unacceptable, even though restricting such acts is an infringement on current private property rights.

See Conklin, supra note 1, at 250-51. In particular, vandalism caused by people stating that a voice told them to engage in such acts would appear to be the act of someone...
IX. CURBING ART CRIME

The final chapter of Conklin’s book is probably the most analytic and one of the few places in which Conklin advocates positions. A number of the things he advocates are relatively commonsensical, such as improving security for art works. Conklin highlights the frequent assertion that to decrease trade in stolen antiquities requires encouraging additional national patrimony laws and having honest customs agents and government officials. However, these suggestions do not seem to go far enough and are highly idealistic, especially in light of the facts Conklin has already acknowledged: patrimony laws cannot work effectively without cooperation from art importing states; and significant bribes are paid to such people in relatively impoverished nations for their cooperation. In my view, requiring repatriation of illicitly obtained antiquities (on a prospective basis) would provide museum curators and collectors with a strong incentive to investigate what they are purchasing. If an objective standard, like obtaining a certificate from the exporting country indicating the property had been legally exported, were required, it would be very difficult to obtain good faith purchaser status in the absence of such a certificate. If a purchaser of illicitly obtained art is not a good faith purchaser, the civil law protection for good faith purchasers will not be available. Of course thieves could argue that the antiquity’s arrival predated the certificate requirement. However, this could be dealt with by allowing voluntary registration of antiquities before the statute goes into effect or by allowing the purported owner to prove the antiquity’s arrival was prior to the requirement.

Similarly, in order to qualify as a good faith purchaser of stolen fine art, the law could mandate that one must first consult a central registry of stolen art. As Conklin points out, currently there are a number of different registries, but there is no one central registry. As such, good faith sometimes can be demonstrated by checking with a relatively obscure database. Although Conklin is skeptical about the possibility of unifying all these databases, it seems plausible that they could all be linked through the internet so a dealer wanting to check title could do so quickly and easily. Additionally, if dealers and auction houses are required to warrant title to works they sell and to carry

who is mentally ill.

140 See id. at 257.
141 Id. at 258.
142 See Conklin, supra note 1, at 203. See also Borodkin, supra note 1; Fox, supra note 12; Kelly, supra note 2, at 54; Lenzner, supra note 1; McGuire, supra note 12.
144 See Conklin, supra note 1, at 262.
insurance to cover such warranties, consumers will have little need to check title independently.

In connection with these registries, Conklin advocates greater publicity of art crimes, while acknowledging some of the potential negative effects of such publicity. He argues that owners who are robbed should have to register the theft to toll the statute of limitations. Although owners may be hesitant to register, given the numerous disincentives collectors and museums believe they have in disclosing such matters, requiring such registration and conditioning good faith purchaser status on checking a central registry apportions responsibility fairly between purchasers and theft victims based upon the actions each of them can reasonably be expected to undertake.

Conklin also recommends purchasers have works of art authenticated before buying them. However, this seems unduly burdensome on consumers and largely unnecessary if reforms are made at the central points of distribution, dealers and auction houses. This could be better accomplished by requiring an independent authentication before dealers and auction houses can sell works of art.

Conklin also appears to advocate France’s position of destroying counterfeit art works, as opposed to returning them to their rightful owners. This is based on a perception that to return the counterfeit work is like returning counterfeit money. However, unlike counterfeit money (which has little use other than to defraud people), counterfeit art can nonetheless be of considerable value to its owner for aesthetic reasons.

Other suggestions include regulating dealers by requiring such things as displaying prices and regulating auction houses so they are more accountable for accepting suspicious materials. However, both dealers and auction houses in the United States currently generally warrant title to items they sell, so the desired types of additional accountability are somewhat unclear.

Conklin astutely notes that any country’s legal reforms will be limited in its effects due to the international nature and scope of art crime. In spite of this position, Conklin believes art crimes should

\[145 \textit{Id. at } 263.\]
\[146 \textit{Id. at } 272.\]
\[147 \textit{See supra} notes 1-13 and accompanying text.\]
\[148 \textit{See Conklin, supra} note 1, at 264.\]
\[149 \textit{Id.}\]
\[150 \textit{Id. at } 267-69.\]
\[151 \textit{Id. at } 271.\]
be more severely penalized. Conklin argues for stiffer penalties based on the value of art and the importance of art to society as a whole. Additionally, given the infrequency with which people engaged in art crimes are caught, stiffer penalties may also help deter art crime.

Finally, Conklin discusses the police investigating units involved in art crimes and some of their techniques. The skeletal crews involved in these endeavors make it easy to understand the Herculean task of trying to stem art crime without additional resources. However, in this era of tight budgets and limited resources, the likelihood of additional resources being allocated to this type of crime is remote.

X. Conclusion

Art Crime is an interesting book for its insights into the art world as a whole and for the numerous anecdotes it describes. However, John Conklin ultimately stops short of creating a conceptual framework for analyzing art crime and discusses the laws affecting art crime in a superficial manner. Through no fault of the author, the book has little statistical evidence. Most of the analysis is either anecdotal in nature or cursory, with ample descriptions of the various possibilities and arguments pro and con, but little discussion of the relative merits of these arguments and alternatives. Additionally, the book's examples become repetitive in the latter chapters.

Nevertheless, Art Crime calls attention to an area of law that needs additional research and leaves the reader with a sense of having learned a great deal about a world that seems inaccessible to many.

---

152 Id. at 275.
153 Id. at 276-80.
154 For example, only "two agents cover eleven million acres of Bureau of Land Management territory" in New Mexico in connection with the Archaeological Resources Protection Act. Conklin, supra note 1, at 279.