Br. J. Am. Leg. Studies 14(2) (2025), DOI: 10.2478/bjals-2025-0010 sciendo

Wondrous Dark: Visual Art as Free Speech

Thomas Halper*

ABSTRACT

There is general agreement that art is protected by the First Amendment. But what is art? As the nature of art has itself radically evolved, the notoriously unanswerable question has become even knottier. Courts have addressed the issue with a mélange of old fashioned and ill fitting criteria, but one Supreme Court dissenter has proffered an alternative, implicitly accepting the theory of the renowned art critic and philosopher, Arthur Danto.

KEYWORDS

Art, First Amendment, Danto

ACKNOWLEDGEMENTS

I am grateful to Steven Heyman of the Chicago-Kent Law School for his insightful reading of an earlier version of this manuscript.

CONTENTS

I. Introduction 3
II. Art and Communication 5
III. What Is Art? 7
IV. The Courts Speak 20
V. Congress Speaks 32
VI. Some Conclusions 36

* Baruch College/CUNY Graduate Center; E-mail: Thomas.Halper@Baruch.cuny.edu

CC BY-NC-ND © 2025 Thomas Halper, published by Sciendo.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

> "I conceive . . . as to the business of being profound, that it is with writers as with wells . . . . [W]hen there is nothing in the world at the bottom besides dryness and dirt, though it is but a yard and a half under ground, it shall pass, however, for wondrous deep, upon no wiser reason than because it is wondrous dark."
>
> Jonathan Swift[1]

I. Introduction

We take it for granted that art is connected with freedom. The cliché romantic artist, whether a free spirit[2] or a brooding loner,[3] is very much his own person driven by his own vision. He may celebrate or ridicule those in power; he may radically innovate or follow well-trod conventions; he may prowl a Chelsea gallery as a rich man or dine on canned sardines in a garret. Whether talented, successful or a struggling failure, the cliché life of the artist epitomizes the life of a free person.

Whatever his status, the cliché artist is beset by self-interested adversaries, petty predators barking, scratching, grasping to pull him down, and, worse yet, government officials alarmed at his independence and refusal to conform. For them, the freedom of an artist is a threat or a nuisance but certainly nothing to be indulged. Even Plato joins the attack, conceiving art as imitative or mimetic, and therefore inferior to what it was imitating; indeed, because he saw tangible reality as merely a copy of ideal forms, he considered art merely a copy of a copy that leads us away from truth. Plato would have banished art from his Republic as a corrupting force.[4]

With 2.57 million artists in the American workforce[5] and few signs of Rembrandts and Velasquezes among them, it is evident that freedom does not guarantee art of quality. On the other hand, it is commonly thought that the absence of freedom means that it is hard to have real art at all. Freedom is necessary, if not sufficient, for the creation of worthy art. So says the cliché.

This may not be true. Many of the greatest visual artists labored under tyrannies – consider the Renaissance masters in the time of the Medici[6] -- suggesting that in certain cases, the absence of freedom might actually conduce to creativity of a high level.[7] But the cliché, unsullied by facts, remains popular, like junk food.

---

1 Jonathan Smith, A Tale of a Tub 186 (2009) (1704).

2 Joyce Cary, The Horse's Mouth (1944).

3 Irving Stone, Lust for Life (1934).

4 Plato, Republic 80-85 (Francis M. Cornford trans. 1941) (Stephanus *392c-398b).

5 Randy Cohen, *Artists in the U.S. Workforce 2006-2020*, Am. for the Arts (Mar. 2021), https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/artists-in-the-us-workforce-2006-2020.This includes eleven occupational categories, which the United States Bureau of Labor Statistics believes "only capture[s] a portion of all artists in the workforce."

6 To take an extreme example, it is said that Fra Filippo Lippi was imprisoned by Cosimo de Medici until he completed a painting demanded of him. Sayre MacNeil, *Some Pictures Come to Court*, in Harvard Legal Essays 247 (Roscoe Pound ed., 1934).

7 Aleksandr Solzhenitsyn believed that the free societies in the West encouraged a shallow life, focusing on consumerism and gossip; authoritarian systems compelled many citizens to consider such timeless questions as how shall I live? *See* Aleksandr Solzhenitsyn, A World Split Apart (1978).

We also take it for granted that free expression is immensely valuable. Why? Because free expression offers the best path to discovering truth.[8] Because free expression is essential to political accountability.[9] Because free expression improves "all life-affecting decisions."[10] These diverse rationales all share a common element, a belief in the value of communication. In the marketplace search for truth, communications collide; in the pursuit of political accountability, communications between those in power and their critics collide; and in improving life-affecting decision making, communications among the countless interested parties collide.

The results of all these collisions may not be pretty nor are they always productive. With free expression, truth may win out in the long run, but as Keynes observed, "In the long run, we are all dead."[11] Certainly, psychology has taught that there are powerful emotional bases for belief that can easily overwhelm considerations of truth.[12] And yet, overall, we believe with Holmes that "the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace."[13] Not the perfect test, but merely the best among those available. As to accountability, widespread political ignorance or apathy – based in rational calculations[14] – has left us skeptical. Voters seem to credit or blame office holders for matters quite outside their control and to disregard matters that office holders can affect. Yet we still value "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[15]

An additional justification of free expression, highly esteemed by Thomas Emerson, "probably the leading modern theorist of free speech,"[16] is "assuring individual self-fulfillment."[17] "Man," he argues, is distinguished by his "powers to reason and to feel," which implies his "right to form his own beliefs and opinions [and] to express these beliefs and opinions. . . . Hence, suppression of . . . expression is an affront to the dignity of man, a negation of man's essential nature."[18]

Again, this may not be entirely persuasive. If Emerson's test of value is whether an attribute occupies a place as a fundamental human quality, perhaps the urge to dominate (Augustine's *libido dominandi*) is as fundamental as the powers to reason or feel, perhaps, ironically the urge to suppress acts as a corollary of

---

8 John Milton, Areopagitica (1644).

9 Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. Bar Foundation Res. J. 521 (1977).

10 Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 604 (1986). More specifically, free speech is said to improve government decision making, especially in wartime. *See, e.g.*, Luther Gulick, Administrative Reflections from World War II (1948).

11 John Maynard Keynes, A Tract on Monetary Reform 80 (1923).

12 For example, on confirmation bias, *see* Matthias & Megan A. K. Peters, *Confirmation Bias: Without Rhyme or Reason*, 199 Synthese 2757 (2020); on present bias, *see* Ted O'Donoghue & Matthew Rabin, *Present Bias: Lessons Learned and to Be Learned*, 105 Am. Econ. Rev. 273 (2015).

13 Abrams v. United States, 250 U.S. 616, 630 (1919).

14 Anthony Downs, An Economic Theory of Democracy 21-36 (1956).

15 N.Y. Times v. Sullivan, 376 U.S. 259, 270 (1964) (Brennan, J.).

16 Redish, *supra* note 10, at 591.

17 Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, at 878-79 (1963).

18 *Id*. at 879. Relatedly, free speech may be a natural right created to permit us to praise God and to connect with other people, thus allowing us an escape from an otherwise intolerable loneliness.

the powers to reason and to feel. It is the ubiquitous presence of this urge, after all, that is the chief reason we bother about free expression or have the First Amendment. And if free expression may stimulate the powers to reason and feel, it must be admitted that many things stimulate these powers and receive no special constitutional protection, like cooking smells drifting from a kitchen, watching a sporting event or encountering a beautiful person on the street. It must also be said that free expression, like a snake devouring its tail, may stimulate the urge to suppress; your right to say something offensive may trigger my determination to shut you up. Like the other rationales for free expression, the goal of self-fulfillment, Emerson emphasizes, presumes "the right to express these beliefs and opinions. . . . Otherwise they are of little account."[19] Which leads us to the connection between art and communication.

II. Art and Communication

When we ask why it is that we have a First Amendment, do the classic defenses of free speech implicate art? If the rationales all focus on communication, does art necessarily presume a communicative purpose? Tolstoy thought that the "activity of art is based on the capacity of people to infect others with their own emotions and to be infected by the emotions of others."[20] If the work of art is shown to someone not the artist, it would seem that the point is to communicate something.

What does this communication consist of? Sometimes, the answer is concrete and obvious. Jenny Holzer's "Truism: Abuse of power should come as no surprise," a lithograph consisting of thirty-nine maxims, communicates with a directness of a bumper sticker. Some images also are so embedded in common experience that they communicate clearly and unambiguously, like a swastika for Nazism and a Star of David for Judaism. But sometimes, the answer is more problematical, as with Picasso's "Guernica," with its howling people and terrified horse. If the viewer brings a certain knowledge, she will understand that it is a *cri de coeur* responding to a German air attack on the Spanish city of Guernica during the Spanish Civil War; if the viewer lacks this knowledge and sees the painting in isolation, it may communicate to her merely that something terrible has taken place or is threatened. Sometimes, communication is more problematical still, as with Mark Rothko's color field paintings that may communicate a vague mood or perhaps not even that.[21] Thus, the rejection of abstract expressionism by Communists and Nazis because it was "too difficult to inject effective propaganda into."[22]

---

19 *Id*.

20 Leo Tolstoy, What Is Art? 228 (Aylmer Maude trans., 1930) (1898).

21 On the other hand, Kierkegaard imagined a monochromatic red painting, "The Israelites Crossing the Red Sea," of which the color represented the drowned soldiers of Pharaoh's army. A distinguished art critic observed that if the painting had instead been titled "Red Square" (a Moscow landscape), "Nirvana" (a Buddhist sacred work) or "Red Table Cloth" (a still life), its subject would transform it into a different painting. Arthur C. Danto, The Transfiguration of the Commonplace: A Philosophy of Art 1 (1981). *See also* Lydia Goehr, Red Sea-Red Square-Red Thread: A Philosophical Detective Story (2021).

22 Clement Greenberg, Art and Culture: Critical Essays 19 (1961). Relatedly, the early American Puritans rejected art as a frivolous distraction. David R. Brigham, Public

On the other hand, a visual artist might retort that expecting verbal type communication from a painting is like expecting a dog to fly like a bird. Thus, when one sympathetic lawyer called abstract art "non-ideational,"[23] he may have inadvertently meant that it speaks in an unfamiliar language. The nature of visual art communication, in other words, is different – not inferior but simply different – from written or spoken communication. Thus, Justice Souter declared that if a "particularized message" were needed to implicate First Amendment protection, it "would never reach the unquestionably shielded painting of Jackson Pollock"[24] (though Souter never explained why this would be so).[25]

Cumulatively, however, it has been argued, that art has had substantial social effects. For example, Daniel Bell believed that modern art, confronting established norms of rationality and celebrating hedonistic subjectivity and immediate gratification, has contributed to undermining the traditional work ethic and morality that undergird Western capitalism.[26] On the other hand, notwithstanding the bromide that "artistic expression . . . is central to the cultural and political vitality of democratic society,"[27] it is not exactly crystal clear that Pollock's drip paintings are central to the cultural and political vitality of the United States. Similarly, Marcia Hamilton contended that visual art is protected by the First Amendment "because its flourishing furthers the intangible and unquantifiable value of increasing the people's capacity to resist hegemony."[28] When one considers how postmodern artists have distanced their work from laypeople and how often artists have supported hegemony, the rationale collapses under the weight of sentimental wishful thinking. Such skepticism perhaps contributed to Bork's position that only political speech merited First Amendment protection, leaving art worthy but unprotected.[29]

Does art, then, require a communicative purpose? It is obvious that art exists as a mode of self-expression,[30] and if the artist is expressing something, we assume that the artist is expressing it to someone, even if to an abstract idealized viewer. At a conceptual level, cubism, for instance, may be viewed as a communication –

Culture in the Early Republic: Peale's Museum and Its Audience 18-19 (1995); John Dillenberger & Claude Welch, Protestant Christianity: Interpreted through Its Development 105 (1954).

[23] James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491, 499 n. 45 (2011).

[24] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

[25] This echoed Justice Sanford's applying the free speech guarantee to the states, offering no justification whatever. Gitlow v. New York, 268 U.S. 652, 666 (1925). *See* Thomas Halper, *Lear's Daughters? Unenumerated Fundamental Rights and the Constitution*, 13 Brit. J. Am. Legal Stud. 1, 7 (2024).

[26] Daniel Bell, The Cultural Contradictions of Capitalism 54-76 (1976).

[27] David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech,* 67 N.Y.U. L. Rev. 675, 739 (1992).

[28] Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73, 112 (1996).

[29] Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, at 27-28 (1971).

[30] Collingwood thought the defining element in art was its expressing the emotions of the artist. R.G. Collingwood, The Principles of Art 117 (1938). However, there are phenomena that we consider art but do not express emotions (like much of conceptual art) and phenomena that express emotions but are not considered art (like screaming).

perhaps a hostile and incendiary communication – with the naturalistic tradition, as well as with specific artists and viewers.

However, art need not always be communicative in intent. Dutton, for instance, believed that the aesthetic sense is innate and driven by "an intention to create something you're going to want to look at after you've finished"[31] – the artist's communication, in this sense, is with himself. Much of what is called outsider art or *art brut* also may be characterized as self-expression, though it was made with no interest in communication. Perhaps the most famous outsider artist, Henry Darger, a hospital janitor, produced an enormous illustrated novel that became known only after his death.[32] Pure self-expression (like Darger's) would be unlikely to generate efforts at suppression, as no one but the artist would be aware of the art; only the posthumous efforts of others publicized his work, granting it a communicative dimension he did not desire or foresee. During Darger's life, First Amendment protection would have been superfluous, for the issue of suppression or punishment would never have arisen. On the other hand, if his work was not communicative in intent, it surely was communicative in effect, which accounts for its popularity.

What has the First Amendment to do with art? The answer is: it depends. It depends upon the art and it depends upon the audience. Can art help in the search for truth or in holding rulers accountable? Consider Goya's series of etchings, "The Disasters of War," depicting the subject with extraordinary power. Or Daumier's "The Legislative Belly," ridiculing members of France's National Assembly. Much of today's art, too, has been characterized as "moralizing message-delivery systems," specializing in currently fashionable notions of social justice.[33] These self-consciously didactic works were intended to convey rather specific messages and found audiences who would easily understand them. Much art, however, is not like that (think the work of Barnett Newman or Cy Twombly).

Even here, however, one might claim that abstract art communicates both the artist's determination to paint what he likes, no matter how unconventional, and the society's commitment to his freedom to do so. By contrast, under Stalin's stifling, unrealistic social realism, art was reduced to propaganda presenting unending confirmations of the successes of Soviet society as a socialist utopia. "Art belongs to the people,"[34] said Lenin, by which he meant that it belonged to the party. All this suggests that art's implicit message may communicate far more powerfully than what literally appears on canvas. Can art, then, enhance our life-affecting decisions? Some viewers doubtless will find that it opens up new ways of seeing themselves or their society. But probably art simply is not important enough to most people to inform such practical life-affecting decisions as those on marriage, occupation, or place to live, let alone such broader questions as how one shall live one's life or what kind of person one should be.

---

[31] Denis Dutton, The Art Instinct: Beauty, Pleasure, and Human Emotion 7 (2009).

[32] Jill Elledge, Henry Darger, Throwaway Boy: The Tragic Life of an Outsider (2013). Zangwill believes that the theory of art requires "no reference to an audience." Nick Zangwill, *Art and Audience*, 57 J. Aesthetics & Art Criticism 315, 330 (1999).

[33] Alice Gribbin, *The Great Debasement*, Tablet, May 26, 2022.

[34] Qtd. in Klara Zetkin, Reminiscences of Lenin 14 (1929).

III. What Is Art?

Whatever the Framers thought about art, it is obvious that in recent years the concept has undergone a revolution. Once upon a time, art seemed to have a narrative purpose. Consider Hieronymus Bosch's "Last Judgment" that warns of the horrors of eternal damnation or Jacques-Louis David's "Napoleon Crossing the Alps," which celebrates the subject's military victories. The art work encounters the viewer's experience: we come to the paintings understanding that Bosch is referring to hell, not simply a nightmare, and that Napoleon was a great general, not a cowboy in fancy dress. Yet, it must be said that much of what today's art communicates is incomprehensible to the uninitiated general public, which is perhaps the point. As Habermas put it, "Modernity revolts against the normalizing functions of tradition; modernity lives on the experience of rebelling against all that is normative."[35]

Unfortunately, we cannot avoid the notorious quagmire, what is art, the "central,"[36] "most venerable,"[37] and "most vexing"[38] problem of aesthetics and "one of the central questions of analytic philosophy."[39] "Art" derives from the Latin "ars," which also signifies skill. We used to assume that art required skill. Piero Manzoni canned thirty grams of his own excrement in "Merde d'Artiste"; it was purchased by the Tate, England's premier venue for contemporary art, for $61,000.[40] Chris Burden's "Shoot" consisted of a video showing him shot in the left arm by a friend using a .22 rifle; "Through the Night Softly" saw him crawling across broken glass in his underwear; and "Trans-Fixed" depicted him nailed to a Volkswagen.[41] We also used to assume that the artist made the art. Sherrie Levine's celebrated exhibit, "After Walker Evans," consisted of photographs of reproductions of Evans' photographs;[42] Richard Prince's photographs of Marlboro cigarette advertisements brought over $3,000,000 at auction.[43] At the very least, we used to assume that the art was something. Salvatore Garou's sculpture, "La Sono" (Italian for "I am") was invisible; it sold for $18,300;[44] a prestigious London gallery exhibited invisible

---

35 Jurgen Habermas, *Modernity: An Incomplete Project*, in The Anti-Aesthetic: Essays on Postmodern Culture 4 (Seyla Ben-Habib trans., Hal Foster ed., 1983).

36 Clive Bell, Art 3 (1914).

37 Jerrold Levison, *Defining Art Historically*, 19 Brit. J. Aesthetics 232 (1979).

38 Monroe Beardsley, *Redefining Art*, in The Aesthetic Point of View 298 (Michael J. Wreen & Donald M. Callen eds., 1982).

39 Noel Carroll*, Identifying Art*, in Institutions of Art: Reconsiderations of George Dickie's Philosophy 4 (Robert J. Yanal ed., 1994).

40 *Tate's Tinned Art Leaves Bad Smell*, Sydney Morning Herald (July 1, 2002

41 *Dangerous Art: The Weapons of Performing Artist Chris Burden*, The Art Story Blog (2022), https://www.theartstory.org/blog/dangerous-art-the-weapons-of-performance-artist-chris-burden/.

42 Howard Singerman, *Sherrie Levine's Art History,* 101 Oct. 96 (2002). There was no copyright issue because Evans had been employed by the government, leaving his photographs in the public domain.

43 Alex Novak*, Richard Prince's Marlboro Man Sets World Record of $3.4 Million for Photo at Auction*, E-Photo Newsletter (iPhoto Central, https://www.iphotocentral.com/news/article-view.php/148/139/818), Jan. 3, 2008.

44 Taylor Dafoe, *An Italian Artist Auctioned Off an 'Invisible Sculpture' for $18,300. It's Made Literally of Nothing,* Artnet (June 3, 2021), https://news.artnet.com/art-world/italian-artist-auctioned-off-invisible-sculpture-18300-literally-made-nothing-1976181.

works by Andy Warhol, Yves Klein, and Yoko Ono.[45] The eminent conceptual artist and sculptor, Sol LeWitt, "a lodestar of modern American art,"[46]claimed to have buried a metal cube in the ground, but doubt remains that he actually did so;[47] what was important was not whether he buried the cube, but instead the public's response to his claim.

All this underscored a complaint by Duchamp about

> too great an importance given to the retinal. . . . it's been believed that painting is addressed to the retina. That was everyone's error. . . . . Before, painting had other functions: it could be religious, philosophical, moral. . . . Our whole century is completely retinal. . . . It's absolutely ridiculous. It has to change.[48]

The point of all these works was to repudiate and destroy traditional artistic conventions – for example, the tradition that held that "the painter is concerned solely with representing what can be seen"[49] -- and it has succeeded.

What, then, is art? Conventional answers have tended to focus on the artwork, the process of creating the artwork or the viewer's experience in perceiving the artwork. More recently, several philosophers have proposed clusters of attributes,[50] imagination,[51] social significance and harmony,[52] "recognition criteria"[53] or "seven conditions,"[54] each of which constitutes a list of attributes that may be found in art. Some of these lists may be quite long.[55] A work of art, from this perspective, is defined as something that meets some or all or some of these tests. The logic is clear. As there is a consensus that certain things are works of art, we can identify the characteristics of these consensus works and apply them inductively to other works to determine whether they, too, are works of art.

Others emphasize the historical context, in which "the artist's way of seeing [has] been conditioned by the world of art [and the] struggle with the forms which

---

45 Andrew Barnes, *Blank Canvas: London Gallery Unveils 'Invisible' Art Exhibit*, Independent, May 18, 2012, https://www.independent.co.uk/arts-entertainment/art/news/blank-canvas-london-gallery-unveils-invisible-art-exhibition-7767057.html.

46 Michael Kimmelman, *Sol LeWitt, Master of Conceptualism, Dies at 78*, N.Y. Times, Apr. 9, 2007, https://www.nytimes.com/2007/04/09/arts/design/09lewitt.html.

47 *"Buried Cube," Sol LeWitt,* Art**Iris (Oct. 29, 2013), https://artiris.wordpress.com/2013/10/29/buried-cube-sol-lewitt/.

48 Qtd. in Pierre Cabanne, Dialogues with Marcel Duchamp 43 (Ron Padgett trans., 1971).

49 Leon Battista Alberti, On Painting 43 (John R. Spencer trans., 1970) (1435).

50 Berys Gaut, *The Cluster Account of Art Defended*, 45 Br. J. Aesthetics 273 (2005); Francis Longworth & Andrea Scanantino, *The Disjunctive Theory of Art: The Cluster Account Reformulated*, 50 Br. J. Aesthetics 151 (2010).

51 Dutton*, supra* note 31, at 51.

52 De Witt H. Parker, *The Nature of Art*, in The Problems of Aesthetics 104 (Eliseo Vivas & Murray Krieger eds., 1953).

53 Denis Dutton, *A Naturalist Definition of Art,* 64 J. Aesthetics & Art Criticism 367 (2006).

54 E.J. Bond, *The Essential Nature of Art*, 12 Am. Phil. Q. 177 (1975).

55 *E.g.,* Gaut lists ten properties. Berys Gaut, *Art as a Cluster Concept*, in Theories of Art Today 28 (Noel Carroll ed., 2000).

others have imposed on life."[56] The artist, looking both backward and forward, labors in an historical process.[57]

However, taking past definitions of art as given does not really inquire as to what art is, for the lists cannot avoid a key problem with enumerative definitions: the absence of principles of inclusion and exclusion. An additional practical problem is that the criteria are so numerous that the whole enterprise becomes intellectually unwieldy. How many tests need to be met? How closely must they be met? Must they be rigid to reflect enduring principles, in which case they will be overtaken by change and discarded as irrelevant? Or must they be flexible to accommodate change, in which case they will be so vague that their utility is undermined?

Another approach singles out art's functional aesthetic character, as in Panovsky's definition of art as a "man-made object designed to be experienced aesthetically."[58] The distinctive marker for him, as for many others,[59] is the intention of the artist that inheres in the object.[60] Yet as art now is thought to include natural objects repurposed as art, this definition will strike us as passé. Relatedly, Bloomsbury's Clive Bell focuses on art's capacity, through beauty or the nature of the object, to evoke a "peculiar emotion [in] all sensitive people."[61] All great art objectively partakes of the "significant form," which defies precise definition but which we can subjectively experience as an "aesthetic emotion." ("We have no other means of recognizing a work of art than our feeling for it."[62]) On the one hand, Bell's intense intuitionism downplays the role of the critic. ("To appreciate a work of art we need bring with us nothing from life, no knowledge of its ideas or affairs, no familiarity with its emotions . . . for a moment we are shut off from human interests."[63]) On the other hand, in highlighting the role of sophisticated elites, Bell foreshadowed a more modern focus, specifically, the work of Arthur C. Danto, "one of the most influential and prolific philosophers of art of the second half of the twentieth century."[64]

In approaching the old chestnut, what is art? Danto observed that new technologies, like photography and movies, had drastically reduced the need for representational or imitative art, leading artists to abandon that traditional format, so that the "whole main point of art in our [twentieth] century was to pursue the question of its own identity."[65] Self-conscious art, for example, examined the process

---

56 Andre Malraux, Voices of Silence: Man and His Art 281 (Stuart Gilbert trans., 1978).

57 George Kubler, The Shape of Time: Remarks on the History of Things 35 (2008); Jerrold Levinson, *Defining Art Historically,* 19 Brit. J. Aesthetics 232, 234 (1979).

58 Erwin Panovsky, Meaning in the Visual Arts 14 (1955).

59 *E.g.,* Christy Mag Uidhir, Art and Art-Attempts 22-25 (2013); Paul Bloom, *Intention, History, and Artifact Concepts*, 60 Cognition 1 (1996).

60 Panovsky, *supra* note 58, at 11-13.

61 Bell, *supra* note 36, at 6; Beardsley, *supra* note 38, at 19; Frank Sidley, *Aesthetic Concepts*, 68 Phil. Rev. 421 (1959); David Hume, Of the Standard of Taste, in Essays Moral, Political, Literary (Eugene F. Miller ed., rev. ed., 1987) (1759).

62 Bell, *supra* note 36, at 8.

63 *Id*. at 27.

64 John Erik Hmiel, *Art and Indiscernibility: Arthur C. Danto and the Dynamics of Analytical Philosophy*, 19 Mod. Intel. Hist. 1157 (2022); Peter Osborne, *Interview Arthur C. Danto: Art and Analysis*, 90 Radical Phil. 33 (Feb. 1998).

65 Arthur C. Danto, *The End of Art*, in The Death of Art 30 (Berel Lang ed., 1984).

of visual understanding in cubism, as well as color and form in abstraction.[66] Freed from traditional constraints, the artist was now liberated, resulting in a pluralistic burgeoning of artistic visions. This is not exactly art for art's sake – it is really art for the artist's sake – for art now needed to have no subject outside itself. Indeed, "it was no longer clear that we could pick the artworks out from the non-artworks all that easily."[67] Thus, for Danto "virtually all there is in the end is theory, art having finally vaporized in a dazzle of pure thought about itself, and remaining, as it were, solely as the object of its own theoretical consciousness."[68]

At a gallery, Danto spied Andy Warhol's famous "Brillo Box," and "In a moment of revelation, everything becomes clear."[69] Warhol's "Brillo Box," deliberately virtually indistinguishable from the real thing,[70] is somehow art, and the real Brillo box is not. How can this be? Danto concludes that "if there were no visible differences, there had to have been *invisible* differences. . . works of art *embodied meanings*."[71] Thus, "one could not tell by looking" if something were art or not.[72] One would have to know which Brillo box contained an embedded meaning?[73] How to know? Anything (or nothing) can be art. "To see something as art requires something the eye cannot descry – an atmosphere of artistic theory, a knowledge of the history of art, or artworld."[74] In short, it is the artworld (chiefly, critics) which assigns and discovers meaning, and it is the artworld which determines what art is. A dead starfish on the beach is a dead starfish, but hang it on a critic's wall, and as if by magic, it becomes art. A neck tie with blue paint produced by a child may be "indiscernible" from one produced by Picasso, but only the Picasso tie qualifies as a work of art.[75] Similarly, if we came upon Robert Gober's "Bag of Doughnuts" on the sidewalk, we would consider it trash; at the Paula Cooper Gallery, it was considered art.[76] Danto compares the "transformative procedure" to

---

66 *Id.* at 20-21.

67 Arthur C. Danto, *The End of Art: A Philosophical Defense*, 37 Hist. & Theory 127, 129 (1998).

68 Danto, *supra* note 65, at 31. Danto here ironically sounds an uncanny echo of Tom Wolfe's diatribe against the art establishment. "Art made its final flight, climbed higher and higher in an ever-decreasing tighter-turning spiral until, with one last erg of freedom, one last dendritic synapse, it disappeared up its own fundamental aperture . . . and came out the other side as Art Theory! Art theory pure and simple, words on a page, literature undefiled by vision, flat, flatter, flattest, a vision invisible, even ineffable, as ineffable as the Angels and the Universal Souls." *See* Tom Wolfe, The Painted Word 107-08 (1975).

69 Danto, *supra* note 67, at 133.

70 Hyper-realistic art, of course, had a long historical pedigree, as in the still lives of Chardin and the *trompe l'oeil* of William Harnett. In truth, Warhol's Brillo box was indistinguishable from a real Brillo box only from a distance.

71 Arthur C. Danto, What Art Is (2013).

72 Danto, *supra* note 67, at 130.

73 *Id*. at 141.

74 Arthur C. Danto, *The Artworld*, 61 J. Phil. 571, 580 (1964). Similarly, Kant thought that aesthetic judgment is a function of the viewer, not the object, and that subjectivity would be tempered by the tendency of cultivated persons to agree on these judgments. Immanuel Kant, Critique of Judgment 74-81 (J.H. Bernard trans., 1951).

75 Danto, *supra* note 21 at 40.

76 A critic and artist, Ed Brzezinski, reported, "I noticed this bag of doughnuts sitting on a pedestal. . . . I figured somebody had bought them and then gotten tired of them. So I

"something like baptism . . . in the sense of . . . giving a new identity, participation in the community of the elect."[77]

Of course, what makes these transformative procedures work is the faith of the audience. Initially, the public was dismissive of pop art; decades later, it has come to accept it. Is this because it now finds meaning in Warhol's "Brillo Box" or merely because pop art has become so familiar and unexceptional that the public (which rarely pauses to consider aesthetic queries) has gotten used to it? For Danto, the question hardly matters, as what counts is the artworld's imprimatur from which societal acceptance flows.

Danto concedes that the real Brillo box is "about something – Brillo – and embodies its meaning, " namely, that it contains steel wool cleaning pads. Danto adds that "the design of the Brillo cartons is exceedingly ingenious."[78] (The boxes were designed by James Harvey, an abstract artist who also produced commercial art, and died at age thirty-six a year after Warhol's exhibit.) The point of the cartons, indeed, of marketing generally, is to convey meaning.

But Danto warns us that there is meaning and there is meaning; "the questions Warhol raises are philosophical questions," whereas the Brillo box as a piece of commercial art merely "strives by rhetorical means to make Brillo preferable to other soap pads."[79] Danto here seems to assume that meaning is a function of the intention of the creator, but plainly this need not be so. It is a commonplace for scholars to discover meanings in practices and objects of which their creators were entirely ignorant. For example, movie critics have located racist[80] and misogynist[81] themes in films, whose makers were quite oblivious to the issues. Thus, Danto brushes aside the possibility that commercial design may also raise philosophical questions, for example, questions concerning aesthetics, perception, and memory or questions concerning the roles of women, the value of cleanliness, and the pull of consumerism. If one searches for philosophical meaning, it is nearly always possible to find it.

Moreover, the line between fine and commercial art may be blurrier than Danto postulates. What to make of Toulouse-Lautrec's nightclub and theatre posters that, like Brillo boxes, had a commercial purpose, namely, to attract audiences to the Moulin Rouge? Or Warhol's drawings of shoes that began as advertisements for I. Miller and ended in an exhibition at the Tate? Would Danto dismiss them, too?

On the other hand, one might argue that neither Brillo's nor Warhol's Brillo box is a work of fine art. One is merely a Brillo box, and the other merely a copy.

For Danto, only the meaning ascribed by the artworld counts. As the hypothetical critic dispenses meaning by fiat, her authority is immense, maybe even

---

grabbed one and bit it. It tasted stale." Qtd. in Daniel Birnbaum, *The Art of Destruction*, Frieze, no. 35, June-Aug, 1997.

[77] Danto*, supra* note 21 at 125. As if denying his own efforts, Danto later declared, "You can't say something's art or not art anymore. That's all finished." Qtd. in Amei Wallach*, Is It Art? And Who Says So?* N.Y. Times, Oct. 12, 1997, at B36.

[78] Danto*, supra* note 67, at 142.

[79] *Id*.

[80] *E.g*., Matthew W. Hughey, *Cinethetic Racism: White Redemption and Black Stereotypes in "Magical Negro" Films,* 56 Soc. Probs. 543 (2009).

[81] *E.g*., Kenneth MacKinnon, Misogyny in the Movies: The De Palma Question (1990).

greater than the artist's. In one sense, it is folly to dispute Danto's definition, for a definition is merely a record of one's determination to use a word in a certain way. Danto, from this perspective, is less concerned with the nature of art or art as an activity than with the appropriate labeling of art. To which one might reply (with Humpty Dumpty): "The question is, which is to be master – that's all."[82] Danto, in short, is free to define art as green cheese if he so chooses.

However, we are also entitled to inquire as to the consequences of his definition, for the devil is in the details. Danto describes himself as an "essentialist [who seeks] to find the definition of art everywhere and always true."[83] Suppose, as often happens in the face of major innovations the artworld is divided, for example, as it was at the birth of impressionism[84] or cubism.[85] In the absence of consensus, how to discover whether a work qualifies as art? Does this disagreement suggest that some of the critics' designations may be mistaken? Can one member of the artworld, say, a gallery owner, act on behalf of the artworld as a whole, without bothering about winning their consent? Or is this literally, by definition, impossible? In the end, if the designation is simply a question of whether the "work . . . suit[s] the critic's taste,"[86] would evolving taste, then, mean that a work might be art at one point, not art at another, and art again at a third? Should we ignore the views of earlier generations in a paroxysm of presentism? Suppose we doubt whether in days gone by there were *any* people we might now recognize as critics operating in an art tradition, for example, in the time of cave paintings?[87] Danto refers to these works as a form of "past art," and seems impressed that the "painters had their predecessors as models,"[88] but perhaps, there then existed no concept of art as we know it, so the cave painters themselves did not consider themselves artists or their work art.[89] Which also suggests the absence of an artworld. Would these

---

82 Lewis Carroll, Alice in Wonderland and Through the Looking-Glass 247 (1924) (1865).

83 Danto, *supra* note 67, at 128. Sometimes he departs from this position, indicating that the intention of the artist and not the work itself is key in determining whether it qualifies as art.

84 *See, e.g.,* Emile Cardon, *Avant le Salon L'Exposition des Révoltés*, La Presse, 2-3 Apr. 29, 1874; Sue Roe, The Private Lives of the Impressionists 129 (2007). A prominent critic wrote a scathing review that may have coined the term "impressionism." Louis Leroy, *Les Expositions des Impressionnistes*, Le Charivari, Apr. 25, 1874.

85 *See, e.g.,* Julian Street*, Why I Became a Cubist,* Everybody's Magazine, 28 (June 1913*); Medical Science's Protest against New "Art.",* Wash. Times, Oct. 9, 192A prominent critic wrote a hostile review that may have coined the term "cubism." Louis Vauxcelles, *Le Salon des Independants*, Gil Blas, Mar. 25, 1909.

86 Joseph Kosuth, Art After Philosophy and After 17 (Gabriele Guercio ed., 1991).

87 Stephen Davies*, Defining Art and Artworlds*, 73 J. Aesthetics & Art Criticism 375 (2015).

88 Arthur C. Danto, After the End of Art: Contemporary Art and the Pale of History 62 (1997).

89 A distinguished German scholar believed that "prior to the Renaissance, no Western theory of the image had been resolved." Hans Belting, Likeness and Presence: A History of the Image before the Era of Art 351 (Edmund Jephcott trans., 1994). Another distinguished German scholar maintained that European intellectuals deployed no concept of art until the eighteenth century. Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics Part I*, 12 J. Hist. of Ideas 496 (1951). Elsewhere, he concedes that "the various arts are certainly as old as human civilization." Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics*

considerations deny these paintings the label of art or would certifying by today's critics retrospectively save their status? Danto understands the conundrum. "The eye is not historical," he likes to say, "but we are."'[90] But how to incorporate this insight into his theory? His answer: "there is a kind of transhistorical essence in art, everywhere and always the same, but it only discloses itself through history."[91] But how could we even begin to show this is true?

In the absence of a formal certifying body, does the artworld certify itself? How to establish the critic's bona fides? Must the critic be a real person or may it be a hypothesized ideal – and if a person, can the critic be the artist herself, expert, knowledgeable but not exactly disinterested? Danto asks us to rely on an appeal to authority, a standard logical fallacy, except that he uses the authority not to establish the truth of a proposition, but rather the utility of a definition. All this matters because without the critic – as much as without the artist – art would be impossible. Does this make sense?

More fundamentally, why ensconce critics as gatekeepers? With the Museum of Modern Art's huge posthumous exhibit, Andy Warhol: A Retrospective" (1989), Warhol was designated the most important and influential artist of the twentieth century. Was he the most profound? The most innovative? The most impactful? The power of the museum's designation required nothing so precise. Then, why require gatekeepers at all? We understand that we need physicians as gatekeepers. If we were free to purchase any medicine we chose, the results might be horrific. Similarly, we understand why we are not permitted to drive cars without driving licenses certifying some minimum level of competency. In these cases, society acting through an institutional intermediary and following formal procedures reaches decisions grounded in a consensus on safety. But why do we need experts on their own authority to define art for us? If we fail to grasp the art in Marcel Duchamp's famous "Fountain" – in reality, simply a readymade urinal with the words "R. Mutt 1917" scrawled on the base – what harm have we caused by our naïve philistinism?[92]

Why, then, do we need Danto to police the boundaries of art?

The answer, of course, is financial. As an economist surveying the art market put it, "You are nobody in contemporary art until somebody brands you. Or until you brand yourself."[93] Collectors, often limited in artistic expertise and thus unwilling to trust their own instincts, require some externally driven ratings to ensure that they avoid foolish purchasing decisions. An artworld certification, where critics grade artworks and instruct the Great Unwashed, meets that need.[94]

Part II, 13 J. Hist. of Ideas 17, at 45 (1952). *Cf.*, James I. Porter, *Is Art Modern? Kristeller's "Modern Systems of Art" Reconsidered*, 49 Br. J. Aesthetics 1 (2009).

90 Qtd in Whitney Davis, A General Theory of Visual Culture 11 (2017).

91 Danto, *supra* note 65, at 28.

92 The "Fountain" episode is discussed in Calvin Tomkins, Duchamp: A Biography (1996). Duchamp insisted that the urinal not be viewed aesthetically, as "I thought to discourage aesthetics . . . I threw the . . . urinal in their faces as a challenge." Qtd. in Hans Richter, Dada: Art and the Anti-Art 207-08 (1966).

93 Don Thompson, The $12 Million Stuffed Shark: The Curious Economics of Contemporary Art 84 (2008). Thompson's artworld, however, sees the critic and curator as losing influence vis a vis the collector, dealer, and auction house.

94 On the other hand, the artworld's seal of approval may enable sellers to take advantage of gullible purchasers, as in Tyco's CEO, Dennis Kozlowski, famously overpaying for

But how, by the way, do critics make up their minds? What criteria do *they* apply? In the end, are we left with an unaccompanied demand simply to trust today's critics? As Danto was a critic, there is an unmistakable element of self-dealing here. Art is defined by the artworld, which is defined by its art. Indeed, the reader cannot avoid wondering whether there is any point to Danto's exercise other than elevating the status and power of the critic, including, not coincidentally, himself. Would it be preferable simply to consider art undefinable?[95] Arguably, this might actually encourage innovation and risk taking by eliminating the role of the self-appointed, judgmental expert.[96] Why not leave the question open and unaddressed?

In support of this, a casual reader may take for granted that vision – including the critic's vision – is essentially a passive phenomenon: we open our eyes and see the object before us. Yet often, of course, our eyes are actively searching for something, and what we "see" may be a function of our expectations or memories, which may induce us to misperceive certain objects or not notice them at all. Show a painting of an airplane to a citizen of ancient Athens and she may not know what to make of it; to us, it is so obvious that we do not pause to decipher its meaning. We are simultaneously aware that we are viewing an airplane and a painting, what Wollheim calls "twofoldness."[97] Thus, in a rough and imprecise way, we might say that while we look at an object, it looks back at us.[98] All this complicates the critic's task, generating disagreement and confusion.

George Dickie elaborated on Danto's notion of the artworld. Both philosophers are essentialists, who believe, as Clive Bell put it, that "The forms of art are inexhaustible; but all lead to the same road of aesthetic emotion to the same world

---

weaker works by famous painters. Paul Tharp, *Art Pros: Disgraced Kozlowski Was a Sucker*, N.Y. Post, June 12, 2002; Jay Palmer, *Show Me the Monet*, Barron's, Nov. 18, 2002.

95 Cook maintains that the open character of art makes it impossible to specify which objects merit the label. Roy T. Cook, *Art, Open-Endedness, and Infinite Extensibility*, in Art and Abstract Objects 69 (Mag Uidhir ed., 2013). Weitz believes that while works of art share a familial relationship, the unpredictable nature of the evolution of art makes it impossible to establish a fixed set of necessary and sufficient conditions that could adequately define art, as the concept is open and emendable and thus can evolve in unforeseen ways. Morris Weitz, *The Role of Theory in Aesthetics*, 15 J. Aesthetics & Art Criticism 27 (1956). Weitz follows Wittgenstein's notion of family resemblance: something may resemble something that is called art, so art grows to encompass the new thing; hence, the concept of art knows no fixed limits. There are "no common properties – only strands of similarities." Ludwig Wittgenstein *et al.,* Philosophical Investigations 67 (G.E.M. Anscombe et al. trans., 4th ed., 2009). An empirical study concluded that most "people have an open concept of art." Ellen Winner, *How Art Works: A Conversation between Philosophy* and *Psychology*, 163 Proc. Am. Phil. Soc. 136, 141 (2019). *See also* William E. Kennick, *Does Traditional Aesthetics Rest on a Mistake*? 67 Mind 317 (1958). E.H. Gombrich declared, apparently without irony, in The Story of Art 15 (1950) that "There really is no such thing as art. There are only artists."

96 *But cf.,* Maurice Mandelbaum, *Family Resemblances and Generalization Concerning the Arts,* 2 Am. Phil. Q. 219, 226 (1965).

97 Richard Wollheim, Art and Its Objects 224 (2d ed., 1980). Similarly, Rene Magritte's famous painting, "Ceci n'est pas une pipe," reminds the viewer that she is viewing a painting of a pipe, not a pipe.

98 James Elkins, The Object Stares Back: On the Nature of Seeing (1996).

of aesthetic ecstasy."[99] For Dickie, "a work of art is art because of the position it occupies within a cultural practice;"[100] more specifically, it is "an artifact of a kind created to be presented to an artworld public."[101] A work of art, then, is "a status which is achieved as the result of creating an artifact within or against the background of the artworld,"[102] that is, critics, art historians, museum curators, teachers, dealers, collectors, government and private funders. The artworld, a "cultural construction"[103] constituted as formal and informal institutions, engages in conversations, reading, and thinking, and from this develops rules or conventions that determine whether to legitimize or designate certain things as art. Literally, anything is eligible. Hence, the label of Dickie's approach as the institutional theory of art. Of course, in ordinary speech, "institution" rarely assumes so amorphous a character, but normally has well defined structures and functions, goals and histories.

Dickie admits that some works that are so designated by his institutions are mediocre or worse,[104] but he demands that the focus not only be on the works but on the designator. Here, he insists that the work must be an artifact, that is, an object presented to the artworld and made by a person, though he would also include readymades (like Duchamp's shovel, "In Advance of the Broken Arm") and found pieces (like driftwood art), for it is persons who made them into artifacts.[105] Because "an artist always creates for a *public* of some sort," Dickie maintains that there "must [be] a role for a *public* to whom art is presented."[106] By "public," echoing Clive Bell, he means the artworld public, which "requires knowledge and understanding similar in many respects to that required of an artist."[107]

Like Danto, however, Dickie does not attempt to spell out what criteria the artworld would or should employ in determining whether an artifact qualifies as art. Instead, his definition, by altering nouns, could be applied to anything; for example, a football match is an artifact of a kind created to be presented to the football public.[108] He also ignores artists who, for whatever reason, choose not to interact with the artworld. Finally, he, too, fails to persuade us that the exercise is worth doing. What he does do is offer us art as a sociologist might do, that is, concerned not with the nature of the work but simply with how self-selected elites view it.[109]

Joseph Kosuth, a pioneering and highly regarded conceptual artist, rebelled against the tradition of art-and-the-passive-spectator, dismissing the art that came

---

99 Bell, *supra* note 36, at 16. They would agree on the single road, but not on Bell's destination.

100 George Dickie, The Art Circle: A Theory of Art 52 (1984).

101 *Id*., at 60. *Cf*., George Dickie, *Defining Art*, 6 Am. Phil. Q. 253, 254 (1969).

102 George Dickie, *The New Institutional Theory of Art*, Proc. of the 8th Wittgenstein Sympos. 57, 60 (1983).

103 George Dickie, Art and Value 60 (2001).

104 *Id*., at 94.

105 Dickie, *supra* note 100, at 45.

106 Dickie, *supra* note 102, at 61.

107 *Id*.

108 *Cf*., Carroll, *supra* note 39, at 12-13.

109 Perhaps the point is that the elite's judgment permits the works to take on the social function of art. Noel Carroll, The Philosophy of Art: A Contemporary Introduction 248 (1999).

before him as "little more than historical curiosities."[110] As the purpose of art is to convey meaning and actively engage the viewer, images merely get in the way and should be done away with. Instead, installations of objects can provoke us to think deeply about social (racism, poverty) or personal (loneliness, identity) issues. This involves a struggle against critics, who sought to impose their taste and dominate artists. "A work of art," he maintains, "is a kind of proposition presented within the context of art as a comment on art."[111] Each work of art, then, he sees as an effort by the artist to define art, in short, a function of the artist's intent. Kosuth is far more radical than Danto or Dickie, and yet he shares their reluctance to inform us as to precisely how those in possession of the label "art" propose to justify using it.

At about the same time that Danto and his critics were meditating on the nature of the artworld, a distinguished sociologist, Howard Becker, was approaching the topic from a different perspective. It is sometimes assumed that art arrives as a consequence of the artist's "unwavering commitment to his personal vision,"[112] but to Becker this focus on individual genius is mere romantic jabbering. Like Danto, Becker downplays the role of the artist, but instead of elevating the critic, he emphasizes that art works "are not the products of individual makers," but instead "like all human activity, involve the joint activity of a number, often a large number, of people."[113] Here, Becker refers not only to the "extensive division of labor" and "elaborate cooperation"[114] among those who make and sell the supplies, operate the galleries, discuss the art in the media, and so forth. He also has in mind that artists "do not decide things afresh. Instead, they rely on earlier agreements now become customary, agreements that have become part of the conventional way of doing things in that art."[115] These conventions, widely taken for granted, cover a range of factors from the materials used to the assumptions of the viewers, and shape aesthetic judgments, as well as matters of production, distribution, marketing, and consumption.

And yet, conventions change; indeed, Becker concedes that they "change more or less continually," and in this sense, are only stable "for a while."[116] Radical change, however, raises different questions from the normal process of gradual evolution. It constitutes an assault on the aesthetic beliefs we accept as "natural, proper, and moral;" it also attacks the interests of an art world "invested in the status quo."[117] Because making art involves the efforts of many people, "Revolutionary changes succeed when their originators mobilize some or all of the relevant art world to cooperate in the new activities their vision of the medium requires."[118] Much of the art world must relinquish the grip of the familiar, welcome the new, and market the change to an audience sophisticated and unsophisticated. Yet against the overwhelming weight of the art world, Becker isolates innovation in the individual artist. "Change takes place . . . because artists whose work does not fit and who thus

---

[110] Kosuth, *supra* note 86, at 19.
[111] *Id*. at 20-21.
[112] Seymour Slive, 2 Frans Hals 147 (1970).
[113] Howard S. Becker, Art Worlds 35, 1 (1982).
[114] *Id*. at 13, 28.
[115] *Id*. at 29.
[116] *Id*. at 301, 307.
[117] *Id*. at 305, 306.
[118] *Id*. at 308.

stand outside the existing systems attempt to start new ones and because established artists exploit their attractiveness to the existing system to force it to handle work they do which does not fit."[119] Such an innovator was Warhol.

Ironically, though Becker found that the "'artworld' Dickie and Danto refer to does not have much meat on its bones,[120] he agrees that "aesthetic value arises from the consensus of the participants in the art world" and that "art world officials have the power to legitimate works of art."[121] Thus, "however their position is justified, some people are commonly seen by many or most interested parties as more entitled to speak on behalf of the art world than others; the entitlement stems from their being recognized by the other participants in the cooperative activities through which that world's works are produced and consumed as the people entitled to do that."[122] What gives this power its special importance is its connections to the resources available.[123] Works that gain the artworld's approval become valuable to collectors and to those in charge of grants and awards, as well as conferring considerable pride in achievement among the artists concerned.

In sum, an examination of some prominent excursions into the question, what is art, leaves us (unsurprisingly) with a very unsatisfactory product. It is what some self-selected experts say that it is.

Complicating matters further is the fuzzy distinction between art and craft. They are related, but different, we understand, with art somehow being more valuable and significant. The most obvious difference is that craft objects possess a practical function, where art objects do not.[124] In the famous words of Oscar Wilde, "All art is quite useless."[125] Hence, a painting represents art and a quilt represents craft. But suppose we do not use the quilt on a bed, but, like a painting, display it on a wall as an object of aesthetic contemplation? Or suppose we use a painting as a desk? What of the Euphronios Krater, a huge ancient Greek urn used for mixing wine and water, of which a former director of the Metropolitan Museum of Art said, "this may be the single greatest work of art . . . I will ever collect."[126] Have these objects lost their functional character because the creator or current owner renounces it? And why posit that a work of art that stimulates or inspires lacks a practical function? If it leads us to examine and reconsider, say, war, nature, color, shape, why (as Kosuth might demand) dismiss this as useless? What to make of Duchamp's shovel, which is as utilitarian as an object could possibly be, yet is universally regarded as art? Or the tombs in Westminster Abbey, aesthetic on the outside and utilitarian on the

---

[119] *Id*.at 136.

[120] *Id*. at 149.

[121] *Id*. at 134, 163.

[122] *Id*.at 151.

[123] *Id.* at 133, 157. Taxpayers also subsidize the arts, chiefly through such tax expenditures as charitable deductions and lower capital gains levies.

[124] Kant thought art was made "only as play, i.e., an occupation that is agreeable in itself" that requires the soul to be put to work. Craft, on the other hand, depends on industry and learning, and is made for money. Immanuel Kant, The Critique of the Power of Judgment 183 (Paul Guyer & Eric Matthes trans., Guyer ed., 2000) (1790).

[125] Oscar Wilde, *A Preface to The Picture of Dorian Gray*, 49 Fortnightly Rev. 291 (1891). Presumably, Wilde meant that art is superior to mundane practicality.

[126] Thomas Hoving, *Super Art Gems of New York City*, Artnet (June 27, 2001), http://www.artnet.com/Magazine/features/hoving/hoving7-2-01.asp.

inside? Did today's art begin as craft?[127] As "art invades craft,"[128] and craftspeople naturally aspire to the status of artists, the confusion is compounded.

Finally, there is the question as to whether there can be art without artists. Kant observed that "though we like to call the product that bees make (the regularly constructed honeycombs) a work of art . . . we recall that their labor is not based on any rational deliberation on their part," and is, therefore, not art.[129] Similarly, Dutton argued that as art "needs an intention to create something you are going to want to look at after you are finished . . . animals . . . do not create art."[130] Empirical research indicates that for most people, intentionality is the most important factor in their determination as to whether an object qualifies as a work of art.[131] On the other hand, Dickie thought it irrelevant.[132] Kamber conducted an online survey, asking professional artists, art buffs, and ordinary people whether they considered a number of different objects (paintings, photographs, poems) works of art. He found that thirty-six percent of art professionals thought a painting by an elephant a work of art and ten percent regarded a cloud as a work of art.[133]

Of more pressing interest, artists and computer experts have developed artificial intelligence (AI) innovations, really sets of algorithms or instructions intended to mimic human intelligence, sometimes by "learning" from Internet content to generate new work. Indeed, computer generated art was produced as early as 1973.[134] Today, Generative Adversarial Networks (GANs) can generate visual content,[135] AICAN can produce images that may appear indistinguishable

---

[127] Michael Baxandall, Painting and Experience in Fifteenth Century Italy (1972).

[128] Howard S. Becker, *Arts and Crafts*, 83 Am. J. Socio. 862, 867-76 (1978).

[129] Kant, *supra* note 124, at 182.

[130] Dutton, *supra* note 53, at 7, 9. *See also* Christy Mag Uidhir, Art and Art-Attempts 22-25 (2013).

[131] Elze Sigute Mikalonyte & Markus Kneer, *The Folk Concept of Art* 12-13 (Jan. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4322866; Jean-Luc Jucker *et al., "I Just Don't Get It": Perceived Artists' Intentions Affect Art Evaluations*, 32 Empirical Stud. of the Arts 149 (2014); George E. Newman & Paul Bloom, *Art and Authenticity: The Importance of Originals in Judgments of Value,* 141 J. Experimental Psych. Gen. 558 (2012).

[132] George Dickie, *Intentions: Conversations and Art*, 46 Br. J. Aesthetics 70 (2006).

[133] Richard Kamber, *Experimental Philosophy of Art*, 69 J. Aesthetics & Art Crit. 197, 202 (2011).

[134] Ahmed Elgammal, *AI Is Blurring the Definition of Artist: Advanced Algorithms Are Using Machine Learning to Create Art Autonomously,* 107 Am. Scientist 18 (2019). However, when viewers are told that the work is AI generated, they tend to perceive it as less creative and less likely to produce an emotional response than if they thought it was human created. Kobe Millet *et al., Defending Humankind: Anthropocentric Bias in the Appreciation of AI Art*, 143 Computs. in Hum. Behav. 107707 (2023). Indeed, people appear reluctant to term AI creators artists. Elze Mikalonyte & Markus Kneer, *Can Artificial Intelligence Make Art? Folk Intuitions as to Whether AI-Driven Robots Can Be Viewed as Artists and Produce Art*, 11 ACM Transactions on Hum.-Robot Interactions 1 (2022).

[135] Ian Goodfellow et al., *Generative Adversarial Nets*, 27 Advances in Neural Info. Processing Sys. 2672 (2014); Lei Wang et al., *A State -of-the-Art Review on Image Synthesis with Generative Adversarial Networks*, 8 IEEE Access 63514 (2020).

from paintings,[136] style transfer can create new art in the style of old masters,[137] and AI art has been compared to photography.[138] Advocates contend that when AI uses existing content, it is merely learning from available material as a means of producing its own material, in short, acting the way human artists act. In this light, it has been suggested that the algorithms be considered more a medium than a tool,[139] and so persons using AI techniques are often called artists. Also, if we view the First Amendment from the perspective of the audience, we should acknowledge its right to view all kinds of art, including art generated by AI.

On the other hand, some artists are quite hostile to AI, viewing it as a tool of high-tech plagiarism and sometimes fearing that massive and cheap AI will make it hard for human artists to successfully compete. Of course, this is a self-interested economic argument, but to the extent that it discourages human artists, it might possibly have a limited constitutional purchase. As major technology companies race to develop generative AI, it might well transform both art and artworld in ways that we cannot foresee. How would Danto, Dickie, and Kosuth greet this brave new world?

IV. The Courts Speak

Understandably, courts are not eager to venture into the Definition of Art swamp and might be tempted to echo Justice Stewart's famous observation about obscenity: they know it when they see it.[140] Except presumably courts understand (or ought to understand) that they do *no*t know art when they see it. Perhaps, a century ago, they might have relied on subjective intuition guided by memories of the Mona Lisa and Washington Crossing the Delaware, but those days are gone, never to return. Alternatively, courts might be bullied by postmodernists into openly embracing the views of Danto, Dickie, or Kosuth, formally (or informally) subcontracting the question to a self-selected elite with no constitutional expertise or authority.

Defining art might be dismissed as yet another pointless academic exercise, were it not for the fact that courts have extended First Amendment protection to art. Having done that, one might expect that they might seriously grapple with the key term. But one would be mistaken.

Consider some examples of what courts have done or not done.

Close v. Lederle (1970) concerned Chuck Close, one of the most highly praised artists in America, who was asked to exhibit his paintings at the University of Massachusetts. After a few days, administrators had the paintings, sexually provocative male nudes, removed. Close responded with a lawsuit claiming that art is fully protected by the First Amendment, with the removal violating his free

---

[136] Marian Mazzone & Ahmed Elgammal, *Art, Creativity, and the Potential of Artificial Intelligence*, 8 Arts 26 (2019).

[137] Christine S. Pitt, Anjali S. Bal & Kirk Plangger, *New Approaches to Psychographic Consumer Segmentation: Exploring Fine Art Collectors Using Artificial Intelligence*, 54 Eur. J. Mktg. 305 (2020); *The Next Rembrandt: Blurring the Lines between Art Technology and Emotion*, Microsoft News (Apr. 13, 2016).

[138] Aaron Hertzmann, *Can Computers Create Art?* 7 Arts 18 (2018).

[139] Mazzone & Elgammal, *supra* note 136.

[140] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

speech rights. He sought an injunction forcing the university to display his work for the unexpired period for which it had been scheduled.

The First Circuit in a brief opinion, dismissed Close's contention for ignoring that the exhibit imposed "inappropriate"[141] images upon "a captive audience."[142] As "there is no suggestion . . . that plaintiff's art was seeking to express political or social thought," the court concluded that their "constitutional interest [was] minimal."[143] Accordingly, "this is a case that should never have been brought."[144] Close's First Amendment claims – which he believed expressed obvious political and social thought – were swept aside like crumbs off a table.

Soon after, the Supreme Court adopted a different stance in the famous case of *Miller v. California* (1973), which set down criteria for determining obscenity and explicitly exempted work of "artistic . . . value" from suppression.[145] However, Justice Brennan did no more than list artistic value along with three other categories, none of which received any elucidation whatever. In the same paragraph, Brennan observed that "to equate the free and robust exchange of political ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[146] With this, Brennan struck a pair of themes that would resonate in many art related First Amendment cases to come: that the desire to profit is somehow incompatible with First Amendment values,[147] and that low aesthetic quality bars First Amendment protection.[148]

At the same time, in *Kaplan v. California* (1973), a case involving a bookstore selling explicit sexual material in violation of an obscenity law, the Supreme Court intimated that pictures may be entitled to less First Amendment protection than the printed word. As Chief Justice Burger put it, echoing Brennan's remark on quality,

> Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred position in our hierarchy of values, and so it should be.[149]

Thus, a picture is no longer worth a thousand words. As the holding was in the context of obscenity, virtually a dead letter today, it is not clear that the finding retains much precedential value. However, a California Court of Appeals' ruling the

---

141 Close v. Lederle, 424 F. 2d. 988, 990 (1st Cir. 1970).
142 *Id*. at 991.
143 *Id.* at 990.
144 *Id*. at 991.
145 Miller v. Calif., 413 U.S. 15, 34 (1973).
146 *Id*.
147 In holding that obscene materials were not protected by the First Amendment, Brennan also held the door open to efforts to suppress a wide range of erotic expression, though changes in public attitudes have completely robbed this of any practical significance.
148 *Cf.*, Randall Bezanson, *The Quality of First Amendment Speech*, 20 Hastings Comm. & Ent. L. J. 275, 277 (1996).
149 Kaplan v. Calif., 413 U.S. 115, 119 (1973).

following year concerning a vendor of paintings reached the same conclusion.[150]

Claudio v. United States (1993) concerned a large painting that the General Services Administration granted a license to be displayed in the lobby of a federal courthouse and post office building. Upon viewing the painting at its unveiling, the agency decided to remove it, on the ground that its graphic and bloody depiction of a coat hanger-induced abortion and a dead fetus constituted political expression that was not allowed in federal property. Claudio contested the removal, maintaining that the First Amendment gave him the right to exhibit politically controversial work in a public forum. The removal, he charged, amounted to unconstitutional content and viewpoint-based discrimination.

The North Carolina district court concluded, astonishingly, that Claudio failed to establish that the government was "motivated by a desire to suppress viewpoint [because] the painting is ambiguous in its position on abortion and likely was designed that way."[151]

The court also repeatedly expressed contempt for the painting, calling it "art"[152] and describing it as "vulgar, shocking and tasteless,"[153] "vulgar and inappropriate,"[154] and lacking "taste, "decorum," "sensitivity," or "respect."[155] It is not clear that the judge would designate the painting as a work of art or entertain the possibility that vulgar, tasteless art was not a contradiction in terms,[156] but in any event, defining art formed no part of his decision.

Brooklyn Institute of Arts & Sciences v. Giuliani (1999) concerned an artwork called "The Holy Virgin Mary," constructed of elephant dung and other material with photographs of buttocks and female genitalia in the background. New York's mayor, Rudolph Giuliani, viewing the work as desecrating religion and therefore offensive, threatened to cancel the museum's lease on its building and withhold its monthly subsidy from the city of nearly a half million dollars. The museum sought declaratory and injunctive relief to prevent the city from taking this action.

The district court found that the city's move would cause irreparable damage to the museum, and that the mayor's effort "to coerce the museum to relinquish its First Amendment rights" did not amount to "the mere assertion of an incidental infringement."[157] In the course of deciding for the museum on grounds of viewpoint discrimination, the court noted that the city conceded that art and the ideas it expresses are protected by the First Amendment.[158] Again, art was left undefined.

Bery v. New York (1996) turned on a municipal ordinance of general application that limited the number of New York City sidewalk vendor licenses in the interest of reducing congestion in a densely populated urban area. A number of artists who sold their work on sidewalks and could not obtain licenses maintained that art

150 S.F. St. Artists Guild v. Scott, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974).

151 Claudio v. United States, 836 F. Supp. 1219, 1230 (E.D.N.C. 1993).

152 *Id.*, at 1234.

153 *Id.*, at 1235.

154 *Id.*, at 1236.

155 *Id.*, at 1234.

156 In a survey of art professionals, art buffs, and ordinary folk, Kamber found that in each category clear majorities were willing to term aesthetically weak objects as art. Dutton, *supra* note 130, at 198-99.

157 Brook. Inst. of Arts v. N.Y., 64 F. Supp. 2d 184 (E.D.N.Y.1999).

158 *Id*. at 199.

receives absolute protection from the First Amendment and sought a preliminary injunction prohibiting enforcement of the ordinance against them.

The Second Circuit noted that "Visual art is as wide ranging in its depiction of ideas, concepts, and emotions" as written material, so that paintings, photographs, sculptures, and prints "always communicate some idea or concept" to the viewer. Thus, visual art, "a primitive but effective way of communicating ideas . . . is similarly entitled to full First Amendment protection."[159] Whether other types of art merited protection would be left to a case by case examination, depending upon the expressive quality of the item.

The city, however, viewed "visual art as mere 'merchandise' lacking in communicative concepts or ideas,"[160] distinguishing between art and selling art, and noting that it permitted artists to display their art but simply not to sell it. The court observed that "without the money, the plaintiffs would not have engaged in the protected expressive activity."[161] The court also noted that "street marketing is in fact a part of the message," as the vendors "believe that art should be available to the public."[162] Applying settled time, place, and manner criteria, the court found that the licensing system was not narrowly tailored and did not leave the artists ample alternative channels that would justify barring an entire category of expression. The court's opinion is notable for accepting the commercial aspect of art, alluding to differences between art and craft, and addressing the nature of visual art at some length.[163] And yet, even here, there was no real attempt to define art.

Mastrovincenzo v. New York (2006) saw the Second Circuit revisiting *Bery*. This case involved a vendor, who sold items outside the four protected categories listed in *Bery*, specifically, hand designed and painted clothing. The city required that vendors be licensed, but he was unable to obtain a license because the city had limited the number and there were no vacancies. He then violated the law by selling the clothing without a license, arguing that they were works of art, which were therefore protected by the First Amendment.

The Second Circuit retained *Bery's* four categories, but added that the key determination was whether the "dominant purpose" of the work was expressive or utilitarian,[164] that is, whether the vendors "are genuinely and primarily engaged in artistic self-expression or whether the sale of such goods is instead chiefly a commercial exercise."[165] Should the focus, then, not be on the work, but on its

---

[159] Bery v. N.Y., 97 F. 3d 689, 695 (2nd Cir.1996).
[160] *Id*. at 695.
[161] *Id*. at 696.
[162] *Id*.
[163] In requiring art vendors but not print vendors to have licenses, the ordinance also violated the Fourteenth Amendment's equal protection clause. *Id*. at 699.
[164] Mastrovincenzo v. N.Y., 435 F. 3d 78, 91 (2d Cir. 2006).
[165] *Id*. In State v. Chepilko (2009), a New Jersey appellate court upheld the conviction of a sidewalk photographer, who sold photographs of pedestrians, finding "no basis for concluding that defendant's simple snapshots . . . served predominantly expressive purposes." State v. Chepilko, 405 N.J. Super. 446, 463 (App. Div. 2009), *pet. denied*, 201 N.J. 156 (2010). (Presumably, had the street photographs instead been sold at galleries – like the work of such renowned street photographers as Gary Winograd, Lee Friedlander, and Robert Frank – courts would have reached a different result.) Similarly, in People v. Saul, a New York court upheld the conviction of a sidewalk vendor selling playing cards with photographic images of war heroes and political figures, finding that the cards

dominant purpose? Must art flee from commerce as a toxic inferno?

It is understandable that courts would not want vendors to call themselves artists in order to evade regulation, as this would lead to a proliferation of vendors, exacerbating congestion. But the artworld also adds to the problem, for it is frequently painfully squeamish about commerce, as if money were somehow too *déclassé* to mention, when actually it might well be the point of everything. Thus, Bosker observes that galleries (not art stores) place a work (not sell it) and purchasers acquire it (not buy it).[166]

Yet requiring artists, perhaps alone among all occupations, to downplay the goal of earning a living is passing strange. Consider Warhol, perhaps the most famous artist of the past half century. "Being good in business is the most fascinating kind of art," he said. "Making money is art and a good business is the best art."[167] "The new art," he remarked, "is really a business."[168] This did not mean that he was less interested in artistic quality in his commercial ventures. However, in place of handmade art, Warhol favored copies produced at his famous Factory. Indeed, an editor at Warhol's magazine, *Interview*, said of him, "Of everything Andy produced, the Factory was one of his most important works of art."[169]

The court in *Mastrovincenzo* ruled that the clothing was mainly expressive, and thus protected. The court applied the time, place, and manner intermediate scrutiny standard, and found a significant government interest in reducing congestion, and saw the law as narrowly tailored with ample alternative means for the artists to express themselves, for example, giving the clothing away or selling it through licensed vendors. Thus, the vendors' plea failed.

The great advantage of the court's expressive/utilitarian dichotomy was said to be its workability: "we live in the real world with law enforcement decisions being made by police on the beat."[170] Was the ruling as workable as advertised? It did not consider that the dominant purpose of an item may vary from buyer to buyer, seller to seller, and even from item to item. Or that the expressive/utilitarian purposes may be too entangled to separate. The clothing was worn as shirts (utilitarian) but painted with graffiti (expressive); how to decide the dominant purpose without resorting to the arbitrary and the subjective? The court advised balancing the claims but gave no hint as to how this should be pursued,[171] itself dismissing it

---

were more likely bought to be used than to be displayed. People v. Saul, 3 Misc. 3d 260, 265 (N.Y. Crim. Ct. 2004). On the other hand, in People v. Chen Lee, a street vendor selling coasters featuring pictures of celebrities and famous places was found to have a "dominant" expressive purpose because they were suitable for display and not for use. People v. Chen Lee, 19 Misc 3d 791, 795 (N.Y. Crim. Ct. 2006). Thus, selling the photographs was not protected by the First Amendment, but selling the coasters was.

[166] Bianca Bosker, Get the Picture: A Mind-Bending Journey among the Inspired Artists and Obsessive Art Fiends Who Taught Me How to See (2024).

[167] Artinfo, *The Business Artist: How Andy Warhol Turned a Love of Money into a $228 Million Art Career*, HuffPost (Dec. 16, 2010, 01:10 PM), https://www.huffpost.com/entry/the-business-artist-how-a_b_797728.

[168] Blake Gopnik, *Andy Warhol Offered to Sign Cigarettes, Food, Even Money to Make Money*, Artforum, Apr. 21, 2020.

[169] Glenn O'Brien, qtd in John O'Connor & Benjamin Liu, Unseen Warhol 11 (1996).

[170] *Mastrovincenzo*, 435 F. 3d at 95.

[171] *Id*.

as an "ultimately absurd intellectual exercise?"[172] Adding to the confusion, the court declared art "a famously malleable concept the contours of which are best defined not be courts, but in the proverbial eye of the beholder"[173] – which seems to enshrine inconsistency.

Conceivably, the court could have inquired as to whether the vendors were truly artists. Their formal training presumably would have established their *bona fides*. But this tack would also have been defective, for many esteemed artists were entirely self-taught and a credentialist approach veers close to introducing quality as a First Amendment consideration (credentials providing some assurance of at least minimal skill and commitment). Following this rationale, the underlying assumption would seem to be that good art is protected, bad art is not, and courts applying credentialism can tell the difference. No one would suggest applying this approach to books.

On the matter of ample alternatives, the *Mastrovincenzo* court took a position entirely opposite from *Bery,* indicating that the vendors could add their names to a decades long waiting list, petition the City Council to amend the law, or give the items away.[174]

White v. Sparks (2007) involved an itinerant sidewalk artist, who claimed that a city ordinance requiring a license to make and sell art on the street was an unconstitutional content-based limitation on speech that also operated as prior restraint. The city, citing an earlier case, argued that the First Amendment protected only the sale of items with a "religious, political, philosophical, or ideological message."[175] However, the Ninth Circuit found that the arts were also covered, making it "clear [that the artist's] painting constitutes expression protected by the First Amendment [as it] expressed the artist's perspective."[176] *Contra Mastrovincenzo*, the court added that the paintings did not forfeit this protection by being objects of sale and that the paintings themselves are not commercial speech.[177] Thus, it concluded that "an artist's sale of his original paintings is entitled to First Amendment protection."[178]

Suppose, however, he was selling another artist's work or a copy of another artist's work? Or suppose the copy had been mass produced in a factory? A focus on the work alone might offer it an art designation; a focus on its production might reach a contrary result. The court refused to consider these scenarios.[179] Again a court declined the opportunity to define art.

Kleinman v. San Marcos (2010) involved an owner of chain stores that sold novelty items and gifts. When a new store was opened, customers were invited to pay for the privilege of sledgehammering an old car; the store commissioned painters to paint the wreck; finally, the car was filled with dirt, turned into a cactus planter, and displayed in front of the store. The painters claimed that they had intended to describe American car culture and the tie between gasoline and the

---

[172] *Id*.
[173] *Id*. at 94-95.
[174] *Id*. at 95.
[175] Gaudiya Vaishnava Soc. v. S.F. 952 F. 2d 1059, 1066 (9th Cir. 1990).
[176] White v. City of Sparks, 500 F. 3d 953, 956 (9th Cir. 2007).
[177] *Id*.
[178] *Id*. at 957.
[179] *Id*. at 956 n. 4.

ongoing war in Iraq. A San Marcos ordinance and the Texas Transportation Code banned displaying junked vehicles in public view. A court ordered the store either to remove the car or hide it behind an enclosure, and the store appealed, maintaining that the car was visual art protected by the First Amendment.

The Fifth Circuit, applying a case-by-case approach, held that First Amendment protection "is not so unbounded [and] refers solely to great works of art,"[180] while "this cactus planter, a three-dimensional advertisement for a novelty shop . . . is a utilitarian device . . . and ultimately a 'junked vehicle.'"[181] Its utilitarian "qualities objectively dominate any expressive component," and so "the public display of the object is conduct subject to reasonable state regulation."[182] Following the intermediate scrutiny test, the court found that the law furthered an important or substantial governmental interest that was unrelated to suppressing free speech, and that the interference with speech was no greater than was essential in furthering this interest, including offering ample alternative means of expression. Accordingly, the court found the car-planter to be a public nuisance that posed criminal, fire, health, safety, and economic issues, considered the law content neutral and not targeted at speech, and concluded that the planter did not qualify as a work of art because it was "'promotional' material" advertising the store.[183]

The court's opinion, however, could not dislodge a pair of problems. First, it was not obvious that the utilitarian nature of the object negated its artistic content. That is, it is hard to imagine that the lawmakers who banned junked cars had this car, painted by artists and displayed as a work of art, in mind. If a promotional purpose denies a work artistic stature, what of Keith Haring's drawings on drug use, South Africa, AIDS? The pervasive cross fertilization of art and commerce – advertising campaigns regularly use art and artists regularly use advertising campaigns – suggests that erecting a wall between the two is a fool's errand. Second, numerous precedents had established that speech cannot be suppressed on grounds of inferior quality. Justice Scalia, for example, had observed in an earlier case, "it is quite impossible to come to an objective assessment of . . . artistic value. . . . Just as there is no use arguing about taste, there is no use litigating about it."[184] Moreover, when the court declared that hiding the car-planter "behind a fence, indoors, or in a garage enclosure"[185] constituted an ample alternative means of communication, it overlooked the obvious fact that a hidden object could hardly substitute for one openly exhibited. Would permitting a speaker to declaim in a closet constitute an acceptable alternative?

Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018) concerned a same sex couple, who asked Masterpiece to bake them a wedding cake

---

[180] Kleinman v. City of San Marcos, 597 F. 3d 323, 326 (5th Cir. 2010).

[181] *Id*. at 326-27.

[182] *Id*. at 327-28.

[183] *Id*. at 329.

[184] Pope v. Illinois, 481 U.S. 497, 504-05 (1987). Similarly, Justice Harlan noted, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). On the other hand, the Court decided that vulgar and profane speech may be banned from radio at time when children would be likely to be listening. FCC v. Pacifica Found., 438 U.S. 726 (1978).

[185] *Kleinman*, 597 F. 3d, at 329.

and were refused because the baker was religiously opposed to same sex marriage. The Supreme Court found for the baker, citing disparaging comments made by the commission that violated the baker's First Amendment protected religious beliefs.[186]

However, much of the oral argument addressed the baker's contention that he was an artist, and, therefore, that compelling him to create a cake for a same sex couple violated his First Amendment rights. The result was repeated colloquies. For example, when the baker's counsel spoke of him as an artist, Justice Ginsburg queried, "Who else then? . . . the person who does floral arranging, owns a floral shop?"[187] Yes, if the flowers are custom designed, the counsel agreed. And the "person who designs the [wedding] invitation?" Yes. And for the jeweler? asked Justice Kagan. "It would depend," the counsel replied, presumably referring to whether the jewelry was custom designed. And a hair stylist "creating a wonderful hairdo?" "Absolutely not." Nor a "makeup artist" because they do not "communicate something." Whereupon Justice Kagan asked that if "a cake can be speech because it involves great skill and artistry . . . how do you draw a line?" Which provided an opportunity for Justice Sotomayor to inquire, "when have we ever given [First Amendment] protection to food?" Dodging the question, the counsel urged that the baker

> is painting on a blank canvas. He is creating a painting on that canvas that expresses messages. . . . [W]hen we have someone that is sketching and sculpting and hand designing something, that is creating a temporary sculpture that serves as the centerpiece of what they believe to be a religious wedding celebration, that cake expresses a message.

But later when asked whether an architectural design was entitled to First Amendment protection as art, he said no because "buildings are functionable, not communicative." Which provoked an incredulous Justice Breyer to ask how a design by "Mies or Michelangelo . . . is not protected. . . but this cake baker is?"[188] Later, the Solicitor General entered the fray, maintaining that "the first way to draw that line is you analogize it to something that everyone regards as traditional art and everyone agrees is protected speech." The wedding cake qualifies, he concluded, because it "is essentially synonymous with a traditional sculpture except for the medium used." But it is precisely the medium that the dissenters believed denied the cake its traditional standing. Yet given how art has been radically transformed, why focus on tradition? A key question remaining was whether the cake was "predominantly art or predominantly utilitarian? And here people pay very high prices for these highly sculpted cakes, not because they taste good, but because of their artistic qualities."[189] Turning to the nexus of art and craft, Justice Breyer observed, "An artisan is not quite the same as an artist, but an artisan can be a great artisan and can produce good things." All this led the counsel for the Civil Rights Commission to declare "that it is just not possible to develop doctrine based on how expressive, how artistic the speech is."[190]

---

186 Masterpiece Cakeshop v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729-32 (2018).

187 Transcript of Oral Argument at 11, Masterpiece Cakeshop v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729-32 (2018) (No. 16-111).

188 *Id*. at 11-18.

189 *Id*. at 39-40.

190 *Id*. at 78-79.

Confusion runs through the discussions like a hair in a sausage. Why is a baker an artist when certain others contributing skill and creativity to weddings are not? How to distinguish art from craft? Why valorize traditional art in defining the art of today? What is striking is less the poverty of the replies than the obvious observation that no one had read or thought deeply about the issues.

Only Justice Thomas in his opinion raised the question of the constitutional status of art. Concurring, he thought baking the cake constituted "expressive" conduct protected by the First Amendment. The baker, he added, "considers himself an artist. The logo for the Masterpiece Cakeshop is an artist's paint palate with a paintbrush and baker's whisk. [The baker] takes exceptional care with each cake that he creates – sketching the design out of paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."[191]

If Thomas' point is that baking the cake is a communicative activity – presumably, not unlike such communicative activities as running a red flag up a pole[192] or wearing a funereal armband to school[193] – it is reasonably clear, if perhaps not persuasive. But why the excursion into art? Is Thomas resting his argument on the activity as protected art? If so, there is an obvious and unaddressed problem: cake baking, even sophisticated cake baking, is not so clearly an art form as, say, painting or drawing. We may not need a definition of art to agree that The Last Supper is a work of art, but we do if the subject is Masterpiece's wedding cake, which arguably falls under the heading of craft. Is Thomas' rebuttal claiming that in determining whether an object qualifies as a work of art, we need to ask only if the person responsible calls himself an artist? Or if he prepared his work carefully? But why rely on the creator's self-serving view of himself? Why emphasize preparation, if in the end our concern is only with the final product? Where Danto and Dickie insisted on artworld gatekeepers, Thomas apparently would dispense with them altogether. Where they ask that we trust the critic, he asks (like Kosuth) that we trust the self-designated artist. It is hard to evaluate Thomas' approach as an improvement on the discussions of earlier critics.

VSMsq Structural Engineers, LLC v. SStructural Consultants Associates (2023),[194] a Texas court of appeals (Houston) case, involved the Texas Citizens Participation Act, which protects speech on matters of public concern. SCA claimed that VSMsq posted images of buildings on its website that had been engineered by SCA, misappropriating the images and deceiving the public. VSMsq replied that the law protects artistic commercial speech, that the buildings on the site were artistic works, and thus that the posting was protected by the First Amendment.

The problem was that the law did not define "artistic work" nor did Texas case law offer an answer. The court, as a result, was moved to provide a pair of definitions: a "[c]reative expression, or the product of a creative expression" or an "occupation or business that requires skill, a craft." VSMsq countered that "engineering has long been recognized to be an art form in addition to a scientific endeavor." The court found that VSMsq had either to demonstrate an "element of

191 *Masterpiece Cakeshop*, 138 S. Ct., at 1742.
192 Stromberg v. California, 283 U.S. 359 (1931).
193 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
194 VSMSQ Structural Engineers, LLC v. Structural Consultants Assocs., Inc., 679 S.W.3d 767 (Tex. App. 2023).

creative expression" or show that the "buildings are 'artistic works,'" but that it had failed to do so. Accordingly, it denied the artistic expression exemption and refused to dismiss SCA's misappropriation claim.

What is most striking is the court's feeble efforts to define or describe artistic expression. In focusing only on Texas law, which it conceded was quite inadequate, it entirely ignored the vast literature on the subject. If art is synonymous with creative expression, how to distinguish it from creative expressions in science or business? Or do they also become art? Or if art is an occupation that requires skill, is it then indistinguishable from nearly all occupations? And can "art" refer both to product and producer? The opinion is hopelessly muddled, and it never bothered even to address the practical question before it: how to determine whether a building embodies artistic expression? When one considers Jefferson's Monticello or a decrepit garage, the answer seems obvious: the former is artistic and the latter is not. Yet this view implies that only good art deserves the label, introducing an element of subjectivity that undermines the value of the concept.

Andy Warhol Foundation v. Goldsmith (2023) raised philosophical issues in the context of copyright law. A prominent celebrity photographer, Lynn Goldsmith, on assignment from *Newsweek* shot several portraits of the rock star Prince for use in the magazine, though none of the photographs were actually used. A few years later, *Vanity Fair* magazine licensed one of the photographs for $400 for one time only for a story on Prince, and *Vanity Fair* hired Andy Warhol to produce a work based on the photograph, with credit to Goldsmith acknowledged. In total, Warhol created fifteen additional works based on the photograph, now owned by museums, galleries, and collectors and reproduced hundreds of times in books, magazines, and promotional materials. Goldsmith learned of the fifteen copies over thirty years later in 2016, when *Vanity Fair* contacted the Foundation, which asserted copyright in them, to republish the photograph, paying it $10,000 to license its use. Goldsmith received nothing. She asserted copyright infringement, and the Foundation sued her, claiming that Warhol's works conveyed a different meaning from Goldsmith's and thus were transformative and protected under fair use.[195]

The Supreme Court, with Justice Sotomayor speaking for a seven-two majority, found for Goldsmith. Over thirty years earlier, Judge Pierre Laval of the Southern District of New York writing in a widely cited article had promoted transformativeness as a justification for secondary use in copyright law.[196] In *AWF*,

---

[195] Andy Warhol Foundation v. Goldsmith, 143 S. Ct. 1258 (2023).The Second Circuit explained that fair use comprises four elements: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. It concluded that all four supported Goldsmith.

[196] Pierre N. Laval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990). By "transformative," he meant that the "use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original." This requires that the "secondary use adds value to the original . . . for the enrichment of society." *Id*. at 1111. It is not the only factor to be considered, he conceded, and it may be outweighed by other considerations, but it must be taken into account. Thus, Laval downplayed the significance of the artist's intent and emphasized the effects of his efforts. Four years later, the Supreme Court endorsed his approach, recognizing that the extent of the

the Court had granted review on the meaning of "transformative," and Sotomayor was skeptical that Warhol's works met this standard, emphasizing that they made only "modest alterations"[197]and preserved Goldsmith's photograph's essential nature. Several photographs were integrated in the text to illustrate her points.[198]

Transformation in her eyes, however, was trumped by a more important consideration: both the original and secondary works shared a common purpose, commercial licensing. Warhol's work, therefore, seemed derivative. *Vanity Fair* needed a picture of Prince; it could have picked either Goldsmith's or Warhol's; it chose Warhol's. However, the point of fair use was to protect copyright owners from the derivative use of their work. *Vanity Fair's* use of Warhol's work is substantially the same as that of Goldsmith's photograph. "To hold otherwise," Sotomayor wrote,

> would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use.[199]

Sotomayor sees what she sees; everything is on the surface. As for the dissent, "its single-minded focus on the value of copying ignores the value of the original works."[200]

In a vigorous and lengthy dissent, Justice Kagan "just kind of went at [Sotomayor] hammer and tong."[201] Her central point was that the majority failed to understand the nature of transformativeness, and thus was unable to grasp Warhol's art as adding something new. As they saw it,

> It does not matter that the silkscreens and the photo do not have the same aesthetic characteristics and do not convey the same meaning. . . . All that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done.[202]

---

transformation might vary a good deal. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). The secondary use may comment on the original or on some other societal or other matter. The Copyright Act of 1976 had defined a derivative work to have "recast, transformed, or adapted" a prior work. 17 U.S.C. sec. 101.

197 Andy Warhol Foundation v. Goldsmith, 143 S. Ct. 1258, 1285 (2023).

198 Perhaps no case has generated such an intense use of pictures. An analysis of opinions from 1997-2009 revealed only twenty-three cases with forty-two pictures, nearly all maps, charts, graphs, and diagrams. Nancy Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 Chi-Kent L. Rev. 331, 334-38 (2013).

199 Andy Warhol Foundation v. Goldsmith, 143 S. Ct. 1258, 1285 (2023).

200 *Id*. at 1286.

201 Kagan, qtd. in Josh Gerstein, *Kagan Enters Fray Over Congress' Power to Police Supreme Court*, Politico, Aug. 3, 2023, https://www.politico.com/news/2023/08/03/kagan-enters-fray-over-congress-power-to-police-supreme-court-00109770.

202 *Andy Warhol Foundation*, 143 S. Ct., at 1292.

This "commercialism-uber-alles view"[203] undercuts "copyright's core purpose . . . to foster creativity."[204] "Fair use proceeds from the understanding that artists cannot do what they do without borrowing from or otherwise making use of the work of others," and so it "advances creativity and artistic progress."[205] "Andy Warhol is the avatar of transformative copying."[206] Like Sotomayor, Kagan included photos to buttress her case, though in addition to depicting works of the parties, it also included masterpieces by Giorgione, Titian, and Manet, implying that Warhol was of their stature.

In a conversational tone that invites the reader to look at the pictures with her, Kagan then discussed Warhol's "laborious and painstaking"[207] technique in the context of his famous portrait of Marilyn Monroe, echoing Danto: "the meaning is different from any the photo had."[208] For Kagan, seeing is important, but it must be supplemented by context, history, expert commentary, and the like. A magazine editor deciding which to use to accompany an article would immediately see what the majority evidently misses: that they convey different messages.[209] "The majority thus treats creativity as a trifling part of the fair-use inquiry."[210] Courts had been pretty flexible toward artists working off preexisting art, and Kagan worried that the majority was abruptly altering rules that had been settled and sensible. Both opinions overflowed with personal barbs, an unexpected development in view of the justices' history of broad agreement.[211]

It is probably fair to say that when Sotomayor viewed the silkscreen she saw Prince, and when Kagan viewed it, she saw Warhol. This, in turn, reflected very different ways the two Justices, normally allies, approached the case. For Sotomayor, the dispute was over money. As both sides used the photograph for commercial purposes, it was their similarity that most impressed her, signaling that the second work infringed on the copyright of the first. The dissenters, perhaps defeated by artspeak, were unable to discern what was plain to those not mesmerized. We are judges, she implied, not art critics, and concentrating on use saves us from the morass of aesthetics.[212]

For Kagan, this was the view of a philistine. "There is precious little evidence in today's opinion that the majority has actually looked at these images, much less that

---

[203] *Id.* at 1303.
[204] *Id*. at 1292.
[205] *Id*. at 1293.
[206] *Id*. at 1293.
[207] *Id*. at 1296.
[208] *Id*. at 1294.
[209] *Id*. at 1297.
[210] *Id*. at 1311.
[211] In the preceding year, Sotomayor and Kagan had agreed on 90% of cases where two Justices joined at least part of the same opinion and 78% where two Justices joined the same opinion in all parts without writing separate opinions. These were the highest levels of agreements between any two Justices that term. Angie Gou, Elena Erskine, & James Romoser, SCOTUSBlog, Stat Pack for the Supreme Court, 2021-22 Term 15 (July 7, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf.
[212] Concurring, Justice Gorsuch remarked, "Nothing in the law requires judges to try their hand at art criticism and assess the character of the resulting work." *Andy Warhol Foundation*, 143 S. Ct. at 1289.

it has engaged with expert views of their aesthetics and meaning."[213] No one could possibly mistake the portraits for each other because it was obvious that Warhol imbued his with a meaning far different from Goldsmith's. The majority does not understand what art is or how artists work. To Sotomayor, Kagan's argument must have seemed the pretentious ruminations of an academic philosopher. To Kagan, Sotomayor's argument must have seemed more likely to come from an accountant than from the most liberal voice on the Court. Neither seemed to notice that their focus was only on reproductions, not on the originals, a fact that might have proven germane in assessing their character.

V. Congress Speaks

In 1990, attached to the Judicial Improvements Act that authorized eighty-five federal judgeships and without floor debate, Congress passed the Visual Artists Rights Act (VARA), which acknowledged and protected the artist's moral rights to integrity and attribution. The right to integrity permits the artist to claim limited control over her work, even when it had been sold and passed to other hands, and to prevent the "intentional distortion, mutilation or modification"[214] of works or the destruction of those of "recognized stature."[215] Common sense exceptions, as for wear and tear and conservation, were allowed. The right to attribution protects the artist's power to be recognized by name as the creator of the work.[216] The rights remain in force to the end of the artist's life. The legislation, with its triumph of artists over real estate interests, had a decided David-and-Goliath character.

The assumption behind this "moral right" was that "an artist's professional and personal identity is embodied in each work created by that artist,"[217] entitling her to some control of her work.[218] Also, it was thought that the rights promised societal as well as individual benefits, in that they served the public interest by encouraging artists and preserving their work.[219] Moral rights, which had originated in France,[220]

---

[213] *Id.* at 1301.

[214] 17 U.S.C. § 106A(a)(3)(A).

[215] *Id*., at (B). Prior to the adoption of the law, American courts refused to recognize moral rights. Vargas v. Esquire, 164 F. 2d 522 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 89 N.Y.S. 2d 813 (S. Ct. 1949).

[216] 17 U.S.C. § 106A(a)(3)(A).

[217] H.R. Rep. No. 101-514, at 15 (1990).

[218] The assumption that this melding of identity to product is unique or even distinctive to art is open to challenge. For example, many proprietors of small businesses doubtless feel the same about their creations. Jack Welch, the former CEO of General Electric, made a similar claim in Jack Welch, Jack Straight from the Gut (2001).

[219] Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 Hofstra L. Rev. 317, 325-26 (1989). The societal purpose is to some degree undermined by the VARA protection ceasing with the death of the artist.

[220] *See* Martin A. Roeder*, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940). This, in turn, has been traced to the writings of Kant and Hegel. Cheryl Swack*, Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *between France and the United* States, 22 Colum.-VLA J.L. & Arts 361, 370-72 (1998).

had earlier been recognized by the Berne Convention, a century old international copyright treaty,[221] which Congress had joined in 1988.[222]

Unlike courts, VARA defined visual art as a "painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of 200 copies or fewer."[223] Excluded were "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work . . . any merchandising item or advertising . . . any work made for hire."[224] Would this exclude a clay statue used in preparation of a bronze statue?[225] How about photographic prints given to an artist to be used as a basis for a painting?[226]

VARA's very traditional notion of art was hardly welcoming to the new work that had already become commonplace for decades. For example, the conceptual artist, Chapman Kelley, created an award-winning garden in Chicago that he called Wildflower Works, maintained it at his own expense for almost twenty years, and finally saw the city destroy it. The Seventh Circuit declined to classify it as a work of art under VARA, as it did not meet the legal definition.[227] "To qualify for moral-rights protection under VARA, Wildflower Works cannot just be 'pictorial' or 'sculptural' in some aspect or effect. It must actually be a 'painting' or a 'sculpture.' Not metaphorically or by analogy but really."[228] The court worried, too, that calling the installation art would invite an "infinitely malleable" definition.[229]

VARA's "recognized stature" requirement also raises questions. The term, which the statute does not define, has an obvious practical ambiguity. Will courts determine that stature attaches to the work of art or will they infer it from an artist's reputation?[230] The term has been interpreted in *Carter v. Helmsley-Spear* to mean "viewed as meritorious" or "recognized by art experts, other members of the artistic community, or by some cross section of society,"[231] that is, a matter of "common sense."[232] But is it really common sense to ask juries to make this determination

[221] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

[222] Pub. L. No. 100-568, 102 Stat. 2853. The United States considered the Convention an executory treaty requiring implementation legislation by Congress. *See* § 2(1).

[223] 17 U.S.C. § 101.Unlike moral rights, the Constitution's copyright provision is justified solely by the societal interest "to promote the progress of science and the useful arts." U.S. Const. art. I, § 8, cl. 8. Moral rights also differ in that copyright holders' interests are mainly pecuniary.

[224] 17 U.S.C. § 101.VARA was much narrower than the treaty, which protected all artistic and literary work.

[225] The answer was no. Flack v. Friends of Queen Catherine, Inc., 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

[226] The answer was yes. Lilley v. Stout, 384 F. Supp. 2d 83 (D.D.C. 2005).

[227] Kelley v. Chicago Park District, 635 F. 3d 290, 306 (7th Cir. 2011).

[228] *Id*. at 300.

[229] *Id*. at 301.VARA may also have disincentivized property owners from installing artworks by limiting their power to relocate, remove or alter them. William M. Landes & Richard A. Posner, the Economic Structure of Intellectual Property Law 286 (2003).

[230] Scott v. Dixon, 309 F. Supp. 2d 395, 400 (S.D.N.Y. 1994).

[231] Carter v. Helmsley-Spear, 861 F. Supp. 303, 325 (S.D.N.Y. 1994). The Second Circuit did not address the definition in its appellate decision. Carter v. Helmsley Spear, 71 F. 3d 77, 84 (2d Cir. 1995).

[232] Cohen v. G & M Realty, 320 F. Supp. 3d 421, 428 (E.D.N.Y. 2018). Artists who had painted graffiti on a disused building for twenty years learned that it would be renovated

of merit as a finding of fact that will often bleed into a value judgment? For that matter, are lawyers and judges, whose entire professional lives are spent parsing verbal communication, prepared to make these determinations? Justice Holmes was skeptical, calling it "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits."[233] The court in *Carter* made the same point,[234] but if judges are forced to choose among art experts, the artistic community, and some cross section of society, it is hard to see how they could avoid it.

Nor are the references to art experts and some cross-section of society helpful, as they seem prone to generate contradictions and confusion. For example, large cross sections of society seem enamored of kitsch in Margaret Keane's paintings of sad eyed children, Thomas Kinkade's sentimental landscapes, and George Rodrigue's blue dogs, but very few art experts would grant these artists much stature. Nor can problems be avoided by relying on expert witnesses to establish stature, as this tactic treats subjective opinions as establishing an objective reality. In a practical sense, moreover, a reliance on experts might favor established artists, who presumably need less protection than neophytes, and set up contests of opposing opinions, informed but inescapably personal and likely expressed in jargon unintelligible to juries and perhaps even to judges.[235] In the end, by targeting quality, VARA approves the principle that government can act "simply on the basis that some speech is not worth it."[236]

Also, in excluding works for hire, that is, "work prepared by an employee within the scope of his or her employment,"[237] VARA failed to define "employee" and "employer" clearly, leaving courts dependent on a multipronged test set down by the Supreme Court prior to the passage of VARA in *Community for Creative Non-Violence v. Reid.*[238] But why make the conditions of employment a key consideration in determining VARA protection for art, disqualifying large numbers of works in the process? Would we disqualify Tiffany glass as produced as work for hire? Or Michelangelo's ceiling of the Sistine Chapel because it was commissioned by Pope Julius? Surely, our interest is in the work, not the employment status of those who created it. The purpose of the work for hire provision appears to be denying protection to artistic reproductions, especially mass reproductions,[239] but by requiring a work of visual art to be an "original work of authorship," one wonders

---

and their work destroyed; they asked the court to determine if any of their work merited VARA protection; before the court could rule, the building owner had the works painted over the artists sued, the court ruled that forty-five of the forty-nine works deserved protection, and the artists were awarded $6.75 million.

233 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

234 Carter v. Helmsley-Spear, 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

235 For example, in a case involving the proposed destruction of a sculpture in the lobby of an office building, the judge dismissed the judgment of a former long time art critic of the *New York Times* and the then current art critic and editor of *The New Criterion* as "myopic." Carter v. Helmsley-Spear, 861 F. Supp., at 324. On the other hand, in Martin v. Indianapolis, the "recognized stature" of an outdoor sculpture was determined merely by reference to the local press. 192 F. 3d 608, 612-13 (7th Cir. 1999).

236 United States v. Stevens, 559 U.S. 460, 470 (Roberts, C.J. 2010).

237 VARA, *supra* note 214, at sec. 201(b)(2006).

238 490 U.S. 730, 750 (1989).

239 U.S.C.C.A.N. 6915 (1990).

whether Warhol's famous "Brillo Box" would qualify."[240] Warhol's silk screens of Elizabeth Taylor and Marilyn Monroe would earn VARA protection because fewer than 200 copies were made, but why should they be denied if he decided to make more than 200 copies? Why should the number of copies be dispositive?

There is also the matter of "applied art." *Cheffins v. Stewart* (2016) concerned a pair of artists, who transformed a disused school bus into an elaborate Spanish galleon for use at various festivals. Stewart, who owned the bus/galleon, burned it to salvage scrap metal; the artists sued, maintaining that in destroying the bus/galleon, Stewart had violated VARA by destroying their work of art. The case turned on whether the bus/galleon was applied art, and thus unprotected by the law.

The Ninth Circuit defined applied art as covering an object "that initially served a utilitarian function and . . . continues to serve such a function after the artist made embellishments or alterations to it."[241] As the bus/galleon was still used to transport people, it "retained a largely practical function [and] plainly was 'applied art.'"[242] A concurring opinion complained that the "majority's formulation may protect the clearest cases," but would leave other cases "out in the cold . . . turning judges into art critics or consigning to litigation every work of art that includes some utilitarian function."[243] In defining applied art, it concluded, "the right question to ask is whether the primary purpose of the work as a whole is to serve a practical, useful function, and whether the aesthetic elements are subservient to that utilitarian purpose."[244] The concurrence seems easier to implement, until one reads the next sentence, which without offering justification, announces that the bus/galleon qualifies as applied art, when an opposite conclusion appears to have been equally plausible.

A few years earlier, the Second Circuit had proposed a solution to the applied art question. "VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture."[245] How to tell sculpture that looks like a piece of furniture from a piece of furniture? Is the answer Danto's answer, that is, inquire of the artworld?

Another question *Cheffin* raises is exactly whose First Amendment rights are in play? The law assumes it is the rights of the artists to control their work, but arguably the owners of the work also possess these rights.[246] If an owner decides that he dislikes what the work communicates, would forcing him to display it amount to compelled speech? And what of the audience, actual or potential? The applied art loophole permitted the court to sidestep the question, and so it remains unaddressed.

---

240 *See* 17 U.S.C. § 101.

241 Cheffins v. Stewart, 825 F. 3d 588, 594 (2016).

242 *Id*., at 596. A sculptor sued a real estate company on the ground that moving his stationary site-specific art from a Boston park violated VARA. The First Circuit ruled that VARA did not apply to site specific art. Phillips v. Pembroke Real Estate, Inc., 459 F. 3d 128 (2006).

243 Cheffins, 825 F. 3d, at 598.

244 *Id.*

245 Pollara v. Seymour, 344 F. 3d 265, 269 (2d Cir. 2003).

246 In Serra v. General Services Administration, 847 F. 2d 1045 (2d Cir. 1988), the Second Circuit confirmed the GSA's authority to relocate a massive sculpture because the government had bought it and owned it. The relocation was justified by the inconvenience it imposed on pedestrians, not on aesthetics.

There is also, finally, the question as to whether the purpose of VARA, helping artists maintain their reputation, is a proper task of government. Apart from the very different law of libel, the law's general approach is to leave reputations to the marketplace. Even without the law, artists could defend themselves by negotiating more favorable contracts that would better safeguard their work or seeking to influence the artworld. Of course, this would not prevent some valuable art from being lost nor would it prevent some inferior art from being retained, but no solution will please everyone.

VI. Some Conclusions

In a famous passage, Keynes observed that "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."[247] We all apply theories to make sense of the hustle and bustle around us. Sometimes, the theories are explicit, like Danto's; whether or not one finds it useful or valid, one must concede that it is there for interested parties to examine, dissect, and evaluate. Courts, however, have not developed an explicit theory of art, and thus find themselves falling back on unexamined assumptions, perhaps years out of date, and emotional reactions, positive and negative, that may be quite incoherent, naïve or inconsistent, perhaps like the ideas of Keynes' defunct economist.

In this spirit, courts have continued to insist that art is protected by the First Amendment**,** without making any serious attempt to say what art is. For many years, a rough, unspoken consensus on defining art meant that this approach made perfect sense. Why enter the quagmire if there seems no reason to do so? By the twenty-first century, however, the old consensus on art had long ago been dropped in the rubbish bin, like a pair of worn-out shoes.

What have courts done to accommodate themselves to this no longer new reality? For the most part, they have been satisfied to apply dichotomies devised generations earlier, for example, contrasting high quality (art) and low quality (not art) or aesthetic purpose (art) and commercial purpose (sometimes art and sometimes not art) or aesthetic value (art) and utilitarian value (not art). These simplistic and occasionally contradictory responses may strike some observers as little short of a dereliction of duty.

Is the whole enterprise doomed? Sontag famously attacked interpretation itself. In the name of making the object "intelligible [and] disclosing its true meaning [it] excavates, and as it excavates, destroys; it digs 'behind' the text to find a sub-text which is the true one." Thus, she concluded, "interpretation is the revenge of the intellect upon art. . . . To interpret is to impoverish, to deplete the world – in order to set up a shadow world of 'meanings.'"[248] Interpretation entails a kind of betrayal.

Yet the practical question remains: How can courts advantage or disadvantage art without a satisfactory definition of what it is? Danto offers an exit from the morass. Delegate the issue to respected (if self-appointed) experts: art is whatever the artworld says it is. It is true that the artworld has shown that it believes that

---

[247] John Maynard Keynes, The General Theory of Employment, Interest and Money 383 (1936).

[248] Susan Sontag, Against Interpretation and Other Essays 6, 7 (1966).

under the proper circumstances art can cover anything at all. Or even nothing. As a consequence, those not yet conversant with the secrets and mysteries of Dantovian analysis might sometimes find the results silly or bizarre.

But considering the alternatives, the analysis might make imperfect sense. Why conjure up a new definition of art, when the odds of its attracting a consensus seem remote? Why continue struggling with traditional definitions, old fashioned, out of date, and difficult to usefully apply to the art of today? Aristotle warned that we must not expect more precision than the subject matter permits,[249] and plainly defining art does not permit much precision. Similarly, the renowned constitutional scholar, Alexander Bickel, considered prudence the indispensable judicial asset, lauding judges skilled in the "ways of muddling through."[250]

Accordingly, it is no wonder that courts sometimes seem to have adopted the Dantovian philosophy *sub silentio,* probably, without even bothering to become familiar with the sacred texts. If scholars over the centuries have failed adequately to define art, judges preoccupied with the specific disputes before them, can hardly be blamed for ducking the issue. Thus, when the Supreme Court announces that Pollock's drip paintings fall under the First Amendment's protection, it does not pause to connect them to conventional free speech justifications, like the pursuit of truth or democratic accountability. Instead, it simply announces it, as if it were too obvious to require justification.[251] As Pollock's paintings were nearly a half century old and the painter a presence in the pantheon, this announcement seemed merely stating what in the artworld passed for conventional wisdom. Similarly, *Carter's* construing "recognized stature" as "recognized by art authorities" and Kagan's passionate dissent in *AWF* also follow the Dantovian path (though neither felt the need to mention Danto by name). This would allow courts to skirt the controversy, avoid trouble, and proceed as if they were merely ratifying the general agreement that art is what the artworld says it is. Never mind that it has no statutory basis. It is entailed by a "clearly widespread intuition."[252] The alternative, as Kagan implies, is likely more of the stumble and bumble that characterizes the courts' ongoing efforts. Are there viable alternatives to the Dantovian approach? The courts have not found them.

---

[249] Aristotle, Nicomachean Ethics bk. I, at 3 (W.D. Ross trans. & ed.,1908) (c.384 B.C.E.) (1094b.24ff).

[250] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 64 (1962). Relatedly, Bickel was sympathetic to the ideas of Edmund Burke, skeptical of idealism and respectful of tradition. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L. J. 1567, 1600-605 (1985).

[251] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995). This case, so often cited as seminal in the relation of art to the First Amendment, had nothing to do with art. It concerned whether a gay rights group was entitled to march in a Saint Patrick's Day parade. The often-quoted sentence was mere dicta.

[252] Mark Tushnet, *Art and the First Amendment*, 23 Colum. J. L. & Arts 169, 197 (2012).