The ART market

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Art, forgery, and the public interest

'Supper at Emmaus' 1937
by Dutch forger, Van Meegren.

Our legal system is often blind to the sorts of private interests it protects. It protects the economic interests of individuals or private bodies while paying little regard to the nature of those interests. For instance, the legal system will enforce virtually any contract between individuals or companies provided some minimal conditions are met, and the contract does not facilitate various kinds of illegal activities. But protection of such interests is directly and indirectly enormously costly to the public. A great deal of public money is spent to protect these interests through financing the court system and training lawyers who study subjects which deal with protecting such interests in publicly funded universities. Even the cost of private individuals hiring lawyers is partly paid for by the public as those who hire expensive legal help are often in a position to pass on the costs through raising the prices of goods they sell. In addition, it could be argued that protecting some of these private interests has other important social consequences. For example, perhaps intelligent people who could be usefully used elsewhere in the community are attracted into the legal profession. (Further, perhaps as a result of the demand created for the services of top class lawyers, the cost of the quality legal help needed by disadvantaged sectors of the community rises.)

Liberal neutrality and its consequences

The idea that the legal system should be indifferent to the nature of the private interests it protects is in keeping with philosophical liberal assumptions which, in some form or other, are widespread in our society. One of these assumptions, which was eloquently defended by the 19th century English philosopher John Stuart Mill, is that it is not the law's business to inquire into private matters unless *direct* harm to others is involved.[1] Of course, as it stands, this does not entail that one should protect any interests which are formed as a result of private agreements between parties. Mill, unlike other liberal theorists, recognised that it is perfectly feasible for the legislature and the court system to *allow* such agreements to be made, but to refuse to spend public time and resources to *enforce* them.[2] However, another widely held liberal assumption, which is that justice has to do with enforcing the freely arrived at decisions of individuals, would make enforcing such agreements an important issue of justice.

A powerful tradition of thought, which goes back at least to the 17th century English philosopher John Locke, sees individuals as property owners who have property in their own bodies and other things, and who are entitled to protect their property and freely exchange it. The role of the state is to protect this property, and to enforce such agreements. In recent times, John Rawls has defended a modified version of this view in which the just principles for running a state are the ones which would be agreed to by an individual behind a veil of ignorance which hides the social position that individual would have in society. Rawls concludes that the primary and fundamental principle individuals behind the veil would agree to would be the principle that

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everybody is to have maximum freedom compatible with a similar freedom for others. A consequence one might plausibly draw from this is that individuals should be at liberty to make legally enforceable contracts of virtually any kind. Not to allow individuals to make such contracts is to deprive them of an important kind of freedom.

Rawls also articulates a common liberal assumption, namely that one cannot come to any universal or even general agreement about what is fundamentally good for people. The good is a matter of opinion, unlike the just, and people working out what is just behind the veil of ignorance have to put aside their conception of the good. Rawls mitigates this claim by admitting that some goods, like having enough to eat, are more fundamental than others.[3] But he only applies this to a narrow class of goods. This implies that, except for this narrow class of goods, it is illegitimate for the law to protect some types of goods and not others.

Rawls' views have been widely criticised in the philosophical literature, and I do not want to discuss these criticisms in detail here. I will take his key claims to have been shown to be inadequate.[4] This means that some other reason is needed for us to accept that we should use public money to protect private interests whose protection does not directly harm others.

One justification for using public money to protect such interests is that encouraging secure commerce in, and possession of, all sorts of goods is in everybody's interest.[5] This defence of legally enforcing some agreements is very plausible. For example, we all seem to benefit if the trade in foodstuffs flows smoothly, so that protecting the interests manufacturers and retailers come to have as a result of their agreements seems to be in the public interest. But it is not at all obvious that the law should be largely indifferent to the kinds of goods which are being traded, which is what is required for this argument to be used to defend our current legal practice. The economic interests the law protects need to be examined to determine whether they are worth protecting. One should not multiply potential law suits beyond necessity.

In the light of all this, it is legitimate to ask whether scarce public resources should be used to protect all these private economic interests, or whether the law should be restructured so that some private economic interests are not protected. I will discuss certain private interests in art to illustrate this point.

Private and public interests in art

The art market has grown enormously in the last 20 years. Private investors invest huge amounts of money in supposed masterpieces by well-known artists. This has had some obviously problematic effects on the public interest. First, the price of many works has risen enormously, putting them out of the reach of public institutions. Second, a great deal of litigation has arisen which has swallowed a lot of money from the public purses of many countries. (These events have been facilitated by legal systems which are willing to enforce contracts for the sale of art works in which the extent to which the work is by a particular artist is crucial.) Further, such legal systems have facilitated the development of a cult of authenticity in which it seems the artistic merit of works is of less relevance than who produced them and what they are worth on the market. It is far from clear that this is in the public interest. There is a great deal of social status to be gained from owning expensive, authentic, works of art and the legal system has underwritten this status by helping to make the financial investment in such works more secure.[6]

Consider a recent English case: after examining and falling in love with a painting which was supposedly by the Austrian painter Schiele, a buyer bought the painting from Christie's. A Christie's catalogue said the picture 'represents an important moment in the artist's development'. The catalogue also contained the remark that Christie's was not responsible for faults in attribution. It turned out that the work was not by Schiele, and that Christie's had been negligent in not checking the provenance of the painting carefully. Another artist had overpainted 94% of the painting and a signature had been added with intent to deceive. The price of the painting fell to a fraction of its previous market value as a result of the discovery that it was a forgery. The buyer sued Christie's and was successful because the painting was a forgery, the negligence being deemed by the judge to be legally irrelevant. This case is likely to open the door to similar legal actions at some cost to the public.[7]

Should public money be used to protect a buyer's financial interest in the authenticity of a work of art, even though this might mean that money would have to be taken away from other public services? Should public legal powers be used to protect such interests even though the effect of enforcing them might be against the public interest?

It might be said that people should be protected from various kinds of fraud, but no fraud was involved in this case. A second argument might invoke the interests of living artists. It might be said that living artists have an important interest in not having forgeries passed off as their work. After all, an artistic reputation can take years to develop, and many artists need the money generated from the sale of their work to survive. If someone mistakenly buys a work they think is the work of a particular artist, the artist will lose money they would probably otherwise have got. There is, in addition, a public interest in making talented artists secure so that they have time to use and develop their talents. One problem with this argument is that saying that an artist should have a legal right to sue someone who sells a forgery of their work does not imply that a buyer should have a similar legal right. Perhaps it could be argued that confident buyers are more likely to pay higher prices, so that the artist's interests are being protected through protecting the buyer's interests. However, this is rather a remote interest of the artist, and spending scarce public money to protect it at the expense of other worthy causes does not seem worthwhile. In any case, it is not clear why the law should protect buyers purchasing works produced hundreds of years ago: so such an argument would at best have limited application.

Another argument might be put on the basis of the view that the authenticity of a work of art is pertinent to its artistic qualities. This is a view which has recently been developed in some detail by philosophers. If the idea is correct, it might be argued that we all have an interest in having works of artistic merit identified clearly, so that we can appreciate them properly.

We might think that if the artistic qualities of a work are there, someone should be able to notice them whether the work is forged or not. Yet the art world does not treat works in this way. Consider the work of the Dutch forger Van Meegren who was working in the 1930s and 1940s. Van Meegren specialised in forging Vermeer paintings. He was a highly creative forger, for he created paintings in what was thought to be the style of Vermeer, but paintings which were

not copied from Vermeer originals. For example, having read that Vermeer was probably influenced by the Caravaggisti, he produced a 'Supper at Emmaus' with Vermeer-like light, but with figures posed in the manner of Caravaggio. It took years for Van Meegren's forgeries to be detected. The 'Supper at Emmaus' was declared by some critics to be one of Vermeer's finest works.

A common line of argument about this case, put by art historians, is that the works of Van Meegren can be seen by careful study to be far inferior to those of Vermeer. That some famous critics did not notice at the time has to do with them being blinded because they used subjective criteria of judgment, and failed to notice features of Van Meegren's work which have become more apparent with time. The symbolist and other stylistic features of Van Meegren's work were common in the period in which he worked, but are much less common now, and so stand out.[8]

Some philosophers have added the argument that the aesthetically valuable features of works of art are often not apparent. They give at least three reasons for their claim. First, they say we rightly prize features such as originality in technique of representation. But a forgery is rarely original in this sense. Van Meegren was not breaking fundamental new ground in using light in his pictures in the way that he did. However, Vermeer's use of light is an important innovation. Second, they maintain perception is not camera like. We gradually learn to notice features of fine works of art through training and study. Many features do not stand out, and there is a kind of inexhaustibility about the works of great artists. Aesthetically valuable features of their works are likely to be discovered in the future.[9] Third, they argue an important way in which we pick out key features and understand the meaning of a work is by studying an artist's work in its context, and as a whole. To understand the significant as opposed to the insignificant features of a work and their meaning we must know where to concentrate our attention and this suggests the need for a biographical and historical context.[10]

These reasons imply that in buying a painting one is buying something whose aesthetically important features are not readily apparent. Indeed, one is buying an aesthetic treasure whose value can only be realised over time. Perhaps this means that for the law to adopt a buyer beware policy is to expect buyers to have capacities they could not reasonably be expected to have; and it should be recognised that a buyer of a work of art, unlike other buyers, is trying to buy a future as well as present aesthetic pleasure which can be deeply affected by features that are not readily discernible.

Further, if we pick out central features and understand the meaning of a work by studying an artist's work in its context, and as a whole, then this has another important implication. Consider the plight of someone looking at important works in a public gallery who is seeking to understand the nature and meaning of various paintings. Suppose she rightly relies for advice on the work of various art historians as to what are key features of the works, and what they mean. She might well be missing subtle and aesthetically valuable features of the works because the judgment of art historians has been corrupted through exposure to many forgeries. Also, there could be other works in the gallery of which she could get a rich understanding if she had not been prevented from understanding them because forgeries have prevented experts from understanding the subtle power of the works.

This line of argument might be plausibly extended. If works of art are not mere physical objects, but are in part imbued with meaning and intentions, this may have implications for protecting cultural heritage against forgery. Works of art are produced within a cultural tradition, and are in part an embodiment of that tradition. They are often used to impart and understand important elements of the tradition. A public interest in them is not merely an aesthetic interest. Suppose an Australian gallery stocks a number of works by Aborigines. Aboriginal people take pride in such works, and it is important to them that the complex traditional meanings of the works be properly understood by future generations. It might be said that Aborigines and other Australians have an interest in not having their understanding of such works corrupted. There is sometimes value in preserving a correct understanding of traditions. (Obviously, this can also have important implications for how such works should be stored and displayed in galleries). Thus, it is in the public interest that privately sold Aboriginal works be correctly described.

Conclusion

The arguments in the last three paragraphs show that allowing undetected forgeries to be sold to individuals can damage public and private aesthetic and heritage interests in works of art. Whether these interests are worthy of protection at the expense of other interests is a matter for careful judgment in which one must weigh the value of protecting the various interests involved, while keeping in mind that protecting particular interests drains scarce public resources. In any case, it is not irrelevant to repeat the arguments that protecting the private economic interests involved in the art market raises the price of works of art to the public detriment, and facilitates the development of a snobbish cult of authenticity. It also corrupts the public's judgment by creating an atmosphere in which works of art are more and more prized and admired for their price rather than for their aesthetic features. If one reason for public funding of art galleries is to enhance the aesthetic sensibilities of the population, and to provide aesthetic pleasure, then protecting private buyers from buying forgeries may be inimical to achieving this aim, despite the ways in which it may facilitate aesthetic understanding.

I do not intend to decide whether the interests served by protecting buyers from buying forgeries are as important as other interests. I am merely trying to argue that decisions on such issues should not be made in a narrowly legalistic manner or by simply considering whether the buyer has been unjustly treated by the seller. Such decisions should be made by considering the extent to which the various public and private goods involved promote the well-being of individuals and groups. The legal system cannot feasibly be used to correct all kinds of injustices, and when people have willingly entered into agreements with others, there need to be very good reasons for spending public money to enforce those agreements rather than spending that money on other worthy causes, such as promoting the well-being of socially deprived people.

References

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2. For an interesting discussion of Mill's perceptive but untypical view, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979, pp.330-331.
3. Rawls, J., *A Theory of Justice*, Oxford University Press, Oxford, 1971.

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The most serious problem with the concept of the private financial agreement is that it operates on incorrect assumptions: privately negotiated agreements assume that the parties involved are independent and autonomous, making intelligent, rational and unhurried decisions. Often, this is simply not so. At least litigation or court approval of agreements forces parties to stop and think about their rights and obligations. Many of the arguments against mediation are also applicable to private ordering. Added to this is the fact that there is extensive pressure in family law matters to settle because of the ever-present threat of litigation. Similar to the criticism of mediation, private ordering relegates property division back into the 'private realm' and does not subject the parties' decisions to public scrutiny. The system of financial agreements set out in ss.76-76J of the Bill ignores important research and analysis on the process of private ordering and does not provide for any protection for women.

Suggestions for amendment

Scrutiny of the Bill reveals that it requires substantial amendment to attempt to redress the gender imbalance in family law property matters. The Bill provides a unique opportunity to reconstruct family law in Australia to take into account the last 20 years of practice and the research and literature which has flowed from that experience. Specifically, as discussed above, I suggest the following areas of revision:

1. *Property* — A new definition is required in the Bill, to take into account non-tangible property. Currently, the Bill does not amend the present vague definition in s.4(1) of the Act. A much more detailed definition should be included in the Bill to take into account the modern understanding of property, which includes opportunity costs, loss of earnings, increased earning capacity and depreciated capacity for earnings.
2. *Contribution* — There should be no presumption of a 50/50 contribution to property. Contributions to financial resources should be included in the Bill, as currently such contributions are excluded by the operation of s.86B(2)(a). Contributions to the marriage by way of child-rearing and home making must be seen as being of primary importance. Sections 86B and 86C of the Bill require drastic amendment in order to provide compensation to the spouse making these contributions.
3. *Future needs* — Future needs should be taken into account in all property divisions. There should be no threshold necessitating a rebuttal of equality as presently set out in s.86B(2)(b). There must be recognition that women, simply by virtue of their gender, are at a disadvantage in their ability to earn income irrespective of marriage or separation. Further, s.86D must be amended to take into account depreciated earning capacity because of roles which were assigned during marriage, along the lines of the decision in the Canadian case of *Ormerod v Ormerod,* (1990) 27 RFL (3D) 225 (Ont. UFC)
4. *Spousal Maintenance* — In its current draft, those who do not satisfy the criteria of s.79A of the Bill relating to care of children, age, incapacity or other adequate reason are solely reliant on the factors set out in s.86D for future needs. As discussed, these factors are insufficient. Thus, at the very least, 'adequate reason' in s.79A should be expanded to include suffering loss of earning capacity and opportunity costs due to roles assigned during marriage, to enable more women to apply for spousal maintenance.
5. *Mediation* — Mediation should not be one of the techniques described as a primary dispute resolution method. Mediation of property disputes should be subject to careful scrutiny and public accountability. Section 19 of the Bill should contain some guidelines about when mediation may not be the most appropriate form of dispute resolution. Elaborate guidelines should be established according to Regulations made under the Bill which would provide minimum threshold levels for mediator and mediation service competence.
6. *Private Agreements* — Financial agreements under s.76 of the Bill should be subject to Court approval whether made in Chambers or open court. Similar to current s.86 agreements, the Court should retain a governing role and its jurisdiction should not be excluded. Further, a witness to the agreement should be a person from a category authorised by the Court, such as a solicitor or Justice of the Peace. These measures should provide some safeguards for women who are rushed, bullied or otherwise coerced into private agreements which are not in their best financial interests.

In its current form the Bill is regressive for women. It offers little in the way of protection from inequitable and unfair outcomes. It does nothing to reflect modern research and knowledge about power dynamics in relationships. If passed in its current form, the Bill will only serve to perpetuate the current patriarchal thinking which still, unfortunately, dominates the family law system of property division.

References

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3. Funder, K. and others, above, p. 202.
4. McDonald (ed.), *Settling Up: Property and Income Distribution on Divorce in Australia,* Prentice-Hall of Australia, Sydney, 1986, p.85.
5. McDonald (ed.), above, p.86.
6. Cited in the *Family Law Reform Bill 1994* and the *Family Law Reform Bill (No. 2) 1994,* Report by the Senate Legal and Constitutional Legislation Committee, March 1995, pp.62-63.
7. For a discussion of how women are disadvantaged by mediation see Bryan, 'Killing us Softly: Divorce, Mediation and the Politics of Power', (1992) 40 *Buffalo LR* 441.
8. Senate Legal and Constitutional Legislation Committee, Submission No. 17, Australian Law Reform Commission, 17 January 1995 at 15.
9. Senate Legal and Constitutional Legislation Committee, above.

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5. This is the justification produced by David Hume for enforcing contracts in his famous critique of social contract theory, 'Of the Original Contract', in Hume, D., *Essays, Moral, Political, and Literary,* Free Press, Indianapolis, 1987, pp.465-487.
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8. See, for example, Werness, Hope, in D. Dutton (ed.), *The Forger's Art,* University of California Press, Berkeley, 1983.
9. See Goodman, N., 'Art and Authenticity', and Lessing, A., 'What is Wrong with a Forgery?', in Dutton, above.
10. Gombrich, E., *Art and Illusion,* fifth edn, Phaidon, London, 1977; and Danto, A., *The Transfiguration of the Commonplace,* Harvard University Press, London, 1981. These arguments have not been uncontested. See Beardsley, M., 'Notes on Forgery', in Dutton, above.