University of Glasgow

The Intersection Between Law and Art History:

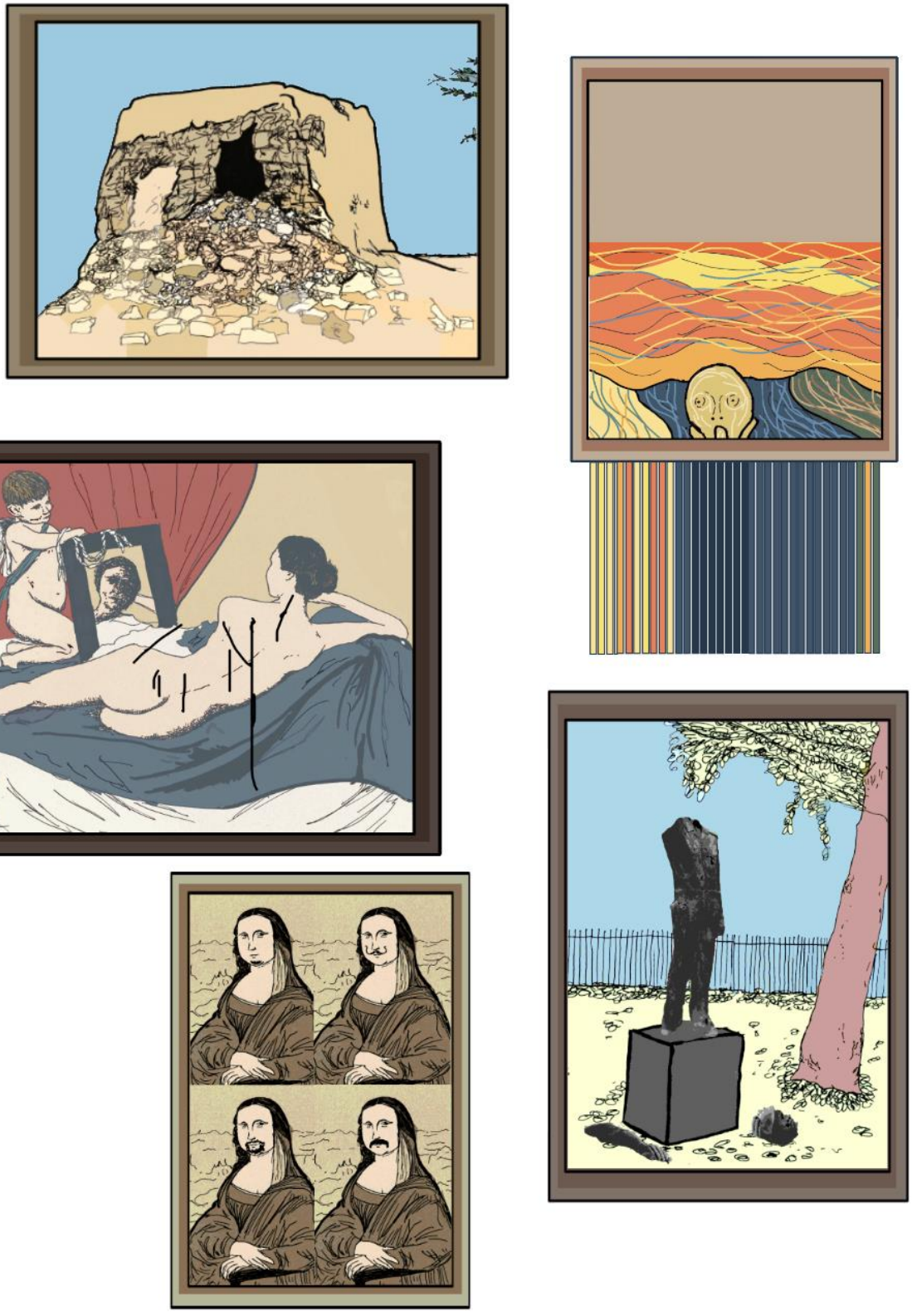
Comparing Interpretations of the Intentional Destruction of Art

Rosie Wilson
LL.B.

Submitted in fulfilment of the requirements of the Degree of Master of Laws (By Research)

School of Law, College of Social Sciences
University of Glasgow

October 2021



The Destruction of Art

Rosie Wilson ©

Abstract

The intentional destruction of art is a highly contentious and complex topic. In recent years the importance of the destruction of art has been increasingly recognised but, thus far, very few studies have directly compared law and art history's approaches to destruction. As a result, it is unclear whether art-historical and legal approaches to destruction are consistent or even compatible. This research addresses this gap in the literature by conducting a socio-legal comparison of interpretations of the intentional destruction of art in law and art history. This comparison is structured around four categories of destruction identified from recent art-historical literature on destruction, including conflict-related, religious, political, and artistic destruction, as well as the distinction between the destruction *of* art and destruction *as* art. These categories are used alongside case studies to determine whether interpretations of the intentional destruction of art differ between law and art history, and whether art historians' interpretations do or could influence legal interpretations. In addressing these questions, this research contributes to a better understanding of the concept of 'destruction' as well as the relationship between law and art, in both theory and practice. Overall, this comparison shows that interpretations of the intentional destruction of art differ between law and art history and the role of art history in influencing law is limited – although this varies between areas of law and art-historical categories of destruction. While art historians effectively differentiate between different categories of destruction and interpret the meaning behind individual destructive acts, the law struggles to do this. As such, this research exposes a fundamental limitation of the regulation of the destruction of art. Under the current legal framework, the law regulates the destruction of art without looking to art history to understand what destruction means to art. Consequently, the law risks confusing important creative expressions and artistic practices with intentional acts of violence and harm.

Contents

Acknowledgements

With thanks to Dr Marta Iljadica and the CREATe team in the University of Glasgow, School of Law.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Rosie Wilson

1. Introduction

The intentional destruction of art is a highly contentious and complex topic. Although artworks have been damaged and destroyed throughout history, greater attention has been given to intentional destructive acts that involve art in recent years. From the fall of communism to modern armed conflicts and terrorist activities; increasing hostility towards Contemporary Art; and the 'statue toppling' of the anti-confederate, anti-colonial, and Black Lives Matter ('BLM') movements – the destruction of art has been increasingly recognised as a topic of global importance.

This inclination can be most clearly demonstrated by the recent increase in art-historical research on destruction. Remarkably, art historians have only recently begun to treat the destruction of art as a distinct and important field of study within art history.[1] This development is part of the wider trend, which started in the 1970s, of art historians shifting their attention to aspects of art history that were 'previously […] ignored'.[2] Initially, art historians mostly researched destruction in the context of the iconomachi (struggle over images) debate in the Byzantine Empire (726-842)[3], as well as the Christian iconoclasm of the European Reformation (1517-1646).[4] However, since these early studies, the scope of art-historical research on destruction has expanded, and the topic is now considered 'one of the most vital and visible topics of the discipline.'[5]

To understand exactly why art-historical interest in destruction has increased, it is worth considering the work of art historian Nicola Lambourne, who has studied the destruction of art during the First[6] and Second World Wars.[7] Lambourne argues that art history has traditionally been production-oriented and has subsequently neglected destruction.[8] To prove this, she

[1] D. Gamboni. *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution.* (Reaktion, 2018), 9.
[2] L. Mulcahy. 'Eyes of the law: a visual turn in socio-legal studies.' (2017) *JLS* 44(1), 111-128, 123. Although, the first art-historical study which looked at the destruction of art was published in 1963 (J. Held. 'Alteration and mutilation of works of art.' (1963) *SAQ* 62. 1-28.)
[3] A. Bryer, J. Herrin. *Iconoclasm.* (Centre for Byzantine Studies, 1977); R. Cormack. *Writing in Gold: Byzantine Society and its Icons.* (OUP, 1985); D.J. Sahas. *Icons and Logos: Sources in Eighth-century Iconoclasm.* (University of Toronto Press, 1986)
[4] J. Phillips. *The Reformation of Images: Destruction in Art in England, 1535-1660.* (University of California Press, 1973); L.P. Wandel. *Voracious Idols & Violent Hands: Iconoclasm in Reformation Zurich, Strasbourg and Basel.* (CUP, 1995)
[5] Gamboni. *Destruction*, 9.
[6] N. Lambourne. 'Production versus destruction: art, World War I and art history.' (1999) *AH* 22(3), 347-363.
[7] N. Lambourne. *War Damage in Western Europe: The Destruction of Historic Monuments During the Second World War.* (Edinburgh University Press, 2001)
[8] Ibid., 3; Lambourne. 'Production', 348.

points out that art historians have generally only looked at the production and reconstruction of art in armed conflict, rather than the destruction.[9] Alarmingly, this has produced optimistic and unrealistic accounts of the relationship between art and war,[10] and neglected the complexity and meaning attributable to destructive acts.[11] In short, Lambourne argues that:

> [D]estruction is as complex as production, as, besides cataloguing the extent of the damage, [art historians] must also analyse the motivation for the act of destruction and the responses to it. [This is because] [m]eaning can be attributed to both production and destruction.[12]

In this, Lambourne effectively argues that art historians should not only gather the facts and record the history of destructive acts that involve art but also interpret their meaning. In support of this, many art historians have now taken on the additional role of interpreting intentional destructive acts that involve art to decipher their meaning.[13]

Another field that has had an increasingly important role in interpreting intentional destructive acts that involve art is law. This is because the intentional destruction of art is regulated at both a national and international level predominantly by four areas of law: cultural heritage law, criminal law, property law, and copyright law. International cultural heritage laws ('ICHL') impose protective obligations on states and punish perpetrators of destruction if the destruction amounts to a war crime or crime against humanity. National criminal laws punish perpetrators of destruction under criminal damage or vandalism offences. Personal property laws determine whether an owner has a right to destroy property that they own, and copyright laws provide moral rights to artists that, in some jurisdictions, can be used to respond to destructive acts. In each area, legal academics and decision-makers must interpret intentional destructive acts that involve art to regulate them.

As such, art history and law both play important roles in interpreting destructive acts that involve art. Art historians interpret destructive acts to assess their meaning, and legal academics and decision-makers interpret destructive acts to regulate them. This research compares interpretations of the intentional destruction of art in the fields of law and art history. Thus far,

[9] Lambourne. 'Production', 348.
[10] Ibid., 349.
[11] Ibid., 350.
[12] Ibid.
[13] See pp.27-31.

very few studies have directly compared law and art history's approaches to destruction.[14] This is surprising given the extent to which the two fields are interrelated in this context. To demonstrate this, consider that the destruction of any artwork is likely to give rise to two corresponding debates in art history and law. The art-historical debate asks whether the artwork *should* have been destroyed (for instance, as a creative expression), and the legal debate asks whether the artwork *could* have been destroyed (under the law). The outcome of one debate should inform the other, but there has been an absence of research generally that has sought to identify the extent to which they do so. As a result, it is unclear whether the art-historical and legal approaches to destruction are consistent or even compatible. This is crucial because it is unclear whether the law takes art into account when regulating it. To find out, this research examines interpretations of the destruction of art in each field, as the intersection between law and art history.

Overall, there are two fundamental questions underpinning this research. First, this research asks whether interpretations of the intentional destruction of art differ between law and art history. Second, this research asks whether art historians' interpretations do or could influence legal interpretations and, consequently, the current legal framework. The primary aim of this comparison is therefore to trace, compare and assess interpretations of the intentional destruction of art in law and art history. Within this, the comparison aims to contribute towards a better understanding of the concept of 'destruction' as well as the relationship between law and art, in both theory and practice. To demonstrate the importance of these aims, each is now considered in turn.

1.1. Interpretations of Destruction

Overall, the destruction of art remains a controversial and complex subject primarily because it 'raises major issues in the theory of art, aesthetics, art law, the theory and practice of conservation, museum studies and heritage studies.'[15] One of the central issues with the intentional destruction of art is the range of destructive acts that involve art. Recent art-historical research shows that not all instances of destruction have the same meaning or effect because destructive acts fundamentally differ depending upon a variety of factors, such as

[14] Except: N. Philatova. 'Erasing identity: how Prosecutor v Ahmad Al Faqi Al Mahdi failed to acknowledge the destruction of Timbuktu's cultural heritage as a case of iconoclasm.' (University of Colorado, 2019). See pp.42-44.
[15] Gamboni. *Destruction*, 9.

context and motivation.[16] As such, destructive acts that involve art are subject to a range of interpretations. Unfortunately, these different interpretations of destruction remain under-studied, and this means that the public interest in destruction is neither well documented nor understood. For instance, heritage academics Cornelius Holtorf and Troels Myrup Kristensen have identified the following questions as being unanswered:

> [W]hat exactly do we mean by different forms of destruction? How is heritage being changed and transformed by different destructive processes? Do preservation and destruction differ in how they may be socially contested? Which values and benefits may destruction have in relation to heritage? How does destruction relate to preservation?[17]

It is crucial to explore these questions and develop a better understanding of the public interest in destruction so that the courts, among others, can more straightforwardly determine the meaning behind an individual destructive act. This could even enable the courts to distinguish between harmful destructive acts that the public is interested in preventing and beneficial destructive acts that the public is interested in protecting or even promoting. While this thesis does not purport to achieve this, it does compile different interpretations of destruction, thus contributing to a better understanding of the concept.

1.2. The Relationship Between Law and Art

The other central aim of this comparison is to better understand the relationship between law and art, including the extent to which art history does or could influence law. There are two fundamental reasons why focus is given to art history's influence on law over the reverse, and these are outlined next.

In Theory – Research

First, there has traditionally been an imbalance in the literature on the relationship between law and art that privileges law's influence on art.[18] It is evident from existing research that the law

[16] See pp.27-31.
[17] C. Holtorf, T.M. Kristensen. 'Heritage erasure: rethinking 'protection' and 'preservation'.' (2015) *IJHS* 21(4), 313-317, 314.
[18] Mulcahy. 'Eyes of the law'.

influences art on the simple basis that several areas of law regulate art.[19] These include property, copyright, cultural heritage, criminal, human rights, confidentiality, data protection, defamation, contract, insurance, trade, customs, and tax law, among others. In contrast, it is less obvious what impact art has upon law. As socio-legal studies academic Linda Mulcahy wrote in 2017, this is because 'the relationship between law, art and the image' has been little discussed in the mainstream legal literature.[20] Mulcahy attributes this to many factors, such as the reluctance of lawyers to take images seriously,[21] which she suggests is a result of the division of images (as 'playful') and text (as 'disciplined') during the Reformation.[22] She also argues that while doctrinal legal scholars have studied the 'production, labelling, ownership and exchange' of artworks,[23] this has 'limit[ed] lawyers' appreciation of the significance of art for law' as it appears that 'law [only] orders and disciplines art.'[24]

Fortunately, there has been growing interest in the relationship between law and art in recent years due to the wider increase in socio-legal research.[25] Legal academic Lucy Finchett-Maddock calls this the 'art/law' 'phenomena and movement',[26] and this movement has led to greater awareness and appreciation of art's influence on law. For instance, Finchett-Maddock argues that 'artists [create] law and lawyers [create] art'[27] on the basis that artists address legal topics in their works, and these works can then inspire legal change.[28] She attributes this to the shift away from classical perceptions of art ('art for art's sake') to relational perceptions of art, which advocate art's role in politics, activism, and protest movements, as well as the use of art as social guidance on how to live.[29] This is a persuasive argument, and through it, Finchett-Maddock provides a compelling example of how art can influence law – through artworks created for that end. However, this thesis offers a different perspective by considering whether art historians' interpretations, which are not intended to influence laws, could in fact influence the legal framework.

[19] P. Gerstenblith. *Art, Cultural Heritage, and the Law: Cases and Materials*. 2nd ed. (Carolina Academic Press, 2008); L.D. DuBoff, M.D. Murray. *Art Law: Cases and Materials.* 2nd ed. (Wolters Kluwer, 2017)
[20] Mulcahy. 'Eyes of the law', 112.
[21] Ibid., 117.
[22] C. Douzinas, L. Nead. 'Introduction.' in C. Douzinas, L. Nead. *Law and the Image: The Authority of Art and the Aesthetics of Law.* (University of Chicago Press, 1999), 1-15. quoted in Mulcahy. 'Eyes of the law', 118.
[23] Mulcahy. 'Eyes of the law', 115.
[24] Ibid., 115.
[25] See pp.10-13,17-19.
[26] L. Finchett-Maddock. 'Forming the legal avant-garde: a theory of art/law.' (2019) *LCH* 1-32, 1.
[27] Ibid., 11.
[28] Ibid., 7.
[29] Ibid., 8-11.

Additionally, Shane Burke, who specialises in the regulation of the arts, has argued that 'rather than operating from a presumption of antagonism […] there would appear to be a number of points of intersection between law and art.'[30] Burke identifies and explores several intersections between law and art, such as 'the use of law as an artistic raw material'[31] – which echoes Finchett-Maddock's argument above. As another example, he traces the impact that the Artists' Reserved Rights Transfer and Sales Agreement[32] had upon artistic practice, as well as art's influence on the drafting of the legal document.[33] Most relevant to this thesis, however, is Burke's focus on the intersections between copyright law and Conceptual Art, which he describes as 'the most potent coalescence of law and artistic expression'.[34] In one study, Burke submits that copyright law and Conceptual Art conflict because copyright law purports to favour expressions over ideas, whereas Conceptual Art claims to favour ideas over expressions.[35] Subsequently, the expression or medium of Conceptual Art determines whether copyright protects it and, as a result, copyright often excludes Conceptual Art based on its final form.[36] In doing this, Burke effectively identifies and compares each area's approach to the idea-expression dichotomy – as an intersection between them – and from this, determines the impact that these differences have upon regulation. As this has proven to be a successful analytical model, this thesis adopts a similar approach by examining interpretations of the destruction of art, as a new intersection between law and art.

Another socio-legal study that has greatly inspired this research is Jonathan Barrett's comparison of perceptions of 'copying' in law and art.[37] In Barret's work, he compares interpretations of copying in copyright law, aesthetic theory, and artistic practice as distinct yet overlapping elements of the art world. He concludes that 'aesthetics can act as a bridge between artistic practice and copyright'[38] if a theory of common-sense aesthetics is adopted,[39] and contends that this would allow copyright law to accommodate changes in artistic practice[40] and

[30] S. Burke. 'Intellectual property law as artistic medium.' in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law*. (Edward Elgar, 2020), 259-277, 260.
[31] Ibid., 261.
[32] A template contract drafted by art dealer and curator Seth Siegelaub and lawyer Robert Projansky, published in 1971. The primary aim of the contract was to protect artists' rights.
[33] Burke. 'Intellectual property law', 262-263.
[34] Ibid., 260; S. Burke. 'Copyright and conceptual art.' in E. Bonadio, N. Lucchi. *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Edward Elgar, 2018), 44-61.
[35] Burke. 'Copyright and conceptual art', 45.
[36] Ibid.
[37] J. Barnett. 'Copying artistic works: copyright, aesthetics, and artistic practice.' in McCutcheon. *Research Handbook*, 59-76.
[38] Ibid., 61.
[39] Ibid., 63.
[40] Ibid., 75.

ideally harmonise the three areas.[41] The method and aims of this thesis are similar to Barrett's, although there are notable distinctions. For one, this research considers interpretations of 'destruction' rather than 'copying', and looks at ICHL, criminal law, and property law as well as copyright law to conduct a fuller analysis of the relationship between the fields. Additionally, this thesis focuses on art history rather than aesthetic theory,[42] because of the significant increase in art-historical research on destruction.

Some additional socio-legal studies on copyright law and art are also worth briefly drawing attention to. For instance, Anne Baron has explored the relationship between copyright law and 'the claims of art'.[43] In this, she examines how art from the Romantic movement has influenced copyright law[44] and finds that copyright has consequently excluded certain forms of expression, such as Indigenous Art.[45] Overall, her research presents a highly persuasive post-colonial critique of the subject matter of copyright using art history. As another example, Marina Markellou has challenged the concepts of 'originality' and 'copying' in copyright by assessing the relationship between copyright law and Appropriation Art.[46] Overall, she contends that art evolves faster than the legal framework[47] because copyright cannot accommodate all forms of Appropriation Art and, as a result, 'copyright is inevitably opposed to art.'[48] These examples are highly influential in that they use art history to expose meaningful limitations in copyright law. This thesis purports to build upon the foundations set by these socio-legal scholars to provide a new and unique account of the relationship between law and art, in the context of destruction, and the influence that the latter can have upon the former.

In doing this, this thesis also tests legal academic Anthony Julius's proposition that 'law and art will remain in tension; the best that law and art […] studies can do is to describe the various aspects of their conflict.'[49] Julius argues that this conflict cannot be remedied as '[l]aw and aesthetics offer rival accounts of art'.[50] This research directly responds to this challenge

[41] Barnett. 'Copying artistic works', 59.
[42] See pp.21-23.
[43] A. Barron. 'Copyright law and the claims of art.' (2002) *IPQ* 4, 368-401.
[44] Ibid., 368.
[45] Ibid., 369.
[46] M. Markellou. 'Appropriation art under copyright protection: recreation or speculation?' (2013) *EIPR* 35(7), 369-372.
[47] Ibid., 369.
[48] Ibid., 372.
[49] A. Julius. 'Art crimes.' in D. McClean, K. Schubert. *Dear Images: Art, Copyright and Culture.* (Ridinghouse, 2002), 473-503, 496.
[50] Ibid., 475.

because it not only documents the conflict between the two disciplines but also asks whether the conflict can be reconciled by the law taking art historians' interpretations into account.

In Practice – Regulation

The second reason that this research focuses upon the influence that art history can have upon law is for the practical reason that the current legal framework still struggles to regulate the intentional destruction of art. This is demonstrated throughout this thesis, but it can be mostly plainly exemplified by the fact that cultural heritage and artworks are still routinely 'subject to damage and destruction' despite national and international regulatory efforts to prevent harmful destructive acts.[51] This has led cultural heritage law academic Alberto Frigerio to conclude that as a result of failed legal, diplomatic, and technical interventions, cultural 'devastation might well continue unabated' unless further action is taken.[52] Not only, however, does the current legal framework struggle to prevent destructive acts; it also struggles to recognise the circumstances in which destruction should be permitted. This distinction is crucial for effective regulation, as the law must determine which destructive acts to protect and which to prevent to uphold the public interest in destruction, as stated previously. Thus, by comparing both fields' interpretations of destruction and asking whether art historians' interpretations do or could influence legal interpretations, this research not only assesses the current legal approach to destruction but also considers whether the law could better respond to destructive acts by taking art historians' interpretations into account.

1.3. Chapter Outline

To contribute to a better understanding of the concepts of destruction, as well as the relationship between the fields of law and art history in both theory and practice, this research conducts a socio-legal comparison of interpretations of destruction in both fields. The next chapter – chapter 2 – sets out the method and terminology used throughout this thesis, and in doing this, begins the comparison by assessing the language adopted by each discipline.

[51] C. Forrest. *International Law and the Protection of Cultural Heritage.* (Routledge, 2011), 131.
[52] A. Frigerio. 'Considerations on the legitimacy of organizing a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage.' (2015) *SACLR* 2(1), 101-116, 102.

The following chapter – chapter 3 – presents an overview of art historians' interpretations of destruction from recent art history literature, and focuses on the works of Dario Gamboni,[53] Stacey Boldrick,[54] and Alexander Adams.[55] In this chapter, different, albeit overlapping, categories of destruction are identified from these works, among others. The categories include destruction in armed conflict, religious destruction, political destruction, and artistic destruction. Additionally, the latter category includes a further distinction, proposed by Adams, between the destruction *of* art and destruction *as* art,[56] which is described further in chapter 6. These art-historical categories are central to the overall research and are used as the basis for the comparison.

The following chapters – chapters 4-6 – compare these art-historical interpretations with legal interpretations, by focusing on individual art-historical categories and the area of law that ordinarily regulates them. Each chapter begins by setting out art historians' accounts of the category. These accounts describe each category's distinguishing characteristics and how they are interpreted by art historians, using further examples from the art history literature. The chapters then set out legal interpretations of destruction under the rules and theory of the relevant legal regime. In this, the chapters establish how the area of law regulates the art-historical category of destruction and how the courts and legal academics interpret it. As such, doctrinal legal analysis, legal theory, and critical analysis are used to ascertain legal interpretations of destruction. Finally, these legal interpretations are compared with art historians' interpretations by applying both to case studies. The case studies have been chosen on the basis that art historians and either the courts or legal academics have interpreted them. Overall, the case studies function as the primary tool of the interdisciplinary comparison and analysis because they demonstrate the extent to which the interpretations are alike and the influence that art historians' interpretations have or could have upon legal interpretations.

Within these chapters, chapter 4 focuses on two art-historical categories – destruction in armed conflict and religious destruction. This chapter compares art historians' interpretations of

[53] Gamboni. *Destruction.*
[54] S. Boldrick, R. Clay. 'Introduction.' in S. Boldrick, R. Clay. *Iconoclasm: Contested Objects, Contested Terms.* (Routledge, 2007), 1-14; T. Barber, S. Boldrick. 'Introduction.' in T. Barber, S. Boldrick. *Art Under Attack: Histories of British Iconoclasm*. (Tate, 2013), 8-13; S. Boldrick. 'Iconoclasms past and present: conflict and art.' in Barber. *Art Under Attack,* 14-21; S. Boldrick. 'Attacks on art.' in Barber. *Art Under Attack,* 126-139; S. Boldrick. 'Introduction: breaking images.' in S. Boldrick, *et.al. Striking Images, Iconoclasms Past and Present.* (Routledge, 2018), 1-12; S. Boldrick. *Iconoclasm and the Museum.* (Routledge, 2020)
[55] A. Adams. *Iconoclasm, Identity Politics and the Erasure of History*. (Societas, 2020)
[56] Ibid., 55-68. The language of Adams's theory is varied to 'destruction' rather than 'defacement', in accordance with the terminology used in this thesis. See pp.23-25.

religious and conflict-related destruction with legal interpretations in ICHL using the recent *Al Mahdi*[57] International Criminal Court ('ICC') case as a case study. Chapter 5 goes on to examine political destruction in the context of English criminal damage laws and relies upon a historical case study from the British Women's Suffrage Movement. Finally, chapter 6 considers artistic destruction in the context of personal property law and copyright law using a range of both historical and contemporary case studies, including detested art, Auto-Destructive Art, and Dadaist Art.

Overall, the legal framework used in this research comprises four areas of law: ICHL, criminal law, property law, and copyright law. On a practical level, this research considers multiple areas of law to examine all the identified art-historical categories of destruction – conflict-related, religious, political, and artistic – and to cover the main ways destruction is regulated. As such, it is worth noting that this research does not expressly consider 'art law', which is defined as 'law that regulates the buying and selling of art, as well as national and international regimes of intellectual property rights.'[58] This is because destruction is prevalent in many areas of law, including both public and private law, so this definition is restrictive. Additionally, most of the socio-legal research that incorporates art only considers one area of law – mainly, copyright law. By looking at several areas of law, rather than focusing on one, this research examines the intricacies of the art/law intersection in different circumstances. As a result of this breadth, the contribution of this research is therefore somewhat unique.

Based on similar reasoning, this research looks at both national and international law, to observe the intersection between law and art history with sufficient breadth. In the national context, this research looks predominantly at UK and English law. However, other jurisdictions are considered for comparative purposes, such as to provide further evidence of different legal interpretations and the wider uncertainty surrounding the regulation of destruction. This research also looks at international law primarily because of the increasing number of international legal measures expressly designed to protect and prevent the destruction of cultural heritage, including artworks.[59] Within this, United Nations ('UN') over European (Council of Europe and European Union) law is examined due to the broader scope of conventions and states which are party to them.

[57] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment, 27 September 2016.
[58] Finchett-Maddock. 'Legal avant-garde', 18.
[59] See pp.35-39.

Overall, this comparison shows that interpretations of the intentional destruction of art differ between law and art history, and the role of art history in influencing law is limited – although this varies between areas of law and art-historical categories of destruction. While art historians effectively differentiate between different categories of destruction and interpret the meaning behind individual destructive acts, the law struggles to do this. As such, this research exposes a fundamental limitation of the regulation of the destruction of art. Under the current legal framework, the law regulates the destruction of art without looking to art history to understand what destruction means to art. Consequently, the law risks confusing important creative expressions and artistic practices with intentional acts of violence and harm.

1.4. Purpose and Disclaimer

It must also be stressed from the outset that it is not the intention of this thesis to support, encourage or promote destructive acts against cultural heritage and art. On the contrary, this thesis intends only to compile different interpretations of destruction and challenge legal perceptions of destructive acts in line with recent art-historical discourse. In doing so, this thesis aims to consider how laws can best respond when something is damaged or destroyed rather than incite acts of destruction. Most importantly, it must also be borne in mind that:

> The significance of image breaking […] varies. In each case it is a transformation of some form of power – an implication or degradation or desecration, or a positive sign signalling transition or transformation, or at times a bit of both.[60]

This effectively demonstrates the spectrum of destructive acts and their consequences. The significance of one destructive act can vary considerably from another, and reactions are likely to differ between groups. Therefore, while this thesis advocates that intentional destruction can, in some circumstances, be interpreted as having a positive effect, this does not apply to or support every purpose for which destruction is carried out. This research only compares interpretations of the intentional destruction of art in law and art history to better understand the concept of 'destruction' and the relationship between law and art.

[60] Boldrick. 'Iconoclasms past and present', 17.

2. The Intersection Between Law and Art History

2.1. Methodology

The two fundamental questions underpinning this research are whether interpretations of the intentional destruction of art differ between law and art history, and whether art historians' interpretations do or could influence legal interpretations. This thesis answers these questions by conducting a socio-legal comparison of interpretations of the intentional destruction of art in law and art history. Due to the interdisciplinary nature of the topic, this research adopts a mixed-methods approach that combines socio-legal research with doctrinal legal analysis, legal theory, critical analysis, and art-historical theory.

Socio-Legal Research on Law and Art

Socio-legal research looks to combine legal research with research from different disciplines, and as noted previously, the combination of law with art is an increasingly popular focus.[61] The scope and potential of socio-legal research is vast. For instance, in considering the meaning of 'socio-legal', the 'legal' element has been interpreted 'not necessarily [as] 'law' in a defined setting but the 'legal' in the everyday'[62] which broadens the ordinarily accepted meaning of 'law' as statutory and common law to encompass other forms of regulation and experience. Additionally, the pairing with 'socio-' enables researchers to create their own inquiries and build their own worlds to answer big questions,[63] and this is what this research aims to do. The main advantage of socio-legal research is that researchers can use it to assess the wider societal consequences or 'social reality' of the law,[64] in comparison to traditional doctrinal or 'black letter' legal research, which looks solely at the written body of law. Therefore, this thesis relies upon doctrinal legal analysis as its basis but uses socio-legal analysis to conduct a broader and more comprehensive study that integrates art history into legal research.

Moreover, socio-legal studies that combine law and art are especially valuable because they can utilise and enhance the advantages of socio-legal research identified above. For instance, Mulcahy concludes in her account of the relationship between law and art that such studies can

[61] See pp.10-13,17-19.
[62] N. Rose, M. Valverde. 'Governed by law.' (1998) *Social and Legal Studies*. quoted in S. Wheeler. 'Socio-legal studies in 2020.' (2020) *JLS* 47(2), 209-226, 216.
[63] Wheeler. 'Socio-legal studies', 217.
[64] T.A. Christiani. 'Normative and empirical research methods: their usefulness and relevance in the study of law as an object.' (2016) *Procedia* 219, 201-207, 201.

explore justice[65] and compare the rhetoric and reality of legal systems.[66] Perhaps even more impressively, Finchett-Maddock argues that academics can use art/law studies as critical devices to '[unravel] the coterminous histories of art, law and resistance'[67], expose patterns in social change, and provide a platform for post-colonial voices.[68] To exploit these benefits and contribute to the growing trend in socio-legal research that incorporates art, this thesis seeks to consider how art history can inform the law at both a theoretical *and* practical level. It does this by first considering whether interpretations of destruction in law and art history differ theoretically, and then by assessing whether art historians' interpretations could be integrated into the legal framework more practically.

It is also worth clarifying that this research looks at law and art history as disciplines, rather than concepts. It is important to make this distinction because one aspect of socio-legal research that has increased in recent years is 'visual jurisprudence' or 'legal aesthetics.' These areas try to understand the abstract concept of law through visual and aesthetic manifestations, such as courtrooms,[69] the clothing of legal actors,[70] and symbols such as Lady Justice.[71] This thesis does not contribute specifically to this movement, as it does not seek to assess representations of the law itself, but representations of destruction *in* law and art history. However, it is worth drawing attention to this emerging area of research as it emphasises the breadth of research on law and art that is currently taking place.

From this, it is also worth briefly comparing the two concepts, 'law' and 'art', to dismantle the widely held belief that the two are 'inherently dissonant.'[72] Generally, law is perceived as rational, a-sensual, and objective, whereas art is perceived as irrational, sensual, and subjective.[73] These distinctions are not, however, accurate, as law and art have a remarkable number of shared characteristics. For instance, both law and art raise and answer questions;[74]

[65] Mulcahy. 'Eyes of the law', 117.
[66] Ibid., 122.
[67] Finchett-Maddock. 'Legal avant-garde', 2.
[68] Ibid., 31.
[69] A. Musson. 'Visualising legal history: the courts and legal profession in image.' in J. Baker. *English Legal History and its Sources*. (CUP, 2019), 203-222.
[70] L. Dahlberg. 'Introduction: visualising law and authority.' in L. Dahlberg, *et.al*. *Visualizing Law and Authority: Essays on Legal Aesthetics.* (De Gruyter, 2012), 1-10, 1.
[71] B. Wardle. 'Lady injustice: inequality and legal iconography.' in McCutcheon. *Research Handbook*, 239-257.
[72] J. McCutcheon, F. McGaughey. 'Introduction to the research handbook on art and law.' in McCutcheon. *Research Handbook*, 1-9, 1.
[73] Ibid., C. Douzinas. 'The legality of the image.' (2006) *MLR* 63(6), 813-830, 813; W.N. Duong. 'Law is law and art is art and shall the two ever meet? Law and literature: the comparative creative process.' (2005) *SCILJ* 15, 1-44, 43-44.
[74] McCutcheon. 'Introduction.' in McCutcheon. *Research Handbook.*, 1.

both are 'instruments of […] emancipation and oppression'[75]; both are 'constrained by judgement' and regularly reinterpreted;[76] both have been developed by 'an elite',[77] and both rely upon a definition and understanding of 'art.'[78] The common assumption that law and art are wholly unalike therefore appears misguided, and it is socio-legal research that has demonstrated this.

Overall, this research is conducted primarily as a socio-legal comparison of art history and law. Researchers tend to base comparisons on an initial assumption of similarity.[79] In this case, the assumption is that art history and law have developed unique interpretations of the intentional destruction of art. To identify and compare these interpretations and thereby test this assumption, this research creates and compares an art-historical framework, derived from recent art history literature on destruction, with a legal framework, derived predominantly from doctrinal legal analysis, as well as legal theory and critical analysis. Before this thesis sets out both fields' interpretations of destruction further, it is first worth outlining the terminology used within this thesis.

2.2. Terminology

As two separate fields – law and art history – are considered within this thesis, it is necessary to justify the terminology used. This is because each field adopts different terms, and many are contentious. Accordingly, by showing how the language differs between law and art history, this also serves as a useful starting point for the overall comparison.

'Cultural Heritage'

For a start, there has been extensive academic debate as to the meanings of 'cultural heritage', 'cultural property' and 'cultural goods' in the development of ICHL.[80] This debate is of

[75] Mulcahy. 'Eyes of the law', 121.
[76] O. Ben-Dor. 'Introduction: standing before the gates of the law?' in O. Ben-Dor. *Law and Art: Justice, Ethics and Aesthetics.* (Taylor & Francis, 2011), 1-29, 1.
[77] Finchett-Maddock. 'Legal avant-garde', 21. See also: J. Berger. *Ways of Seeing.* (Penguin, 2008) for an account of the elitism of art history.
[78] J.B. Prowda. *Visual Arts and the Law*. (Lund Humphries, 2013), 14.
[79] N. Creutzfeldt, *et.al*. 'Introduction: exploring the comparative in socio-legal studies.' (2016) *IJLC* 12(4), 377-389, 377.
[80] L.V. Prott, P.J. O'Keefe. ''Cultural heritage' or 'cultural property'?' (1992) *IJCP* 1(2), 307-320; J. Blake. 'On defining the cultural heritage.' (2000) *ICLQ* 49(1), 61-85; L. Lixinski. *International Heritage Law for Communities: Exclusion and Re-Imagination.* (OUP, 2019), 27-65.

foundational importance to ICHL because acceptance and understanding of the terminology is a prerequisite for legal clarity and therefore the rule of law.[81] Additionally, the definition adopted has enormous consequences for determining what qualifies for protection.[82] In ICHL, '[t]he different instruments use different definitions, and these are rather vague.'[83] For instance, some international conventions protect 'cultural property'[84] whereas others protect 'cultural heritage.'[85] The term 'cultural heritage' is used throughout this thesis because the term is widely accepted and endorsed by historians, archaeologists, and anthropologists,[86] and because 'property' stresses 'commercial relevance'[87] over other cultural factors.

Furthermore, while academics often criticise lists of what 'cultural heritage' constitutes for limiting the scope of cultural expressions,[88] some examples are worth providing here to emphasise the scale and scope of cultural heritage protection. Tangible cultural heritage can be either moveable or immoveable. The former includes artifacts, archaeological discoveries, archives, books, clothing, documents, films, machines, and artworks, among other objects. The latter includes buildings, installations, institutions, cities, historical sites, landmarks, and monuments, among other places. Determining the scope of intangible cultural heritage is 'near impossible'.[89] However, some examples include behaviour, customs, and values; laws; fashion and style; festivals; folklore and oral histories; food and culinary traditions; regional and minority languages; performing arts, such as dance and music; spiritual and religious beliefs, and other traditional practices. As these non-exhaustive lists demonstrate, the scope of cultural heritage protection is vast. To combat this, and following this thesis's focus upon art history, this thesis mainly considers tangible artworks, such as paintings, sculptures, and statues, as well as tangible, immoveable cultural heritage, such as buildings and monuments. The terms 'cultural heritage' and 'artworks' are used interchangeably throughout this thesis to refer to the

[81] '[T]he law must be accessible and so far as possible intelligible, clear and predictable.' in T. Bingham. 'The rule of law.' (2007) *CLJ*, 66(1), 67-85, 69.
[82] Gamboni. *Destruction*, 14-15.
[83] S. van der Auwera. 'International law and the protection of cultural property in the event of armed conflict: actual problems and challenges.' (2013) *JAMLS* 43(4), 175-190, 178.
[84] For instance, the Convention respecting the Laws and Customs of War on Land of 1907 ('Hague Convention 1907') Art.56; the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 ('Hague Convention 1954') Art.1; the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 Art.1.
[85] Convention Concerning the Protection of Cultural and Natural Heritage Convention of 1972 ('World Heritage Convention') Art.1.
[86] Prott. ''Cultural heritage'?', 319.
[87] R. Uerpmann-Wittzack. 'Introduction: cultural heritage law and the quest for human identities.' in E. Lagrange *et.al*. *Cultural Heritage and International Law*. (Springer, 2018), 1-11, 1.
[88] F. Macmillan. *Intellectual and Cultural Property: Between Market and Community*. (Routledge, 2020), 60-83.
[89] Forrest. *International Law*, 362.

broader and narrower groups they represent. However, it is still worth giving further attention to the meaning of the term 'artwork.'

'Art' and 'Artworks'

As lawyer Judith B. Prowda neatly summarises, 'the question, "What is art?" remains as fundamental as it is mystifying to lawmakers and judges, as well as to art experts and artists.'[90] Aesthetics and the ontology of art are primarily concerned with answering the question 'what kind of a thing is a work of art?'[91] This is beyond the scope of this thesis due to the vast nature of the debate and because the focus of this research is on art history rather than aesthetic theory. However, it is worth considering some of the challenges involved in defining and therefore interpreting artworks. As a starting point, philosopher Kendall Walton argues that the variety of answers given to the question 'what is art?' effectively implies that the question is unanswerable.[92] Other art academics point out that any definition of art must represent the multiplicity of the concept, and therefore all the purposes for which artists make art,[93] as well as ongoing historical change.[94] Attempted definitions of 'art' have also been subject to extensive criticism, such as through feminist[95] and Marxist[96] lenses. More broadly, aesthetic theory has also been criticised as it remains behind artistic practice so is itself limited.[97] All of these difficulties have been amplified in recent years by Modern and Conceptual Art practices which have 'stretched the question… to every limit and paradox.'[98] As such, answers to the question 'what is art?' remain largely ineffectual and unsatisfactory. This is particularly troubling for law, as to regulate art, it must define it.

[90] Prowda. *Visual Arts*, 19.
[91] G. Rohrbaugh 'Ontology of art.' in B. Gaut, D.M. Lopes. *The Routledge Companion to Aesthetics.* 3rd ed. (Routledge, 2014), 235-245, 235.
[92] K. Walton. 'Aesthetics – what?, why?, and wherefore?' (2007) *JAAC* 65(2), 147-162.
[93] C. Mag Uidhir, P.D. Magnus. 'Art concept pluralism.' (2011) *Metaphilosophy* 42, 183-196.
[94] P. Kristeller. 'The modern system of the arts.' (1951) *JHI* 12, 496-527.
[95] C. Battersby. *Gender and Genius: Towards a Feminist Aesthetics.* (Women's Press, 1989)
[96] T. Eagleton. *The Ideology of the Aesthetic.* (Basil Blackwell, 1990)
[97] D.M.M. Lopes. 'The ontology of interactive art.' (2001) *JAE* 35(4), 65-81, 65.
[98] Gamboni. *Destruction*, 26.

Property and copyright law are the 'dominant frameworks by which law understands… and names' art.[99] For example, the UK copyright statute defines an 'artistic work' as:

> a graphic work, photograph, sculpture or collage, irrespective of artistic quality; a work of architecture being a building or a model for a building, or; a work of artistic craftsmanship.[100]

In comparison, US copyright law defines a 'work of visual art' as:

> a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[101]

These definitions are provided by statute, but the courts further define art at common law when interpreting these statutory provisions to determine the legal status of a disputed object.[102] In this, courts generally try not to consider whether an artwork is good, but simply whether it constitutes an artwork.[103] In other words, courts most often strive to be aesthetically neutral.[104] Regardless, such cases 'ultimately [require] judges to make aesthetic decisions about the works'[105] – and this often results in conflict. For instance, two of the most cited and discussed cases on aesthetic judgements come from the US. In *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co*, the court held that:

> [A]esthetic considerations are a matter of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of [legal] power.[106]

In contrast, in *Bleistein v. Donaldson*, the judge, Oliver Wendell Holmes, famously held that:

> It would be a dangerous undertaking for persons trained only in the law to constitute themselves as final judges of the worth of pictorial illustrations. At the one end some works of genius would be sure to miss apprehension. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[107]

---

[99] Finchett-Maddock. 'Legal avant-garde', 18.
[100] Copyright Designs and Patents Act 1988 c.48 ('CDPA 1988') s.4(1)(a)-(c).
[101] Copyright Act 1976 17 U.S.C. ('CA 1976 (US)') s.101. Extended to still photographs in s.101(2).
[102] For instance, *LucasFilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch).
[103] Prowda. *Visual Arts*, 15.
[104] B.L. Frye. 'Aesthetic nondiscrimination and fair use.' (2016) *BLR* 3, 29-50, 36.
[105] Ibid., 18.
[106] 72 NLJ 267 (1905), 268.
[107] 188 US 239 (1903), 251.

Legal academic Costas Douzinas uses these cases as evidence of his argument that the 'law continues to struggle with images'[108] and that the 'aesthetic dimension of law', which 'tells us how to see', must be acknowledged.[109] Marta Iljadica instead argues that courts generally consider the 'functionality' or 'utility' of an object over 'aesthetics', and this leads her to conclude that 'the law looks past art entirely even as it looks at it directly'.[110] Even if the courts do take aesthetics into account, this often results in 'confusing, inconstant and erratic decisions'.[111] Additionally, the courts generally understand art as an object – albeit a special category of object – rather than a process or idea. This inflexibility can prevent the courts from 'appreciati[ng] or understanding […] what the image producer is attempting to convey.'[112] Overall, several cases from legal systems across the world demonstrate courts' attempts to judge and define art, but this is again outside the scope of this thesis. The key point to bear in mind is that it remains unsettled how the courts should approach art cases due to these and other challenges. This also effectively reinforces why socio-legal research on art is required – to better understand the relationship between law and art and determine the role that art should play in influencing law. Moreover, as this section has emphasised the challenges involved in defining 'art', this thesis does not adopt a settled definition of 'art' or 'artwork'.

'Damage' and 'Destruction'

In regard next to the terms 'damage' and 'destruction', the term 'damaged' is used in this thesis because it suggests that a work of art has not been obliterated but has survived in some new form; it remains in existence but becomes a 'token of violence.'[113] If something is 'destroyed', on the other hand, this suggests that it is either wholly unrecognisable or all traces of it have been eliminated,[114] and the value of art based solely on its material form is a related but distinct debate.[115] Regardless of this connotation, the phrase 'destruction' is used in this thesis as it

[108] Douzinas. 'Legality of the image', 815.
[109] Ibid., 830.
[110] M. Iljadica. 'Classifying art in diverse legal regimes: the function-aesthetic divide and the public interest.' in McCutcheon. *Research Handbook*, 209-223, 223.
[111] Z.K. Said. 'Fixing copyright in characters: literary perspectives on a legal problem.' (2013) *Cardozo Law Review* 35(2), 769-829, 805. quoted in Burke. 'Intellectual property law', 259.
[112] Mulcahy. 'Eyes of the law', 115.
[113] Gamboni. *Destruction*, 25.
[114] Ibid., 25.
[115] Mulcahy. 'Eyes of the law', 115; Burke. 'Copyright and conceptual art', 45; J. Pila. 'An intentional view of the copyright work.' (2008) *MLR* 71(4), 535-558; A. Waisman. 'Rethinking the moral right to integrity.' (2008) *IPQ* 3, 268-285; E. Derclaye. 'Debunking some of UK copyright law's longstanding myths and misunderstandings.' (2013) *IPQ* 1, 1-17.

runs in parallel with 'creation'.[116] This is based on the proposition that cultural heritage and artworks constantly transform and evolve,[117] as, for example, use and storage themselves pose threats to conservation.[118] As a result, 'destruction' can be interpreted as an 'intervention' in some instances, if it does not result in an object being materially destroyed but instead changed. As art historian John Griffin states: 'breaking an image does not eradicate it; it merely replaces it with another. Destruction is part and parcel of creation.[119] Nevertheless, this thesis recognises that the term 'destruction' is limited in that it 'cannot account for significant differences in the treatment of an object'[120] and does not show whether the destruction is intentional, accidental, full, or partial.[121] To overcome this, this thesis looks only at intentional destruction and each case study is described in sufficient detail.

The choice of intentional over unintentional destruction should therefore also be briefly justified. Threats to cultural heritage and artworks are considerable. Both can be destroyed unintentionally through normal use, including by erosion, substandard preservation efforts or object handling;[122] unprofessional artifact collecting;[123] failed restoration;[124] natural disasters, such as floods or earthquakes, the risks of which have worsened with climate change;[125] and urbanisation,[126] among other causes. This thesis does not consider unintentional destruction because the scope is too large; the legal consequences are limited; and the targets, context, and motivations cannot be assessed so the potential role of art history is limited.

It is also worth noting that the term 'misuse' was considered, but as it relies upon a definition of 'proper use'[127] this is problematic. Additionally, although the word 'attack' can be 'questionable' in this context, since it may anthropomorphise the object and suggest that it

[116] Gamboni. *Destruction*, 32.
[117] L. Smith. *The Uses of Heritage.* (Routledge, 2006), 44; C. Holtorf. 'Averting loss aversion in cultural heritage.' (2015) *IJHS* 21(4), 405-421; L. Arizpe. *Culture, Diversity and Heritage: Major Studies*. (Springer, 2015), 6.
[118] Gamboni. *Destruction*, 33.
[119] A. Wilson. quoted in J. Griffin. 'The seeds of destruction.' *Tate etc.* (9 December 2013) [online] Available from: https://www.tate.org.uk/tate-etc/issue-29-autumn-2013/seeds-destruction [Accessed 5 December 2020]
[120] Gamboni. *Destruction*, 25.
[121] Ibid.
[122] Ibid., 33.
[123] S.M. Hart, E.S. Chilton. 'Digging and destruction: artifact collecting as meaningful social practice.' (2015) *IJHS* 21(4), 318-335.
[124] M. Durney, B. Proulx. 'Art crime: a brief introduction.' (2011) *CLSC* 56(2), 115-132, 123.
[125] E. Sesana, *et.al*. 'Adapting cultural heritage to climate change risks: perspectives of cultural heritage experts in Europe.' (2018) *Geosciences* 8(8), 305-328; F.Z. Giustiniani. 'Protecting world cultural and natural heritage against climate change and disasters: an assessment of the effectiveness of the world heritage convention system.' (2021) *YIDL* 2(1), 233-258.
[126] S. Al-Houdalieh, R. Sauders. 'Building destruction: the consequences of rising urbanization on cultural heritage in the Ramallah Province.' (2009) *IJCP* 16(1), 1-23.
[127] Gamboni. *Destruction*, 33.

suffers in a similar way to a person,[128] this stance is rebutted by the argument that there is a fundamental link between protecting persons and art.[129] Overall, the terms most commonly used throughout this thesis are 'destruction', 'cultural destruction' and 'destructive acts', which are also often used as short-hands for the 'destruction of art' and 'destructive acts that involve art'.

'Iconoclasm' and 'Vandalism'

Finally, the use of 'iconoclasm' and 'vandalism', in themselves, represent a significant discrepancy between interpretations of destruction in art history and law.

'Iconoclasm' literally means the 'breaking of images',[130] but it has recently been reinterpreted as meaning 'sign transformation'[131] or 'sign degradation'[132], as targets of iconoclasm are often changed rather than destroyed – as explained in the previous section. From this, the term can now be used to describe 'any action that substantially changes an art object's physical integrity.'[133] This can take various forms, including:

> [S]troking, striking, slicing, smashing, slashing, spitting, obliterating, kissing, rubbing, scratching, counter-stamping, beheading, burying, dismembering, dismantling, toppling, inverting, bending, hiding, blocking out, writing upon, blowing up, marking, painting, whitewashing, erasing, improving, removing and recycling.[134]

Traditionally, 'iconoclasm' was only used by art historians and theologians to refer to the destruction of religious icons, but the term is now applied to the destruction of all artworks.[135] In comparison, 'vandalism' is defined as 'the ruthless destruction or spoiling of anything beautiful or venerable'.[136] It is deemed to constitute 'barbarous, ignorant, or inartistic

[128] Boldrick. 'Attacks on art', 127.
[129] R. O'Keefe. *The Protection of Cultural Property in Armed Conflict.* (CUP, 2006), 2-3,361; R. Bevan. *The Destruction of Memory: Architecture at War*. 2nd ed. (Reaktion, 2016), 18-19.
[130] J.D. Kila. 'Iconoclasm and cultural heritage destruction during contemporary armed conflicts.' in S. Hufnagel, D. Chappell. *The Palgrave Handbook on Art Crime.* (Palgrave, 2019), 653-683, 654.
[131] Boldrick. 'Introduction: breaking images', 2.
[132] Adams. *Iconoclasm*, 2.
[133] Boldrick. 'Iconoclasms past and present', 17.
[134] Ibid., 15.
[135] Boldrick, Clay. 'Introduction', 9.
[136] Oxford English Dictionary ('OED'). 'Vandalism.' (OUP, 1989) [online] Available from: https://www.oed.com/view/Entry/221344?redirectedFrom=vandalism#eid [Accessed 17 November 2020]

treatment'[137] of property, and is sometimes defined in relation to its status as a criminal offence in certain jurisdictions.[138]

Iconoclasm is discussed frequently in the art history literature, but the term is rarely used in legal discourse, where vandalism (at a national level)[139] or destruction (at an international level)[140] are preferred. While the distinction between iconoclasm and vandalism is often 'unclear'[141], historically iconoclasm was used to describe the cultural destruction of the Byzantine Empire and the European Reformation, whereas 'vandalism' was used to describe the destruction of the French Revolution,[142] and beyond. In comparing both concepts, the targets of iconoclasm are perhaps narrower, as they have been interpreted as being restricted to icons and images.[143] However, art historians now apply the term to almost all art forms, including buildings and monuments, so the scope no longer appears limited. Additionally, some allege that iconoclasm is distinct from vandalism because attacks are purposeful and not 'devoid of meaning'[144], but this is unconvincing as the motivations can be congruent. On this basis, perhaps the main distinction between the terms is the belief that in contrast to vandalism or destruction: '[i]conoclasm can be creative or […] destructive; [or] sometimes it can be both.'[145] As such, although both iconoclasm and vandalism are stigmatised,[146] iconoclasm is less so, as in some cases it can be perceived as positive.[147] Both terms are used throughout this thesis as defined here and the meaning behind destructive acts – whether iconoclasm or vandalism – is considered throughout this research. To do this, the next chapter sets out how art historians interpret destructive acts that involve art.

[137] OED. 'Vandalism.'
[138] Oxford Advanced Learner's Dictionary. 'Vandalism.' (OUP, 2020) [online] Available from: https://www.oxfordlearnersdictionaries.com/definition/english/vandalism [Accessed 17 November 2020]
[139] For instance, Scotland has 'vandalism' offences (Criminal Law (Consolidation) (Scotland) Act 1995 c.39 s.52).
[140] See pp.35-39.
[141] Adams. *Iconoclasm*, 2.
[142] Gamboni. *Destruction*, 23.
[143] Ibid., 24.
[144] K. Kolrud, M. Prusac. 'Introduction – whose iconoclasm?' in K. Kolrud, M. Prusac. *Iconoclasm from Antiquity to Modernity.* (Routledge, 2016), 1-14, 1.
[145] Julius. 'Art crimes', 483.
[146] Gamboni. *Destruction*, 19.
[147] Adams. *Iconoclasm*, 2.

3. Art Historians' Interpretations of Destruction

This chapter shows how art historians interpret the intentional destruction of art, with a focus on the four categories of destruction identified from the recent art history literature. These interpretations and categories are applied to case studies in later chapters to compare interpretations of destruction in art history and law and determine the former's influence on the latter.

3.1. Literature Review

This research relies primarily on the research of art historians Dario Gamboni, Stacey Boldrick, and Alexander Adams. On this basis, these works are reviewed before the categories of destruction, which are identified both from their works and the wider art history literature, are presented. In doing this, some general observations from the art history literature on destruction are also made.

As a starting point, Dario Gamboni's book, *The Destruction of Art*, provided the first comprehensive account of the destruction of art in modern history. The first edition, published in 1997, was inspired by the iconoclasm that accompanied the end of Communism, such as the fall of the Berlin Wall. The work was then revised in 2018 to account for the increasing destruction of art in armed conflict, especially by terrorist organisations, and the growing opposition to Contemporary Art.[148] It is apparent from Gamboni's work that the scope of destructive acts involving art are vast. This is illustrated most plainly by the examples that Gamboni provides in his summary of the breadth of the topic.[149] He notes that a destructive act can be carried out by an individual or a group, either anonymously or for publicity; that act can be direct or indirect, violent or gentle, legal or illegal; the motivations behind it can be explicit or implicit, ideological or private; and the target can 'be private or public property, deemed attractive or 'offensive', acknowledged as art or not'.[150] This range exemplifies why further research on the destruction of art is required – to better understand these distinctions. From this, it is also interesting to note how much art has been destroyed throughout history, and therefore how common destruction has been. This realisation even led Gamboni to conclude

[148] Gamboni. *Destruction*, 7.
[149] Ibid., 31.
[150] Ibid.

that it is an artifact's 'normal fate to disappear.'[151] Nevertheless, Gamboni describes the importance of the destruction of art in the following passage:

> We see daily how the misuse (and use) and the destruction (and creation) of objects, among which are works of art, play a frequent and sometimes crucial role in the transformation of societies […] we may use them to revise our understanding of ourselves and of the importance of 'symbolism' in our societies.[152]

In other words, understanding both the creation and destruction of art is integral to understanding past, current, and future societies and, arguably, the legal frameworks that govern them. Gamboni's seminal work provided the basis on which much of the art history literature followed and, as such, it is referred to throughout this thesis.

The book *Art Under Attack*, which accompanied the Tate London's exhibition of the same name in 2013-2014, provides another extensive account of the destruction of art. This book categorises destructive acts by three factors: religion,[153] politics,[154] and aesthetics.[155] This categorisation usefully separates the three primary motivating factors behind destructive acts and has been used as the basis for the categories set out in this chapter and used throughout this thesis. Notably, however, this thesis has added another category – destruction in armed conflict – as although it often overlaps with religion and politics, it has unique characteristics.[156] In this book, Stacy Boldrick's contributions regarding the relationship between art and conflict[157] and attacks on art are especially insightful.[158] For instance, Boldrick considers in detail the motivations behind attacks against art and concludes that general motivations are not easily discernible because they are so diverse and multifaceted.[159] She does, however, identify that the motivations behind destructive acts mainly comprise a combination of political, environmental, and aesthetic factors, in addition to influences such as the individual character of the perpetrator and media criticism of an artwork.[160] She also, like Gamboni, draws attention to the scale of destruction that has occurred throughout history.[161] In particular, she notes that

[151] Gamboni. *Destruction*, 33.
[152] Ibid., 61.
[153] Barber. *Art Under Attack*, 30-90.
[154] Ibid., 91-124.
[155] Ibid., 125-169.
[156] See pp.32-33.
[157] Boldrick. 'Iconoclasms past and present'.
[158] Boldrick. 'Attacks on art'.
[159] Ibid., 130.
[160] Ibid.
[161] Boldrick. 'Iconoclasms past and present', 19.

'forms of image breaking have always accompanied image making'[162] and that, subsequently, creation and destruction are not only of historical interest but are constant, ongoing, and interrelated activities.

Thirdly, this research has given significant attention to artist and art historian Alexander Adams' most recent work, *Iconoclasm: Identity Politics and the Erasure of History*, published in 2020. This work comments predominantly upon the iconoclasm and 'statue toppling' which occurred in the wake of the 2015-2019 anti-confederate and 2020 BLM and anti-colonial movements. The overall aim of this work is to criticise and condemn these instances of iconoclasm, which Adams associates with left-wing identify politics, social justice, 'cancel culture,' and the erasure of history.[163] Before doing this, however, Adams provides a broader account of some of the political, theological, nationalist, and aesthetic instances of iconoclasm throughout history.[164] In this, he adopts a similar categorisation of destruction to the Tate, except that he (perhaps unnecessarily) separates destructive acts motivated by politics from those motivated by nationalism. In tracing the history of iconoclasm, Adams not only categorises instances of destruction but also offers his opinion on which instances of destruction are permissible and which are not. As such, his work provides an example of how art historians judge destructive acts.

Furthermore, when examining 'aesthetic iconoclasm', Adams draws a distinction between the destruction *of* art (destructive acts that physically destroy artworks) and destruction *as* art (destructive acts that amount to art themselves).[165] This distinction is most relevant to artistic destruction, so chapter 6 provides details of it.[166] However, this thesis refers to the distinction throughout, because it neatly encapsulates what is at stake if different interpretations of destruction are ignored – principally, that artistic practices and creative expressions can be confused with intentional acts of violence and harm. It is also interesting to note a further discrepancy between Adams' account of destruction and those just discussed. While the previous works emphasise that the destruction of art is not unprecedented but highly common, Adams is sceptical of this view and warns that acts of destruction should not be discussed 'neutrally as 'alteration[s]', 'revision[s]' or 'correction[s]'', as this justified immense periods

[162] Boldrick. 'Iconoclasms Past and Present.', 19.
[163] Adams. *Iconoclasm*, 69-83.
[164] Ibid., 8-68.
[165] Ibid., 55-68.
[166] See pp.58-60.

of destruction in Nazi Germany and Soviet Russia.[167] Overall, this thesis treats these works as representations of the art-historical approach to interpreting and categorising destruction. A summary of these interpretations and how this comparison applies them is provided next.

Categories of Destruction – Context and Motivation

From these and other works, the destruction of art can be somewhat straightforwardly divided into four main categories: destruction in armed conflict, religious destruction, political destruction, and artistic destruction. These categories reflect both the context of and motivations behind a destructive act and are not mutually exclusive but frequently overlap. While some art historians have reservations about labelling specific factors that contribute to destruction,[168] these categories have been identified from trends in the art history literature and are sufficiently broad to overcome such hesitations.

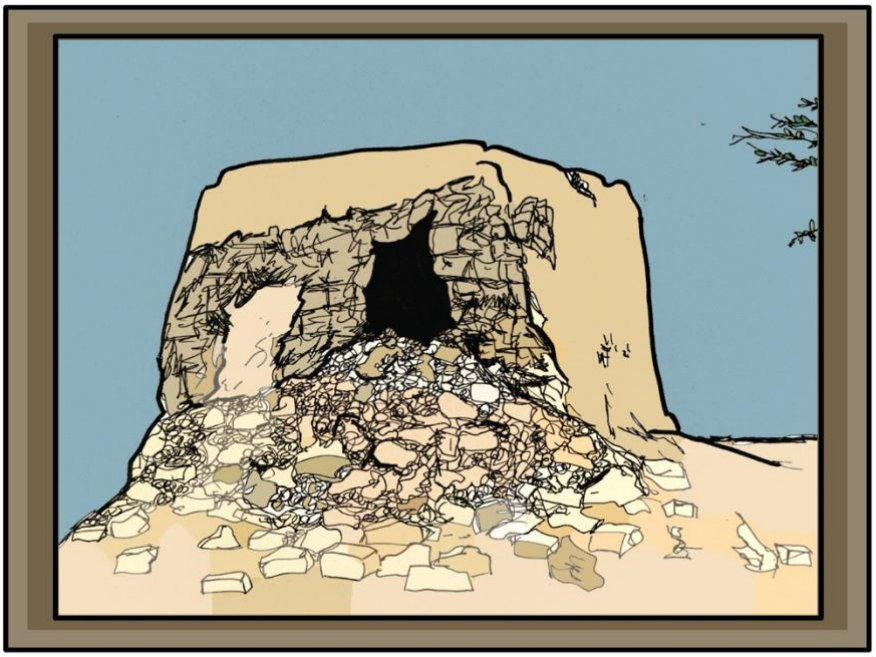
In short, these categories show that the destruction of art varies depending on the context in which destruction takes place and the motivations behind a destructive act. Therefore, destruction in times of international armed conflict, occupation, civil war, revolution, and peacetime fundamentally differ. Additionally, the perpetrators' intention, be it religious, political (including social, nationalistic, or economic), artistic, or conflict-related influences the nature and reception of a destructive act.

These categories are helpful because, broadly speaking, they help to decipher the meaning behind destructive acts and therefore whether the public is interested in preventing or promoting them. For the purposes of the research, the categories are used specifically to trace conceptual trends in art-historical and legal thinking on destruction. Subsequently, the remaining chapters are structured around this categorisation, and each chapter begins by setting out the relevant categories' defining characteristics, using further examples from the art history literature.[169] These art-historical interpretations are then compared with legal interpretations, using case studies, to determine the extent of similarity between the disciplines and the

[167] Adams. *Iconoclasm*, 2.
[168] Boldrick. 'Attacks on art', 130.
[169] The growing interest in the destruction of art has not been limited to art history, but has also increased in other fields, such as heritage, political, theological, criminological, dispute resolution, and literary studies. Due to the interdisciplinary and integrative nature of this thesis, reference will be made to complementary studies from other fields where appropriate, though this will be expressly stated.

influence of art-historical interpretations on legal interpretations. The next chapter begins by examining two categories: destruction in armed conflict and religious destruction.

4. Conflict-Related and Religious Destruction



Al Mahdi and the Mausolea and Mosques of Timbuktu

Rosie Wilson ©

Although art is destroyed in both periods of armed conflict[170] and peace, destruction during armed conflict is art and cultural heritage's 'most prominent threat'.[171] This is primarily because destruction in armed conflict, in some form, becomes inevitable.[172] Art can be destroyed in armed conflict unintentionally if, for instance, art is destroyed as collateral damage during an attack or if conservation is neglected because it is 'no longer [deemed] a priority'.[173] However, focus here is given to intentional destruction, and in the context of war, cultural destruction often becomes 'an aim in itself'[174] and may therefore be carried out systematically.[175] This is especially likely to occur where the conflict is 'identity-bound' as 'the warring parties [aim to] destroy the symbolic goods of the 'other''.[176]

[170] Including both international and internal conflicts, such as civil war, revolution, occupation, and terrorism.
[171] N. Levin, *et.al.* 'World Heritage in danger: big data and remote sensing can help protect sites in conflict zones.' (2019) *GEC* 55, 97-104, 97.
[172] E. Cunliffe, *et.al*. 'The protection of cultural property in armed conflict: unnecessary distraction or mission-relevant priority?' (2018) *NATO OPEN Publications* 2(4), 1-22, 2.
[173] Auwera. 'International law', 175.
[174] Ibid.
[175] Bevan. *Destruction*, 18.
[176] Auwera. 'International law', 175.

A study conducted by heritage experts in 2017 identified that attacks on cultural heritage in armed conflicts are generally motivated by four factors.[177] These include: conflict goals, which are linked to the issue that is being fought over; military-strategy, by which the aim is to win a tactical advantage; signalling, the aim of which is to show the faction's commitment to the aggression; and economic incentives, which refer to the theft and sale of cultural heritage to fund military efforts.[178] Signalling is described more critically by architecture historian Robert Bevan as 'a means of dominating, terrorizing, dividing or eradicating the enemy people altogether'.[179] Heritage academic Sam Hardy also provides, as an example of the destruction of art as a financing strategy, that the Nazis' goal to eradicate 'degenerate art' was funded by the sale and export of that very art.[180]

It is essential to understand the motivations behind the intentional destruction of cultural heritage and art in armed conflict because destruction reduces the likelihood of peace, necessitates reconstruction efforts,[181] and often precedes attacks on people and the diversity they represent.[182] As Hardy points out, cultural destruction may serve as an early warning of genocide,[183] and other heritage academics have referred to cultural destruction more plainly as a 'tool of genocide.'[184] Unlike the other types of destruction identified and discussed within this thesis, art historians are generally always unsympathetic to destruction in armed conflict. In fact, Lambourne has traced the perception that it is morally wrong or 'barbaric' to intentionally destroy cultural heritage during armed conflict to the Franco-Prussian war (1870-1871).[185] The reasons for this are somewhat plain – as destruction in armed conflict is always motivated by discrimination in some form.

Religion has been another prominent motivator for the destruction of art, as notably both 'religion and law have a long history of policing images'.[186] As a historic example, art was destroyed as far back as Ancient Egypt (3100-332 B.C.) because of faith. Ancient Egyptians

[177] J. Brosché, *et.al*. 'Heritage under attack: motives for targeting cultural property during armed conflict.' (2017) *IJHS* 23(3), 248-260, 248.
[178] Ibid.
[179] Bevan. *Destruction*, 18.
[180] S. Hardy. 'Iconoclasm: religious and political motivations for destroying art.' in Hufnagel. *Palgrave Handbook*, 625-652, 627.
[181] A. Segall. 'Protection of cultural property in armed conflict: treaty ratification and implementation.' (2016) *CLB* 42(3), 455-459, 457.
[182] Ibid., 459.
[183] Hardy. 'Iconoclasm', 645.
[184] R. Lee, J.A.G. Zarandona. 'Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm.' (2020) *IJHS* 26(5), 519-538, 520, 532.
[185] Lambourne. *War Damage*, 14.
[186] Douzinas, Nead. 'Introduction', 9.

believed that sculptures held a person's soul (*ka*) and were living things themselves.[187] Accordingly, they destroyed sculptures to 'damn the soul of the depicted'.[188] Art has also been destroyed in the name of Buddhism[189] and each of the Abrahamic religions – Judaism, Christianity, and Islam – based on interpretations of passages from Holy Texts and teachings.[190] For instance, in the Ten Commandments it is stated:

> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.[191]

Similarly, in the Qur'an, there is a prohibition against 'set[ting] up idols to rival God[s], and lov[ing] them as if they are God.'[192] Religious followers have construed these extracts, alongside other passages and texts, as forbidding idolatry (idol worship) and therefore permitting the destruction of idols. The 'distrust of visual and physical representation' also partially stems from the religions' 'preference for the non-physical over the physical, thought over matter'.[193] Recently, religious destruction has been most often associated with terrorist activities conducted by radical Islamic organisations. However, Bevan notes that historically Islam was more flexible than Christianity in preserving the art and cultural heritage of non-believers.[194] Overall, Hardy argues that religious followers use destruction not as 'an absolute religious imperative' but as a 'situational strategy'[195] by which a member or group can demonstrate their faith or further their cause.[196] It is also worth noting that destruction has routinely occurred in religious contexts to protest against perceived corruption within religious organisations.[197] The remainder of this chapter considers conflict-related and religious destruction in the context of ICHL.

---

[187] E. Bleiberg, S. Weissberg. *Striking Power: Iconoclasm in Ancient Egypt.* (Pulitzer Art Foundation, 2019), 28.
[188] Adams. *Iconoclasm*, 9.
[189] F. Rambelli, E. Reinders. *Buddhism and Iconoclasm: A History.* (Bloomsbury, 2012)
[190] J. Noyes. *Politics of Iconoclasm: Religion, Violence and the Culture of Image-Breaking in Christianity and Islam*. (I.B. Tauris, 2016)
[191] *Shemot*, Exodus, chapter 20, verses 3-5. quoted in Hardy. 'Iconoclasm', 632.
[192] *Al-Baqarah*, Surah 2, verse 165. quoted in Hardy. 'Iconoclasm', 628.
[193] J.J. Elias. 'The Taliban, Bamiyan and revisionist iconoclasm.' in Boldrick. *Striking Images*, 145-164, 146.
[194] Bevan. *Destruction*, 32.
[195] Hardy. 'Iconoclasm', 632.
[196] Ibid., 645.
[197] For instance, the group Arrêt Curés (Stop Priests) destroyed a bronze statue of Pontius Pilate in 1983 to protest the Pope's upcoming visit to Lourdes, France (Gamboni. *Destruction*, 111-114.)

4.1. International Cultural Heritage Law ('ICHL')

ICHL developed throughout the twentieth century in response to the damage caused to cultural heritage, including artworks, during conflicts such as the First and Second World Wars.[198] As a result, several international legal instruments were enacted, which included measures designed to minimise damage to cultural heritage, first in armed conflict[199] and later in peacetime.[200]

The overall aim of ICHL is to protect and conserve cultural heritage and prevent damage or destruction. This is achieved through a combination of obligations on states to mark, respect, and safeguard cultural heritage;[201] fund and assist in conservation, restoration, and reconstruction efforts;[202] educate civilians and raise public awareness of cultural heritage protection;[203] and through the imposition of penalties on perpetrators of destruction.[204] As a result of these aims and measures, it is possible that there is a presumption in ICHL that cultural heritage should always be protected and destruction always prevented. If this is the case, this could create conflict with the overarching art-historical perspective that destruction can be

[198] Forrest. *International Law*, 56; O'Keefe. *Protection of Cultural Property*, 1.

[199] The Instructions for the Government of Armies of the United States in the Field of 1863 Art.34, enacted during the American Civil War (1861-1865), was the first legal document to suggest that warring states should protect cultural heritage in armed conflict. This idea was incorporated into international humanitarian law in the Convention respecting the Laws and Customs of War on Land of 1899 ('Hague Convention 1899') and Hague Convention 1907. These were the first internationally binding instruments that included obligations to protect cultural heritage during armed conflict, and both forbid the 'seizure of, destruction or wilful damage done to' institutions dedicated to religion, charity, education, the arts and sciences, as well as historic monuments and works of art (Hague Convention 1899 Art.56; Hague Convention 1907 Art.56). Following the Second World War, the Hague Convention 1954 provided a comprehensive legal framework for the protection of cultural heritage during, before, and after armed conflict. This framework included obligations on states to safeguard (Hague Convention 1954 Art.3) and respect (Art.4) 'cultural property' (including 'movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, […] works of art; […]' Art.1) and only permitted deviation from these obligations on the grounds of military necessity (Art.4(2)).

[200] The World Heritage Convention functions as the primary legal framework for cultural heritage protection in peacetime. It facilitates international cooperation of cultural heritage protection (Art.7) by, for instance, imposing protective obligations on States (Arts.4-6) and introducing the World Heritage and World Heritage in Danger Lists (Art.11).

[201] Hague Convention 1907 Art.27; Hague Convention 1954 Arts.2-7; World Heritage Convention Arts.4-6; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999 ('Second Hague Protocol') Arts.5-10.

[202] World Heritage Convention Arts.13,15-26.

[203] World Heritage Convention Art.27.

[204] Hague Convention 1899 Art.56; Hague Convention 1907 Art.56; Charter of the International Military Tribunal of 1945 ('Nuremberg Charter') Art.6(b); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 1977 Art.85(4)(d),85(5); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 1977 Art.16; Statute for the establishment of the International Criminal Tribunal for the former Yugoslavia of 1993 ('ICTY Statute') Art.3(d); Rome Statute of the International Criminal Court of 1998 ('Rome Statute') Arts.8(2)(b)(ix),8(2)(e)(iv),9(1)(h).; Second Hague Protocol Art.15.

meaningful.[205] However, under the art-historical categories of destruction considered in this chapter – destruction in armed conflict and religious destruction – it will be shown that it is unlikely that this would pose a problem, because these categories of destruction tend to be interpreted as harmful when carried out with discriminatory intent.

Within ICHL, this chapter focuses on the international criminal law measures which penalise individuals who carry out destructive acts. While many of the legal rules in ICHL are concerned with destruction, this section focuses on crimes against destruction because the international criminal courts are most likely to interpret destruction in this context, as required when prosecuting individuals. Additionally, the destruction of cultural heritage has been increasingly criminalised at the international level, particularly in armed conflict, through the introduction of international criminal offences,[206] so it is an area of increasing importance. This focus is especially beneficial because it also means that comparisons can be drawn between interpretations of destruction in international and national criminal laws, which are examined in this next chapter. From this, this research can determine whether either is more closely aligned with art historians' interpretations.

Since the end of the Second World War, several international criminal courts have been set up following armed conflict. Many of the international legal instruments that established these courts have included provisions that allow the courts to prosecute perpetrators of destruction. For instance, the Charter of the International Military Tribunal of 1945, which established and regulated the Nuremberg Trials, included the plunder or destruction of cities, towns, or villages as a war crime.[207] In 1993 the Statute for the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute') also included, as a war crime, the seizure, destruction, or wilful damage of institutions dedicated to the arts, historical monuments, and artworks.[208] Several convictions were secured under this offence for cultural destruction, including the shelling of the Old Town of Dubrovnik, a World Heritage Site, in 1991[209] and the destruction of the Stari Most (Old Bridge) in Mostar in 1993.[210] The judgements of the

[205] See pp.6-7,27-31.
[206] M. Frulli. 'The criminalization of offences against cultural heritage in times of armed conflict: the quest for consistency.' (2011) *EJIL* 22(1), 203-217.
[207] Nuremberg Charter Art.6(b).
[208] ICTY Statute Art.3(d) based on the wording of the Hague Convention 1899 Art.56 and Hague Convention 1907 Art.56; T. Meron. 'The protection of cultural property in the event of armed conflict within the case-law of the International tribunal for the Former Yugoslavia.' (2005) *MI* 57(4), 41-60, 43.
[209] *The Prosecutor v. Jokić,* IT-01-42/1-S, Judgment, 18 March 2004; *The Prosecutor v. Strugar,* IT-01-42-T, Judgement, 31 January 2005.
[210] *The Prosecutor v. Prlić et al,* IT-04-74-T, Judgement, 29 May 2013.

ICTY have been highly influential in establishing that the destruction of cultural heritage constitutes an international criminal offence. For instance, in the case *Prosecutor v. Kordić and Čerkez* the ICTY affirmed that the intentional destruction of cultural heritage is 'criminalised under customary international law' if the act is 'perpetuated with the requisite discriminatory intent'.[211]

More recently, the Rome Statute of the International Criminal Court of 1998 ('Rome Statute') established the ICC – the world's first permanent international court – and set out the four crimes over which it was to have jurisdiction:[212] genocide, crimes against humanity, war crimes, and crimes of aggression.[213] The Rome Statute includes the destruction of cultural heritage as both a crime against humanity[214] – if the destruction is carried out as part of a widespread, systematic attack against a civilian population – and a war crime.[215] Although neither provision expressly references 'cultural heritage' or 'artworks', the ICC's chief prosecutor between 2012-2021, Fatou Bensouda, has confirmed that cultural destruction could fall within either offence, although the latter is more likely.[216] Consequently, the key provision stipulates that it is a war crime to:

> Intentionally [direct] attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, […], provided they are not military objective.[217]

Unlike previous international measures which punish the 'destruction' or 'wilful damage' of cultural heritage,[218] the Rome Statute penalises 'attacks.' This only requires that a perpetrator carries out an attack – not that it results in damage or destruction – so this lowers the standard of the offence. Additionally, earlier measures include 'institutions dedicated to art,' 'historic monuments,' *and* 'artworks' in similar crimes,[219] whereas the Rome Statute only includes 'buildings dedicated to art' and 'historic monuments.' The omission of 'artworks' is significant

[211] IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para.207.
[212] Rome Statute Art.5.
[213] Ibid. Arts.6,7,8,8*bis*.
[214] Ibid. Art.9(1)(h).
[215] Ibid. Arts.8(2)(b)(ix) in international armed conflict, and 8(2)(e)(iv) in internal armed conflicts.
[216] F.B. Bensouda. 'Cultural heritage protection: fighting destruction and trafficking.' *International Conference on the occasion of the 50th anniversary of the 1970 UNESCO Convention in partnership with UNESCO, the European Commission and the Council of Europe.* (16-18 November 2020) [online] Available from: https://cultural-heritage-and-multilateralism2020.com/en/event [Accessed 18 November 2020]
[217] Rome Statute Arts.8(2)(b)(ix),8(2)(e)(iv).
[218] Hague Convention 1899 Art.56; Hague Convention 1907 Art.56; ICTY Statute Art.3(d).
[219] Ibid.

here as it represents a far narrower understanding of 'cultural heritage'.[220] From this reading, the intentional destruction of an individual artwork or several artworks in armed conflict would not constitute a war crime. Yet, the intentional destruction of an art gallery containing several artworks could. In such circumstances, the perpetrator would only be responsible under this provision for destroying the building which contained the artworks, rather than for destroying the artworks themselves. This exclusion is significant as it suggests that architecture is more valuable than artworks or other moveable forms of cultural heritage. The reason for this omission is also perplexing, given that commentators on the drafting of the Rome Statute recommended that the destruction of artworks was a war crime under customary international law and should therefore be included.[221] Accordingly, the ICC's approach is inconsistent, and has led academics to conclude that 'the categories of cultural property deserving protection under international criminal law [remain] unclear and in need of clarification'.[222] Moreover, for the purposes of this research, the definition of 'artwork' is extended in this chapter to accommodate buildings and monuments and examine the ICC's interpretations of destruction.[223]

It is also worth noting that following the enactment of the Rome Statute, and in response to the destruction of the Bamiyan Buddhas (544 AD) by the Taliban in 2003, the United Nations Educational, Scientific and Cultural Organisation issued the Declaration concerning the Intentional Destruction of Cultural Heritage ('UNESCO Declaration'). The primary aims of the UNESCO Declaration are to recall and reiterate the various principles of international law that seek to reduce and punish intentional destruction and thereby encourage states to introduce further measures to 'prevent, avoid, stop and suppress' destructive acts.[224] The UNESCO Declaration defines 'intentional destruction' as:

> [A]n act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an

[220] M. Lostal. *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq and the Buddhas of Bamiyan*. (CUP, 2017), 39, 144.
[221] ILC. *Draft Statute for an International Criminal Court with commentaries, Yearbook of the International Law Commission.* (1994), 39. quoted in G.F. Arribas. 'The narrow protection of cultural properties and historical monuments in the Rome Statute: filling the gap.' (2019) *ICLR* 21, 129-146, 142.
[222] M.E. Badar, N. Higgins. 'Discussion interrupted: the destruction and protection of cultural property under international law and Islamic law – the case of *Prosecutor v Al Mahdi.*' (2017) *ICLR* 17, 486-516, 493.
[223] See pp.19-23.
[224] UNESCO Declaration s.2(2).

> unjustifiable offence to the principles of humanity and dictates of public conscience…[225]

It is particularly interesting to note the inclusion of 'integrity' and 'public conscience' here. In regard first to integrity, the UNESCO Declaration could be implying that integrity is a relevant factor to ICHL and therefore that international criminal courts should consider it in their decision-making, even if it is not mentioned in their statutes. This is significant because the term 'integrity' could be taken to suggest that 'destruction' should be interpreted more broadly than merely meaning that an object ceases to exist following the act – and this is how art historians now interpret destruction.[226] Secondly, the use of the phrase 'public conscience' reinforces the idea that the courts must take different interpretations of destruction into account to assess the meaning behind and public interest in destructive acts. While interesting to note, the UNESCO Declaration is a non-binding instrument, so the importance of these comments should not be overstated. More authoritative ICHL interpretations of intentional destruction are examined in the Al Mahdi case study, which is outlined next.

In 2016, Al Mahdi was convicted of the war crime of directing attacks against buildings dedicated to religion and historic monuments[227] before the ICC. This case is significant as it represents the first time cultural destruction was brought as the principal offence in an international criminal case. As the destructive acts carried out by Al Mahdi were interpreted at the highest international criminal court, this also provides an example of a highly authoritative recent legal interpretation of destruction for the purposes of this research. The following section compares the ICC's interpretation of destruction with art historians' interpretations to assess their likeness and influence upon one another.

Case Study 1: Al Mahdi and the Mausolea and Mosques of Timbuktu

Ahmad Al Faqi Al Mahdi was a member of the militant Islamist group Ansar Dine which was affiliated with Al Qaeda and sought to convert Mali into an Islamic state.[228] Al Mahdi was brought before the ICC in 2016 for his involvement in the destruction of nine mausolea of Sufi Muslim saints and the symbolic door of the Sidi Yahia Mosque in Timbuktu in 2012. The

[225] UNESCO Declaration s.3(1).
[226] See pp.23-26. This is, however, perhaps less relevant as the ICC are directed to focus on 'attacks' over 'destruction'. As will be discussed in chapter 6, 'integrity' is also a key concept in copyright law - see pp.67-72.
[227] Rome Statute Art.8(2)(e)(iv).
[228] Hardy. 'Iconoclasm', 640.

prosecutor of the ICC submitted that Al Mahdi was the controlling mind of the destruction operations.[229] Al Mahdi made an admission of guilt – the first time this had occurred before the ICC – and was convicted under the Rome Statute Art.8(2)(e)(iv). He was sentenced to nine years imprisonment;[230] reparations were ordered for the community of Timbuktu;[231] and the mausolea and mosque were restored, due in part to funding from UNESCO and several additional donors.[232]

Although the ICC only considered the destruction of nine mausolea and a mosque, the extent of destruction carried out by the group was vast. In addition to the cultural destruction considered by the court, Ansar Dine also destroyed intangible heritage in the form of the musical archives of Radio Buktu[233] and ancient manuscripts held in the Ahmed Baba Institute library – although local, secret evacuations are said to have saved around 400,000 documents from the collection.[234] As explained previously,[235] these targets were excluded from the scope of the offence because they were moveable property. Thus, the court could not take the full scale of destruction into account.

The prosecutor of the ICC argued that Ansar Dine had sought, in their destruction, to prevent locals from carrying out their daily and 'deeply rooted religious practices and beliefs' which they practiced at the targeted sites.[236] This was supported by video evidence presented at the trial which showed Al Mahdi stating that the mausolea were 'inappropriate' in Timbuktu because of their associations with idolatry.[237] In their judgement the ICC added that the destruction had been 'aimed at breaking the soul of the people of Timbuktu' and that 'the entire international community' had 'suffer[ed] as a result'.[238] As presented at the ICC, the motivations behind the destruction were multifaceted, and overlapped the conflict-related, religious, and political categorisations provided in chapter 3. It was argued before and by the

[229] Office of the Prosecutor ('OTP'). *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi* (1 March 2016) [online] Available from: https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-al-mahdi-160822 [Accessed 1 June 2021]
[230] *Prosecutor v. Al Mahdi*, Judgement, para.106.
[231] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Reparations Order, 17 August 2017.
[232] M.M. Apotsos. 'Timbuktu in terror: architecture and iconoclasm in contemporary Africa.' (2017) *IJIA* 6(1), 97-120, 115.
[233] Hardy. 'Iconoclasm', 640.
[234] J. Hammer. *The Bad-Ass Librarians of Timbuktu: And Their Race to Save the World's Most Precious Manuscripts.* (Simon & Schuster, 2017)
[235] See pp.37-38.
[236] OTP, *Statement of the Prosecutor*.
[237] Ibid.
[238] *Prosecutor v. Al Mahdi*, Judgement, para.80.

court that Ansar Dine had sought to conquer Timbuktu; demonstrate their political and religious power and supremacy; eradicate opposition; prevent the practice of other religious beliefs and ways of life; and destroy the dignity of Timbuktu's inhabitants.[239] No argument could reasonably suggest that the destruction was motivated by artistic or creative reasons because the primary motivating factor was discrimination. This is therefore a clear example of the destruction *of* art.

In this context, and due to the undoubtedly harmful motivations behind the destructive acts, neither the court nor art historians contemplated any positive value in the destruction.[240] Instead, the art-historical and wider cultural value of the mausolea and mosques were used as evidence to *justify* the prosecution of Al Mahdi, rather than *defend* the destruction. Thus, the prosecution and ICC did not acknowledge positive meaning in Al Mahdi's actions but did firmly recognise the target's cultural value. As can be evidenced from extracts from *The Statement of the Prosecutor* at the opening of the hearing, the cultural value of the sites – informed by a Malian cultural expert and UNESCO representative – formed the foundation which justified the charges:

> […] These mausoleums, which survived the ravages of time, have continued to play a fundamental, even foundational, role in both the life within the city's gates and beyond the city's borders […]
>
> The mausoleums also testify to the historical role Timbuktu played in the spread of Islam in Africa and in the history of Africa itself […]
>
> [T]he mausoleums played a key role in fostering the social cohesion [….]
>
> [T]he destroyed mausoleums played a crucial role in shaping the identity of the people of Timbuktu […]
>
> To destroy Timbuktu's mausoleums is therefore to erase an element of collective identity built through the ages […]
>
> Culture is who we are. Our ancestors created paintings, sculptures, mosques, temples and other forms of cultural possessions all around us. They put their hearts and souls

[239] OTP, *Statement of the Prosecutor*; *Prosecutor v. Al Mahdi*, Judgement.
[240] See pp.42-44.

into the creation of such cultural heritage so that it represents the cultural identity of their times, and is passed on for the benefit of future generations […][241]

As international law academic Paige Casaly argues, the prosecution, Pre-Trial Chamber, and Trial Chambers of the ICC all adopted a combination of cultural relativist and universalist approaches to assess the significance and impact of the destruction, and thereby emphasised the cost to both the local community and humanity as a whole.[242] She notes that these assessments were necessary for the ICC when considering the gravity of the offence, and therefore the case's admissibility.[243] In other words, the gravity of the crime was determined by the cultural value of the targets and the impact that destruction had upon them – which were necessarily informed by their cultural or art-historical history. As such, this case provides a clear example of how art and cultural historians' interpretations can inform legal interpretations. Cultural interpretations of the sites, and the impact that destruction had upon them, justified the legal intervention.

Although it appears that the ICC did recognise and take account of the art-historical and cultural value of the targets, art historian Natalia Philatova wrote in 2019 that the ICC did not go far enough in considering art-historical and aesthetic discourses on iconoclasm.[244] From an art-historical perspective, she argues that iconoclasm has traditionally been carried out for religious purposes, and iconoclasts have used religious iconoclasm to redefine the value of religious sites.[245] Through this, she contends that a site that has been subject to religious iconoclasm becomes 'an embodiment of the trauma witnessed by the landscape and its inhabitants',[246] and religious iconoclasm therefore has a unique and significant impact on regional communities and victims,[247] which the law fails to appreciate. Overall, her argument is based on her assertion that 'what differentiates [religious] iconoclasm from other forms of destruction is its symbolic intent.'[248]

Philatova argues that the *Al Mahdi* case is an evident example of iconoclasm because Al Mahdi's central role in the destruction operations was based on his knowledge of Islamic

[241] OTP, *Statement of the Prosecutor*.
[242] P. Casaly. 'Al Mahdi before the ICC: cultural property and world heritage in international criminal law.' (2016) *JICJ* 14, 1199-1220, 1212.
[243] Ibid., 1214-1215.
[244] Philatova. 'Erasing identity'.
[245] Ibid., 5.
[246] Ibid., 3.
[247] Ibid., 3.
[248] Ibid., 6.

tradition, which meant that he could select sites which, when destroyed, would result in the greatest strategic harm to the people of Timbuktu and their traditions.[249] As she summarises, 'Al Mahdi and Ansar Dine attempted to eradicate an entire belief system through their iconoclastic actions.'[250] By targeting the door of a mosque that local inhabitants believed should not be opened until the end of the world, the militant group also 'drew a parallel between the end of time and their own reign', thereby illustrating their power.[251]

Philatova also argues that the ICC overlooked the consequences of the destruction, as in the ICC's judgement, Judge Pangalangan notes that 'crimes against property are generally of lesser gravity than crimes against persons.'[252] She also argues, more broadly, that the law's disregard of art-historical discourses can be evidenced by the use of the term 'destruction' rather than 'iconoclasm'.[253] This is important because the destruction of cultural heritage can be brought as a crime against humanity on political, racial, and religious grounds and therefore clearly encompasses 'iconoclasm', but the term is not used as art-historical discourses are neglected in favour of political discourses.[254] As evidence, she notes that prominent art historian Michelle Moore Apotsos classed the destruction as 'iconoclasm',[255] but the ICC dismissed this. She supports this by arguing that there is an obvious distinction between iconoclasm and the destruction of cultural heritage – based upon the symbolism attached to the act – and that it is 'vital' that the law recognises this.[256] Overall, Philatova asserts that ICHL takes account of art-historical discourses only to define cultural heritage but not destruction and this is 'counterintuitive, as both disciplines strive to protect cultural heritage from destruction'.[257]

Philatova's work provides an important contribution to this topic. As is done in this thesis, she compares interpretations of destruction in law and art history by examining the *Al Mahdi* case. However, the defining factor that differentiates her study from this study, aside from the scope, is the respective areas of expertise – Philatova comes from an art-historical background, whereas I come from a legal background. It is therefore interesting to note that her conclusion differs from my own.

[249] Philatova. 'Erasing identity', 33-34.
[250] Ibid., 37.
[251] Ibid., 36.
[252] *Prosecutor v. Al Mahdi*, Judgement, para.37. quoted in Ibid., 41.
[253] Philatova. 'Erasing identity', 23.
[254] Ibid.
[255] Apotsos. 'Timbuktu in terror', 97. quoted in Ibid., 42.
[256] Philatova. 'Erasing identity', 42.
[257] Ibid., 23.

While, overall, in both studies it is argued that law and art history have developed distinct interpretations of destruction, it is argued here that the interpretations in this context are mostly congruent. Both art historians and the ICC view the destruction conducted by Al Mahdi as wholly unacceptable, vicious, and inhumane; otherwise, the highest international criminal court would not have heard the case. In fact, the legal perception is largely influenced by art historians' valuation of the targets, which essentially means that the perceptions of both the mausolea and mosques and the impact of their destruction are similar in both fields, if not the same. While the terminology used is distinct, it is arguable that in the context of armed conflict, 'destruction' is perhaps more suitable than 'iconoclasm', because 'destruction' can more easily allude to wider-scale devastation, including urbicide (the destruction of cities) or even the destruction of whole communities, and therefore a link with people. As evidenced in the terminology section of this thesis,[258] the term 'iconoclasm' is also now used by art historians to describe actions such as 'spitting' on, 'kissing' and 'recycling' artworks.[259] It is therefore not limited to extreme acts of religious persecution, as Philatova suggests. Overall, her main objection, that the law does not consider the full scale of harm that the victims have suffered on the basis that the ICC has not consulted art-historical accounts of religious iconoclasm, appears unconvincing. This is especially arguable as she does not indicate how the trial's outcome would differ under her approach. On the contrary, the law appears to fully understand the harm done to the local and international community, and this is why the case was brought and succeeded.

It is also worth briefly noting that theologian Nougoutna Norbert Litoing has argued that the destruction orchestrated by Al Mahdi in Timbuktu – and the destruction carried out by the Taliban in Bamiyan – had the opposite effect than was intended by those who carried out the attacks.[260] He argues that the militant Islamic groups sought to break idols, but instead ended up creating idols, through the increased publicity, knowledge circulation, and appreciation of the targets.[261] Although not mentioned in Litoing's research, the ICC case would have undoubtedly contributed to this, by raising further awareness of the actions and their barbarity through its momentous and widely publicised judgement. As such, in this context, it is arguable

[258] See pp.25-26.
[259] Boldrick. 'Iconoclasms past and present', 17.
[260] N.N. Litoing. 'Rejecting shirk and promoting tawhid? A critical examination of the motivation and objective of the iconoclasts in Bamiyan (2001) and Timbuktu (2012).' (University of Birmingham, 2015), 60.
[261] Ibid.

that the law's interpretation of conflict-related and religious destruction should be given great weight by art historians, as art historians' interpretations were in the case.

Overall, this chapter shows that destruction in armed conflict and religious destruction that is motivated by discrimination can result in the full or partial eradication of cultural heritage and the people they represent. Both art historians and legal decision-makers interpret destruction in armed conflict and discriminatory religious destruction as inhumane. This was evidenced by the Al Mahdi case study, as neither art historians nor the ICC considered any positive meaning behind the destructive acts conducted by Ansar Dine. However, not only did the Al Mahdi case study demonstrate congruence between art-historical and legal interpretations; it also showed how art and cultural history can influence ICHL. While Philatova argued from an art-historical perspective that the ICC did not take full account of art-historical discourses on iconoclasm and therefore failed to appreciate the meaning behind the destructive act, there was no clear evidence of this. Instead, it was shown how the case's admissibility, prosecution's argument, and ICC's judgement were all centred around the cultural value of the targets and the impact that destruction had upon them, which was necessarily informed by art-historical insights. As such, the Al Mahdi case study shows that ICHL and art history's interpretations of conflict-related and discriminatory religious destructive acts are alike, and in this context, legal interpretations rely on art-historical interpretations to understand the value of the targeted cultural heritage and the impact of destruction. This is significant, because it shows that both disciplines recognise that these categories of destruction constitute intentional acts of violence and harm, and that regulatory efforts to protect art by preventing further instances of them should be strengthened. As has been observed, 'despite the many legal sources which seek to regulate attacks of cultural property, the exact contours of the offence are unclear'.[262] The *Al Mahdi* case provides a compelling example of an attempt to clarify the law on harmful cultural destruction and prevent further instances of it; as the lead prosecutor of the ICC argues, the case 'set a clear precedent, sending an important and positive message to the entire world.'[263]

Nevertheless, in circumstances where destruction is motivated by discrimination, the relationship between law and art history is undoubtedly less contentious than in others. There is consensus between the legal and art communities that the destruction was inherently bad, there was no justification for it, and similar destructive acts should be prevented. Tension

[262] Badar. 'Discussion interrupted', 487. These academics criticise the ICC case for failing to consider justifications for the destructive acts under Islamic Law, but this is out-with the scope of this thesis.
[263] OTP, *Statement of the Prosecutor*.

instead emerges where the meaning behind the destructive act is not so easily ascertained, as it is far more likely for art historians' interpretations to diverge from legal interpretations. This situation is considered next in the context of political destruction and national criminal laws.

5. Political Destruction

Mary Richardson and Diego Velázquez's The Rokeby Venus *(1647)*

Rosie Wilson ©

The destruction of art is often motivated by political beliefs, including social, nationalist, and economic ideologies. Art historian Adams observes that revolutionary intentions motivate political destruction rather than a particular left or right-wing political bias.[264] As such, people generally use political iconoclasm to 'prompt change'[265] and encourage resistance and protest.[266] As non-exhaustive examples to support this, the destruction of art was prominent during the English Civil War (1642-1651),[267] the French Revolution (1789-1799),[268] the Russian Revolution (1905-1923),[269] the Spanish Civil War (1931-1939),[270] the Chinese

[264] Adams. *Iconoclasm*, 6.
[265] D. Trilling. 'The art of creative destruction.' *Apollo: The International Art Magazine.* (10 June 2020) [online] Available from: https://www.apollo-magazine.com/colston-bristol-statue-slavery/ [Accessed 15 November 2020]
[266] Hardy. 'Iconoclasm', 645.
[267] J. Spraggon. *Puritan Iconoclasm during the English Civil War*. (Boydell Press, 2003)
[268] R. Wrigley. 'Breaking the code: interpreting French revolutionary iconoclasm.' in A. Yarington, K. Everest. *Reflections of Revolution: Images of Romanticism.* (Routledge, 1993), 182-195.
[269] A.J. Cohen. 'The limits of iconoclasm: the fate of tsarist monuments in revolutionary Moscow and Petrograd, 1917-1918.' (2020) *City* 24(3-4), 616-626.
[270] M. Thomas. *The Faith and the Fury: Popular Anticlerical Violence and Iconoclasm in Spain, 1931-1936.* (Sussex Academic Press, 2019)

Cultural Revolution (1966-1975),[271] and the Iranian Revolution (1978-1979).[272] Therefore, there are also clear overlaps here with destruction in armed conflict.

Nevertheless, art has also been increasingly destroyed for political purposes during peacetime, primarily through protests against 'bad' art.[273] Some consider art politically 'bad' if the art is associated with a historical injustice such as oppression, fascism,[274] slavery,[275] or colonialism.[276] Acts of destruction that seek to remove 'bad' cultural heritage are highly contentious.[277] Some argue that it can lead to the erasure or re-writing of history[278] and that the presence of the 'bad' functions as a 'culturally significant' reminder of the atrocity.[279] In contrast, others argue that 'bad' cultural heritage reinforces hateful sentiments,[280] social injustice,[281] and disempowerment.[282] As a recent example, the UK government enacted a new heritage policy in 2021 to prevent controversial cultural heritage from being damaged, destroyed, or removed.[283] This new policy was a response to the anti-colonial and BLM movements of 2020. It endorses the 'retain and explain' principle, which promotes the contextualisation of 'bad' cultural heritage rather than its destruction or removal. Accordingly, this recent government intervention clearly demonstrates how prominent and powerful destructive acts that involve art can be as tools of political communication.

Journalist and novelist Tom Rachman effectively summarises the political destruction of art in the following passage: 'political assaults on artworks are invariably statements about power,

[271] R. MacFarquhar, M. Schoenhals. *Mao's Last Revolution.* (Harvard University Press, 2008)
[272] A. Taheri. *The Spirit of Allah: Khomeini and the Islamic Revolution.* (Adler and Adler, 1986)
[273] D. Butt. *Rectifying International Injustice*. (OUP, 2009); H. Silverman. *Contested Cultural Heritage: Religion, Nationalism, Erasure and Exclusion in a Global World*. (Springer, 2011)
[274] S. Macdonald. *Difficult Heritage: Negotiating the Nazi Past in Nuremberg and Beyond.* (Routledge, 2009), 9.
[275] M. Dresser. 'Set in stones? Statues and slavery in London.' (2007) *HWJ* 64(1), 162-199; E. Linn-Tynen. 'Reclaiming the past as a matter of social justice: African American heritage, representation and identity in the United States.' in V. Apaydin. *Critical Perspectives on Cultural Memory and Heritage: Construction, Transformation and Destruction*. (UCL Press, 2020), 255-268.
[276] J.A.R. Nafziger, A.M. Nicgorski. *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce.* (Brill-Nijhoff, 2009)
[277] T.C. Fryer, *et.al.* 'As the statues fall: an (abridged) conversation about monuments and the power of memory.' (2021), *Current Anthropology* 62(3), 373-384.
[278] J. Simpson. *Under the Hammer: Iconoclasm in the Anglo-American Tradition.* (OUP, 2010), 15.
[279] R.W. Khalaf. 'Cultural heritage reconstruction after armed conflict: continuity, change and sustainability.' (2020) *HEPP* 11(1), 4-20, 11.
[280] Linn-Tynen. 'Reclaiming the past', 262.
[281] Ibid., 264.
[282] Ibid., 265.
[283] Ministry of Housing, Communities & Local Government, *et.al*. 'New legal protection for England's heritage.' *GOV.UK* (17 January 2021) [online] Available from: https://www.gov.uk/government/news/new-legal-protection-for-england-s-heritage [Accessed 1 June 2021]

whether it is the assertion of a new authority… or a protest against powerlessness.'[284] In other words, destructive acts empower people to make political statements and potentially even inspire change. Arguably, the legal regulation of political destruction can significantly curtail this power in that it dictates who can carry out destructive acts, on what property, and why. Thus, the law can empower some and disempower others. This chapter studies how the law responds to and interprets political destruction using a historical case study from the British Women's Suffrage Movement in the context of the English criminal damage offence.

5.1. Criminal Law

Before legal interpretations of political destruction are considered, it is worth briefly examining the contentious relationship between criminal law and art more broadly, because criminal law routinely conflicts with art. There are not only 'art crimes' against artworks, such as vandalism, criminal damage, fraud, forgery, theft, looting, and illicit trading offences, but also artists who break the law either intentionally or unintentionally as part of their art. In fact, art can be a target or object of crime; a criminal instrument itself; a personal expression of a crime, criminal, victim, or witness;[285] or even, potentially, a defence to a crime. On the latter point, Julius has argued that as criminal laws do not generally recognise art as a defence, it is questionable whether 'art [must] always subordinate itself to law'.[286] He notes that while the 'aesthetic ends do not justify criminal means' principle 'seems intuitively right'[287] and can be applied straightforwardly in most cases; this is not always the case since '[l]aw and aesthetics offer rival accounts of art'.[288] It is the relationship between these rival accounts that this chapter – and thesis – examines. The regulation of political destruction through English criminal law is set out next.

[284] T. Rachman. 'Passion, principle or both? Deciphering art vandalism.' *The New York Times.* (20 September 2013) [online] Available from: https://www.nytimes.com/2013/10/01/arts/design/art-under-attack-at-tate-britain-explores-motives.html [Accessed 5 May 2021]
[285] F. Koenraadt. 'On art, crime and insanity. The role and contribution of mental disorders.' in J. Kila, M. Balcells. *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends.* (Brill, 2014), 341-365, 341-343.
[286] Julius. 'Art crimes', 473.
[287] Ibid., 473.
[288] Ibid., 475. See p.12. Ian Edwards also acknowledges that 'there is no special defence of "artistic merit" or "aesthetic value" under the Criminal Damage Act 1971 c.48 ('CDA 1971') s.1 which makes it difficult for artists to defend destruction that falls within the Act. (I. Edwards. 'Banksy's graffiti: a not-so-simple case of criminal damage?' (2009) *JCL* 73(4), 345–361, 347.)

English Criminal Law

In England it is a criminal offence to intentionally or recklessly destroy or damage property belonging to another without lawful excuse.[289] This is known as the 'criminal damage' offence and it applies to tangible property,[290] including artworks.

To establish criminal liability under this offence, the prosecution must first show that property belonging to another was damaged or destroyed.[291] The words 'damage' and 'destroy' are notably not defined in the statute. Although rarely expanded upon in the case law, 'destroy' is generally accepted as meaning that the property ceases to exist following the defendant's actions. In contrast, several cases illustrate the intended meaning of the word 'damage.' 'Damage' is taken by the English courts to be a 'sufficiently wide' word that includes 'injury, mischief or harm'.[292] Whether property has been 'damaged' is a question of fact and degree,[293] guided by common sense,[294] and the individual circumstances of each case.[295] The courts have also noted that 'damage' does not need to render the property useless[296] and need not be permanent.[297] It will, however, be relevant that time, effort, and money have been required to restore the property,[298] and that the value or usefulness of the property has been temporarily impaired.[299] It has also been noted that the damage should be physical and therefore able to be perceived by the human senses.[300]

Secondly, the prosecutor must show that it was the accused's aim or purpose to destroy or damage the property,[301] or that the accused was subjectively aware of the risk of damage, and in the circumstances known to the accused, it was objectively unreasonable for them to take that risk.[302] The perpetrator must therefore have either intended or have been reckless to the damage. Additionally, a defendant will not be liable for criminal damage if they are found to have a lawful excuse. Lawful excuse defences include any general defences,[303] as well as a

[289] CDA 1971 s.1(1).
[290] Ibid. s.10(1).
[291] Ibid. s.1(1).
[292] *Samuels v Stubbs* [1972] 4 SASR 200, 203.
[293] *Roe v Kingerlee* [1986] Crim LR 735, 735-736.
[294] Ibid.
[295] *Samuels v Stubbs*.
[296] Ibid.
[297] *Hardman v Chief Constable of Avon* [1986] Crim LR 330.
[298] Ibid.
[299] *Morphitis v Salmon* [1990] Crim LR 48.
[300] D. Ormerod, K. Laird. *Smith, Hogan and Ormerod's Criminal Law.* 15th ed. (OUP, 2018), 1070.
[301] *R v Moloney* [1985] 1 AC 905.
[302] *R v G* [2003] UKHL 50.
[303] CDA 1971 s.5(5). Such as self-defence.

belief that the owner would have consented to the damage[304] and a belief that the defendant was acting to protect the property.[305] There is no art-related defence.[306]

Examples of successful criminal damage charges include spreading mud on the walls of a police cell,[307] stuffing a blanket down a toilet in a prison cell, thereby causing flooding,[308] and drawing on a pavement in water-soluble paints where the local authority paid to use high-pressure water jets to remove the drawings.[309] Under the previous law,[310] trampling on grass was even held to constitute damage.[311] While these examples do not involve art, they effectively emphasise the low criteria for damage under this offence. Evidently, 'damage' is interpreted broadly by the English criminal courts, and legal academics criticise this approach on the basis that the courts' assessments of damage are inconsistent,[312] as several factors can be considered, and these are weighted differently in each case. Additionally, as the courts can consider changes in the value or usefulness of the property, this can lead to prosecutions in unsuitable circumstances.[313]

To better understand and assess how art history and national criminal laws interpret political destruction, interpretations from both disciplines are compared next using a famous historical act of destruction carried out during the British Women's Suffrage Movement. This example helps to demonstrate the range of interpretations a political destructive act can be subject to (in law and art history as well as by the media and public) and the challenges that national criminal laws would face in attempting to incorporate art-historical interpretations into their decision-making process. Although the case study was decided under the previous law,[314] and the destructive act was carried out over 100 years ago, the historical nature of the case study has been intentionally chosen to emphasise a major obstacle to the inclusion of art historians' interpretations of political destruction in law – that art historians' interpretations can evolve and change over time.

[304] CDA 1971 s.5(2)(a).
[305] Ibid s.5(2)(b).
[306] See p.49.
[307] *Roe v Kingerlee*.
[308] *Figk* [2005] EWCA Crim 2381.
[309] *Hardman v Chief Constable*.
[310] Malicious Damage Act 1861 c.97 ('MDA 1861').
[311] *Gayford v Chouler* [1898] 1 QB 316, DC.
[312] Ormerod. *Criminal Law*, 1070.
[313] A.T.H. Smith. *Property Offences: The Protection of Property Through the Criminal Law*. (Sweet & Maxwell, 1994) para.27.16; Edwards. 'Banksy's graffiti', 350-352.
[314] MDA 1861

Case Study 2: Mary Richardson and Diego Velázquez's **The Rokeby Venus** *(1647)*

During the Women's Suffrage Movement in Britain, Suffragettes attacked art and cultural heritage on numerous occasions to gain publicity for the female suffrage cause. Between 1913 and 1914, prior to the outbreak of the First World War, there were at least thirty-two attacks against public art,[315] and in the first few months of 1914 alone, 'one hundred and forty-one acres of destruction were chronicled in the Press'.[316]

One of the most famous instances of destruction carried out during this period was militant Suffragette Mary Richardson's attack on Diego Velázquez's *The Toilet of Venus (The Rokeby Venus)* in the National Gallery, London. *The Rokeby Venus* depicts the goddess Venus lying nude on a bed beside a mirror held by her son, the god of love, Cupid. The National Gallery acquired the painting in 1906 for £45,000, and on the 10 March 1914, Richardson slashed it using a small axe (although later referred to as a meat cleaver) five times.[317] Richardson carried out this attack while she was on temporary release from Holloway Prison under the Prisoners (Temporary Discharge for Ill Health) Act 1913 c.4 (also known as the 'Cat and Mouse Act'), because of poor health caused by her hunger strike.

Richardson was arrested in the National Gallery and sentenced to 6 months imprisonment the following day.[318] The court charged her with wilfully and maliciously damaging the painting[319] to the extent of £100 and she pleaded guilty because the offence was premeditated.[320] The National Gallery and several other cultural institutions, such as the National Portrait Gallery, the Tate Gallery, and the Wallace Collection, were temporarily closed.[321] Restrictions were placed on women entering cultural institutions[322] and Helmut Ruhemann eventually restored the painting so the marks are no longer visible.[323]

---

[315] Adams. *Iconoclasm*, 56.
[316] S.E. Pankhurst. *The Suffragette Movement: An Intimate Account of Persons and Ideals.* (1977), 544. quoted in Gamboni. *Destruction*, 117.
[317] P. Jackson. *Females in the Frame: Women, Art, and Crime.* (Palgrave Macmillan, 2019), 79.
[318] L. Nead. *The Female Nude: Art, Obscenity and Sexuality.* (Taylor & Francis, 1992), 34.
[319] MDA 1861 s.39.
[320] 'The slashed Venus six months for militant.' (13 March 1914). *Manchester Courier and Lancashire General Advertiser*. taken from *The British Newspaper Archive.* [online] Available from: https://www.britishnewspaperarchive.co.uk/viewer/bl/0000206/19140313/091/0009 [Accessed 15 June 2021]
[321] *The Times.* (12 March 1914), 6. in L. Mohamed. 'Suffragettes: the political value of iconoclastic acts.' in Barber. *Art Under Attack*, 114-125, 119; Nead. *Female Nude*, 35.
[322] S. MacLeod. 'Civil disobedience and political agitation: the art museum as a site of protest in the early twentieth century.' (2006) *MS* 5(1), 44-57, 46.
[323] C. Davies. 'Velazquez in London.' (2007) *The New Criterion* 25(5), 53-55, 55.

Richardson provided several accounts of her motivations behind the act - when leaving the gallery, in court, in an explanatory statement to the Women's Social and Political Union ('WSPU'), in interviews and her memoirs.[324] Many were reproduced in the media where she was given the nicknames 'Slasher Mary', 'the Ripper', and 'the Slasher' – which Gamboni points out were names normally reserved for serial killers.[325] As the act took place the day after Emmeline Pankhurst – an organiser of the Suffragette Movement – was imprisoned, Richardson began in her explanatory statement to the WSPU:

> I have tried to destroy the picture of the most beautiful woman in mythological history [Venus] as a protest against the Government for destroying Mrs. Pankhurst, who is the most beautiful character in modern history.[326]

In court, Richardson argued that although she had been an art student, she cared far more for justice than art, and believed that her act was excusable on this basis.[327] In an interview in 1952, she added that she objected to 'the way men visitors gaped at it all day long.'[328]

Unsurprisingly, interpretations of this act vary greatly under criminal law and art history. For one, under criminal law, the action was interpreted as having resulted in 'damage', whereas art historians may class the act as either 'destruction' or 'iconoclasm'.[329] As is evident from the immediate sentencing of Richardson, the criminal damage requirements were straightforwardly fulfilled,[330] which again demonstrates the low standard of 'damage' for the criminal damage offence. This is arguably beneficial as it can be determined relatively simply whether a party will be found liable, thereby providing certainty under the law. However, because of this, although Richardson provided an account of her motivations to the court, these motivations were largely irrelevant once the requirements of the offence were fulfilled.[331]

It is debatable whether the courts would have benefited from taking the motivations of Richardson into account beyond the offences' requirements. The appeal of this is somewhat dubious as, in this instance, for the court to give any weight to the motivations behind her actions, the court would essentially have had to make a political decision by providing a stance

---

[324] M. Richardson. *Laugh a Defiance.* (Weidenfeld & Nicolson, 1953), 167-173.
[325] Gamboni. *Destruction*, 118.
[326] 'National gallery outrage. Suffragist prisoner in court. Extent of the damage.' *The Times.* (11 March 1914) quoted in Ibid., 116.
[327] Gamboni. *Destruction*, 116.
[328] *The Star*. (22 February 1952) quoted in Ibid., 116.
[329] See pp.23-26.
[330] Note that this was under the previous law: MDA 1861.
[331] 'The slashed Venus', *Manchester Courier*.

on the legitimacy of the Women's Suffrage Movement. This is undoubtedly not the judiciary's role,[332] but as a result, the court cannot appreciate the meaning behind political destructive acts that involve art. Additionally, this means that the court's interpretation indicates that the act is an example of the destruction *of* art, as in the *Al Mahdi* case, and there is no scope to consider otherwise. This demonstrates the importance of looking at the context around a legal decision through art-historical accounts – to better understand the nature and significance of the act, as will be done next.

Within art history itself, interpretations of the damage to *The Rokeby Venus* differ greatly.[333] Traditionally, in line with media reports, art historians considered the act to be a grave assault against a great and rare work of art from the Baroque period, and against fine art itself.[334] For instance, proponents of the Vorticist Art movement printed an open letter to members of the Suffragette movement requesting that they 'leave works of art alone'.[335] At first, the art community intuitively interpreted the act as an instance of the destruction *of* art. Conversely, modern, feminist art historians have given renewed attention to the campaign of destruction carried out by militant Suffragettes and interpret their acts as destruction *as* art.[336]

In this, Jackson has observed that although the Suffragettes' actions are well documented and researched, their attacks against art are generally absent from art history and art crime literature.[337] This reflects the fact that destruction has only become a topic of interest in art history in recent years,[338] but also has more substantial repercussions. For instance, both Jackson and Mohamed draw attention to the fact that many cultural institutions which owned and displayed the targeted artworks have concealed the events and their consequences, despite the important role that the destructive acts played in the history of the Women's Suffrage

[332] Under the separation of powers (C. Montesquieu. 'The spirit of laws.' in *The Complete Works of M. de Montesquieu. Translated from the French in Four Volumes*.' 1st vol. (T. Evans, 1777), book XI, chapter VI, 198.)
[333] For instance, Mohamed argues that the act has been 'presented simply as an act of vandalism – [both] then and now' by art historians and the media (Mohamed. 'Suffragettes', 118.). Nevertheless, art historians are increasingly recognising the act's importance. For example, DK's history of the female nude contains a reference to Richardson's act (DK. *The Art Book.* (Penguin Random House, 2017), 148-151.). See also Boldrick. *Iconoclasm and the Museum,* 6.
[334] For instance, Fowler argues that Suffragette attacks on art 'were almost universally condemned' (R. Fowler. 'Why did suffragettes attack works of art?' (1991) *JWH* 2(3), 109-125, 109.)
[335] 'To suffragette'. *BLAST.* (20 June 1914), 1, 151. quoted in Mohamed. 'Suffragettes', 118-119.
[336] Fowler. 'Why did suffragettes attack?'; Nead. *Female Nude;* MacLeod. 'Civil disobedience'; Mohamed. 'Suffragettes'; Jackson. *Females in the Frame*; Boldrick. *Iconoclasm and the Museum,* 5-9. Also argued by anthropologist Alfred Gell (A. Gell. *Art and Agency: An Anthropological Theory* (OUP, 1998), 64-65. quoted in Boldrick. *Iconoclasm and the Museum,* 7.
[337] Jackson. *Females in the Frame*, 78.
[338] See pp.6-7.

Movement and feminist history more broadly.[339] In similar vein, Barber and Boldrick note that '[m]useum labels can omit references to damage, and conservation can expertly erase from view traces of past harm.'[340] Thus, in displaying the painting again, after it had been both damaged and expertly restored, without alluding to the destructive act, these art historians submit that a significant part of the work's history and British feminist history is missing.

Moreover, Mohamed submits that Suffragette iconoclasm was not 'about destruction, it was a creative process',[341] which protested society's construction 'of the imagined female form'.[342] This is also echoed in Jackson's proposition that '[t]he incident has come to symbolize a particular perception of feminist attitudes towards the female nude.'[343] Both Mohamed and Gamboni argue that in her destructive act, Richardson was able to not only target the subject of the work (the female form and nude) but also the owners of the works (cultural institutions, the public, and the state), without endangering any human lives.[344] This highlights the emblematic power of the act, which the courts did not – and likely still could not – recognise.

Therefore, it is clear from the contemporary, feminist art-historical accounts of Richardson's act that although the destructive act was not part of an art movement, per se, it can be interpreted as an instance of destruction *as* art because considerable meaning can be ascribed to it.[345] Remarkably, Suffragette Alice Hunt wrote in 1914 that:

> This picture will have an added value and be of great historical interest, because it has been honoured by the attention of a militant [Suffragette].[346]

Although this has now been realised, it has taken a considerable amount of time. These recent feminist interpretations give both the work and the act new significance, which was not appreciated by the courts nor earlier art historians. As these interpretations are novel, this effectively illustrates a major challenge of national criminal courts relying on art historians' interpretations to understand and analyse the value of a destructive act; namely, that they develop and change over time. This is neatly summarised by Fowler, who concludes by stating:

---

[339] Jackson. *Females in the Frame*, 78; Mohamed. 'Suffragettes', 116.
[340] Barber. 'Introduction', 13; See also Boldrick. *Iconoclasm and the Museum*, 8.
[341] Mohamed. 'Suffragettes', 122.
[342] Ibid., 124.
[343] Jackson. *Females in the Frame*, 78.
[344] Mohamed. 'Suffragettes', 124; Gamboni. *Destruction*, 118.
[345] Interestingly, the act also inspired future artworks. For instance, the artist Kate Davis produced a series of prints featuring the damaged image entitled *Curtain I-VII* (2011) to honour it (Boldrick. *Iconoclasm and the Museum*, 181-182.)
[346] A. Hunt. *The Suffragette*. (31 July 1914), 122. quoted in Mohamed. 'Suffragettes', 115.

> [F]rom the viewpoint of three-quarters of a century later, we can see in the suffragettes' choice of target a proto-feminist awareness of the sexual politics of art and connoisseurship which we are only now able to recognize and articulate.[347]

Another point that should be stressed is that Richardson was given the maximum prison sentence of six months for her offence, yet had she broken a window instead of damaged a painting, she could have been sentenced to eighteen months' imprisonment.[348] This gives rise to a notable point of contrast with ICHL. As was described previously, the cultural value of the targeted cultural heritage was a significant factor to the ICC in determining the impact of destruction and therefore the admissibility and success of the *Al Mahdi* case. In contrast, the art-historical value of *The Rokeby Venus*, although significant, was not a relevant factor to the court. This effectively demonstrates that national criminal courts have not traditionally taken art or art history into account, as the damage of any window has been deemed to warrant greater punishment than the damage of an irreplaceable painting.

Overall, this chapter shows that political destruction is a complex category because interpretations may not only differ between law and art history but within art history itself. The Richardson case study indicates that initially English criminal courts and art historians' interpretations of the destructive act were similar, in that they both objected to the damage. This similarity was not, however, deliberate, as the courts neither considered the art-historical value of the political destructive act nor *The Rokeby Venus* – although now, under the reformed law, it is at least likely that the courts would consider the cultural value of the target.[349] Moreover, the case study also highlights how contemporary, feminist art historians have recently reinterpreted Richardson's destructive act as a creative and meaningful political expression, which plays a significant role in feminist history. As a result, there is now conflict between the legal interpretation of Richardson's act as simply a case of the destruction *of* art, and feminist art-historical interpretations which assert that the destructive act *is* art. While this effectively means that national criminal courts fail to take art-historical interpretations of political destruction into account, and the idea that political destruction can itself constitute art, it is difficult to suggest that national criminal courts should do this. This is for the simple reason that art historians' interpretations of political destruction change and evolve. There are two fundamental consequences of this. First, the meaning behind political destructive acts becomes

[347] Fowler. 'Why did suffragettes attack?', 124.
[348] 'The slashed Venus', *Manchester Courier*; J. Conklin. *Art Crime.* (Praeger, 1994), 95.
[349] See pp.50-51.

a question for art history and not for law. Second, the law does not and likely cannot differentiate between political destructive acts that are creative and have artistic meaning, and those that are inherently violent and harmful – although it is doubtful whether anyone could easily delineate this distinction. Consequently, it becomes clear that law and the political destruction of art are fated to conflict. The next chapter compares interpretations of artistic destruction in art history and property law to further understand the concept of 'destruction' and the relationship between the disciplines.[350]

[350] For a study that assesses how criminal damage treats the category of artistic destruction – which this thesis considers in the next chapter – Edwards examines the prosecution of Graffiti artists under the CDA 1971 s.1 in Edwards. 'Banksy's graffiti'. Edwards finds several challenges and contradictions in the criminal law approach to Graffiti and Street Art and concludes that 'the law's protection of property rights [marginalises] other conceptions' including 'artistic expression' (361). A similar conclusion can be drawn from this chapter, in that criminal law also marginalises political expression.

6. Artistic Destruction – The Destruction *of* Art, Destruction *as* Art

The Destruction of/as Art

Rosie Wilson ©

The final category of destruction considered in this chapter is artistic destruction, which is destruction motivated overtly by artistic factors. This category encompasses destruction that results in the creation of new artworks, as well as the destruction of existing artworks for artistic reasons, such as to critique the art world. Adams examines 'aesthetic iconoclasm' as part of his broader account of the history of iconoclasm,[351] and his argument is the primary focus of this category. Adams understands 'aesthetic iconoclasm' as 'attacks on images not motivated principally by the subjects of symbolism but… [as] attacks on fine art as fine art'.[352] More importantly, Adams draws a distinction between the destruction '[*of*] art' and destruction '[*as*]

[351] See p.29.
[352] Adams. *Iconoclasm*, 58.

art'.[353] In doing this, Adams essentially proposes that artistic destruction is in some cases impermissible and in some cases can constitute art itself.

Adams considers the destruction '[*of*] art' to include 'art vandalism' and 'art attacks'.[354] He does not define these concepts but provides examples to indicate what they encompass. For instance, the individual who threw blue dye over Carl Andre's *Equivalent VIII*[355] at the Tate in 1976 and the individual who poured black ink into Damien Hirst's *Away From the Flock*[356] in 1994 are both taken to be art vandals.[357] Adams refuses to name the perpetrators of such attacks so as not to give them what he perceives as unwarranted fame and attention.[358] He does, however, attempt to identify some shared characteristics of art vandals – namely that their actions are generally either intended to critique art, standards of beauty, or an artwork's financial value.[359] He also suggests that individuals may be failed artists targeting a famous artwork or artist to compensate for their failure.[360]

In contrast, Adams condones and justifies certain acts which amount to destruction '[*as*] art'. He reasons that destruction is inherent in several Modernist Art movements,[361] and in doing this, he suggests that it is not in fact destruction that takes place but the creation of something else. As examples, he cites Mannerism, Romanticism, Impressionism, Cubism, Futurism, Dadaism, and Surrealism. He argues that these movements are similar in that they broke conventional rules of art regarding expression, composition, colour, and perspective, among other elements,[362] and were, therefore, in effect, destructive. He also notes that specific art movements - Futurism, Dadaism, and Surrealism - expressly advocated destruction. For instance, he cites the declaration in the Futurist Manifesto that reads: 'Set fire to the library shelves! Divert the canals so they can flood the museums!'[363] As examples of artworks which amount to destruction '[*as*] art', Adams discusses, with approval, Jean Tinguely's *Homage to New York* (1960),[364] and Dadaist Marcel Duchamp's defacement of Da Vinci's *Mona Lisa*

[353] Adams. *Iconoclasm,* 55-68.
[354] Ibid., 64-66.
[355] A minimalist sculpture made up of 120 bricks.
[356] A display case containing a preserved sheep in formaldehyde solution.
[357] Adams. *Iconoclasm,* 64.
[358] Ibid., 64.
[359] Ibid., 68.
[360] Ibid., 65-66
[361] Ibid., 58.
[362] Ibid.
[363] A. Danchev. *100 Artists' Manifestos from the Futurists to the Stuckists.* (Penguins Books, 2011), 4. quoted in Ibid., 58.
[364] Adams. *Iconoclasm,* 60.

(*L.H.O.O.Q* (1919))[365] – both of which are considered later in this chapter as case studies.[366] Even though destruction was fundamental to these movements and their corresponding artworks, Adams contends that destruction should not function as a bar to their protection or value. Instead, Adams suggests that destruction increased the value of the movements and their artworks, as it added additional meaning to them. This stance is also reciprocated by those involved in the movements. For instance, Pablo Picasso has been quoted as saying: 'a picture is the sum of its destructions'[367] and the novelist Alexander Trocchi has stated: '[m]odern art begins with the destruction of the object'.[368] Adams' distinction between the destruction *of* art and destruction *as* art is assessed throughout this chapter by determining whether property and copyright law recognise and accommodate these different types of artistic destruction.

Unlike the previous chapters, this chapter considers artistic destruction in the context of private law. Private law is distinct from public law as private law regulates the destruction of art between private actors and, therefore, the destruction of art by an artist and owner as well as members of the public. It is, however, worth bearing in mind that public elements can remain significant in this context. For instance, if art is public property, meaning that it is situated in a public location or owned by a public body, or if the courts expressly consider the public interest in destroying or preserving an artwork.[369] As such, this chapter also briefly explores the public/private dichotomy in law in respect of destruction and art as part of the comparison.

Additionally, and in line with the focus upon artworks and art history,[370] this chapter focuses predominantly on copyright and the integrity right. Before doing so, it first explores the foundational debate on the 'right to destroy' in personal property law more broadly. The intersection between these distinct areas of property law is important because the former regulates the ownership of intangible property whereas the latter regulates the ownership of personal tangible property or 'chattels.' The legal distinction between an artwork and its material form results in tension when a physical embodiment of an artwork is owned by

[365] Adams. *Iconoclasm*, 59.
[366] See pp.64-65,72-74.
[367] P. Picasso. quoted in C. Zervos. *Conversations avec Picasso.* transl. A. Adler. (Cahiers d'Art, 1935), 173.
[368] A. Trocchi. (26 August 1962) quoted in A. Wilson. 'Destruction in art: destruction/creation: act or perish.' in Barber. *Art Under Attack*, 140-153, 141.
[369] For instance, both elements were present in a German case brought during the de-Communisation process in Berlin. The case concerned the proposed removal of Nikola Tomsky's *Lenin Monument* (1968-1969) from Leninplatz, Berlin – the location it was designed for – because it was routinely damaged. The Berlin Supreme Court held that removing the monument did not infringe Tomsky's moral rights because artists' rights must be balanced with the public interest in removing a monument associated with Communism. (*Bürgerinitiative Lenindenkmal* 1991 quoted in Gamboni. *Destruction*, 102-103.) See also p.82.
[370] See p.66.

someone other than the artist because artists continue to hold moral rights over their artworks which can interfere with the exercise of private property rights. This is worth emphasising from the outset, as the conflict between chattel ownership and copyright ownership and the impact that this has upon artistic destruction is considered throughout this chapter.

6.1. Property Law

To understand the broader context of destruction in the property rights framework, this chapter first considers the 'right to destroy' legal property debate, which concerns tangible property. Legal property theory is relied on here, over doctrinal legal analysis, because the primary focus of this chapter is on intangible property, copyright law and moral rights. As such, this section seeks only to introduce the overarching property law debate on destruction, and further distinguish tangible and intangible ownership.

The 'right to destroy' property debate looks at whether property law does or should recognise a right to destroy. In other words, the debate considers whether the owner of tangible property has a right to destroy their property as part of the bundle of rights framework.[371] This debate is of foundational importance to property law and the regulation of the destruction of art. For instance, if property law does not recognise an owner's right to destroy, there may need to be legal obligations in place to preserve and safeguard property from destruction. Nevertheless, legal academic Gregory S. Alexander, who has written most recently upon the topic, notes that the right to destroy remains the 'least discussed' of the bundle of rights which make up property ownership.[372] He adds that this is surprising, given that destruction can result in the 'complete and irrevocable removal of an asset from future market transactions' and thereby prevent market transferability, which property rights work to facilitate.[373]

The lack of academic attention given to this debate essentially means that it remains unclear exactly how destruction fits within the property rights framework. More practically, this means that it is unclear what an owner can do with their property under the law, which is highly problematic. Alexander has argued that Anglo-American laws have historically recognised the

[371] A.M. Honoré. 'Ownership.' (1961) *CLR* 61(7), 1384-1391.
[372] G.S. Alexander. 'Of buildings, statues, art, and sperm: the right to destroy and the duty to preserve.' (2018) *CJLPP* 27(3), 619-660, 620.
[373] Ibid., 619.

right to destroy as part of legal ownership,[374] but there has been a recent shift away from this position.[375] Regardless, it is likely that most property owners believe that they have the right to dispose of or destroy property that they own. This becomes more contentious when the property is of high economic or cultural value, such as if it is an artwork.

Joseph Sax, who was among the first to write on the debate, has argued that a person should not have a right to destroy culturally significant property.[376] Following this, Edward J. McCaffery argued against the existence of the right to destroy altogether.[377] In contrast, Lior Jacob Strahilevitz has supported the right to destroy because of its expressive value.[378] Strahilevitz argues that the destruction of property tends to be irrational.[379] As a result, destruction is generally only carried out for expressive purposes and would therefore fall under the freedom of expression.[380] He contends that a collectivist interpretation of freedom of expression would straightforwardly permit regulation aimed at preventing destruction.[381] Whereas, an interpretation based on individual autonomy – which he argues is more compelling – would require a balance between expressive, economic, and social welfare interests to determine whether a destructive act is permissible.[382] This latter stance mirrors the destruction of/as art distinction, and asks that the courts take this into account when deciding whether destruction should be prevented or protected. Alexander goes further than Strahilevitz and argues that 'human flourishing' over 'social welfare' could more effectively encapsulate what is at stake when culturally significant property is destroyed.[383]

---

[374] For instance, *jus abutendi* (the right to destroy) was recognised in Roman Law and jurist William Blackstone wrote that a person could destroy their property under the common law (W. Blackstone. *Commentaries on the Law of England.* (1765-69) (University of Chicago Press, 1979), 221-222. quoted in Alexander. 'Of buildings', 621.)

[375] For instance, 'the right to destroy' was removed from the incidents of ownership in the most recent edition of *Black's Law Dictionary.* 7th ed. (1999) and in the US case *Eyerman v. Mercantile Trust Co.* 524 S.W.2d 210 (Mo. Ct. App. 1975) the court held that a provision in a will directing that an executor should destroy the testator's house was unenforceable on the grounds of public policy (Alexander. 'Of buildings', 620, 622.). Questions on the right to destroy are commonly raised in succession law litigation, where testators have directed that art be destroyed upon their death (Alexander. 'Of buildings', 645.)

[376] J. Sax. *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*. (University of Michigan Press, 1999), 17-18.

[377] E.J. McCaffery. 'Must we have the right to waste?' in S.R. Munzer. *New Essay in the Legal and Political Theory of Property.* (CUP, 2001), 76-106.

[378] L.J. Strahilevitz. 'The right to destroy.' (2005) *YLJ* 114(4), 781-854.

[379] Ibid., 853.

[380] Ibid. Strahilevitz focuses upon the US First Amendment right which specifies that 'artistic expression' is part of freedom of expression, although his argument can be applied more broadly.

[381] Ibid., 853-854.

[382] Ibid.

[383] Alexander. 'Of buildings', 621.

While there is considerable variation between these positions, each legal academic effectively suggests that the right to destroy is not absolute. They recognise that destruction can harm social welfare or human flourishing if culturally significant property is targeted and that there may be expressive value in destruction itself. As a result, there is undoubtedly scope in this legal property debate to consider the destruction of/as art distinction and art historians' interpretations. To better demonstrate this, the following case study considers a situation in which the 'right to destroy' could be hypothetically contested under personal property law – the destruction of an artwork by the artist who created it.

Case Study 3: Artists Destroying Their Own Artworks – Detested and Destructionist Artworks – Jean Tinguely's Homage to New York *(1960) and Banksy's* Love is in the Bin *(2018)*

As outlined in the preceding paragraphs, it is unclear from the legal literature whether an owner has a right to destroy an artwork that they own. There are potential further restrictions on this right under copyright law – which the next section addresses[384] – but these restrictions do not apply to artists who carry out destructive acts against their own artworks.[385] As such, the situation in which an artist destroys their own artwork is regulated more by personal property law than intellectual property law, so this is a useful example to consider here. There are two predominant reasons why an artist may destroy their own work, and both are worth assessing.

First, the most obvious example of an artist destroying their own work is an artist who does so because they have come to disapprove of or detest an artwork as part of the creative process or when reviewing older works. This is a common phenomenon, with famous artists such as Claude Monet, John Baldessari,[386] and George Rouault[387] having destroyed many of their own artworks. Art critic M.H. Miller has written that such destruction can occur as 'an act of frustration', 'a mere disavowal of own's early work', a symbolic 'fresh start' or an 'attempt by

[384] See pp.66-82.
[385] Artists may be able to object to the destruction of their artworks by third parties using their moral rights under copyright law, although this is explored in the next section. If artists destroy their own artworks, this will not give rise to moral rights infringement because artists cannot object to destructive acts that they themselves carry out. For instance, Wilson has argued that 'there can be no question of moral rights infringement' when artists destroy their own work (M. Wilson. *Art Law and the Business of Art.* (Edward Elgar, 2019), 23). Interestingly, however, a court in Italy has confirmed that moral rights enable authors to destroy their own work (*Paolo Greco & Paulo Vercellone, I Diritti Sulle Opere Dell'Ingegno* 103 (1974), 117-118.)
[386] M.H. Miller. 'From Claude Monet to Banksy, why do artists destroy their own work?' *The New York Times.* (11 March 2019) [online] Available from: https://www.nytimes.com/2019/03/11/t-magazine/artists-destroy-past-work.html [Accessed 5 July 2021]
[387] Sax. *Playing Darts*, 43.

a living artist to control a posthumous legacy'.[388] He argues that: '[d]estroying one's art has become a kind of art in itself',[389] thereby suggesting that this practice could constitute destruction *as* art, in line with the destruction of/as art distinction. In support of this purported value, legal academic Sax argues that artists *should* have a right to destroy their own artworks as they 'should be entitled to decide how the world will remember [them]'.[390] This could, however, arguably conflict with his overall stance that works of cultural significance should not be destroyed. This is because it is arguable that there is public interest in retaining the artworks of great artists, as property of high economic or cultural value, despite the artists' own disapproval.

In this context, an argument could be made that such destruction can amount to destruction *as* art, since it informs or is arguably part of the artistic process, or the destruction *of* art, as it removes such works from both the private and public realm. Thus far, UK laws do not try to prevent such destructive acts, so no issue in interpretation has arisen. From this, it is arguable that the law intuitively accepts that such acts are components of the creative process, but this is doubtful. Instead, it is far more likely that the law does not foresee an ability to justify or enforce such a strong intervention into private property rights.[391] Nevertheless, it would be worthwhile clarifying the existence of the 'right to destroy' in this situation, due to the uncertainty surrounding artistic freedom and the potential conflict between private and public interests in preserving artists' portfolios.

The other example worth considering here is Destructionist Art, of which Auto-Destructive Art is a pertinent example. Gustav Metzger (1926-2017) developed the concept of Auto-Destructive Art,[392] and Jean Tinguely (1925-1991) created the first 'Auto-Destructive mechanised sculpture, which was designed to destroy itself'[393] in 1960. Tinguely's *Homage to New York* (1960) sculpture destroyed itself in front of an audience in a single performance at the Museum of Modern Art, New York, and now exists only in the form of fragments[394] and

[388] Miller. 'From Claude Monet'.
[389] Ibid.
[390] Sax. *Playing Darts*, 200. In France this is partially addressed through the additional moral right of retraction or withdrawal of the work (Intellectual Property Code 1992 No 92-597 (France) Art.L.121-4).
[391] See pp.75-78.
[392] G. Metzger. 'Machine, auto-creative and auto-destructive art.' (1962) *Ark* 32, 7-8.
[393] Adams. *Iconoclasm*, 60.
[394] MoMA. 'Jean Tinguely. *Fragment from Homage to New York.* (1960).' *MoMA.* [online] Available from: https://www.moma.org/collection/works/81174 [Accessed 14 July 2021]

images.[395] Following this display, Auto-Destructive Art became a prominent feature of Modern Art, such as through the renowned Destruction in Art Symposium (1966).[396] A recent, high-profile example also worth noting is Banksy's *Girl With Balloon* (2002), which was partially shredded as it sold for over $1million at Sotheby's auction house, London, in October 2018.[397] The art world welcomed this destructive act as it resulted in the creation of a new artwork entitled *Love is in the Bin*. For instance, Sotheby's auction house announced that history had been made as the destruction 'marked the first time a piece of live performance art [was] sold at auction'.[398]

Auto-destructive Art is perhaps the clearest representation of destruction *as* art and one of the clearest promulgations of the artists' right to destroy. It therefore also clearly demonstrates what is at stake to artistic freedom if the law expressly restricted the right to destroy. If, say, the law placed limitations on the destruction of culturally significant property, Auto-Destructive Art would pose a peculiar problem since its cultural significance comes from its destruction. The public interest is in the destruction taking place as, without it, such artworks would not exist at all. Such legal constraints could therefore create considerable conflict with artistic practice, and it may be because of such complexities that the law has largely avoided addressing the topic thus far.

These examples highlight not only different interpretations of the 'right to destroy' in law and art history but also the risks to creative expression if the right is limited. Greater legal attention should be given to this debate, as until further clarification is given, it is likely that artists will continue to presume that they can freely create and destroy their own artworks. In some instances, this is inherently positive, as Destructionist and Auto-Destructive Art can be produced as a result. In other instances, the impact is questionable, as private and public interests conflict in the destruction of renowned artists' portfolios. The consequences of this speculative artistic freedom to destroy therefore deserve further academic scrutiny.

The proceeding sections move on to consider how copyright law regulates destruction. It is worth reiterating that this represents a shift away from understanding artworks as tangible,

[395] MoMA. 'Homage to New York: a self-constructing and self-destroying work of art conceived and built by Jean Tinguely. (Mar 17 1960), MoMA.' *MoMA.* [online] Available from: https://www.moma.org/calendar/exhibitions/3369 [Accessed 14 July 2021]
[396] Wilson. 'Destruction in art', 140-153.
[397] Sotheby's. 'Latest Banksy artwork 'Love is in the Bin' created live at auction.' *Sotheby's.* (11 October 2018) [online] Available from: https://www.sothebys.com/en/articles/latest-banksy-artwork-love-is-in-the-bin-created-live-at-auction [Accessed 12 July 2021]
[398] Ibid.

physical objects towards understanding artworks as intangible property.[399] This means, for instance, that the destruction of a digital reproduction as well as the original work would fall within the regulatory framework. The main question asked in the remainder of this chapter is how artists can use their moral rights to respond to destructive acts. From this, it will also be determined whether copyright law's interpretation of destruction aligns with art history's and whether art history could be further integrated into copyright law to assess destructive acts, using case studies.

6.2. Copyright Law

The relationship between art and copyright law has been debated in several legal and art-historical studies – far more so than in the areas of law considered thus far.[400] This is primarily because copyright law purports to regulate and protect creativity and the arts,[401] so the importance of the relationship between law and art is indisputable in this context. Nevertheless, legal academics Eberhard Ortland and Reinold Schmücker argue that '[t]he need for a more adequate understanding of the interdependencies and interferences between copyright and art [has become] more urgent today.'[402] Thus, while socio-legal studies on the relationship between copyright law and art are increasing, further research is still required to understand and assess the legal framework's effect on creativity and artistic practice and vice versa. To contribute to this trend, this research aims to determine whether copyright law – as well as ICHL, criminal and property law – adopt a similar approach to destruction as art history, and whether art history could further influence these areas of law. The regulation of destruction in copyright through the moral right of integrity is set out next.

[399] See pp.60-61.
[400] See pp.11-12,15.
[401] While there is no singular theory of the purpose of copyright, civil law countries justify copyright on the basis that it protects an artist's personhood, as an artist's work is seen as an extension of themselves. In contrast, common law countries justify copyright by the Lockean theory that a person should be able to appropriate property that they have laboured upon; the 'tragedy of the anticommons' theory that endorses private property rights as economic incentives; and the utilitarian theory that artists' creative expressions are positive contributions to society so artists should be rewarded (W. Fisher. 'Theories of intellectual property.' in Munzer. *New Essays*, 168-201). These different justifications are vital because they have produced significant differences between national copyright frameworks. However, what each of these justifications has in common – albeit to varying degrees - is that the overarching aim of copyright is to protect and regulate creativity, artists, artworks, and the public interest in them.
[402] E. Ortland, R. Schmücker. 'Copyright & art.' (2005) *GLJ* 6(12), 1762-1776, 1769.

International Copyright Law

The UN body, the World Intellectual Property Organisation, and the international agreement, the Berne Convention for the Protection of Literary and Artistic Works of 1971 ('Berne Convention') regulate international copyright law. Under the Berne Convention artistic works are protected by copyright,[403] and authors of artistic works obtain a moral right of integrity.[404] The integrity right under the Berne Convention Art.6*bis*(1) provides authors of artistic works[405] with a right:

> [T]o object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

It is possible that the integrity right, as expressed in the Berne Convention, could be interpreted as allowing an artist to object to the destruction of an artwork they have created – be it the original or a reproduction. As art historian Gamboni points out:

> That the author of a work is thus entitled to oppose a modification that he or she considers as a degradation is clear. That he or she may object to a destruction, however, depends on interpretation.[406]

Interpretations of the integrity right and what it encompasses vary considerably between jurisdictions and legal academics.[407] The debate on whether the integrity right incorporates destruction is especially important because:

> Whether or not a work of art is protected from destruction represents a fundamentally different perception of the purpose of moral rights. If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited; if the right is meant to emphasize the authority's personality, destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist […][408]

In other words, how destruction fits within a country's integrity right has significant implications for the perceived purpose of copyright law. Additionally, this debate is long-

[403] Berne Convention Art.2(1).
[404] Ibid. Art.6*bis*(1).
[405] The terms 'artist' over 'author', and 'artwork' over 'artistic work', are used in the remainder of this chapter in line with art-historical over copyright language. See pp.21-23.
[406] Gamboni. *Destruction*, 170.
[407] H. Hansmann, M. Santilli. 'Authors' and artists' moral rights: a comparative legal and economic analysis.' (1997) *JLS* 26(1), 95-143; E. Adeney. 'The moral right of integrity: the past and future of "honour."' (2005) *IPQ* 2, 111-134.
[408] Gerstenblith. *Art*, 191.

standing. For instance, one legal commentator who contributed to negotiations on revisions to the Berne Convention in 1928 argued that as destruction does not suggest that an artist has created a work that they have not in fact created, destruction cannot harm their honour or reputation and should not therefore fall under the integrity right.[409] Additionally, a contributor to further revisions to the Berne Convention in 1965 was also reluctant to include destruction within the moral rights framework, unless the destruction was solely intended to harm the author's honour or reputation.[410]

These examples suggest that there is a tendency to exclude destruction from the integrity right, but regulation of the destruction of art through moral rights depends on how individual legal systems have enacted and construed the moral right. Although this chapter looks primarily at UK copyright law, reference is also made to other jurisdictions. This is done both for comparative purposes and because there is a lack of information and clarity on the UK's approach to destruction, which means that other jurisdictions can offer potential resolutions. The UK's approach to the integrity right and destruction is set out next.

UK Copyright Law

In the UK the position of destruction within the integrity right remains unsettled. Under UK copyright law, the moral right of integrity is expressed as a right for artists' artworks not to be subject to 'derogatory treatment'.[411] 'Treatment' is taken to include additions, deletions, alterations, or adaptations of the work,[412] and 'derogatory' treatment is understood as treatment that amounts to a distortion or mutilation of the work or treatment that otherwise prejudices the honour or reputation of the artist.[413] If this right is infringed, it is actionable as a breach of statutory duty owed to the person entitled to the right,[414] and the courts can grant an injunction as a remedy, if they see fit, which prohibits the doing of any act which associates the author with the treatment of the work.[415]

---

[409] M.A. Roeder. 'The doctrine of moral right: a study in the law of artists and creators.' (1940) *HLR* 53(4), 554-578, 569. quoted in Gamboni. *Destruction*, 170.
[410] R. Gerhardt. 'Ware oder wert? Rechtsstreit des bildhauers hajek mit dem ADAC.' *Frankfurt Allgemeine Zeitung.* (9 August 1982) quoted in Gamboni. *Destruction*, 170.
[411] CDPA 1988 s.80(4).
[412] Ibid. s.80(2)(a).
[413] Ibid. s.80(2)(b), although it is unclear whether a treatment must be a distortion or mutilation *and* prejudicial to the honour or the reputation of the artist (See p.70.)
[414] Ibid. s.103(1).
[415] Ibid. s.103(2).

It is unclear whether the destruction of an artwork amounts to derogatory treatment under UK copyright law. Accordingly, it is unclear whether an artist can use the integrity right to respond to destructive acts by commencing infringement proceedings. Before this is considered further, it is worth briefly distinguishing moral and economic rights. Moral rights developed in civil law jurisdictions, such as France and Germany, under the *droit moral* principle, where it is believed that artists' works are an extension of themselves.[416] Moral rights were only introduced in the UK in 1989 and they provide weaker protection to artists than economic rights. For instance, moral rights belong solely to the artist who created the artwork, which means that unlike economic rights, they cannot be transferred to a new owner, but only waived.[417] Additionally, moral rights only enable an artist to protect the integrity of their artwork, whereas economic rights grant the holder exclusive control over the use of their artworks.[418] The relationship between moral rights and economic rights in governing destructive acts is considered further in case study 4.[419] This section instead focuses on how destruction fits within the UK's moral rights framework and, therefore, whether destruction constitutes 'derogatory treatment'.

In regard first to whether destruction amounts to 'treatment', Christina Michalos argues that '"[d]eletion from or alteration to" a work implies that the work continues to exist, and logically, this would exclude destruction.'[420] Similarly, Agustin Waisman reasons that the destruction of the material support of an object cannot be considered an 'alteration' because material supports exist separately to original expressions.[421] Nevertheless, in the 2010 case *Harrison v Harrison*[422] the court interpreted 'treatment' as 'a broad, general concept' which:

> [I]mplies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work.[423]

On this reading, destruction would quite simply amount to a 'treatment'. However, this case concerned a literary work rather than an artwork, so the applicability of this precedent to artworks is questionable. This is especially the case given that there are notable distinctions

[416] See p.66.
[417] CDPA 1988 s.87.
[418] Ibid., ss.16-21.
[419] See p.74.
[420] C. Michalos. 'Murdering art: destruction of art works and artists' moral rights.' in D. McClean. *The Trials of Art.* (Ridinghouse, 2007), 173-194, 177.
[421] Waisman. 'Rethinking', 271.
[422] [2010] EWPCC 3; [2010] ECDR 12.
[423] Ibid., 60.

between the copyright protection of literary works and artworks – namely, that literary works must be reduced to material form for copyright to subsist,[424] whereas materiality and fixity may not be required for artworks.[425] While it therefore remains unclear whether the destruction of an artwork would amount to 'treatment' under the UK integrity right, it would be beneficial if the courts adopted the interpretation from *Harrison* in this situation. This is because art historians have similarly interpreted destruction as a transformation, on a spectrum from creation to destruction,[426] so an endorsement of this judgement could create greater harmonisation between the two disciplines.

In regard next to whether destruction can be said to amount to '*derogatory* treatment', the *Laddie* practitioner text notes that the Oxford England Dictionary definition of 'mutilation' includes the 'destruction of one or more of [a thing's] parts'.[427] As a result, *Laddie* suggests that destruction could be interpreted as 'the most complete form of mutilation.'[428] This would mean that if the courts relied upon the dictionary definition of 'mutilation', destruction could straightforwardly be interpreted as derogatory. However, in the UK it remains unclear whether mutilation alone suffices or whether both mutilation (or distortion) *and* prejudice to the honour or reputation of the artist are required.[429] This is because the UK courts have taken an inconsistent approach.[430] If both elements are required, it is less likely that an artist could use the integrity right to respond to destruction. This is because it is far more difficult to demonstrate that destruction prejudices the honour or reputation of an artist,[431] as after an artwork has been destroyed, it could be argued to have 'disappear[ed] from public view and memory.'[432] It may also be undesirable. For instance, the *Laddie* practitioner text advises that it is unlikely that the UK courts will hold that destruction harms an artist's honour or reputation

[424] CDPA 1988 s.3(2).
[425] *Cuisenaire v Reed* [1963] 5 FLR 180; Derclaye. 'Debunking', 1-17.
[426] See pp.23-25.
[427] A. Speck. *et.al. Laddie, Prescott & Vitoria: The Modern Law of Copyright*. 5th ed. (LexisNexis, 2018), para 38.27.
[428] Ibid., para 38.29.
[429] M. Iljadica. 'Graffiti and the moral right of integrity.' (2015) *IPQ* 3, 266-288, 272. Iljadica considers whether the partial or full destruction of graffiti, such as through whitewashing, would be covered by the UK integrity right.
[430] For instance, the UK courts have held in some moral right infringement cases that the elements are separate, meaning that one is sufficient: *Tidy v Trustees of the National History Museum* (1995) 39 IPR 501; *Delves-Broughton v House of Harlot Ltd* [2012] EWPCC 29; whereas in other cases the courts have held that both elements are required: *Pasterfield v Denham* [1999] FSR 168; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch).
[431] Iljadica. 'Graffiti', 272-273.
[432] N. Caddick, *et.al. Copinger and Skone James on Copyright.* 18th ed. (Sweet & Maxwell, 2020), para.11.52. Although, it can be alternatively argued that this creates a compelling argument in favour of the artist's honour and reputation being harmed, as the reduction in their portfolio diminishes their honour and reputation. A parallel can also be found here with ICHL, which seeks to prevent such losses.

for two reasons.[433] First, it could 'confuse the destruction of a physical embodiment of the work with the destruction of the work itself', which is important as an artist can still bring copyright infringement proceedings even if no physical manifestations of the work remain.[434] Second, recognition could give rise to an obligation on the owner of an artwork to safeguard its physical existence, which would be overly burdensome.[435]

Consequently, many legal academics accept that the UK moral right of integrity 'does not envisage the destruction of the artist's work as amounting to derogatory treatment.'[436] They agree that the destruction of artworks is unlikely to infringe the integrity right under UK copyright law, although the situation remains untested by the courts. Conversely, some legal academics argue that the integrity right *should* include the right to prevent the destruction of an original work of art in the UK. For instance, Stina Teilmann argues that 'a very unhappy consequence' of the framing of the UK integrity right is that 'moral rights do nothing to protect the unique original from destruction'.[437] Additionally, Tania Cheng-Davies proposes that 'honour' should be equated to 'respect' rather than 'reputation' in the UK, as this would enable artists to object to destruction under the integrity right.[438]

Overall, it appears both strange and illogical that the integrity right in the UK implicitly favours the total destruction of an original artwork over alterations to it. This severely limits the control that artists have over the fate of their artworks[439] and even, potentially, the public's ability to appreciate original artworks. The consequences of the UK's current position are explored further in the following case studies. While focus has been given to the use of the integrity right by an artist to object to the destruction of an artwork by a new owner, three situations are considered here, including: an artist destroying another's artwork as part of their own art; an artist compelling a new owner to destroy their artwork; and an artist objecting to a new owner destroying their artwork – the most likely use of the right. Unlike the previous chapters, a series of case studies are considered here to assess the breadth of situations that copyright law covers with respect to artistic destruction, and to demonstrate the balancing exercise that copyright

[433] Speck. *Laddie*, para.38.29.
[434] Ibid. See pp.23,60.
[435] Ibid.
[436] Wilson. *Art Law*, 23; S. Stokes. *Art and Copyright.* 2nd ed. (Hart, 2012), 94.
[437] S. Teilmann. 'Framing the law: the right of integrity in Britain.' (2005) *EIPR* 27(1), 19-24, 23.
[438] T. Cheng-Davies. 'Honour in UK copyright law is not 'a trim reckoning' – its impact on the integrity right and the destruction of works of art.' (2016) *OJLS* 36(2), 272-303, 272.
[439] For instance, recent studies shown that the integrity right does not enable an artist to prevent the destruction or relocation of their public statues (D. Liu. 'Regulating the destruction of public sculpture through the moral right of integrity: a balance between the artist, the public, and the owner.' (2019) *EIPR* 41(12), 766-777.) or site-specific artworks (Michalos. 'Murdering art'.)

law conducts between protecting artists, owners, artworks, and the public interest in them – in different contexts.

Case Study 4: Artists Destroying Other Artists' Artworks – Dadaism – Marcel Duchamp's L.H.O.O.Q *(1919) and Leonardo Da Vinci's* Mona Lisa *(1503)*

This first case study considers artists who destroy other artists' work as part of their own artworks and focuses on Marcel Duchamp – one of art history's most revered proponents of destruction.[440] Duchamp (1887-1968) was a French artist, most notably associated with Dadaism – an art movement that began in Zurich as a negative reaction against the First World War. Dadaism is defined by its 'satirical and nonsensical […] nature'[441] and its rebellion against and mocking of traditional values and conventions.[442] The art movement is known for 'question[ing] the whole meaning and value of art',[443] and as such, the works of Duchamp, and other Dadaist artists, have been subject to extensive art-historical *and* legal debate. For instance, readymades are ordinary, often mass-produced objects displayed in a new context, such as an art gallery,[444] and Duchamp created several.[445] Readymades raise numerous issues in copyright law – particularly around authorship, moral rights, and infringement, because an artist does not create the object but merely selects and sometimes modifies it.[446] Although readymades effectively demonstrate the conflict between legal and art-historical interpretations, they do not constitute 'destruction' as considered in this thesis. Instead, this section considers Duchamp's work *L.H.O.O.Q* (1919).

L.H.O.O.Q is a reproduction of Leonardo Da Vinci's *Mona Lisa* (1503-1506), with the addition of a moustache and beard. The title, *L.H.O.O.Q*, which is also written beneath the image, is a pun in French that translates in English to 'she is hot in the arse,' thereby implying that the Mona Lisa has strong sexual desire.[447] While this artwork does not constitute destruction in the

[440] For instance, Duchamp stated: 'use a Rembrandt as an ironing-board.' (Adams. *Iconoclasm*, 59.)
[441] Tate. 'Art term: dada.' *TATE*. [online] Available from: https://www.tate.org.uk/art/art-terms/d/dada [Accessed 5 July 2021]
[442] DK. *Art Book*, 342.
[443] Ibid., 284.
[444] Ibid., 343.
[445] As examples, Duchamp's readymades included a bicycle wheel (1913), a steel comb (1916), and a porcelain urinal (1917).
[446] Markellou. 'Appropriation art', 369.
[447] Adams. *Iconoclasm*, 59.

traditional sense, in that the original work is not obliterated, it would constitute an art-historical understanding of destruction or iconoclasm, in that the image is transformed.[448]

In art history, the work is both widely admired as an artwork as well as an act of iconoclasm. In fact, Adams uses it as one of his central examples of destruction *as* art.[449] He argues, 'Duchamp's defacement of the *Mona Lisa* not only mocked the canon and good taste, it also added depth to the subject.[450] Gamboni also describes Duchamp's works more generally as 'the paradigm of twentieth-century avant-garde "iconoclasm"'.[451] This therefore shows that art historians widely accept this work as both destructive and artistic, with its artistic value stemming from its destructive nature.

In the context of copyright law, it must first be noted that Da Vinci painted the *Mona Lisa* before copyright protection. Additionally, the duration of its copyright protection would have, hypothetically, lapsed when Duchamp created his work, and this means that moral rights could not be used to challenge *L.H.O.O.Q*. However, Duchamp's work can still be used as an interesting albeit hypothetical example, to determine how copyright might interpret and respond to similar works that fall within copyright protection.

It is likely that *L.H.O.O.Q* would not count as destruction but an alteration under UK copyright law, due to the addition of the facial hair and text.[452] This is supported by Julius, who would classify this work as an offence of reproduction rather than an offence of destruction, meaning that it concludes with a copy or reproduction rather than an erasure or extinguishment of the original work.[453] This is based on his proposition that the attack would be on the original work's uniqueness rather than its existence, which could mean that it does not injure the work itself.[454] He would therefore not count this work as an act of iconoclasm, which he would attribute to an offence of destruction.[455] This, therefore, presents an immediate disparity between art history and law – art history would class this as destruction whereas law would not. As the law would classify this work as an altered reproduction, the artists would likely be able to use their integrity right to object to it. Under the current regulatory framework, works such as

[448] See pp.23-25.
[449] Adams. *Iconoclasm*, 59.
[450] Ibid., 59.
[451] Gamboni. *Destruction*, 152.
[452] For instance, in *Pasterfield v Denham* changes to the colouring and edges of an illustration on a leaflet were considered alterations.
[453] Julius. 'Art crimes', 476-477.
[454] Ibid., 476-477.
[455] Ibid., 483.

Duchamp's *L.H.O.O.Q* could therefore likely be challenged under the integrity right and perhaps no longer made.

Nevertheless, it is worth noting that if the work was challenged by economic rights infringement, it might now be protected by the newly enacted parody exception in UK copyright law.[456] This exception, introduced in 2014, permits fair dealing with a copyright-protected work for the purposes of caricature, parody, or pastiche,[457] and only applies to economic rights. In her extensive account of the parody exception, legal academic Sabine Jacques uses Duchamp's *L.H.O.O.Q* as an example of a work that could fall within the exception's scope.[458] However, as this exception only applies to economic rights, this could mean that if a work similar to *L.H.O.O.Q* were made today, it could be held to constitute both derogatory treatment and a parody, thereby infringing moral rights but not economic rights, and this creates conflict within the legal interpretation of artistic destruction. The parody exception has sought to protect works that constitute parodies, thereby enabling legal interpretations to align more closely with art-historical interpretations, but only under one rights framework. This is contradictory and could perhaps be partially resolved if the parody exception were at least a relevant factor in moral rights infringement proceedings. Unfortunately, it remains to be seen how the UK courts will interpret the parody exception but, regardless, it would not likely be enough to safeguard Duchamp's *L.H.O.O.Q* if it were made today.

Case Study 5: Artists Requiring Destruction of Their Artworks by a New Owner – Charles Camoin (1879-1965)

Next, it is worth briefly considering the situation where an artist wants a new owner to destroy an artwork they created. In practice, such situations would likely be rare and highly controversial. However, in France, an artist has successfully used the integrity right to order that a new owner destroy their work.[459] This case concerned Expressionist landscape painter, Charles Camoin, who had ripped and disposed of some of his artworks, and then later discovered that they had been recovered, restored, and put on sale without his permission. Although the proposition that an artist can successfully use their moral rights to order a new

[456] S. Jacques. *The Parody Exception in Copyright Law.* (OUP, 2019), 171.
[457] CDPA 1988 s.30A(1).
[458] Jacques. *Parody,* 108-110.
[459] *Camoin v. Carco (Affaire Camoin)* Trib. Civ. Seine, Nov. 15, 1925.

owner to destroy them seems provocative, this does not seem arguable on these facts, as the artist merely used his integrity right under copyright to reinstate his prior actions and intention that the works be destroyed. Art-historical and legal interpretations would likely align here, as this represents another example of an artist destroying their own artworks as part of the creative process, and therefore destruction *as* art.[460]

Case Study 6: Artists Objecting to or Preventing Destruction of Their Artworks by a New Owner – Depictions of Winston Churchill – Lady Churchill and Graham Sutherland's Portrait (1954)

The final situation considered here is the use of the integrity right by an artist to object to a new owner destroying an artwork that they have created. This has been the predominant focus of this chapter since it is the most likely use of the integrity right and forms an important part of the wider right to destroy debate. As shown throughout this chapter, it is unclear whether destruction amounts to derogatory treatment under the UK integrity right. The following case study helps to illuminate the consequences of the current uncertain approach, as well as its anticipated exclusion.

This case study considers renowned British artist Graham Sutherland's portrait of Winston Churchill – Prime Minister of the United Kingdom from 1940-1945 and 1951-1955, celebrated wartime leader, Nobel Prize winner, and denounced colonial policymaker. As both a famous and controversial historical figure, there have been many depictions of Churchill in art, which have been subject to various interpretations and responses.[461] The most notorious example is perhaps, however, the reaction of Lady Spencer-Churchill – Winston Churchill's wife – to one of Churchill's commissioned portrait.

In 1978, following her death, it was discovered that Lady Spencer-Churchill had destroyed Sutherland's portrait of her husband. Parliament commissioned the portrait as a gift to Churchill for his 80th birthday, and he was presented with it in 1954 at a ceremony held in Westminster Hall.[462] Lady Spencer-Churchill reportedly destroyed the painting because she and her husband did not like it.[463] She thought it portrayed him as 'a gross and cruel monster',

[460] See pp.63-64.
[461] J. Black. *Winston Churchill in British Art, 1900 to the Present Day: The Titan with Many Faces.* (Bloomsbury, 2017)
[462] Sax. *Playing Darts*, 35.
[463] Wilson. *Art Law*, 23-24.

and he described it as 'filthy' and 'malignant'.[464] While the destruction was motivated by personal taste and aesthetic rather than political reasons,[465] the act resulted in considerable controversy since the portrait was the work of a respected British artist and had been paid for by members of parliament.[466]

Interestingly, the artwork is likely of greater interest and importance to art history *because* of the recipients' reaction. For instance, the art critic John Russell has focused on the connection between the Churchills' response and the artist's attempt at realistically portraying Churchill's age and illness, regardless of his status as a great man.[467] The artist himself, in response to the uncovering of the destruction, has even written of the difficulty for subjects in encountering truthful representations of themselves:

> [O]nly those totally without physical vanity, educated in painting, or with exceptionally good manners, can disguise their shock or even revulsion when confronted for the first time with a reasonable truthful painted image of themselves.[468]

Therefore, the artwork and its subsequent destruction have become a fascinating case study into responses to portraiture in art history. Nevertheless, under the destruction of/as art distinction, the destructive act would likely constitute the destruction *of* art rather than destruction *as* art since the purpose was merely to eradicate its existence rather than creatively critique it. This view is supported by Sutherland who described the act as 'without question an act of vandalism'.[469] This perhaps shows a limitation of the destruction of/as art distinction, as it dismisses the importance to art history that the act has now claimed.

In contrast, art lawyer Martin Wilson has cited the Churchills' destructive act as an example of artists' inability under UK copyright law to respond to destruction when an artwork is owned by another.[470] More critically, Michalos submits that:

> The case of the Sutherland portrait highlights the competing interests that surround artworks – the rights of owners to do as they wish with their property, the rights of the

[464] C. Wrigley. *Winston Churchill: A Biographical Companion.* (ABC-CLIO, 2002), 318.
[465] Alexander. 'Of buildings', 637.
[466] Wrigley. *Winston Churchill*, 318.
[467] J. Russell. 'Critic's notebook: the art of finding a met president.' *The New York Times.* (16 January 1978) [online] Available from: https://www.nytimes.com/1978/01/16/archives/critics-notebook-the-art-of-finding-a-met-president.html [Accessed 16 July 2021]
[468] G. Sutherland. *The Times.* (15 January 1978), 4. quoted in Alexander. 'Of buildings', 643.
[469] G. Sutherland. *The New York Times.* (13 February 1978), 7. quoted in Michalos. 'Murdering art', 176.
[470] Wilson. *Art Law*, 23-24. Although note that the destruction occurred before the CDPA 1988.

> artist who has created the work, and the wider public interest in preserving artworks for future generations.[471]

Michalos points out that as Churchill had been assigned the copyright in the portrait,[472] and moral rights for artists were not introduced in the UK until 1989,[473] the Churchills were fully entitled to carry out this act. Nevertheless, she argues that '[d]espite legislative changes, it [remains] doubtful whether [UK copyright law]' would provide recourse for artists in Sutherland's position today.[474]

There is conflict within the legal literature as to whether this destruction was or should have been lawful, and this returns us to the broader 'right to destroy' property debate. Sax argues that the Churchills should not have had the right to destroy this portrait, despite having private ownership of it, because there was public interest in the work – with the subject being a historic and political public figure.[475] He argues that Lady Churchill's destructive act removed an important public record,[476] which showed how Churchill 'was seen by a major portrait painter'.[477] He also goes on to compare the destruction with restrictions on critical biographies.[478] Similarly, Stina Teilmann argues that moral rights should be operational against 'such acts of vandalism as Lady Churchills' destruction of the state-commissioned portrait.'[479]

In contrast, legal academic Alexander argues that while owners should not generally be allowed to destroy culturally significant artworks that they privately own, in these circumstances, destruction was permissible.[480] He argues that this example is distinct from most in that it is rare for owners of artworks to be the subject of the pieces they own.[481] He also notes that the portrait was a wholly private over public piece, as a private gift,[482] and as such, argues against the public interest argument deployed by Sax in retaining the portrait:

> [I]t is difficult to see why it was relevant to the British public to see Sir Winston suffering from the ravages of age. That does not seem to be the sort of information that

[471] Michalos. 'Murdering art', 173.
[472] Ibid., 176.
[473] Ibid., 177. Under the CDPA 1988.
[474] Ibid., 177.
[475] Sax. *Playing Darts*, 36-42.
[476] Ibid.
[477] Ibid., 35.
[478] Ibid.
[479] Teilmann. 'Framing the law', 23.
[480] Alexander. 'Of buildings', 643.
[481] Ibid.
[482] Ibid.

> bears upon the very legitimate public interest in whatever aspects of his life remain connected with his role upon the world stage.[483]

Although Alexander's position makes sense, in that this ownership case is distinguishable from others on the basis that the owner was also the subject of the destroyed artwork, his objections do not appear sufficient in rendering the artist's moral right or public interest in the survival of the work obsolete. He argues that the 'default rule' should be that owners cannot destroy culturally significant artworks, but these facts present an exception.[484] This does not make logical sense as it is unclear why the subject of this painting should disqualify it from protection. Sax's position more thoughtfully incorporates art historians' interpretation of the work into the legal discourse, in that he recognises the broader value of the artwork and argues that destruction should be impermissible on this basis.

Despite these debates, it is unlikely that the integrity right under UK copyright law could be relied upon to object to similar destructive acts.[485] For one, as was shown previously, it is unclear whether an artist can even object to destruction as part of their integrity right in the UK. Perhaps even more significantly, the main obstacle becomes practical enforcement. As Alexander notes:

> Of course, as a practical matter, regardless of the legal rule, private owners may still destroy a work secretly. There is no feasible way to prevent a determined owner from doing so.[486]

Once an artwork is fully destroyed, as occurred in this case, the original cannot be recovered.

In summary**,** the Churchill portrait provides an interesting example of the relationship between copyright law and art history. Art historians' interpretations of the artwork and its destruction have been considered by legal researchers, with hindsight, but could not likely have been enforced. Furthermore, this case study has also demonstrated that the public interest in the artwork would likely become a key factor in determining whether destruction should be prevented if litigation on similar facts were ever brought – although, it is difficult to conceive how an artist would be able to bring a case if they were not informed of the planned destructive act. This would increase tensions between the public/private dichotomy, but could also

[483] Alexander. 'Of buildings', 642.
[484] Ibid., 643.
[485] See pp.68-71.
[486] Alexander. 'Of buildings', 644.

potentially bring art historians' interpretations into the remit of copyright law in the context of destruction.

Notably, this case study looked at a privately owned depiction of Churchill. To conduct a fuller comparison, it is worth briefly considering how art historians and copyright law would respond to the destruction of a *public* depiction of Churchill, where the public interest is more evidently at stake. With public artworks, there is greater conflict between artists' moral rights; the reputation rights of the subject and their successors; the local community; and arguably humanity – if a work is deemed to fall within international cultural heritage protection. Additionally, as Michalos points out, copyright issues become 'particularly acute in relation to [… public,] site-specific works, where the work itself is designed taking into account its location'.[487] To demonstrate this, the grade II listed Winston Churchill statue, created by Ivor Roberts-Jones, and unveiled in Parliament Square, London in 1973, has been increasingly targeted. Protestors attacked the statue on the 1 May 2000 during anti-capitalist May Day demonstrations by adding a mohawk and red paint – intended to resemble blood – to the statue, in addition to other features. The statute was then targeted again on the 7 June 2020 during the BLM protests, which led to it being temporarily concealed from public view.[488] While Adams has described the latter as a clear example of the destruction *of* art,[489] Boldrick argues that images of the former have become well-known themselves and now 'represent the protests and event anti-capitalism itself.'[490] Therefore, there is a case to be made that the 2000 defacement has become art itself, under the destruction of/as art distinction, which results in inconsistency within Adams' argument. Both examples would likely constitute criminal damage, and as they did not amount to full destruction, they could also infringe the artist's moral right of integrity. What is most interesting to note here, however, is that the public interest in the work – as a public rather than a private piece – could lend it more significant art-historical value as its value is more open to scrutiny by various stakeholders.

Overall, should an artist be able to object or otherwise respond to destructive acts against their artworks through the inclusion of destruction within the remit of the integrity right? It remains to be seen how the UK courts will interpret destruction under the integrity right, and it is

[487] Michalos. 'Murdering art', 173.
[488] L. Dearden. 'Winston Churchill and Nelson Mandela statues covered up ahead of Black Lives Matter counter-protests.' *The Independent.* (12 June 2020) [online] Available from: https://www.independent.co.uk/news/uk/home-news/winston-churchill-statue-london-cenotaph-protests-scaffolding-a9561856.html [Accessed 19 September 2021]
[489] Adams. *Iconoclasm*, 95-96.
[490] Boldrick. 'Iconoclasms past and present', 16.

therefore unclear how these case studies would be treated if they were to come before the court. Although many legal academics predict that the UK courts would decide against the inclusion of destruction in the integrity right,[491] in India, the courts have included destruction within their integrity right provision[492] – which is similar to the UK's integrity right. This occurred in a case in which a bronze mural sculpture, created by Amar Nath Sehgal and commissioned by the Indian government, was severely damaged during its removal. The court held that the destruction of an artwork constituted an extreme form of mutilation; that by reducing the artist's collection of work his reputation had been harmed; and that his integrity right was thereby infringed.[493] It is therefore conceivable that the UK courts could adopt a similar interpretation.

Additionally, as moral rights originated from the French civil law tradition of *droit moral*, there has also been long-standing debate[494] and jurisprudence[495] on how destruction fits within artists' moral rights in France. These cases date as far back as 1936,[496] but as recent examples, the French courts have prevented the owner of a panelled work by Bernard Buffet from separating the panels to sell them individually;[497] enabled artist Jean Dubuffet to compel Renault to complete an only partially-completed, commissioned work;[498] and prevented a church from destroying a sculpture which they deemed blasphemous.[499] As another example from a civil law country, a Danish court recently found in favour of the artist Tal R who objected to new owners cutting his painting into pieces to use as material in their commercial watch designs.[500] These cases suggest that there is a trend in some European jurisdictions

[491] See p.71.
[492] Copyright Act 1957 c.14 (India) s.57.
[493] *Sehgal v Union of India* [2005] FSR 829.
[494] W.R. Cornish. *Intellectual Property.* 4th ed. (Sweet & Maxwell, 1999), 444; E. Adeney. *The Moral Rights of Authors and Performers: An International and Comparative Analysis.* (OUP, 2006), 186. quoted in Stokes. *Art and Copyright*, 87.
[495] Michalos. 'Murdering Art', 178.
[496] *Sudre v. Commune de Baixas,* Conseil d'état, 3 avril 1936; 1936 Gaz Pal II 274.
[497] *L'affaire Bernard Buffet*, Cour d'Appel, Paris, Recuil Dalloz) D 1962 570.
[498] *Dubuffet v. Regie Nationale Des Usines Renault (No. 2)* Cour d'Appel (Versailles) 8 July 1981 (1983) 117 RIDA 80; [1983] FSR 32.
[499] *Hong v. Saltpetriere Chapel Assn,* CA Paris, 1 Ch (10 April 1995), (1995) 166 *RIDA* 316.
[500] R. Orange. 'Danish artist seeks to stop his work being cut up to make watches.' *The Guardian.* (2 December 2019) [online] Available from: https://www.theguardian.com/world/2019/dec/02/danish-artist-tal-r-paris-chic-watches [Accessed 18 May 2021]; S. Stokes. 'Does cutting up a work of art and re-using fragments of the canvas to make watches infringe copyright law?' *Blake Morgan.* (2019) [online] Available from https://www.blakemorgan.co.uk/does-cutting-up-a-work-of-art-and-re-using-fragments-of-the-canvas-to-make-watches-infringe-copyright-law/ [Accessed 18 May 2021]

towards allowing artists to use their integrity right to object to destruction. It could therefore be favourable for the UK to follow this approach to improve European harmonisation.[501]

Alternatively, some jurisdictions have an express moral right to object to the destruction of an artwork that is separate from the integrity right, although they often still overlap. For example, Switzerland has an express right to object to destruction.[502] In this, owners must offer 'original embodiments of works' to artists before they are destroyed, if the owner could reasonably assume that the artist has a justified interest in preserving them.[503] Additionally, in the US the Visual Artists Rights Act 1990 – which introduced moral rights to US copyright law – gave artists both a general integrity right,[504] and a right to prevent any intentional or grossly negligent destruction of works of 'recognized stature'.[505] The US courts have interpreted 'recognized stature' as meaning that the work must be of merit or intrinsic worth, and that the work's stature must be recognised by art experts, members of the artistic community or some cross-section of society.[506] Although this requirement is both 'controversial and difficult to apply in practice', because it requires assessments of artistic merit,[507] it successfully elevates the role of art experts, including art historians, to the extent that the courts' assessments 'generally [depend] upon [their] evidence'.[508] For instance, in the '5 Pointz' case, artistic expertise[509] helped a group of streets artists win damages of over $6million after their work had been white-washed from the walls of the 5 Pointz building in New York.[510] As the prevention of destruction in such cases is dependent upon recognition, the public interest in the artwork becomes a clear and decisive factor, and the law is given scope to properly consult and consider art history. Both Switzerland and the US's rights provide a clear and straightforward way to object to destruction in copyright law, and the latter also effectively incorporates artistic

[501] Irini Stamatoudi argues European harmonisation would be one of the best ways for copyright law to more effectively protect the rights of creators, including artists (I.A. 'Moral rights of authors in England: the missing emphasis on the role of creators.' *IPQ* 4, 478-513, 512.)
[502] Federal Copyright Act 1992 (Switzerland) s.15.
[503] Ibid.
[504] CA 1976 (US) s.106A(3)(a).
[505] Ibid. s.106A(3)(b).
[506] *Carter v. Helmsley-Spear Inc*, 861 F Supp 303 (SDNY 1994), 324; *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).
[507] Stokes. *Art and Copyright*, 96. See pp.21-23.
[508] Michalos. 'Murdering art', 184.
[509] *Jonathan Cohen et.al. v. G&M Realty LP et.al.,* Case No 13-CV-5612 (FB) (JMA) (EDNY 2013) quoted in S. Burke. '5 Pointz down: the New York District Court ruling on 'Graffiti Mecca.'' (2014) *QMJIP* 4(3), 226-235, 229-230.
[510] *Cohen v. G&M Realty*, 320 F. Supp 3d 421 (EDNY 2018), 447.

opinion. While there is little appetite for such rights to be introduced in the UK, they would resolve the uncertainty surrounding the UK's current position.

Overall, this chapter shows that while art historians can interpret the meaning of artistic destruction, by distinguishing between the destruction *of* art and destruction *as* art, property law and copyright law struggle to interpret artistic destruction altogether. Under legal property theory there is ongoing debate as to whether a private owner has a 'right to destroy' artworks they own, and in UK copyright law it remains uncertain whether an artist can object to the destruction of artworks they have created using their integrity right. While there is evidence of some legal researchers and legal decision-makers (in other jurisdictions) considering art-historical expertise, overall, these areas of law appear to have shirked their responsibility of interpreting and effectively regulating destruction. The implications of this are manifold. For one, privately-owned artworks may be lost to secret destructive acts (case study 6) or reassembled against the artists' wishes (case study 5). More broadly, it is uncertain the extent to which property and copyright law respect and facilitate artistic freedom. Under the current regulatory approach, it is unknown whether artists can destroy their own artworks (case study 3), create Auto-Destructive Art (case study 3) or incorporate and transform other artists' works into their own using destructive techniques (case study 4). This is significant because these are all practices that have been interpreted by art historians as destruction *as* art, and it is unclear how they are treated under the law. Although copyright law strives to protect creative expressions, artists, artworks, and the public interest in them – in the context of destruction, it appears as though copyright law ignores art. To rebalance this relationship, the law must interact with art-historical interpretations of destruction.

7. Conclusion

Overall, this research has conducted a socio-legal comparison of interpretations of the intentional destruction of art in law and art history. This has been done by first examining art-historical interpretations, then studying legal interpretations, and finally comparing both using case studies. This comparison has been structured around the four categories of destruction identified from recent art-historical literature on destruction, including destruction in armed conflict, religious destruction, political destruction, and artistic destruction, as well as the destruction of/as art distinction. These categories have been used alongside case studies to determine whether interpretations of the intentional destruction of art differ between law and art history, and whether art historians' interpretations do or could influence legal interpretations. This was done to develop a better understanding of the concept of 'destruction', in addition to the relationship between law and art, in both theory and practice.

This research has been among the first to directly compare both disciplines' approaches to destruction and has, in the process, presented several areas of contention and concern. Broadly speaking, this comparison has shown that interpretations of the intentional destruction of art differ between law and art history, and the role of art history in influencing legal interpretations is limited. Nevertheless, the interaction between law and art history varies depending on the art-historical categories and areas of law that a destructive act falls under.

Firstly, case study 1 (Al Mahdi) in chapter 4 showed that both art historians and legal decision-makers are unsympathetic to destruction in armed conflict and religious destruction that is motivated by discrimination. In fact, this case study demonstrated both congruence between art-historical and legal interpretations, and provided evidence of cultural history influencing ICHL. Although Philatova criticised the ICC for not taking adequate account of art-historical interpretations of religious iconoclasm – which she evidenced by the court's use of the term 'destruction' over 'iconoclasm' – this analysis was contested on the basis that the admissibility, success, and outcome of the case were centred around the cultural value of the targets and the impact that destruction had upon them. Overall, the Al Mahdi case study showed that art-historical and legal interpretations mostly align when destruction is motivated by armed conflict and religious discrimination because they can be straightforwardly accepted as inherently harmful. As both disciplines endorse this view, this effectively shows why further regulatory efforts should be made in ICHL, like the ICC case, to prevent conflict-related and discriminatory religious destruction.

In contrast, case study 2 (Mary Richardson) in chapter 5 demonstrated that difficulties arise with political destruction, as interpretations may not only differ between law and art history but within art history itself. Although the English criminal courts and traditional art historians both opposed Richardson's political destructive act, this was a result of coincidence rather than intention. Evidently, the courts were not influenced by art-historical interpretations as the value of *The Rokeby Venus* was not relevant to the case – and the destruction of any window would have carried greater sentencing powers than the destruction of the irreplaceable artwork. Moreover, the case study showed how art-historical discourse on the incident has changed over time, as modern, feminist art historians have recently found meaning in the destructive act itself. On this reading, the courts' interpretation could therefore be argued to be limited. However, as art-historical interpretations of political destruction evolve and change over time, it would be both inappropriate and impracticable to include them within the remit of national criminal law judgements – except insofar as the courts consider the value of the target. As a result, this chapter showed that the law would struggle to take the art-historical meaning of political destructive acts into account, which means that it would not be able to differentiate between creative and harmful political destructive acts – if such a distinction can be made at all. Although this tension seems irreconcilable, we can look to art history to discern the meaning behind political destructive acts, that are otherwise decontextualised under the law.

Following this, in chapter 6, a range of case studies showed how areas of private law struggle to interpret artistic destruction. In property law there is ongoing debate as to whether an owner has a 'right to destroy' their private property and artworks. Likewise, in copyright law it remains unclear in the UK – and other jurisdictions – whether destruction is included within the remit of the artists' moral right of integrity, meaning that it is uncertain whether an artist has a right to object to the destruction of an artwork that they have created. If these questions remain unanswered, not only might privately-owned artworks be secretly destroyed (case study 6 – Winston Churchill) or reassembled (case study 5 – Charles Camoin) against the artists' wishes or the wider public interest, but there is real potential for creative expression and artistic practice to be stifled. For instance, it is currently unknown what the legal status is of artists who destroy parts of their portfolio (case study 3), create Destructionist Art, such as Auto-Destructive Art (case study 3 – Jean Tinguely, Banksy), or incorporate and transform other artists' works into their own using destructive techniques (case study 4 – Marcel Duchamp). This is a central concern because these are all art practices art historians highly value, as clear examples of destruction *as* art, and the law has not yet provided clear guidance on how it

regulates or interprets them. In essence, it therefore appears that the law cannot effectively distinguish between destruction that amounts to art rather than simply the destruction of it. In other words, the law cannot effectively distinguish between the destruction *of* art and destruction *as* art. This is particularly disturbing given that copyright law expressly strives to protect artists, artworks, and the public interest in them. As such, although it largely remains to be seen how the courts will interpret the intentional destruction of art and address these concerns, art historians' interpretations will be of the utmost importance when they do so.

In conclusion, while art historians interpret the meaning behind individual destructive acts, the law struggles to do this. This is primarily what distinguishes art-historical and legal interpretations of the destruction of art. As it stands, the law regulates the destruction of art without looking to art history to understand what destruction means to art. As a result, under the current legal framework, the law risks confusing important creative expressions and artistic practices that should be protected, with intentional acts of violence and harm that should be prevented. In returning to Julius's proposition that 'law and art will remain in tension; the best that law and art […] studies can do is to describe the various aspects of their conflict',[511] this research has described the conflict between legal and art-historical interpretations of destruction, as an intersection between the disciplines. In this, although it has been shown that the law has failed to engage with art to a considerable extent, it has also been shown how the law could develop a better understanding of destruction from art-historical research, and how this could be applied in both theory and practice to different areas of law. Therefore, while interpretations of destruction in art history and law are neither consistent nor wholly compatible, the law will continue to struggle with the destruction of art until it recognises what destruction means to art.

[511] Julius. 'Art Crimes', 496. See pp.12-13.

Bibliography

Charters and Statutes

Charter of the International Military Tribunal of 1945

Rome Statute of the International Criminal Court of 1998

Statute for the establishment of the International Criminal Tribunal for the former Yugoslavia of 1993

Conventions

Berne Convention for the Protection of Literary and Artistic Works of 1971

Convention Concerning the Protection of Cultural and Natural Heritage Convention of 1972

Convention respecting the Laws and Customs of War on Land of 1907

Convention with respect to the Laws and Customs of War on Land of 1899

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 1977

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 1977

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970

Declarations

UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage of 2003

Acts of Parliament

India

Copyright Act 1957 c.14

Switzerland

Federal Copyright Act 1992

UK

Copyright Designs and Patents Act 1988 c.48

Criminal Damage Act 1971 c.48

Criminal Law (Consolidation) (Scotland) Act 1995 c.39

Malicious Damage Act 1861 c.97

Prisoners (Temporary Discharge for Ill Health) Act 1913 c.4

US

Copyright Act 1976 17 U.S.C.

Visual Artists Rights Act 1990 17 U.S.C.

Case Law

Canada

Snow v The Eaton Centre Ltd (1982) 70 CPR (2d) 105.

France

Camoin v. Carco (Affaire Camoin) Trib. Civ. Seine, Nov. 15, 1925.

Dubuffet v. Regie Nationale Des Usines Renault (No. 2) Cour d'Appel (Versailles) 8 July 1981 (1983) 117 RIDA 80; [1983] FSR 32.

Hong v. Saltpetriere Chapel Assn, CA Paris, 1 Ch (10 April 1995), (1995) 166 *RIDA* 316.

L'affaire Bernard Buffet, Cour d'Appel, Paris, Recuil Dalloz) D 1962 570.

Sudre v. Commune de Baixas, Conseil d'état, 3 avril 1936; 1936 Gaz Pal II 274.

International Criminal Tribunal for the former Yugoslavia

The Prosecutor v. Jokić, IT-01-42/1-S, Judgment, 18 March 2004.

The Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Judgment, 26 February 2001.

The Prosecutor v. Prlić et al, IT-04-74-T, Judgement, 29 May 2013.

The Prosecutor v. Strugar, IT-01-42-T, Judgement, 31 January 2005.

International Criminal Court

Office of the Prosecutor. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi* (1 March 2016) [online] Available from: https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-al-mahdi-160822

The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment, 27 September 2016.

The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Reparations Order, 17 August 2017.

India

Sehgal v Union of India [2005] FSR 829.

Italy

Paolo Greco & Paulo Vercellone, I Diritti Sulle Opere Dell'Ingegno 103 (1974)

UK

Confetti Records v Warner Music UK Ltd [2003] EWHC 1274 (Ch)

Cuisenaire v Reed [1963] 5 FLR 180.

Delves-Broughton v House of Harlot Ltd [2012] EWPCC 29.

Figk [2005] EWCA Crim 2381.

Gayford v Chouler [1898] 1 QB 316, DC.

Hardman v Chief Constable of Avon [1986] Crim LR 330.

Harrison v Harrison [2010] EWPCC 3; [2010] ECDR 12.

LucasFilm Ltd v Ainsworth [2008] EWHC 1878 (Ch)

Morphitis v Salmon [1990] Crim LR 48.

Pasterfield v Denham [1999] FSR 168.

R v G [2003] UKHL 50.

R v Moloney [1985] 1 AC 905.

Roe v Kingerlee [1986] Crim LR 735.

Samuels v Stubbs [1972] 4 SASR 200.

Tidy v Trustees of the National History Museum (1995) 39 IPR 501.

US

Bleistein v. Donaldson 188 US 239 (1903)

Carter v. Helmsley-Spear Inc, 861 F Supp 303 (SDNY 1994)

City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co 72 NLJ 267, 268 (1905)

Cohen v. G&M Realty, 320 F. Supp 3d 421 (EDNY 2018)

Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999)

Codes

France

Intellectual Property Code 1992 No 92-597

US

Instructions for the Government of Armies of the United States in the Field of 1863

Books

Adams, A. *Iconoclasm, Identity Politics and the Erasure of History*. (Societas, 2020)

Arizpe, L. *Culture, Diversity and Heritage: Major Studies*. (Springer, 2015)

Barber, T., Boldrick, S. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013)

Battersby, C. *Gender and Genius: Towards a Feminist Aesthetics.* (Women's Press, 1989)

Berger, J. *Ways of Seeing.* (Penguin, 2008)

Bevan, R. *The Destruction of Memory: Architecture at War*. 2nd ed. (Reaktion, 2016)

Black, J. *Winston Churchill in British Art, 1900 to the Present Day: The Titan With Many Faces.* (Bloomsbury, 2017)

Bleiberg, E., Weissberg, S. *Striking Power: Iconoclasm in Ancient Egypt.* (Pulitzer Art Foundation, 2019)

Boldrick, S. *Iconoclasm and the Museum.* (Routledge, 2020)

Bryer, A., Herrin, J. *Iconoclasm.* (Centre for Byzantine Studies, 1977)

Butt, D. *Rectifying International Injustice.* (OUP, 2009)

Caddick, N. *et.al. Copinger and Skone James on Copyright.* 18th ed. (Sweet & Maxwell, 2020)

Conklin, J. *Art Crime.* (Praeger, 1994)

Cormack, R. *Writing in Gold: Byzantine Society and its Icons.* (OUP, 1985)

Cornish, W.R. *Intellectual Property.* 4th ed. (Sweet & Maxwell, 1999)

DK. *The Art Book.* (Penguin Random House, 2017)

DuBoff, L.D., Murray, M.D. *Art Law: Cases and Materials.* 2nd ed. (Wolters Kluwer, 2017)

Eagleton, T. *The Ideology of the Aesthetic.* (Basil Blackwell, 1990)

Forrest, C. *International Law and the Protection of Cultural Heritage*. (Routledge, 2011)

Gamboni, D. *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution.* (Reaktion, 2018)

Gerstenblith, P. *Art, Cultural Heritage, and the Law: Cases and Materials.* 2nd ed. (Carolina Academic Press, 2008)

Hammer, J. *The Bad-Ass Librarians of Timbuktu: And Their Race to Save the World's Most Precious Manuscripts.* (Simon & Schuster, 2017)

Jackson, P. *Females in the Frame: Women, Art, and Crime.* (Palgrave Macmillan, 2019)

Jacques, S. *The Parody Exception in Copyright Law.* (OUP, 2019)

Lambourne, N. *War Damage in Western Europe: The Destruction of Historic Monuments During the Second World War.* (Edinburgh University Press, 2001)

Lixinski, L. *International Heritage Law for Communities: Exclusion and Re-Imagination.* (OUP, 2019)

Lostal, M. *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq and the Buddhas of Bamiyan*. (CUP, 2017)

Macdonald, S. *Difficult Heritage: Negotiating the Nazi Past in Nuremberg and Beyond.* (Routledge, 2009)

MacFarquhar, R., Schoenhals, M. *Mao's Last Revolution.* (Harvard University Press, 2008)

Macmillan, F. *Intellectual and Cultural Property: Between Market and Community.* (Routledge, 2020)

Nafziger, J.A.R., Nicgorski, A.M. *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce.* (Brill-Nijhoff, 2009)

Nead, L. *The Female Nude: Art, Obscenity and Sexuality.* (Taylor & Francis, 1992)

Noyes, J. *Politics of Iconoclasm: Religion, Violence and the Culture of Image-Breaking in Christianity and Islam*. (I.B. Tauris, 2016)

O'Keefe, R. *The Protection of Cultural Property in Armed Conflict*. (CUP, 2006)

Ormerod, D. and Laird, K. *Smith, Hogan and Ormerod's Criminal Law.* 15th ed. (OUP, 2018)

Phillips, J. *The Reformation of Images: Destruction in Art in England, 1535-1660.* (University of California Press, 1973)

Prowda, J.B. *Visual Arts and the Law.* (Lund Humphries, 2013)

Rambelli, F., Reinders, E. *Buddhism and Iconoclasm: A History.* (Bloomsbury, 2012)

Richardson, M. *Laugh a Defiance.* (Weidenfeld & Nicolson, 1953)

Sahas, D.J. *Icons and Logos: Sources in Eighth-century Iconoclasm.* (University of Toronto Press, 1986)

Sax, J. *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures.* (University of Michigan Press, 1999)

Silverman, H. *Contested Cultural Heritage: Religion, Nationalism, Erasure and Exclusion in a Global World.* (Springer, 2011)

Simpson, J. *Under the Hammer: Iconoclasm in the Anglo-American Tradition.* (OUP, 2010)

Smith, A.T.H. *Property Offences: The Protection of Property Through the Criminal Law.* (Sweet & Maxwell, 1994)

Smith, L. *The Uses of Heritage.* (Routledge, 2006)

Speck, A. *et.al. Laddie, Prescott & Vitoria: The Modern Law of Copyright*. 5th ed. (LexisNexis, 2018)

Spraggon, J. *Puritan Iconoclasm during the English Civil War.* (Boydell Press, 2003)

Stokes, S. *Art and Copyright.* 2nd Ed. (Hart, 2012)

Taheri, A. *The Spirit of Allah: Khomeini and the Islamic Revolution.* (Adler and Adler, 1986)

Thomas, M. *The Faith and the Fury: Popular Anticlerical Violence and Iconoclasm in Spain, 1931-1936.* (Sussex Academic Press, 2019)

Wandel, L.P. *Voracious Idols & Violent Hands: Iconoclasm in Reformation Zurich, Strasbourg and Basel.* (CUP, 1995)

Wilson, M. *Art Law and the Business of Art.* (Edward Elgar, 2019)

Wrigley, C. *Winston Churchill: A Biographical Companion.* (ABC-CLIO, 2002)

Zervos, C. *Conversations avec Picasso.* transl. A. Adler. (Cahiers d'Art, 1935)

Chapters in Edited Collections

Barber, T., Boldrick, S. 'Introduction.' in T. Barber, S. Boldrick. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013), 8-13.

Barnett, J. ‘Copying artistic works: copyright, aesthetics, and artistic practice.’ in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law.* (Edward Elgar, 2020), 59-76.

Ben-Dor, O. ‘Introduction: standing before the gates of the law?’ in O. Ben-Dor. *Law and Art: Justice, Ethics and Aesthetics.* (Taylor & Francis, 2011), 1-29.

Boldrick, S. ‘Attacks on art.’ in T. Barber, S, Boldrick. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013), 126-139.

Boldrick, S. ‘Iconoclasms past and present: conflict and art.’ in T. Barber, S. Boldrick. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013), 14-21.

Boldrick, S. ‘Introduction: breaking images.’ in S. Boldrick, *et.al*. *Striking Images, Iconoclasms Past and Present.* (Routledge, 2018), 1-12.

Boldrick, S., Clay, R. ‘Introduction.’ in S. Boldrick, R. Clay. *Iconoclasm: Contested Objects, Contested Terms.* (Routledge, 2007), 1-14.

Burke, S. ‘Copyright and conceptual art.’ in E. Bonadio, N. Lucchi. *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Edward Elgar, 2018), 44-61.

Burke, S. ‘Intellectual property law as artistic medium.’ in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law.* (Edward Elgar, 2020), 259-277.

Dahlberg, L. ‘Introduction: visualising law and authority.’ in L. Dahlberg, *et.al*. *Visualizing Law and Authority: Essays on Legal Aesthetics.* (De Gruyter, 2012), 1-10.

Douzinas, C., Nead, L. ‘Introduction.’ in C. Douzinas, L. Nead. *Law and the Image: The Authority of Art and the Aesthetics of Law.* (University of Chicago Press, 1999), 1-15.

Elias, J.J. ‘The Taliban, Bamiyan and revisionist iconoclasm.’ in S. Boldrick, *et.al*. *Striking Images, Iconoclasms Past and Present.* (Routledge, 2018),145-164.

Fisher, W. ‘Theories of intellectual property.’ in S.R. Munzer. *New Essays in the Legal and Political Theory of Property* (CUP, 2001), 168-201.

Hardy, S. ‘Iconoclasm: religious and political motivations for destroying art.’ in S. Hufnagel, D. Chappell. *The Palgrave Handbook on Art Crime.* (Palgrave, 2019), 625-652.

Iljadica, M. ‘Classifying art in diverse legal regimes: the function-aesthetic divide and the public interest.’ in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law.* (Edward Elgar, 2020), 209-223.

Julius, A. ‘Art crimes.’ in D. McClean, K. Schubert. *Dear Images: Art, Copyright and Culture.* (Ridinghouse, 2002), 473-503.

Kila, J.D. ‘Iconoclasm and cultural heritage destruction during contemporary armed conflicts.’ in S. Hufnagel, D. Chappell. *The Palgrave Handbook on Art Crime.* (Palgrave, 2019), 653-683.

Koenraadt, F. ‘On art, crime and insanity. The role and contribution of mental disorders.’ in J. Kila, M. Balcells. *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends.* (Brill, 2014), 341-365.

Kolrud, K., Prusac, M. ‘Introduction – whose iconoclasm?’ in K. Kolrud, M. Prusac. *Iconoclasm from Antiquity to Modernity.* (Routledge, 2016), 1-14.

Linn-Tynen, E. ‘Reclaiming the past as a matter of social justice: African American heritage, representation and identity in the United States.’ in V. Apaydin. *Critical Perspectives on Cultural Memory and Heritage: Construction, Transformation and Destruction*. (UCL Press, 2020), 255-268.

McCaffery, E.J. ‘Must we have the right to waste?’ in S.R. Munzer. *New Essay in the Legal and Political Theory of Property.* (CUP, 2001), 76-106.

McCutcheon, J., McGaughey, F. ‘Introduction to the research handbook on art and law.’ in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law.* (Edward Elgar, 2020), 1-9.

Michalos, C. ‘Murdering art: destruction of art works and artists’ moral rights.’ in D. McClean. *The Trials of Art.* (Ridinghouse, 2007), 173-194.

Mohamed, L. ‘Suffragettes: the political value of iconoclastic acts.’ in T. Barber, S, Boldrick. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013), 114-125.

Montesquieu, C. ‘The spirit of laws.’ in *The Complete Works of M. de Montesquieu. Translated from the French in Four Volumes*.’ 1st vol. (T. Evans, 1777)

Musson, A. ‘Visualising legal history: the courts and legal profession in image.’ in J. Baker. *English Legal History and its Sources*. (CUP, 2019), 203-222.

Rohrbaugh, R. ‘Ontology of art.’ in B. Gaut, D.M. Lopes. *The Routledge Companion to Aesthetics.* 3rd ed. (Routledge, 2014), 235-245.

Uerpmann-Wittzack, R. ‘Introduction: cultural heritage law and the quest for human identities.’ in E. Lagrange *et.al. Cultural Heritage and International Law.* (Springer, 2018), 1-11.

Wardle, B. ‘Lady injustice: inequality and legal iconography.’ in J. McCutcheon, F. McGaughey. *Research Handbook on Art and Law.* (Edward Elgar, 2020), 239-257.

Wilson, A. ‘Destruction in art: destruction/creation: act or perish.’ in T. Barber, S, Boldrick. *Art Under Attack: Histories of British Iconoclasm.* (Tate, 2013), 140-153.

Wrigley, W. ‘Breaking the code: interpreting French revolutionary iconoclasm.’ in A. Yarington, K. Everest. *Reflections of Revolution: Images of Romanticism.* (Routledge, 1993), 182-195.

Journal Articles

Adeney, E. 'The moral right of integrity: the past and future of "honour."' (2005) *Intellectual Property Quarterly* 2, 111-134.

Al-Houdalieh, S., Sauders, R. 'Building destruction: the consequences of rising urbanization on cultural heritage in the Ramallah Province.' (2009) *International Journal of Cultural Property* 16(11), 1-23.

Alexander, G.S. 'Of buildings, statues, art, and sperm: the right to destroy and the duty to preserve.' (2018) *Cornell Journal of Law and Public Policy* 27(3), 619-660.

Apotsos, M.M. 'Timbuktu in terror: architecture and iconoclasm in contemporary Africa.' (2017) *International Journal of Islamic Architecture* 6(1), 97-120.

Arribas, G.F. 'The narrow protection of cultural properties and historical monuments in the Rome Statute: filling the gap.' (2019) *International Community Law Review* 21, 129-146.

Badar, M.E., Higgins, N. 'Discussion interrupted: the destruction and protection of cultural property under international law and Islamic law – the case of *Prosecutor v Al Mahdi.*' (2017) *International Criminal Law Review* 17, 486-516.

Barron, A. 'Copyright law and the claims of art.' (2002) *Intellectual Property Quarterly* 4, 368-401.

Bingham, T. 'The rule of law.' (2007) *Cambridge Law Journal* 66(1), 67-85.

Blake, J. 'On defining the cultural heritage.' (2000) *International and Comparative Law Quarterly* 49(1), 61-85.

Brosché, J., *et.al*. 'Heritage under attack: motives for targeting cultural property during armed conflict.' (2017) *IJHS* 23(3), 248-260.

Burke, S. '5 Pointz down: the New York District Court ruling on 'Graffiti Mecca.'' (2014) *Queen Mary Journal of Intellectual Property* 4(3), 226-235.

Casaly, P. 'Al Mahdi before the ICC: cultural property and world heritage in international criminal law.' (2016) *Journal of International Criminal* Justice 14, 1199-1220.

Cheng-Davies, T. 'Honour in UK copyright law is not 'a trim reckoning' – its impact on the integrity right and the destruction of works of art.' (2016) *Oxford Journal of Legal Studies* 36(2), 272-303.

Christiani, T.A. 'Normative and empirical research methods: their usefulness and relevance in the study of law as an object.' (2016) *Procedia – Social and Behavioural Sciences* 219, 201-207.

Cohen, A.J. 'The limits of iconoclasm: The fate of tsarist monuments in revolutionary Moscow and Petrograd, 1917-1918.' (2020) *City* 24(3-4), 616-626.

Creutzfeldt, N., *et.al*. 'Introduction: exploring the comparative in socio-legal studies.' (2016) *International Journal of Law in Context* 12(4), 377-389.

Cunliffe, E., *et.al*. 'The protection of cultural property in armed conflict: unnecessary distraction or mission-relevant priority?' (2018) *NATO OPEN Publications* 2(4), 1-22.

Derclaye, E. 'Debunking some of UK copyright law's longstanding myths and misunderstandings.' (2013) *Intellectual Property Quarterly* 1, 1-17.

Douzinas, C. 'The legality of the image.' (2006) *Modern Law Review* 63(6), 813-830.

Dresser, M. 'Set in stones? statues and slavery in London.' (2007) *History Workshop Journal*, 64(1), 162-199.

Duong, W.N. 'Law is law and art is art and shall the two ever meet? Law and literature: the comparative creative process.' (2005) *Southern California Interdisciplinary Law Journal* 15, 1-44.

Durney, M., Proulx, B. 'Art crime: a brief introduction.' (2011) *Crime, Law and Social Change* 56(2), 115-132.

Edwards, I. 'Banksy's graffiti: a not-so-simple case of criminal damage?' (2009) *Journal of Criminal Law* 73(4), 345–361.

Finchett-Maddock, L. 'Forming the legal avant-garde: a theory of art/law.' (2019) *Law, Culture and the Humanities*, 1-32.

Fowler, R. 'Why did suffragettes attack works of art?' (1991) *Journal of Women's History* 2(3), 109-125.

Frigerio, A. 'Considerations on the legitimacy of organizing a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage.' (2015) *Santander Art and Culture Law Review* 2(1), 101-116.

Frulli, M. 'The criminalization of offences against cultural heritage in times of armed conflict: the quest for consistency.' (2011) *European Journal of International Law* 22(1), 203-217.

Frye, B.L. 'Aesthetic nondiscrimination and fair use.' (2016) *Belmont Law Review* 3, 29-50.

Fryer, T.C. *et.al.* 'As the statues fall: an (abridged) conversation about monuments and the power of memory.' (2021), *Current Anthropology* 62(3), 373-384.

Giustiniani, F.Z. 'Protecting world cultural and natural heritage against climate change and disasters: an assessment of the effectiveness of the world heritage convention system' (2021) *Yearbook of International Disaster Law Online* 2(1), 233-258.

Hansmann, H., Santilli, M. 'Authors' and artists' moral rights: a comparative legal and economic analysis.' (1997) *Journal of Legal Studies* 26(1), 95-143.

Hart, S.M., Chilton, E.S. 'Digging and destruction: artifact collecting as meaningful social practice.' (2015) *International Journal of Heritage Studies* 21(4), 318-335.

Held, J. 'Alteration and mutilation of works of art.' (1963) *South Atlantic Quarterly* 62, 1-28.

Holtorf, C. ‘Averting loss aversion in cultural heritage.’ (2015) *International Journal of Heritage Studies* 21(4), 405-421.

Holtorf, C., Kristensen, T.M. ‘Heritage erasure: rethinking ‘protection’ and ‘preservation’.’ (2015) *International Journal of Heritage Studies* 21(4), 313-317.

Honoré, A.M. ‘Ownership.’ (1961) *Columbia Law Review* 61(7), 1384-1391.

Iljadica, M. ‘Graffiti and the moral right of integrity.’ (2015) *Intellectual Property Quarterly* 3, 266-288.

Khalaf, R.W. ‘Cultural heritage reconstruction after armed conflict: continuity, change and sustainability.’ (2020) *Historic Environment: Policy & Practice* 11(1), 4-20.

Kristeller, P. ‘The modern system of the arts.’ (1951) *Journal of the History of Ideas* 12, 496-527.

Lambourne, N. ‘Production versus destruction: art, World War I and art history.’ (1999) *Art History* 22(3), 347-363.

Lee, R., Zarandona, J.A.G. ‘Heritage destruction in Myanmar’s Rakhine state: legal and illegal iconoclasm.’ (2020) *IJHS* 26(5), 519-538.

Levin, N *et.al.* ‘World Heritage in danger: big data and remote sensing can help protect sites in conflict zones.’ (2019) *Global Environmental Change* 55, 97-104.

Liu, D. ‘Regulating the destruction of public sculpture through the moral right of integrity: a balance between the artist, the public, and the owner.’ (2019) *European Intellectual Property Review* 41(12), 766-777.

Lopes, D.M.M. ‘The ontology of interactive art.’ (2001) *Journal of Aesthetic Education* 35(4), 65-81.

MacLeod, S. ‘Civil disobedience and political agitation: the art museum as a site of protest in the early twentieth century.’ (2006) *Museum and Society* 5(1), 44-57.

Mag Uidhir, C., Magnus, P.D. ‘Art concept pluralism.’ (2011) *Metaphilosophy* 42, 183-196.

Markellou, M. ‘Appropriation art under copyright protection: recreation or speculation?’ (2013) *European Intellectual Property Review* 35(7), 369-372.

Meron, T. ‘The protection of cultural property in the event of armed conflict within the case-law of the International tribunal for the Former Yugoslavia.’ (2005) *Museum International* 57(4), 41-60.

Metzger, G. ‘Machine, auto-creative and auto-destructive art.’ (1962) *Ark: Journal of the Royal College of Art* 32, 7-8.

Mulcahy, L. ‘Eyes of the law: a visual turn in socio-legal studies.’ (2017) *Journal of Law and Society* 44(1), 111-128.

Ortland, E., Schmücker, R. ‘Copyright & art.’ (2005) *German Law Journal* 6(12), 1762-1776.

Pila, J. ‘An intentional view of the copyright work.’ (2008) *Modern Law Review* 71(4), 535-558.

Prott, L.V., O’Keefe, P.J. ‘‘Cultural heritage’ or ‘cultural property’?’ (1992) *International Journal of Cultural Property* 1(2), 307-320.

Segall, A. ‘Protection of cultural property in armed conflict: treaty ratification and implementation.’ (2016) *Commonwealth Law Bulletin* 42(3), 455-459.

Sesana, E., *et.al*. ‘Adapting cultural heritage to climate change risks: perspectives of cultural heritage experts in Europe.’ (2018) *Geosciences (Basel)* 8(8), 305-328.

Stamatoudi, I.A. ‘Moral rights of authors in England: the missing emphasis on the role of creators.’ *Intellectual Property Quarterly* 4, 478-513.

Strahilevitz, L.J. ‘The right to destroy.’ (2005) *Yale Law Journal* 114(4), 781-854.

Teilmann, S. ‘Framing the law: the right of integrity in Britain.’ (2005) *European Intellectual Property Review* 27(1), 19-24.

van der Auwera, S. ‘International law and the protection of cultural property in the event of armed conflict: actual problems and challenges.’ (2013) *Journal of Arts Management, Law, and Society* 43(4), 175-190.

Waisman, A. ‘Rethinking the moral right to integrity.’ (2008) *Intellectual Property Quarterly* 3, 268-285.

Walton, K. ‘Aesthetics – what?, why?, and wherefore?’ (2007) *Journal of Aesthetics and Art Criticism* 65(2), 147-162.

Wheeler, S. ‘Socio-legal studies in 2020.’ (2020) *Journal of Law and Society* 47(2), 209-226.

Theses and Research Papers

Philatova, N. ‘Erasing identity: how Prosecutor v Ahmad Al Faqi Al Mahdi failed to acknowledge the destruction of Timbuktu’s cultural heritage as a case of iconoclasm.’ (University of Colorado, 2019)

Litoing, N.N. ‘Rejecting shirk and promoting tawhid? A critical examination of the motivation and objective of the iconoclasts in Bamiyan (2001) and Timbuktu (2012).’ (University of Birmingham, 2015)

News Articles

Dearden, L. ‘Winston Churchill and Nelson Mandela statues covered up ahead of Black Lives Matter counter-protests.’ *The Independent.* (12 June 2020) [online] Available from: https://www.independent.co.uk/news/uk/home-news/winston-churchill-statue-london-cenotaph-protests-scaffolding-a9561856.html

Miller, M.H. 'From Claude Monet to Banksy, why do artists destroy their own work?' *The New York Times.* (11 March 2019) [online] Available from: https://www.nytimes.com/2019/03/11/t-magazine/artists-destroy-past-work.html

Orange, R. 'Danish artist seeks to stop his work being cut up to make watches.' *The Guardian.* (2 December 2019) [online] Available from: https://www.theguardian.com/world/2019/dec/02/danish-artist-tal-r-paris-chic-watches

Rachman, T. 'Passion, principle or both? Deciphering art vandalism.' *The New York Times.* (20 September 2013) [online] Available from: https://www.nytimes.com/2013/10/01/arts/design/art-under-attack-at-tate-britain-explores-motives.html

Russell, J. 'Critic's notebook: the art of finding a met president.' *The New York Times.* (16 January 1978) [online] Available from: https://www.nytimes.com/1978/01/16/archives/critics-notebook-the-art-of-finding-a-met-president.html

'The slashed Venus six months for militant.' (13 March 1914). *Manchester Courier and Lancashire General Advertiser*. taken from *The British Newspaper Archive.* [online] Available from: https://www.britishnewspaperarchive.co.uk/viewer/bl/0000206/19140313/091/0009

Magazine Articles

Davies, C. 'Velazquez in London.' (2007) *The New Criterion* 25(5), 53-55. [online] Available from: https://newcriterion.com/issues/2007/1/velazquez-in-london

Trilling, D. 'The art of creative destruction.' *Apollo: The International Art Magazine.* (10 June 2020) [online] Available from: https://www.apollo-magazine.com/colston-bristol-statue-slavery/

Websites and Blogs

Griffin, J. 'The seeds of destruction.' *Tate etc.* (9 December 2013) [online] Available from: https://www.tate.org.uk/tate-etc/issue-29-autumn-2013/seeds-destruction

Ministry of Housing, Communities & Local Government, *et.al*. 'New legal protection for England's heritage.' *GOV.UK* (17 January 2021) [online] Available from: https://www.gov.uk/government/news/new-legal-protection-for-england-s-heritage

MoMA. 'Jean Tinguely. *Fragment from Homage to New York.* (1960).' *MoMA.* [online] Available from: https://www.moma.org/collection/works/81174

MoMA. 'Homage to New York: a self-constructing and self-destroying work of art conceived and built by Jean Tinguely. (Mar 17 1960), MoMA.' *MoMA.* [online] Available from: https://www.moma.org/calendar/exhibitions/3369

Oxford Advanced Learner's Dictionary. 'Vandalism.' (OUP, 2020) [online] Available from: https://www.oxfordlearnersdictionaries.com/definition/english/vandalism

Oxford English Dictionary. 'Vandalism.' (OUP, 1989) [online] Available from: https://www.oed.com/view/Entry/221344?redirectedFrom=vandalism#eid

Sotheby's. 'Latest Banksy artwork 'Love is in the Bin' created live at auction.' *Sotheby's.* (11 October 2018) [online] Available from: https://www.sothebys.com/en/articles/latest-banksy-artwork-love-is-in-the-bin-created-live-at-auction

Stokes, S. 'Does cutting up a work of art and re-using fragments of the canvas to make watches infringe copyright law?' *Blake Morgan.* (2019) [online] Available from https://www.blakemorgan.co.uk/does-cutting-up-a-work-of-art-and-re-using-fragments-of-the-canvas-to-make-watches-infringe-copyright-law/

TATE. 'Art term: dada.' *TATE.* [online] Available from: https://www.tate.org.uk/art/art-terms/d/dada

Events and Conferences

Bensouda, F.B. 'Cultural heritage protection: fighting destruction and trafficking.' *International Conference on the occasion of the 50th anniversary of the 1970 UNESCO Convention in partnership with UNESCO, the European Commission and the Council of Europe.* (16-18 November 2020) [online] Available from: https://cultural-heritage-and-multilateralism2020.com/en/event