

# *Nova Law Review*

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*Volume 14, Issue 2*

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*Article 1*

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## Nova Law Review Full Issue





# NOVA

## LAW REVIEW

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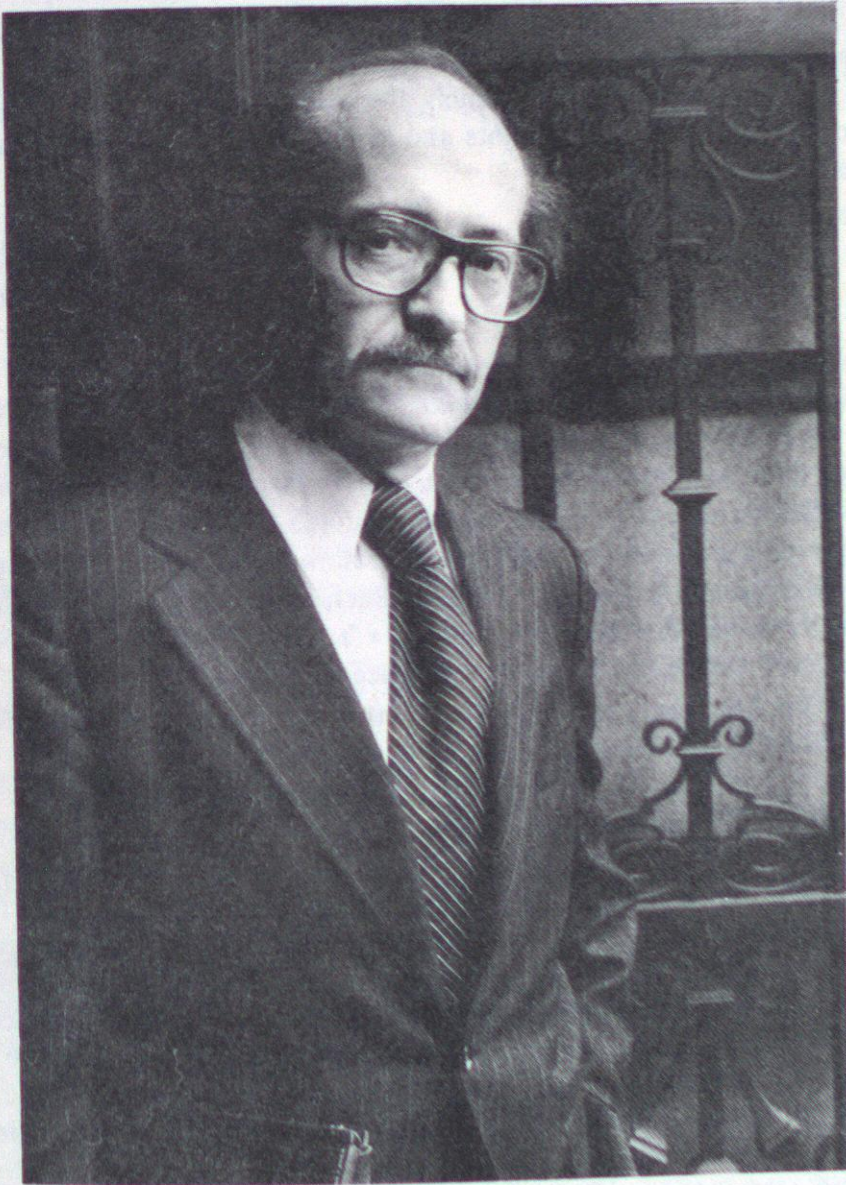
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## *Dedication To Gustave Harrow*

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*Gustave Harrow has specialized in law and the arts, and arts and litigation. As Assistant Attorney General for New York State, he represented the State in the Mark Rothko litigation; he represented the artists of the Westbeth community against co-op conversion; he represented Richard Serra in the matter of "Tilted Arc" and acted as a consultant to Senator Edward M. Kennedy for the Artists' Rights legislation.*



Creativity has always interested Gus and now we honor his creativity, perhaps it is obvious to his colleagues in the legal profession, but it has spread to the artists' community. So with intelligence, conviction, and courage, he has defended the creativity of a group of citizens that society has kept marginal, namely the artists. He has given them respect and protected their rights and as one of the artists, I remain affectionately grateful.

*Louise Bourgeois, Sculptor  
New York, New York*

\*\*\*\*

On behalf of Gus Harrow's friends and colleagues who have come to know him well through the Center for Law and Human Values, I offer him our congratulations for this well-deserved tribute.

During the past decade, the work of the Center has had an enormous impact on lawyers and legal educators interested in the interplay of social justice and self-knowledge. Each semester, participants have met for a weekend conference in New York to share the aspirations, successes and frustrations we experience in our work.

Gus has been a central player in this process, and we are grateful for his valuable contributions to our personal and professional lives. His deep commitment to ethical issues and lawyering engenders our respect, and we empathize with his pain when students or other lawyers do not appreciate his high standards. In a profession where named parties are often ignored amidst the posturing of adversarial peacocks, Gus cares more about his clients than the cut of his suits. In a profession where guards rarely drop and image can be everything, Gus offers us Gus—unadulterated, honest, generous, vulnerable, dedicated and courageous. In the process, his openness has helped make it possible for all of us to remove some armor, to gain insights into our own lives and, in turn, to work more effectively towards our ideals. As his former client, Jill Burkee, wrote in these pages four years ago, Gus "is a man from whom I have learned that law and art travel the same path, that of revealing the truth."

*Michael Burns  
Professor of Law, Nova Center for the Study of Law  
and fellow participant of the Center for Law and Human Values  
New York, New York*



\*\*\*\*

Gus Harrow's remarkable legal career has been distinguished by his extraordinary commitment and contributions to artists' rights. He has devoted his career and his life to preserving the integrity of America's Heritage. The arts and artists of America have no finer champion.

*Senator Edward M. Kennedy  
Washington, D.C.*

\*\*\*\*

In December of 1984, Mr. Harrow was approached by artist members of the Westbeth Preservation Committee to retain him to look into a projected plan to co-op Westbeth, a 385-unit rental building in Manhattan's West Village created for artists of low to moderate income. The building was then having problems with a deficit on its HUD-held mortgage. A plan to co-op the building had been formulated by a group of residents and was then before the Department of Real Estate of the New York State Attorney General's Office. Approval, given the reported size of the deficit and the crisis atmosphere, was an almost foregone conclusion.

Because his clients were those artists unable to afford a co-op, Mr. Harrow worked pro bono at half his fee, and spent one year in intense labor on our behalf. He made a thorough investigation of the legal structure underlying the creation of the artists' residence in 1967, with foundation grants from the National Endowment for the Arts and the J.M. Kaplan Fund. He also made an in-depth study of the origin and growth of the deficit, the under-utilized financial potential of the 100,000 square feet of non-resident space reserved for commercial use, and entered into intense behind-the-scenes discussions with HUD and the NEA.

Mr. Harrow concluded that it would be illegal for the trustees to transfer the property to some of the residents and members of its own board as the co-op plan proposed, particularly when it specified that three years into its operation a vote could be taken by the shareholders to sell the property. He also concluded that the financial crisis and HUD's intransigence had been greatly exaggerated to the residents. The threat of foreclosure that hung over the residents for several years was removed when the Westbeth Board, coincidentally following the Harrow report's recommendation of a fifteen percent rent increase, paid off the defaulted interest payments in less than three years.



Five years later the artists of Westbeth are still secure in their homes and enjoying a rent that with skyrocketing Manhattan housing costs is relatively lower than ever. Nevertheless, a number of the residents are still disappointed that they were unable to acquire the block-square landmark building on Manhattan's Gold Coast, worth a minimum of \$60 million, for the \$2 million they proposed to offer HUD under the co-op plan.

*Jessie McNab and Catherine Revland  
Residents of Westbeth Artists Housing  
New York, New York*



\*\*\*\*

Gus Harrow and I, of course, first met through the *Matter of Mark Rothko* and did not get to know each other personally until several years later.

Gus Harrow will always stand out for me as a unique symbol of integrity and commitment to a cause. He came into my life at a time when many of my idealistic childhood illusions had recently been shattered. I could sense his deep dedication to the preservation of my father's work even observing from a distance (all that was possible during the trial) and this somehow filled a void for me.

Although his prior legal experience had not involved him in the world of art, Gus Harrow committed himself to this new field with the same energy that seems to have entered into all his undertakings. He went far beyond his basic obligation as assistant attorney general to represent the charitable beneficiaries and delved into the depths of the case researching every detail and educating himself in a totally new field. It was Gus Harrow who sought out and interviewed a whole series of expert witnesses who played a key role in the *Matter of Rothko*. Listening to his questioning of these individuals, one would feel his complete intellectual and emotional involvement in the case.

When I subsequently got to know Gus Harrow on a more personal level, I found that this same in depth commitment and unique integrity has suffused everything he has undertaken as well, as his personal life. I believe it has been these qualities combined with his legal skill which have led to his success.

It gives me pleasure to think that his deep interest in art and the law may have grown at least in part, out of his emotional involvement in the *Matter of Mark Rothko*. This is certainly an area of the law which had long been neglected and which stands in sharp contrast to today's legal world of mergers and acquisitions.

Kate Rothko Prizel  
Daughter of Mark Rothko



\*\*\*\*

I have known Gus Harrow since he was five years old. He is articulate, bright, straight-forward, honest and super-ethical. He has always worked beyond the call of duty prodigiously day and night, for the Rothko estate, for Richard Serra and "Tilted Arc" and for the Westbeth project and was never motivated by fees alone. He is as much of an artist as any lawyer can be.

*Lester Raskin, attorney  
New York, New York*



\*\*\*\*

I first encountered Assistant Attorney General Gustave Harrow on Valentine's Day in 1974. It was the first day of the *Rothko* trial, which I was covering for *The Village Voice*. His appearance was not as I had expected, he looked like a romantic poet in contrast to the dozen hard-nosed New York lawyers surrounding the long table before the bench in Surrogate's Court. His demeanor was polite and gentlemanly; his rounded accents and his mobile tenor voice did not lend his words the authority their import deserved. The other lawyers—including highly-renumerated, well-tailored partners from Sullivan and Cromwell, Breed Abbott and Paul Weiss—treated the *lowly* civil servant from the estates and trusts divisions with royal condescension. Their briefs were pithier, more important-looking, his more verbose—heavy on ethics and morality.

But as the trial went on, and tactics were more evident, it became clear that without Gus Harrow and his driving and incisive legal thrusts, the lawsuit would have been lost long before. It was Harrow who persuaded the judge to sign a crucial temporary injunction forbidding the Marlborough Gallery from further sales of the Rothko estate paintings. His presence made attempts at settlement next-to-impossible. It was Harrow who pursued Marlborough's international laundering of Rothko paintings at bulk prices to fictitious foreign entities and gallery shills. Harrow also lined up a group of Rothko intimates to attest to his hopes for the future of his oeuvre, and a group of art experts who testified to his important stature. Against the advice and belief of his fellow lawyers for the plaintiff Rothko children (who termed it a "waste of the court's time") Harrow had the disputed paintings appraised by an expert using slides—which was one positive yardstick that must have influenced the judge in his final \$9.3 million evaluations. It was Harrow who emphasized that the Rothko Foundation was merely a "cat's paw" used to coverup the self-dealing of Rothko's three executors who were also the charity directors. It was Harrow who uncovered many of the discrepancies in phony versus real sales. After the judgment, Harrow acted quickly on a tip to stop the secret exodus of Marlborough's art then in the process of being surreptitiously shipped out of Canada and the reach of United States justice. Later, since Lloyd had order Rothko entries in Marlborough's stockbook doctored in lieu of evidence, Harrow took the felonies to the D.A.'s attention and, determined to see justice done, he subsequently testified in the criminal trial in which Frank Lloyd, the billionaire international art dealer, was convicted by a jury on three counts. Harrow single-handedly (and without precedent)



reconstituted the Rothko foundation with directors he chose; ultimately their paintings have been strategically given to museums for the public benefit. All in all, in the seemingly endless *Matter of Rothko*, and the subsequent criminal case, Gustave Harrow was the conscience of the court.

Afterwards, as our friendship grew, I saw Gus' dedication to artists' rights deepen even further. He was ready to accept any challenge; to title—always with a passionate conviction and often with surprising success—at whatever powerful bureaucracies that aimed to stifle free expression. Richard Serra's Tilted Arc and Westbeth are two other causes he is publicly identified with.

When, in 1976, Walter Annenberg and Thomas Hoving, then respectively Trustee and Director of the Metropolitan Museum of Art, had persuaded the museum's board to create a Communications Center in a huge projected \$20 million wing of the museum—with its own board and Hoving as its director—a group of museum-lovers determined to fight this encroachment on our repository of unique and original art. With the help of two board members, memoranda were produced which indicated clear conflicts of interest on the part of Hoving and Annenberg. After several incendiary articles, a public hearing was held, and Gus Harrow took charge behind the scenes to define and clarify the conflicts on the part of the two men. Mr. Annenberg suddenly and without explanation withdrew his \$20 million offer. Consequently, with thanks to Gus Harrow, our great museum has not lost its central purpose.

If only Gustave Harrow were well enough to defend the artistic value of the Mapplethorpe exhibit in Cincinnati, I am convinced that he might put an end to yet another of obscene challenges to the First Amendment. Gus is there fighting in spirit, you can count on that.

Lee Seldes  
author, *The Legacy of Mark Rothko*



## Where Are We Now? Some Thoughts on "Art Law"\*

Susan Duke Biederman, Esq.\*\*

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It was with great pleasure that I accepted the invitation in April of 1989 to write the introduction—a brief overview of "art law"—to this volume of *Nova Law Review*. Over a year in the making, this issue devoted to the law of the visual arts represents a number of things. They are all good. First, reaffirmation that a discipline of "art law" exists as a separate body of law in the United States today. It is a response of enlightened thinkers—jurists, legislators, lawyers and law students. They recognize that transactions and disputes surrounding the creation and ownership of art objects differ greatly from other activities and objects in our lives.

Twenty or thirty years ago, "art law" was an infant—with only a handful of distinguished thinkers skilled and dedicated enough to shape those crucial early days. In this issue we pay homage to Gustave Harrow. He is a leader among these pioneers. Whether at the center of legislation designed to protect the consumer from art fraud, or a lawsuit designed to protect the artist from those who would abuse him, or a project designed to give shelter and comfort to the creator, or a myriad of other art law or world complexities and problems, Gus has been, in the words of Senator Edward M. Kennedy, a champion. By professors and artists, lawyers and lawmakers, he is hailed here, and rightfully so. The dedications are warm, loving, admiring. They set a wonderful tone with which to begin our view into "art law."

There were so few in those early days—men who sat and thought and wrote long and hard about "art law," even though there wasn't a buck to be made in it. John Henry Merryman and Albert E. Elsen taught us about history, ethics, principles—the "thinking man's guide" to the new field. Of course, my two favorites are Franklin Feldman and Stephen E. Weil. They, too, sat and thought and wrote long and hard—and, ever the lawyers, laid the groundwork and built the foundation upon which we now base our "art law" jurisprudence, a foundation

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\*\* Mrs. Duke Biederman is a fine arts attorney and is the co-author of *Art Law*, with Franklin Feldman and Stephen E. Weil (1986, Supp. 1988).



we all now view as so natural and so right.

We are indebted to these pioneers. There is no better way to honor them—and pay special tribute to Gus—than with an issue devoted to “art law.”

And where are we now? We are in the same wondrous, exciting and perplexing place one finds himself when faced with the infant who is past the very early years. We see the growth—and the attendant questions this growth raises—in a multitude of places. Consider, for example, the *droit moral* borrowed from the French. Whereas five years ago only a handful of states had moral right statutes, the summation of which was found wanting, we now have three complicating factors. First, more states have such statutes, making interstate activities truly interesting for those who would alter, deface, mutilate or modify an artwork. Second, we might ask, what happens to these state inconsistencies if we have a federal statute? And third, what role does Berne—and the method of our adherence—add to the discussion?

Legislators are not alone in the current state of affairs. Courts have been previously unable to even comprehend, much less incorporate into their reasoning, expert testimony on such things as current market value. Now as we see in *DeWeerth v. Baldinger* standing flush against *Guggenheim v. Lubell*, the courts have advanced to the stage of arguing among themselves! Thus forms precedent. And thus forms a jurisprudence.

This issue of Nova Law Review takes us that many more steps further. We begin with a difficult discussion, that of the NEA and the First Amendment. The articles here are diverse and thought-provoking. Ranging from Senator Jesse Helms to Richard Serra, the writers present a full range of discourse. Nova Law Review is to be commended for presenting the full range. Next, we look at aspects of art law that honor the artist. First, an enlightened discussion of moral rights, followed by copyright in the employment relationship and what the United States Supreme Court has taught us about the creator and the laws protecting him. We then turn to the oft-occurring imbalance of the artist-dealer relationship, and a legislative solution to that inequity. Finally, we consider the American flag. Is it an icon? What shall we do as law-abiding citizens, equally respectful of the sanctity of the artist's image, when faced with the burning of our flag? We look next at business issues and review a bit of history. We then finish with a philosophical view of law and art, ending with “The Lawyer as an Artist.” In closing, I quote from the author, Dean Roger I. Abrams:



The lawyer as an artist. It must seem an oxymoron. People in the two fields dream differently. A lawyer searches for predictability, certainty, logical analysis, and clarity in thought and words. The artist seeks feeling, essence, grace, style and line. They have little in common. Even research on brain specialization suggests different parts of the brain are responsible for skills associated with legal thought and artistic expression. (Footnote omitted). Yet lawyers who are creative and imaginative may steer the law through uncharted waters. These lawyers-as artists drive the law forward.

This special issue of Nova Law Review, dedicated to Gustave Harrow and devoting its pages to "art law," will do much to drive the law forward, in a creative and imaginative way. May it thank those who have gone before us and inspire those who follow.



# *Art, The First Amendment, and the NEA Controversy*

## Tax-Paid Obscenity

Jesse Helms\*

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America has been caught up in a struggle between those who support values rooted in Judeo-Christian morality and those who would discard those values in favor of a radical moral "relativism." As Congressman Henry Hyde has said, "the relativism in question is as absolutist and as condescendingly self-righteous as any 16th century [Spanish] inquisitor."

For my part, I have focused on the federal government's role in supporting the moral relativists to the detriment of the religious community. I confess that I was shocked and outraged last year when I learned that the federal government had funded an "artist" who had put a crucifix in a bottle of his urine, photographed it, and gave it the mocking title, "Piss Christ." Obviously, he went out of his way to insult the Christian community, which was compounded by the fact that Christian taxpayers had been forced to pay for it.

As one distinguished federal judge wrote in a personal letter to me,

when a federally-funded artist creates an anti-Christian piece of so-called art, it is a violation of an important part of the First Amendment which guarantees the right of all religious faiths to be free from governmentally-sanctioned criticism. When the National Endowment for the Arts contributes money to an artist for him to use to dip a crucifix in his own urine for public display, it is no different [in terms of church and state entanglement] from a municipality's spending taxpayers' money for putting a crucifix on the top of

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\* Senator Helms represents North Carolina in the United States Senate. He is the Minority Leader of the Committee on Foreign Affairs, a member of the Committee on Agriculture, Nutrition and Forestry and a member of the Select Committee on Ethics and the Rules Committee.



city hall."

The controversy over Andres Serrano's so-called "art" had hardly begun when it was disclosed that the National Endowment for the Arts also had paid a Pennsylvania gallery to assemble an exhibition of Robert Mapplethorpe photographs which included photos of men engaged in sexual or excretory acts. The exhibit also included photos of nude children. A concerned Borough President in New York City sent me a copy of an NEA-supported publication in New York, *Nueva Luz*, which featured photos of nude children in various poses with nude adults, men with young girls and young boys with adult women.

All of these "works of art" were offensive to the majority of Americans who are decent, moral people. Moreover, as any student of history knows, such gratuitous insults to the religious and moral sensibilities of fellow citizens lead to an erosion of civil comity and democratic tolerance within a society. Therefore, funding such insults with tax dollars surely is anathema to any pluralistic society.

This was the basis of my offering an amendment to the Interior Appropriations bill to prohibit the National Endowment for the Arts (NEA) from using tax dollars to subsidize or reward "art" which is blasphemous or obscene. Congress unwisely enacted only a severely weakened version of the amendment that does not even prohibit funding for such works as those by Mapplethorpe and Serrano — which created the controversy. Even so, this weakened amendment has been the target of unfounded and often absurd criticisms.

Opponents of the legislation often make the following unfounded and misleading allegations:

1. ***Restrictions on federal funding for the arts constitutes direct censorship.***

This is a deliberate attempt to confuse censorship with sponsorship. Such deliberate misrepresentations are intellectually dishonest.

The Constitution gives Congress the responsibility and duty to oversee the expenditure of *all* federal funds — including funding for the arts. The amendment originally proposed, as well as the one passed, was intended to forbid the federal government from taking money from citizens by force and then using it to subsidize or reward obscene or blasphemous art. The amendment clearly limits the issue to the question of whether the government should use tax funds in the role of a patron (sponsor) for such "art." The legislation in no way "censors"



artists; it does not prevent artists from producing, creating, or displaying blasphemous or obscene "art" at their own expense in the private sector.

Therefore, sanctimonious comparisons between the amendment and communist dictatorships in Eastern Europe fall on their face. In communist countries everything is paid for by the government; therefore, if not approved by the government, it is not produced. Western democracies, on the other hand, rely on the private sector where ideas are left free to compete with minimal or no governmental participation.

Thus, it should be obvious to all that, despite the amendment, American artists who choose to shock and offend the public can still do so—but at their own expense, not the taxpayers'. *Censorship* is not involved when the government refuses to subsidize such "artists." People who want to scrawl dirty words on the men's-room wall should furnish their own walls and their own crayons. It is tyranny, as Jefferson said in another context, to force taxpayers to support private activities which are by intent abhorrent and repulsive.

The enormous response I have received from throughout the country indicates that the vast majority of Americans support my amendment because they were aghast to learn that their tax money has been used to reward artists who had elected to depict sadomasochism, perverted homoerotic sex acts, and sexual exploitation of children.

## 2. *Subsidizing some art forms but not others (obscene art) constitutes indirect censorship.*

If this is true—and it isn't—the NEA has been in the censorship business for 25 years, which means that the only way to get the government completely out of the "censorship business" is to dismantle the NEA.

By its very nature, the NEA has the duty to establish criteria for funding some art while not funding others. So, those who are crying "censorship" in this regard are ignoring the defect of their logic (or lack thereof). Do they not see that, following *their* logic, every applicant denied federal funding can protest that he has been "censored" by the *subjective* value judgments of the NEA's artistic panels?

## 3. *Is there such a thing as obscene art?*

The vast majority of taxpayers would first ask themselves whether something is obscene—and if it is, then it's not art. However, some



verbose art experts—and the NEA—do just the opposite: Anything they regard as “art” cannot be obscene no matter how revolting, decadent, or repulsive. As NEA’s Chairman John Frohnmayer told a California newspaper, “If an [NEA art] panel finds there is serious artistic intent and quality in a particular piece of work, then by definition that is not going to be obscene.”

4. *Federal funding restrictions must use the obscenity definition outlined by the Supreme Court in Miller v. California?*

It is important to remember that the Supreme Court has never established an obscenity definition for the purposes of restricting government funding. But Chairman Frohnmayer and the “arts community” erroneously assert that the Constitution requires that the definition in *Miller v. California* be used in both restricting federal funding and banning obscenity. However, refusing to subsidize something does not “ban” it. In order to *BAN* obscenity, *Miller v. California* requires the government to prove that materials: 1) appeal to a prurient interest; 2) depict in a patently offensive manner sexual or excretory activities or organs; and 3) lack serious artistic or scientific value.

Numerous cases show that the Court does not apply the same standards to government’s refusal to *fund* First Amendment activities as it does to the government’s efforts to *ban* such activities.

For example, in *Maher v. Roe*, the Court stated that merely because one has a Constitutional right to *engage* in an activity, he or she does not have a Constitutional right to federal funding of that activity. As long ago as 1942, in *Wickard v. Filburn*, the Court stated that, “It is hardly lack of due process for the Government to regulate that which it subsidizes.” And as recently as 1983, in *Regan v. Taxation With Representation*, a unanimous Court reiterated a litany of cases holding that restrictions on the use of taxpayers’ funds, in the area of expressive speech, do not violate the First Amendment and need not meet the same strict standards of scrutiny.

Thus, it is unlikely that the Supreme Court would require Congress to use the *Miller* test in its entirety in order to prohibit the NEA from funding obscenity. In fact, I believe the Court would uphold a Congressional *prohibition on funding* for any patently offensive depictions or descriptions of sexual or excretory activities or organs regardless of the presence or absence of artistic merit.

It would be interesting if Congress should decide to adopt the *Miller* test in its entirety because *Miller* allowed a jury of ord



nary citizens to decide if something is or is not obscene. The 1989 amendment approved by Congress, on the other hand, effectively grants the NEA and its elitist arts panels *sole* authority to decide what is or is not obscene *for purposes of government funding*.

Thus, the legal effect of the current law is to prohibit nothing. The NEA can cloak even the most patently offensive depictions of sexual or excretory conduct with "artistic merit" simply by deciding to fund the work, thereby making it *legally* non-obscene. This was precisely what the current amendment's drafters intended since they wanted to deceive the public into assuming that federal funding for obscenity had been prohibited—when, as a legal matter, it has not. Since last fall, Chairman Frohnmayer has asserted that he would and could fund the Mapplethorpe exhibit under the language passed by Congress.

#### 5. *The original Helms amendment is not enforceable.*

This is nonsense, and those who say that *know* that it's nonsense. There was nothing vague about it—and the Federal Communications Commission is having no problem making the determination that various broadcasts are indecent and/or obscene. The Postal Service is able to do the same thing concerning obscene or indecent mail. The Justice Department's National Obscenity Task Force has been able to determine what is obscene under the federal criminal statutes.

If the FCC, the Postal Service, and the National Obscenity Task Force can handle *their* responsibilities in this regard, why cannot the National Endowment for the Arts do likewise?

#### 6. *The amendment chills artistic expression.*

The "arts community" is fond of asserting that prohibiting NEA funding of obscene art will either "destroy art in America" or, at best, "lead to art which is bland." On the other hand, they also argue that the NEA has funded only about 20 controversial works out of 85,000 grants over the last 25 years. (This, by the way, is statistical manipulation, but that's an argument for another day.)

The point is this: The "arts community" cannot have it both ways. Either the NEA is funding so many controversial works that eliminating such funding will devastate the arts community—or the NEA has funded so few (20 in 25 years) that an obscenity restriction could have no more than a negligible impact.

My response to the first argument is that if art in America is so



dependent on obscenity in order to be creative and different, then Congress has a duty to the taxpayers to shut the NEA down completely, thereby slowing America's slide into the sewer. My answer to the second argument is that if so few offensive works have indeed been subsidized by the NEA, why all the fuss from the "arts community"?

In summary, the National Endowment for the Arts has always had the responsibility and the duty to decide what is and is not suitable for federal funding of the arts—and that has been precisely the problem. The NEA has defaulted upon that responsibility. It has been insulated from mainstream American values so long that it has become captive to a morally decadent minority which delights in ridiculing the values and beliefs of decent, moral taxpayers.

It should therefore be evident that as long as the NEA is given the *sole* authority to decide what is artistic—and thus not obscene—the agency intends to continue to fund obscenity under the pretense that it is "art"—even when the taxpayers disagree. Congress, at a minimum, should use the entire *Miller* test by allowing a panel of lay citizens—and not the self-appointed elitists at the NEA—to decide whether patently offensive works merit taxpayer funding.

Or Congress could just adopt my original amendment, and let the "arts community" continue to howl.



## Art and Censorship\*

Richard Serra\*\*

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The United States government destroyed "Tilted Arc" on March 15, 1989.<sup>1</sup> Exercising proprietary rights, authorities of the General Services Administration (GSA) ordered the destruction of the public sculpture that their own agency had commissioned ten years earlier.<sup>2</sup> The Government's position, which was affirmed by the courts, was that: "As a threshold matter, Serra sold his 'speech' to the Government . . . . As such, his 'speech' became Government property in 1981, when he received full payment for his work . . . . An owner's '[p]roperty rights in a physical thing [allow him] to possess, use and dispose of it.'"<sup>3</sup> This is an incredible statement by the government. If nothing else, it affirms the government's commitment to private property over the interests of art or free expression. It means that if the government owns the book, it can burn it; if the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right to property supercedes all other rights: the right to freedom of speech, the right to freedom of expression, the right to protection of one's creative work.

In the United States, property rights are afforded protection, but moral rights are not.<sup>4</sup> Until last year, the United States adamantly re-

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\* This article is based on a speech given by Mr. Serra in Des Moines, Iowa, on October 25, 1989, and which was reproduced in the Des Moines Sunday Register on October 29, 1989.

\*\* ©Richard Serra, 1989. Richard Serra, born in 1939 in San Francisco, lives and works in New York City and Cape Breton, Nova Scotia.

1. On March 15, 1989, Mr. Serra's sculpture, "Tilted Arc," was dismantled and removed from its site at the Federal Plaza in New York City, New York. "Tilted Arc" was specifically created for this sight and its removal from this location resulted in the work of art's destruction; no relocation was possible.

2. See *Serra v. United States Gen. Serv. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988) (the sculpture was considered government property and thus its fate was within the government's control).

3. Brief for Appellee (edited version), reprinted in RICHARD SERRA'S *TILTED ARC* 253 (C. Weyergraf-Serra & M. Buskirk eds. 1988).

4. See Note, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435 (1990).



fused to join the Berne Copyright Convention, the first multilateral copyright treaty, now ratified by seventy-eight countries.<sup>5</sup> The American refusal was based on the fact that the Berne Convention grants moral rights to authors. Such a policy was—and is—incompatible with United States Copyright law, which recognizes only economic rights. Although ten states<sup>6</sup> have enacted some form of moral rights legislation, federal copyright laws tend to prevail and those are still wholly economic in their motivation. Indeed, the recent pressure for the United States to agree—at least in part—to the terms of the Berne Convention—came only as a result of a dramatic increase in the international piracy of American records and films.

In September, 1986, Senator Edward M. Kennedy of Massachusetts first introduced a bill called the Visual Artist's Rights Act.<sup>7</sup> This bill attempts to amend federal copyright laws to incorporate some aspects of international moral rights protection. The Kennedy bill would prohibit the intentional distortion, mutilation, or destruction of works of art after they have been sold.<sup>8</sup> Moreover, the act would empower artists to claim authorship,<sup>9</sup> to receive royalties on subsequent sales,<sup>10</sup> and to disclaim their authorship if the work were distorted.<sup>11</sup> This legislation would have prevented Clement Greenberg and the executors of David Smith's estate from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable—unpainted sculptures. Such moral rights legislation would have prevented a Japanese bank in New York from removing and destroying a sculpture by Isamu Noguchi, simply because the bank president did not like it. And such legislation would have prevented the United States government from destroying "Tilted Arc." More importantly, under the proposed bill—still not passed in over two years—the destruction or mutilation of art would be a federal crime.<sup>12</sup>

5. See *infra* notes 12-13 and accompanying text; see also Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407 (1990).

6. See Note, *supra* note 4, at 444.

7. For a reproduction of the proposed billed Kennedy Bill, see *Appendix-Senate Bill S. 1198* (the Kennedy Bill), 14 NOVA L. REV. 451 (1990).

8. *Id.* at 452, §3(a)(3)(B).

9. *Id.* at 452, §3(a)(1)(A).

10. Although this section appeared in the original version of the Kennedy Bill, the current version of this Bill provides for a study of resale royalties in § 9.

11. *Kennedy Bill* at 452, § 3(a)(2).

12. Since the bill was originally prepared, the Kennedy Bill has been



If Senator Kennedy's bill were enacted, it would be a legal acknowledgment that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by United States copyright law is insufficient. The bill recognizes that moral rights are independent from the work as property and these rights supercede—or at least coincide with—any pecuniary interest in the work.<sup>13</sup> Moreover, the bill acknowledges that granting protection to moral rights serves society's interests in maintaining the integrity of its art works and in promoting accurate information about authorship and art.

On March 1, 1989, the Berne Convention Implementation Act<sup>14</sup> became U.S. law.<sup>15</sup> On March 13th, 1989, upon learning that the government had started to dismantle "Tilted Arc," I went before the United States District Court in New York City, seeking a stay for the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case. I expected—as would be the case in other countries that became signatories to the treaty—to be protected by the moral rights clause, which gives an artist the right to object to "any distortion, mutilation or other modification" that is "prejudicial to his honor and reputation," even after his work is sold. I learned, however, that in my case—and others like it—the treaty ratified by Congress is a virtually meaningless piece of paper in that it excludes the key moral rights clause. Those responsible for censorship of the treaty are the powerful lobbies of magazine, newspaper and book publishers. Fearful of losing economic control over authors and faced with the probability of numerous copyright suits, these lobbies pressured Congress into omitting that part of the Berne Convention Implementation Act which provided moral rights protection.<sup>16</sup> Thus, publish-

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amended to provide that such acts would not be a federal crime.

13. See Kennedy Bill, *supra* note 7 at 453, §3.

14. See Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 409 (1990).

15. Last October, both the United States Senate and the House of Representatives passed the Berne Convention Implementation Act of 1988, which made the necessary changes in the United States Copyright Law, 17 U.S.C. §§ 101-914 (1988), for adherence to the Berne Convention. On October 20, 1988, the Berne Convention was ratified, and on October 31, 1988, President Reagan signed into law the copyright amendments, making the United States the 78th member of the Convention. See Goldberg & Bernstein, *Berne, Baby, Berne!*, 7 PTC NEWSLETTER 5 (Winter 1989).

16. The moral rights provision of the Berne Convention states:

*Article 6bis.*



ers can continue to crop photographs, magazines and book publishers can continue to mutilate manuscripts, black and white films can continue to be colorized, and the federal government can continue to destroy art.

A key issue in my case, as in all first amendment cases, was the right of the defendant to curtail free speech based on dislike of the content.<sup>17</sup> Here the court stated that the aesthetic dislike is sufficient reason to destroy a work of art: "To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible."<sup>18</sup>

In his July 2, 1989 article, which appeared in the New York Times, Hilton Kramer asked, "Should public standards of decency and civility be observed in determining which works of art or art events are to be selected for the Government's support?"<sup>19</sup> He answers his rhetorical question with yes, and insinuates that "Tilted Arc" was uncivil comes to the conclusion that it was rightfully destroyed:

What proved to be so bitterly offensive to the community that "Tilted Arc" was commissioned to serve was its total lack of amenity — indeed, its stated goal of provoking the most negative and disruptive response to the site the sculpture dominated with an arrogant disregard for the mental well-being and physical convenience of the people who were obliged to come into contact with

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1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights.

3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

This section of the Berne Convention Implementation Act was not ratified by Congress.

17. Brief for Appellant, *reprinted in* TILTED ARC, *supra* note 3 at 243-45, (for example, counsel analogized the case to Board of Educ. v. Pico, 638 F.2d 404 (2d Cir. 1980), which held that library books could not be removed simply because the board disliked the content of the texts.)

18. Serra, 847 F.2d at 1051.

19. Kramer, *Is Art Above the Laws of Decency?* N.Y. Times, July 2, 1989, § 2, (A1) (insure), at 1, col. 1.



the work in the course of their daily employment.<sup>20</sup>

Kramer goes on to say that it was my wish to "deconstruct and otherwise render uninhabitable the public site the sculpture was designed to occupy."<sup>21</sup>

All of Kramer's statements concerning my intentions and the effect of the sculpture are fabricated so that he can place blame on me for having violated an equally fabricated standard of civility. "Tilted Arc" was not destroyed because the sculpture was uncivil, but because the government wanted to set a precedent in which they could demonstrate their right to censor and destroy speech. What Kramer conveniently sweeps under the rug is the important fact that "Tilted Arc" was a first amendment case, and that the government by destroying "Tilted Arc" violated my right to free speech.

In the same New York Times article, Kramer applauds the Corcoran for having cancelled an exhibition of Mapplethorpe photographs.<sup>22</sup> The photos Kramer objects to are those which, in Kramer's words, render men "as nothing but sexual—which is to say—homosexual objects."<sup>23</sup> Images of this sort, according to Kramer, "cannot be regarded as anything but a violation of public decency."<sup>24</sup> For those reasons, Kramer concludes, the National Endowment for the Arts should not have contributed funds to support their public exhibition.<sup>25</sup> Once again he accused the artist of having violated a public standard, which in Mapplethorpe's case is the standard of decency. The penalty for this violation is the exclusion of his speech from public viewing and the withdrawal of public funds to make the work available to the public.

Kramer's article is part of a larger radical conservative agenda. The initiative Kramer took in the New York Times was called for by Buchanan in May and June in the New York Post and the Washington Times where he announced "a cultural revolution in the 90's as sweeping as the political revolution in the 80's."<sup>26</sup> It's worth quoting Buchanan at length:

20. *Id.* at 7, col 1.

21. *Id.* at 7, col. 6.

22. *Id.* at 7, col. 1.

23. *Id.* at col. 2.

24. *Id.* at col. 3.

25. *Id.* at 7.

26. Buchanan, *Losing the War for America's Culture?* The Wash. Times, May 22, 1989, at D1.



Culture — music, literature, art — is the visible expression of what is within a nation's soul, its deepest values, its cherished beliefs. America's soul simply cannot be so far gone in corruption as the trash and junk filling so many museums and defacing so many buildings would suggest. As with our rivers and lakes, we need to clean up our culture; for it is a well from which we all must drink. Just as poisoned land will yield up poisonous fruit, so a polluted culture, left to fester and stink can destroy a nation's soul . . . We should not subsidize decadence.<sup>27</sup>

Let me quote another leader of a cultural revolution:

It is not only the task of art and artists to communicate, more than that it is their task to form and create, to eradicate the sick and to pave the way for the healthy. Art should not only be good art, art must reflect our national soul. In the end, art can only be good if it means something to the people for which it is made.<sup>28</sup>

What Buchanan called for and what Kramer helped to justify, Senator Jesse Helms brought in front of the Senate. He asked the Senate to accept an amendment that would bar Federal arts funds from being used "to promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion."<sup>29</sup> The Helms amendment was replaced by the supposedly more moderate Yates amendment. Nonetheless, Helms' fundamental diatribe was successful in that the Senate passed an amendment which gives the government the right to judge the content of art.

The Yates amendment, which was approved by the Senate, calls for denying Federal money for art deemed obscene. It is based on a definition of obscenity as given by a 1973 Supreme Court decision in *Miller v. California*.<sup>30</sup> In *Miller*, the Supreme Court prescribed three tests for obscenity: a work must appeal to prurient interests, contain patently offensive portrayals of specific sexual conduct, and lack serious

27. *Id.*

28. Letter from Goebbels to Furtwangler (April 11, 1933), reprinted in H. BRENNER, *DIE KUNSTPOLITIK DES NATIONALSOZIALISMUS* 178-79 (1963).

29. 135 CONG. REC. S12210 (daily ed. Sept. 29, 1989).

30. 413 U.S. 15 (1973).



literary, artistic, political or scientific value.<sup>31</sup> The decision about whether something is obscene is to be made by a local jury, applying community standards. Does that mean that the material in question can be tolerated by one community and another community will criminalize its author? What about Salomon Rushdie?

Conservatives and democrats agree that taxpayers' money should not be spent on art which carries an obscene content. Kramer wants publicly funded art to conform to the standards of decency and civility; Helms does not want the National Endowment for the Arts (NEA) to fund indecency and obscenity; and the democratic majority in the Senate supported an amendment which will enable the government to deny Federal money for art deemed obscene. The basic underlying premise in all these statements, proposals and the amendment is that obscenity can be defined—that there is actually a standard of decency that excludes obscenity. The assumption of a universal standard is presumptuous. There aren't any homogenous standards in a heterogenous society. There is no univocal voice. Whose standards are we talking about? Who dictates these standards?<sup>32</sup>

It seems a rather extreme measure to impose an arbitrary standard of obscenity on the whole of society. Gays, as one group of this heterogenous society, for example, have the right to recognize themselves in any artform or manner they choose. You cannot deny gays their images of sexuality, and you cannot deny public funds to support the public presentation of these images. Gays are a part of this public. Why should heterosexuals impose their standard of "decency" or "obscenity" on homosexuals? The history of art is filled with images of the

31. *Id.* at 24.

32. In early April, 1990, a preview exhibit of Robert Mapplethorpe's photographs opened in Cincinnati, Ohio, at the Contemporary Arts Center amidst great controversy and litigation. The Hamilton County (Ohio) Municipal judge dismissed a lawsuit by the exhibiting arts center seeking a ruling on whether the show was obscene. Subsequently a grand jury indicted the arts center and its director on obscenity charges. *Photos Promote Arts Indictment*, Ft. Lauderdale Sun Sentinel, April 8, 1990, §A, at 3, col. 2. Nonetheless, the controversial photographs, which depict partly nude children and homosexual acts, remained in the exhibit although the arts center did segregate the more controversial photographs. *Id.* A federal judge later barred police from confiscating these photographs from the exhibit. *Judge Bans Confiscation of Art*, Ft. Lauderdale Sun Sentinel, April 19, 1990, §A, at 3, col. 2. United States District Judge Carl Rubin ordered the county and city authorities not to interfere with the exhibition while the obscenity charges were tried in state court.

In June, 1989, the Mapplethorpe exhibit was canceled at the Corcoran Gallery of Art in Washington, D.C.



debasement, torture and rape of women.<sup>33</sup> Is that part of the accepted heterosexual definition of decency? It is obvious that the initiative against obscenity in the arts is not directed against heterosexual indecencies, but that its subtext is homophobia. That is particularly true for Jesse Helms, who makes no effort to hide the fact that part of his political program is based on homophobia: In an earlier amendment Helms wanted to prohibit federal funds from being used for AIDS education; he argued that the government would thereby encourage or condone homosexual acts. He also stated publicly that no matter what issue comes up, if you attack homosexuals, you can't lose.

The position that I am advocating is the same as Floyd Abrams, a noted constitutional lawyer, who stated:

While Congress is legally entitled to withdraw endowment funding, the first amendment does not allow Congress to pick and choose who gets money and who doesn't. You can't punish people who don't adhere to Congress's version of art they like. Even if they want to protect the public, the basic legal reality is that funding cannot exclude constitutionally protected speech.<sup>34</sup>

The argument ought not to be about assumed standards. We should not get involved in line drawing and definitions of decency and obscenity. There is no reason to participate in this fundamentalist discourse. Taxpayers' dollars ought to support all forms of expression as guaranteed by the first amendment. Gays pay taxes. Taxation must include the right to representation. Ideas, images, descriptions of realities which are part of everyday language cannot be forbidden from entering into the discourse of art. All decisions regarding speech ought to be made in a non-discriminatory manner. Government agencies allocating funds for art cannot favor one form of speech over the other. Preferences or opinions, even if shared by a majority, are non-relevant judgments and improper grounds for exclusion. To repeat: If Government only allocates dollars for certain forms of art and not others, the Government abolishes the first amendment. If anything, the first amendment protects the diversity of speech. Government cannot exclude, because to exclude is to censor.

Kramer, as well as Helms and Yates, argued that the introduction

33. See, e.g., the French Baroque artist Nicholas Poussin's *The Rape of the Sabine Women*.

34. Glueck, *A Congressman Confronts a Hostile Art World*, N.Y. Times, Sept. 19, 1989, § 2, at 1.



of obscenity clauses into the NEA funding guidelines was not an attempt at censorship, because there was no effort to prevent publication or distribution of obscene material. Instead, they argued that they were just barring the use of taxpayers' money for such projects. Taxpayers' money ought to be spent to protect the standards of the Constitution and not to protect bogus standards of decency and civility.

Previously the NEA panels were required only to recognize "artistic and cultural significance" and "professional excellence." Now, the head of the NEA must add to these intentionally and exclusively art related criteria the politically charged criteria of obscenity. I question that obscenity is a matter for the judicial system, but I am certain that it is not for the NEA and politicians to determine. The political independence of the NEA does not exist any longer, and there is no doubt that it will erode even further once the commission that was instituted by the Senate conference committee begins to review the NEA's grant-making procedure and determine whether there should be new standards, other than the new obscenity standard which has been forced upon the NEA already. The twelve member commission which will review the NEA guidelines will be a purely political commission. It will have 4 members appointed by the speaker of the House, 4 by the president pro tempore of the Senate, and 4 by the President.

It is obvious that the Mapplethorpe case set in motion for the NEA what the "Tilted Arc" case set in motion for the GSA. The "Tilted Arc" case was used to fundamentally change the guidelines of the GSA's art-in-architecture program. The peer panel selection process was weakened because every panel will now select under community pressures, or will try to avoid community protest. The contract between the artist and the GSA was changed. The new guidelines now overtly favors the government, which can cancel the contract at any stage of the planning process, and it excludes the realization of site specific projects in that it explicitly states that the art works commissioned by the GSA can be removed from their federal sites at any time.

Other than censorship measures which were incorporated into the guidelines of federal art agencies, the cultural revolution has had yet another effect. It has now also co-opted the American flag.<sup>35</sup> The Senate has approved legislation intended to outlaw flagburning and other forms of flag defacement. Democratic leaders argued that the new statute was a compromise needed to avert an amendment to the Constitu-

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35. See Comment, *Art and First Amendment Protection in Light of Texas v. Johnson*, 14 NOVA L. REV. 487, 501, n. 117 (1990) and accompanying text.



tion. The amendment to the Constitution was defeated, but the principles of the first amendment have been diluted. The symbol of the American flag has been depoliticized by prohibiting its use as an expression of political protest. The statute turns the flag from a symbol of freedom into a symbol of fear and oppression by limiting its meaning and use. The flag has become a form of political intimidation. The result is mandatory patriotism.

We can expect that the Flag Protection Act<sup>36</sup> will be challenged. Once a federal court rules that the Flag Protection Act is unconstitutional, this question will once again be brought before the United States Supreme Court. If the Court upholds its ruling—that destruction of the flag as a protest is a form of political expression that cannot be restricted—we are threatened by a constitutional amendment. Such an amendment which would ban desecration of the flag—if ratified—would be the sorely restrict the Bill of Rights.



# Regarding Reauthorizing the National Endowment for the Arts: *Statement Before the Senate Subcommittee on Education, Arts, and Humanities\**

Bruce Fein\*\*

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Mr. Chairman and Members of the Subcommittee:

I am grateful for your generous invitation to offer testimony addressing legislation to reauthorize the National Endowment for the Arts. The issues raises a more important component of public policy and democratic philosophy than is frequently apprehended. For as the literary giant Shelley perspicaciously observed: "Poets are the unacknowledged legislators of the world." The reason is that the arts inform the evolution of public opinion; and, in democratic governments like our own, public opinion or conventional wisdom, whether right or wrong, is an irresistible legislative juggernaut.

## I. Artists Enjoy No Constitutional Right To Subsidies

The Constitution does not compel government funding of artistic expression that is protected from censorship under the First Amendment. Writing for the Supreme Court in *Maher v. Roe*, 432 U.S. 464 (1977), Mr. Justice Powell underscored the basic fundamental difference "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Thus, while the Constitution, at present, recognizes a right to an abortion, it does not guarantee a right to have the government subsidize that choice; while the Constitution guarantees a right to private education, it does not insist on government funding of that parental choice; and, while the First Amendment protects the right to acquire and to display Vincent Van Gogh's *Irises*, it does not guarantee the owner a \$55 million government bequest to foster exercise of the right.

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\* This paper was originally presented on April 27, 1990, before the Senate Subcommittee on Education, Arts, and Humanities.

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The Supreme Court reiterated in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), that congressional decisions regarding allocation of public largess, tax exemptions, or deductions are generally shielded from judicial oversight in deference to the policy choices of legislators. A legislature's decision to decline subsidies for the exercise of a fundamental right, whether affecting abortion, free speech, or otherwise, is irreproachable unless animated by an illegitimate constitutional purpose, such as hostility towards a particular idea, *simpliciter*.

In sum, no artist is crowned with a constitutional right either to insist that NEA be reauthorized or to receive an NEA grant if the program is extended and funded.

## II. Does NEA Deserve Reauthorization?

The arguments in favor of prolonging NEA's life seem inconclusive at best in an era of worrisome budget deficits. Artistic expression that enlarges and enriches the marketplace of ideas and the pleasures of the eye and ear deserve encouragement. They can provide insights into human nature, knowledge, and evoke emotions that nurture tolerance, stretch the imagination, and offer psychological repose or exhilaration. These are central ingredients to discovery of individual or collective meaning and joy in life.

But it seems inaccurate to suggest that public subsidies are necessary to great or inspiring art. Sam Johnson, Charles Dickens, Henry David Thoreau, and Van Gogh, for instance, produced artistic masterpieces in impecunious circumstances.

This is not to say that public subsidies preclude works of artistic genius. History is to the contrary. But it does suggest that cultural life in the United States would not be extinguished if an epitaph were written for the NEA.

During its 25 year existence, I am unaware of any NEA funded art that seems a strong candidate to live for the ages ala Shakespeare, Beethoven, Michelangelo, or Rembrandt. NEA should not be condemned for seeming to subsidize a surplus of artistic mediocrity. Identifying artistic greatness is itself a high risk art, not a science, and many great artists have been overlooked by their contemporaries.

NEA, however, seems a miscast institution for discovering artistic virtuosity. Its dominant incentives are political and bureaucratic. The imperative of annual appropriations when combined with the prevailing political ethos means that concern over the ethnicity, gender, and geo-



graphical distribution of grantees will be smuggled into the grant-making process. Further, the tropism of all adult bureaucracies like the NEA is toward the conventional and uncontroversial, not towards Voltairean wit and parody of governing officials. The instinctive supine reaction of NEA to the contretemps over the questionable Serrano and Mapplethorpe exhibitions is illustrative.

In sum, persons especially endowed with an eye or ear for artistic talent are more probably to be discovered as employees or consultants of Sotheby's or Christy's than of NEA. The wisdom of elongating the life of NEA is not intuitively obvious, and seems weak as a matter of logic or experience. But if Congress decides in favor of reauthorization, then concurrent content-based restrictions on NEA grantees is constitutionally and prudentially compelling.

### III. Content-Based Restrictions On NEA Grants

President George Bush and his winsome helmsman at the NEA, David Frohnmayer, have wrong-headedly voiced opposition to the imposition of statutory restrictions on grants awarded by the NEA. An alleged harrowing prospect of content-based government censorship of free speech is the arpeggio of their refrain. But Bush's misunderstanding of the First Amendment is unbecoming a president devoted to educational excellence.

At present, NEA is prohibited from funding obscene art, which raises no substantive constitutional concerns. The United States Supreme Court held in *Miller v. California* (1973) that obscenity enjoys no First Amendment protection. This includes any art that appeals to the prurient interest of the average person; depicts or describes in a patently offensive way, to a local community, sexual organs or acts; and lacks "serious literary, artistic, political, or scientific value."

Unquestionably within the obscene concept are the much discussed crudities of Annie Sprinkle, who, in a performance that masquerades as dance, masturbates on the stage, urinates in a toilet, and invites the audience to rivet on her cervix with a flashlight. There cannot be much doubt that the refusal of NEA to underwrite such degenerate ululations would be perfectly acceptable and raise no legitimate objection of free-speech censorship.

Nor should the stentorian cry of censorship inhibit the NEA from refusing to underwrite child pornography, indecent art or art that is intended to arouse racial or religious bigotry.

In *New York v. Ferber* (1982), the Supreme Court sustained a



state criminal prohibition on the knowing promotion of depictions or performances of children engaged in various sexual acts. Writing for the majority, Justice White explained that government may punish child sexual exhibitions even if they were not obscene under the three-pronged *Miller* test. Several reasons were assembled to support the holding:

- the government interest in safeguarding the physical and psychological well-being of minors is compelling;
- the distribution of child pornography may permanently scar the child's psyche, and creates a commercial incentive for child sexual abuse;
- the First Amendment is wholly compatible with restrictions based on speech content, exemplified by rules curbing indecency, adult bookstores, fighting words, and individual or group libel.

If such reasoning permits the *criminal* punishment of content-based speech aimed at the sexual exploitation of children, then there can be no First Amendment constraint whatsoever upon enacting legislation to prohibit taxpayer monies from subsidizing NEA grantees who would either produce or display child pornography.

And Congress should forbid NEA from funding indecent art. As defined by the Supreme Court in *F.C.C. v. Pacifica Foundation* (1978), indecent compositions or performances are those that appeal to the prurient interest, and describe or depict sexual acts or organs in a patently offensive manner. The *Pacifica* decision upheld broadcast curbs on indecency, at least if children were likely members of the audience. Writing for a plurality, Justice Stevens emphasized that any idea worth hearing could be communicated without employing indecent elocutions. At the very least, an indecency ban should pertain to all art subsidized with taxpayer dollars.

Nor is there justification for NEA subventions of art intended by the author or promoter to vilify or arouse hatred against a group based on race or religion. Certainly nothing in the First Amendment compels the expenditure of federal dollars on such artwork. And if Congress foreclosed NEA from doing so, there is strong justifying Supreme Court authority in *Beauharnais v. Illinois* (1952).

There, a state law made it a crime to defame any "class of citizens, of any race, color, creed or religion [by exposing the class members] to contempt, derision, or obloquy, or which [was] productive of breach of the peace or riots." The statute was invoked to punish the distribution of an incendiary leaflet intended to arouse racial ha-



tred. Speaking for the Court, Justice Felix Frankfurter noted that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." He upheld the group libel law, and tacitly recognized that racially or religiously bigoted maledictions seek to close minds permanently, not to open them to ideas, and seek to exploit the human instinct to find vulnerable scapegoats to vent personal or professional unhappiness.

Indeed, to the extent the Constitution comes into play at all with respect to prejudicial art inspired by race or religious hatreds, it is in the funding by the NEA, not in the denial of funding. In *Reitman v. Mulkey* (1967), and *Norwood v. Harrison* (1973), the Supreme Court denounced as unconstitutional any government action that might induce, encourage, or promote private persons to practice racial discrimination. Thus, NEA funding of reproductions or exhibitions of the racist film *The Birth of a Nation* would flout the Constitution if the intended consequence was an exacerbation of racial prejudice.

Similarly, the NEA would violate constitutional strictures by underwriting art that promoted or denigrated religion. The Supreme Court has repeatedly decreed that the First Amendment's establishment clause forbids use of taxpayer monies to sponsor either religion or non-religion. Thus, the NEA cannot subsidize the authorship or reproduction of a prayer book. Nor could it fund Marilyn Murray O'Hair diatribes against religion, or, most probably, depictions of the crucifix upside down in a bowl of urine.

By placing off-limits to the NEA the funding of obscene art, child pornography, indecent art work, and racially or religiously bigoted matter, Congress does not impose an overly prudish standard. Yet even if some might disagree on this point, a bar against grant awards for any such artwork is of no constitutional concern. To the extent President Bush and David Frohnmayer have suggested otherwise as their ground for opposing legislative constraints on NEA funding, they are hiding behind an invisible shield. There is no First Amendment cover to be found.

The idea that NEA must shun content-based evaluations of grant applications is fatuous. How can evaluations otherwise be sensibly made? NEA employees and consultants should be fired if they decline that task so indispensable to their useful employment.

NEA, of course, regularly does make content-based distinctions in the grant-making process. The General Counsel of NEA has publicly confessed, for instance, that one proposal was denied because it seemed to celebrate animal cruelty. How is that content-inspired decision any



different than one refusing a proposal because it would depict children engaged in sexual acts?

#### IV. Why Congress Should Be Concerned With NEA Subsidized Messages

A nation lives by symbols. When the government funds works of art, it necessarily gives tacit approval to the grantee and the goals he promotes with taxpayer dollars. As Justice Louis D. Brandeis lectured in *Olmstead v. U.S.* (1928), "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

The government, accordingly, must be scrupulously concerned with the messages it sends to the public by underwriting specific types of art. Bigotry, for instance, intended to arouse racial or religious prejudice should receive no government backing. Suppose David Duke, a former member of the Ku Klux Klan and current member of the Louisiana legislature, requested a grant from NEA to paint a picture glorifying post-Reconstruction lynching of "niggers". To make the grant would signify government approval or indifference to racial bigotry, and would inflame race relations throughout the country.

Suppose a neo-Nazi sought NEA funding of a mural applauding the Holocaust. To underwrite the applicant would foster anti-Semitism, and suggest the government would be phlegmatic about private persecution of Jews.

The government is vitally interested in suppressing, not promoting, bigotry because it threatens democracy. Freedom and liberty cannot thrive in communities steeped in racial, ethnic, or religious prejudice, as the German Third Reich verifies.

President Harry Truman explained in 1952 that "Mutual respect and tolerance for the beliefs of others is the secret of the strength of this blessed land." Truman was echoing the sentiments conveyed by President George Washington in writing to a Hebrew Congregation in 1790. He asserted that our Government "gives to bigotry no sanction, and to persecution no assistance."

Exploiting the human instinct towards racial or religious intolerance in times of hardship, personal despair, or low esteem was the evil genius of Adolf Hitler. Writing in *Mein Kampf*, Hitler observed that the art of successful propaganda requires directing speech "more and more toward feeling, and only to a certain extent to so-called reason." That understanding is why many colleges and universities have em-



braced rules of student conduct that discipline stigmatization or vilification for reasons unrelated to individual merit. The University of Michigan, for example, adopted a policy against "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, age, marital status, handicap or Vietnam veteran status," and creates a demeaning educational environment. (On September 7, 1989, a federal district judge enjoined enforcement of the policy because of vagueness.)

It is said that identifying a malignant intent of the author of racially or religiously bigoted speech is unworkable. But proof of intent is a legal commonplace; it is an element of most crimes, libel suits, litigation addressing claims of racial or religious discrimination, and free speech challenges to removal of books from public school libraries. Even a dog knows the difference between the kick and an unwitting bump from his master!

It is said that if racially or bigoted speech is squelched, there will be no stopping point to prevention of genuine free speech. Nonsense! The progress of civilization has been the progress of making refinements and differentiations in the law. As Justice Oliver Wendell Holmes observed, all law depends on matters of degrees "as soon as it is civilized."

To search for a mechanism of public funding of the arts that is devoid of tacit expressions of government approval for the ideas promoted by grantees is a futile quest. In the public mind, the underwriter cannot be separated from the author. The United States Supreme Court has acknowledged that psychological phenomenon in declaring that government funding of religious institutions, even if limited to their secular endeavors, nevertheless frequently created a prohibited appearance of state sponsorship of religion. *See School District of City of Grand Rapids v. Bell*, 473 U.S. 373 (1985).

Artists or scholars who receive government monies can easily exploit the financial tie to boost their ideas. Suppose a grantee authors a work that trumpets the asserted virtues of polygamy. He could thereafter proselytize that his ideas were sponsored and approved by the United States government, and thereby enhance his credibility. Grant recipients who lionized homosexual sodomy or hallucinogenic drugs might similarly claim the government as a votary of their viewpoints to fortify their acceptance in the marketplace.

The purposes of the First Amendment are undisturbed by government scrutiny of the artistic or scholastic ideas it promotes through subventions. Justice Brandeis delineated those purposes as four-fold in



*Whitney v. California*, 247 U.S. 357 (1927) (concurring): to foster the discovery and spread of political truths; to make individuals free to develop their mental faculties; to make them happy by tolerating their ruminations and expressions; and, to avoid the hate and violence precipitated by censorship of ideas.

Curbs on government funding of particular ideological messages does not impair the quest for political truths. They leave undisturbed the right of all artists or scholars to challenge whatever orthodoxies they wish through private means. Indeed, their credibility may be enhanced by an absence of government financial ties. Their ideas may receive more rather than less attention (but not necessarily more acceptance) if denied government subsidies because public curiosity may be aroused by reasons assembled for the decision. Thus, *The Satanic Verses* achieved instant popularity when it ignited thundering opposition and death threats from the Government of Iran.

History proves that government subsidized ideas enjoy no special prowess in a free marketplace of ideas. Who believes the Communist Chinese prevarications regarding the Tiananmen massacre of Chinese student dissidents? Of course, government sponsorship does not necessarily taint credibility if a reputation for truth has been established, as with the BBC and the Voice of America.

The danger that government funded ideas will necessarily enjoy a competitive advantage over their unsubsidized rivals in the United States marketplace is virtually non-existent, especially because the subsidies are minuscule in proportion to the solely privately sourced propagation of ideas.

Neither do government restrictions on underwriting ideas constrict individuals from honing their mental faculties. They remain free to read, write, compose, and to deliberate without intrusion by government. Concededly, more hours might be devoted to these mental tasks and challenges if the government guaranteed a handsome stipend or funds to purchase newspapers, broadcast stations, or movie studios to all who desired to engage in cogitative or communicative endeavors. But the First Amendment has never been thought to require government to underwrite all who pine for greater personal cerebration or success in spreading ideas.

The individual fulfillment and enjoyment that stems from uncurbed ponderings and expositions of ideas is unthreatened by an absence of government funding. And, that absence will not breed the hate and violence associated with censorship because of the sweeping free speech protection in the First Amendment for opposing or unconven-



tional viewpoints, including flag burning.

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Politics and art inevitably intersect. Exemplary are Picasso's "Guernica" and "Peace Dove," Longfellow's "Paul Revere's Ride," Francis Scott Key's "Star Spangled Banner," Charles Dickens' *Oliver Twist* and *A Tale of Two Cities*, William Shakespeare's "Julius Caesar," Thomas Nast's political cartoons, and Pete Seeger's folk songs.

NEA thus should consider how proposed works of art might enrich and strengthen democratic norms and aspirations in awarding grants. That task is comparable to the school teacher who selects readings from Alexander Pope over *Hustler Magazine* in order to promote a mastery of the English language and a penetrating understanding of human nature.

## V. Enforcing NEA Restrictions

NEA is ill-suited to administering statutory funding restrictions because its expertise is art, not law. Thus, Congress should instruct NEA to obtain an affidavit from every grant applicant of an intent to adhere to the restrictions. A grantee who broke the promise would be subject to claims of restitution or damages in cases initiated by a United States Attorney, and be permanently barred from NEA funding. In such proceedings, the federal judiciary would adjudicate the merits, including the question of whether any of the statutory curbs on art were unconstitutional. This enforcement procedure obviates the potential of NEA bureaucratic censorship through misapplication of legal standards or through lead-footed decisionmaking. And, it leaves final authoritative interpretation of the First Amendment where it belongs: the contemplative chambers of the United States Supreme Court.



## "One if by Land, Two if by Sea"

Arthur I. Jacobs\*

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"One if by land, two if by sea." Sorry, Paul! With the advent of Glasnost we may no longer need your warning. Certainly the enemies of the United States are not totally diminished, but perhaps we should look elsewhere for the enemy. As Pogo, the cartoon character, warns, "I have seen the enemy and the enemy is us." While Eastern Europe discovers democracy and playwrights become presidents, Miss Liberty's torch is flickering not so bright. While the fresh breath of democracy sweeps across that heretofore oppressed part of the world, the stale breath of oppression threatens our very basic way of life. This writing is an attempt by the author, with the help of others, to discuss the recent action of Congress and its threatening and shadowy effect on creative America.

The Helms amendment called for the banning of federal funding for:

- (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or
- (2) materials which denigrate the objects or beliefs of the adherents of a particular religion or non-religion; or
- (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.<sup>1</sup>

This amendment would have abolished Arts Endowment funding of any project that might offend anyone in any way. In short, Congress would determine what art is suitable for your community, despite the fact that fifty-eight percent of the American public believes that experts should judge what is art.<sup>2</sup> The amendment rose on the wave of controversy generated by two photography exhibits, including the work of Andres Serrano and Robert Mapplethorpe, which were funded by

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1. 135 CONG. REC. S8806 (Daily ed. July 26, 1989).

2. McGuigan, *When Taxes Pay for Art*, NEWSWEEK, July 3, 1989, at 68.



the National Endowment for the Arts (NEA). As passed by the Senate on voice vote (unrecorded with five members present) in July 1989, the amendment would prohibit spending to produce or disseminate material that is "obscene" or "denigrates" any religion "or nonreligion," or "reviles" anyone on the basis of race, creed, sex, handicap, age, or national origin. The difficulty of defining such suggestive terms as "obscene" and "nonreligion" in a way that would leave the first amendment intact is not apparent at a glance. The sweep of the proposal, which applies, for example, to all museums that receive federal funds, is enormous. It would radically rewrite the necessarily uncertain and wary relationship between the government and the arts.

In the House on September 13, 1989, Rep. Dana Rohrabacher (R-Cal.) asked that House conferees on the Interior Appropriations Bill, which includes funding for NEA, be directed to accept the Helms provision. He and his supporters repeated his earlier threat to characterize a vote on the procedural question of whether to take up his motion as a vote on pornography.<sup>3</sup> Such an assertion is, of course, absurd. The issue was not whether to embrace pornography, but whether to alter a procedure for subsidizing the arts, which seems reasonable to most people and which has served both the government's interest in deciding what it should pay for and the art proponents' interest in maintaining a seemingly independence.

Rep. Sidney Yates (D. Ill.) has a number of well-chosen words such as "incredible hodgepodge of administrative barriers," for instance, and "the start of George Orwell's age"<sup>4</sup> for the proposal by which Senator Jesse Helms would shackle the NEA. Rep. Yates' words fell on willing ears. The House rejected the punitive Helms amendment to the \$10.9 billion appropriation bill.

The Senate was reacting to the Endowment's partial funding of a retrospective show of Robert Mapplethorpe's photographs, some of which depict sadomasochism, and its award of \$15,000 to another photographer, Andres Serrano, whose work included an image of a crucifix submerged in urine.<sup>5</sup> This is confrontational photography, and perhaps cruelly unsettling, but it is hardly a reason to destroy a process carefully legislated to insulate art from politics.

For a peer review process that has worked very well for twenty-four years Mr. Helms would substitute clumsy censorship.

3. H.R. 5633, 101st. Cong., 1st. Sess. (daily ed. Sept. 13, 1989).

4. *Id.*

5. S. 550, 101st. Cong., 1st Sess. (daily ed. July 26, 1989).



Are Lautrec's depictions of prostitutes obscene? Does the way Willem de Kooning paints women denigrate, debase or revile? Should any publicly funded theater planning to produce Shakespeare first blue-pencil the play? Who is to decide what is art and what is pornography?

The only certain judge is time. In the end, the best invariably proclaims itself. In the interim the critics among us take chances and make guesses, and choices are made by peer review. But Senator Helms thinks this way is quicker and surer, and Congress will dictate.<sup>6</sup>

When one combines the sweeping restrictions of the Helms amendment with the blacklisting of the Senate bill, there emerges a thinly-disguised attempt to kill the National Endowments for the Arts and the Humanities (NEH).

The terms of the Helms amendment are so encompassing as to virtually paralyze the agencies in their funding decisions. At bottom, the Endowments are directed not to provide any support for any project that might offend anybody. This obviously would gut both the arts and the humanities program, as well as force the Smithsonian to sharply curtail its programs. As the head of the National Museum of History has pointed out, its display of broadly-held scientific views of evolution would clearly offend some religious beliefs. Funding a study of the history of the state of Israel could offend some followers of Islam. A play about adultery would upset some viewers. A painting which is interpreted as telling women that their place is in the home could offend feminists. A study of the virtues of capitalism could offend a tiny handful of socialist voters. What about a community opera society mounting "Showboat" or "Torch Song Trilogy?" The "Merchant of Venice" was not particularly generous toward Jewish moneylenders; would that be off-limits because it might offend some group? A painting castigating the Ku Klux Klan for participating in lynchings would be forbidden.

According to the National Coalition Against Censorship, various groups have recently taken offense and have tried to ban the following works from publication, distribution to schools and libraries, and from receiving government funds: Anne Frank's *Diary of a Young Girl*, Shakespeare's *Hamlet*, Emily Bronte's *Wuthering Heights*, Stephen Crane's American classic, *The Red Badge of Courage*, *The Autobiography of Benjamin Franklin*, *Oedipus Rex*, Chaucer's *The Miller's Tale*, Edith Wharton's *Ethan Frome*, Ernest Hemingway's *The Old Man and the Sea*, and a story picturing a boy cooking. Attempts have

6. *Denigrate, Debase or Revile*, N.Y. Times, Sept. 19, 1989, at A24, col. 1.



even been made to ban Mickey Mouse and Goldilocks.<sup>7</sup> Such examples demonstrate the inevitable dangers of allowing content to become the yardstick for federal arts support, and underscore why the independence of the Arts Endowment must be safeguarded.

Simply put, the Senate restrictions, if they had passed, would force the Endowments to grind to a halt. One of our nation's most popular and successful programs, which has supported arts and humanities activities from one end of the country to the other, would be destroyed.

Common sense and history teaches that virtually every work of art is going to offend *someone*. Indeed, one simply cannot have a democratic system in which the lowest common denominator of concern to any group is grounds for the government to refuse funding.

The Helms amendment is the very antithesis of Congress' initial charter to NEA and NEH. When these endowments were created in 1965, Congress said that one of the artist's and the humanist's great value to society is the mirror of self examination which they raise so that society can become aware of its shortcomings as well as its strengths. The intent of this act should be the encouragement of free inquiry and expression. The Committee wishes to make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression. Nor is innovation for its own sake to be favored. The standard should be artistic and humanistic excellence.

That viewpoint of Congress has carried forward to today. According to the recent Newsweek poll, only twenty-two percent of the American public polled believe that federal officials should exercise more control over art projects to ensure that they do not offend the public.<sup>8</sup>

The fact is that the NEA process of granting funds is fair and effective. Significantly, this system was endorsed by the Task Force on the Arts and Humanities, appointed by President Reagan in 1981.

A few facts are relevant:

(1) between 1965 and 1988 the NEA for the Arts reviewed approximately 302,000 grant applications and funded approximately 85,000 grants.<sup>9</sup>

(2) the NEA's stewardship monies has been remarkably efficient

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7. See Quade, *Book Censorship: Whose First Amendment Is It?*, A.B.A. J., Aug. 1984, at 32.

8. McGuigan, *supra* note 2, at 68.

9. National Endowment for the Arts, 25th Anniversary Report. (available from the National Endowment for the Arts, Washington, D.C.).



and effective. As the House of Representative's Committee on Appropriations recently recognized:

During its existence, NEA has approved approximately 85,000 grants to arts organizations and to individuals, *of which less than 20 have been charged with violating public interest* because of frivolity, indecency, or ethnic disparagement. In other words, less than one-tenth of one percent of the total number of grants aroused protests.<sup>10</sup>

Significantly, many of these projects were provocative, and the fact that a mere handful were matters of public concern demonstrates that the American public is quite able to handle controversial subject matter.

(3) In 1988 NEA distributed over \$151 million. It considered 17,000 grant applications and made 4,600 grants to art institutions and individual artists.<sup>11</sup>

This shows, I believe, that the NEA system is working most effectively. All applications to the NEA are subject to review by an independent panel of experts who review applications and make grant recommendations. Congress says that these panels shall be composed of "individuals who have exhibited expertise and leadership in the field under review, who broadly represent diverse aesthetic or humanistic perspective, and geographical factors, and who broadly represent cultural diversity."<sup>12</sup>

In 1987, for example, there were ninety-two grant-making panels. They were made up of 678 individual artists, art administrators, state and local art agency professionals, trustees of arts organizations, patrons, and representatives of private philanthropic organizations.<sup>13</sup> They came from across the country and from all disciplines. Since 1965, 3,300 people have served on these panels. Every year there is a constant renewal of these evaluation experts. Between forty percent and sixty percent of all panelists rotate off the panel and are replaced.<sup>14</sup>

The NEA panel approach is replicated in virtually every agency and department of the federal government. Such panels bring impor-

10. 135 CONG. REC. H5635 (daily ed. Sept. 13, 1989) (statement by Rep. Conte).

11. National Endowment for the Arts, 1988 Annual Report.

12. 20 U.S.C.A. § 959(a) (West Supp. 1989).

13. National Endowment for the Arts, 1987 Annual Report.

14. 25th Anniversary Report, *supra* note 9.



tant insight and expertise to the government, particularly in areas where the subject matter involves research and development in the sciences and in the creation and invention in the arts.

The panels bring expert judgment to determine the artistic worth of a particular application. They look for project proposals that "foster excellence, are reflective of exceptional talent, and have significant literary, scholarly, cultural or artistic merit."<sup>15</sup> However, the panels only make recommendations. The Chairman of the Endowment makes the final funding decision, with advice of the presidentially-appointed twenty-six member National Council on the Arts.<sup>16</sup>

This panel review system has been operating successfully over the last twenty-five years. Significantly, President Reagan's Task Force on the Arts and Humanities reaffirmed that the panel review system was a tested principle and concluded that NEA's mandate to consider reliance on the judgments of non-governmental professionals, private sector groups, and individuals is well served by professional review.<sup>17</sup> Without qualification, President Reagan's Task Force endorsed the continuation of this system which leaves decisions about artistic and scholarly merit to the judgment of respected professionals in the arts and the humanities.<sup>18</sup> It concluded that the panel review has proved to be a fair and effective system for grant-making at both Endowments.<sup>19</sup>

The process incorporates procedures not only to insure that artistically worthy projects are funded, but also that projects have community support, and in this way are "accountable" to the community. The artistic expertise of the peer review process is reinforced by the requirement that NEA grants be matched by local funding. Any federal grantee is, in fact, accountable to the local community which must secure matching funding in order to qualify for federal grants. Thus, federal money is not available without a clear indication that the local community will support a particular project. If a local arts organization receives a \$30,000 programming grant, it then has to go back to the community to raise at least \$30,000 in money from local or interested organizations to support that particular program. Specifically, the Institute of Contemporary Art (ICA) in Philadelphia which received a

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15. 20 U.S.C.A. § 959(a) (West Supp. 1989).

16. 20 U.S.C.A. § 955(b) (West Supp. 1989).

17. See *Report to the President*, Presidential Task Force on the Arts and Humanities, Oct. 1981.

18. *Id.*

19. *Id.*



\$30,000 NEA grant, raised \$180,000 privately to finance the show.<sup>20</sup> This matching process insures that, broadly, there is support within the community for a particular program. A local arts organization cannot long endure if it cannot convince members of that local community to provide it with programming funds. Thus, there is continuing control and accountability within the funding process that confirms that NEA-funded programs are within the range of tolerance and acceptance in the local community.

If there are any questions as to the present grant-making procedures, the Senate has provided for a \$100,000 study to review those procedures in the amendment which finally passed. The NEA has said that it welcomes any such study, and the arts community supports that proposal.

Although the final Helms amendment was softened somewhat by the final conference report of the 101st Congress, the spectre remains. Those who offered the Senate amendments are determined to offer them again with renewed vigor.

The two critical Senate amendments—the one blacklisting of the two arts organizations involved in the Mapplethorpe and Serrano exhibits and the Helms amendment—raised serious and severe constitutional problems.

The Senate bill attempted to impose a five year ban on NEA funding for the Southern Center for Contemporary Arts (SECCA) in Winston-Salem, North Carolina, and on the Institute of Contemporary Art in the University of Pennsylvania in Philadelphia.<sup>21</sup> This provision constituted a bill of attainder which is specifically barred by the Constitution of the United States.

An attainder is an act of legislative punishment. When Congress singles out a particular group and imposes a punishment, that action is barred by our Constitution. Under our system of government, Congress writes broad statutes of general applicability; it is the responsibility of the courts or the Executive Branch to determine whether individual organizations comply with those standards. As Justice Stevens wrote earlier this year, "The constitutional prohibitions against . . . bills of attainder reflect a valid concern about the use of the political process to punish . . . past conduct or private citizens."<sup>22</sup> The constitutional bar

20. Telephone interview with Anna Steele, deputy director of the NEA, (August 1989).

21. 135 CONG. REC. S8774 (daily ed. July 26, 1989).

22. *City of Richmond v. J.C. Croson Co.*, 109 S. Ct. 706, 731 (1989) (Stevens,



against bills of attainder was a rejection of the practice in the British Parliament whereby the legislature would directly judge the guilt and punish individuals, either through economic sanctions or more severe criminal sanctions.

Such congressional punishment is exactly what is occurring here. Of all of the thousands of grants that have been made by the NEA, only two organizations have been singled out, because they have mounted exhibitions whose contents are controversial to some legislators. There was no separate regulatory purpose stated either in the Senate Report or on the Senate floor. There can *only* be a punitive intent; as Senator Helms said, "Cutting off funding [for ICA and SECCA] will certainly prevent them from misusing Federal funds for the next 5 years."<sup>23</sup> The Senate singled out two organizations and imposed a most severe penalty—denial of NEA funding for a period of five years, no matter how qualified a particular project might be under NEA standards. This is punishment pure and simple, and under our Constitutional system Congress simply cannot do that.

Significantly, the Supreme Court has dealt with a situation directly parallel to this. In the early 1940s Congress determined that no federal funds could be spent for the salaries of three government employees, because some members of Congress had questions about their past beliefs, associations and loyalty. In *United States v. Lovett*,<sup>24</sup> the United States Supreme Court held that this appropriations restriction, singling out particular individuals, violated the provisions of article I, section 3, clause 9 of the Constitution which forbids the enactment of a bill of attainder. The Court said that "legislative acts, no matter what their form, that apply either to name individuals or to easily ascertainable members of the group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."<sup>25</sup> Further, the Court found that the punishment can come through denial of federal funds. Finally, the Court said that

[t]hose who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment . . . when our

J., concurring).

23. 135 Cong. Rec. S. 8807 (daily ed. July 26, 1989) (statement of Sen. Helms).

24. 328 U.S. 303 (1946).

25. *Id.* at 315-16.



Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they prohibited bills of attainder.<sup>26</sup>

This principle has been reinforced by the Supreme Court in *United States v. Brown*,<sup>27</sup> which said that the Constitution prohibited the English parliamentary practice of punishing without trial "specifically designated persons or groups."<sup>28</sup> These same principles inexorably require the firm conclusion that the Senate blacklisting of the two arts organizations is unconstitutional.

The Helms amendment raised a host of other serious first amendment questions. At the outset, the artistic activities and works funded by NEA and the scholarship and investigation supported by the NEH most clearly fall within the protection of the first amendment. In addition, there can be no doubt that there are constitutional limits imposed on the federal government even though it is engaged in funding activities because the Constitution applies when the Government is spending tax money. It is true that many constitutional free speech cases have arisen in the context of governmental prohibitions on particular conduct; it is also clear that in federal funding the Government has somewhat greater "elbow room" in determining the general types of activities that it may wish to fund and subsidize. Nevertheless, the simple fact that funding is involved does not make the first amendment irrelevant. Thus, if NEH were to fund only works of scholarship that are supportive of a Republican Administration, there is no doubt that such content-based restrictions would be unconstitutional.

Viewed in this way, the Helms amendment raised a series of very serious constitutional concerns:

The Government cannot attach conditions on the expenditure of federal funds that would impinge unreasonably on freedom of speech. In *FCC v. League of Women Voters of Calif.*,<sup>29</sup> the Supreme Court ruled that a congressionally imposed ban on editorializing by public broadcasting stations which received federal funds was a ban on a whole class of speech based on its content.<sup>30</sup> Even worse than a ban on

26. *Id.* at 317, 318.

27. 381 U.S. 437 (1965).

28. *Id.* at 447.

29. 468 U.S. 364 (1984).

30. *Id.* at 402. In a similar manner, a series of cases have held that the discriminatory denial of tax exemptions impermissibly infringed free speech. See *Big Mama*



editorializing would be a provision that allowed for editorializing, but only if the content of editorials supported one political party. In such a case, viewpoint discrimination would be imposed on top of content-based discrimination. This is precisely the nature of the Helms amendment when it specifically prohibits negative speech about a group. Clearly the impact of the Helms amendment, which would severely limit the range of artistic expression, is unreasonably restrictive of freedom of speech. As noted above, the net effect of the Helms amendment is that federally-supported programs simply can't offend anyone. Realistically, that quite obviously devastates the range of artistic options available to the creative community.

The standards of the Helms amendment are all-encompassing and, at the same time, extraordinarily vague.<sup>31</sup> Federal funding is denied to any materials which "denigrate the objects or beliefs" of any religious or non-religious group.<sup>32</sup> This means that no federal funding could be used for any work of art which is critical of any group whatsoever—political, social or commercial.

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*Rag, Inc. v. United States*, 631 F.2d 1030 (D.D.C. 1980); *Speiser v. Randall*, 357 U.S. 513 (1958); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Most recently, the Supreme Court affirmed in *Texas Monthly v. Bullock*, 109 S. Ct. 890 (1989) and *Arkansas Writers' Project Inc. v. Ragland*, 107 S. Ct. 1722 (1987) that the Government cannot make content-based discriminations among publications that it chooses to subsidize with tax dollars. The Supreme Court in the seminal case *Police Dept of Chicago v. Mosley*, 408 U.S. 92 (1972) emphasized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

31. The Supreme Court has established standards of specificity to invalidate laws which are vague. Of critical importance is the idea of notice to those subject to a law regarding its meaning. A law must be struck down if "[m]en of common intelligence must necessarily guess at its meaning." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). Secondly, officials must have explicit guidelines to prevent arbitrary and discriminatory enforcement. *Id.* at 622. Thus, legislation standards are invalid when they "turn on language calling for the exercise of subjective judgment, unaided by objective norms." *NAACP v. Button*, 371 U.S. 415, 466 (1963) (Harlan, J., dissenting). The vagueness standards are "especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning." *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.D.C. 1980). As the Supreme Court noted in *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), vague laws "require [those subject to them] to 'steer far wider of the unlawful zone' . . . by restricting their conduct to that which is unquestionably safe." *Id.* at 372. Free speech may not be so inhibited.

32. 135 CONG. REC. E3195 (daily ed. Sept. 27, 1989) (statement of Hon. Lee



Furthermore, it is not clear what the standard would be. Is any "denigration" adequate? Is it only what a reasonable listener would determine to be improper? What if the criticism is both true and fair, but nonetheless challenges a group? Likewise, the amendments preclude "debasement or reviling" any group.<sup>33</sup> Again, there are no objective standards whatsoever. There is simply no way that one can determine whether an official administering the law is faithful to the congressional mandate. The result will be that virtually anything and everything can be rejected. The same can be said of the prohibition on "indecent material." The Supreme Court in *FCC v. Pacifica Foundation*<sup>34</sup> distinguished "obscene" material from "indecent" but noted that "[p]rurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."<sup>35</sup> The Court recently held in *Sable Communications v. FCC*<sup>36</sup> that "[s]exual expression which is indecent but not obscene is protected by the First Amendment" and can only be restricted in narrow circumstances where it is the only way to satisfy a compelling governmental interest. Here an outright ban on funding "indecent" materials can not meet any such standards.<sup>37</sup>

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33. *Id.* The Supreme Court narrowly upheld a state's power to punish group libel in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). However the Court's decision turned on the fact that there was a strong tendency for the prohibited utterances to cause violence and disorder—a condition not even included in the sweeping language of the Helms amendment. Furthermore, subsequent first amendment decisions have "so washed away the foundations of *Beauharnais* that it could not be considered authoritative." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). *Beauharnais* has even been undercut in the area of sexual speech. In *Hudnut*, the court ruled that an Indianapolis pornography ordinance was unconstitutional because its definition of "pornography" suppressed protected speech when it failed to confine itself to the definitive elements of obscenity as set forth in *Miller v. California*, 413 U.S. 15 (1973). The court further commented that it was not "clear that depicting women as subordinate and sexually explicit ways . . . would fit within the definition of a group libel." *Id.* at 331 n.3.

34. 438 U.S. 726 (1978).

35. *Id.* at 740.

36. *Sable Comm. of Calif., Inc. v. FCC*, 109 S. Ct. 2829 (1989).

37. *Id.* at 2836. Although the Court in *Pacifica* ruled that indecency could be regulated in the broadcast medium, subsequent cases have refused to extend the ruling and have supported the narrowness of the *Pacifica* holding. The courts in *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), and *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983), both refused to extend *Pacifica* to cable television stations, and the Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) refused to extend it to the receipt of mail containing unsolicited advertise-



Finally, at a very minimum, the Helms amendment imposes an indirect system of censorship and prior restraint on the publication of materials fully protected by the first amendment.<sup>38</sup> The standards are so vague and subjective and the impact is so severe as to result in a wholesale chilling of free expression within our society. Such censorship by Congress is clearly "abhorrent to a society built on the tenets of freedom of speech and expression."<sup>39</sup>

It is for Congress to decide whether to have an NEA at all and, if so, how much funding to provide it. It is for Congress to establish mechanisms that permit oversight as to NEA's performance.<sup>40</sup> These are unexceptional propositions.

However, Congress may not pepper its grants with unconstitutional conditions. As the Supreme Court emphasized in *FCC v. League of Women Voters*,<sup>41</sup> when funding by Congress is conditioned on the surrender of first amendment rights, the statutory scheme established by Congress is itself subjected to the strictest constitutional scrutiny.<sup>42</sup>

Nor may Congress reward or punish expression because of its con-

ments for contraceptives. As the Court in *Cruz* explained, indecent speech "does not fall within the confines of the definition of obscenity and is accorded some First Amendment protection." 571 F. Supp. at 130. Thus, ordinances were judged overly broad and facially defective when they "transgress[ed] the carefully crafted limits of the *Miller* 'obscenity' test" by "regulating the distribution of 'indecent' materials." *Id.*

38. "Any system of prior restraints of expression comes . . . bearing a heavy presumption against its constitutional validity." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See Near v. Minnesota*, 283 U.S. 697 (1931). Indeed "prior restraints in speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

39. *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 816 (D.D.C. 1986). In this case Congress reduced funding to the Library of Congress for the amount equal to the Library's cost of reproducing *Playboy* magazine in braille. The Librarian subsequently eliminated the magazine from its braille program based on his interpretation of the House floor debate as intending that the magazine be eliminated because of its sexual orientation. The Court held that this was a content-based decision in violation of the first amendment and ordered the Librarian to resume production and to notify libraries and subscribers. Research partially prepared by Arnold & Porter for the Arts Working Group, Washington D.C.

40. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

41. 468 U.S. 364 (1984).

42. *See Sherbert v. Verner*, 374 U.S. 398, 405 (1963) ("Conditions upon public benefits cannot be sustained, if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms").



tent.<sup>43</sup> Any such action by Congress would not only threaten to impoverish the free marketplace of ideas that our society cherishes, but would strike at the core of the first amendment itself.

These are necessarily general legal observations. More important, and far more difficult, are some thoughts on the appropriate future conduct of NEA and the nature of congressional—or, if you will, taxpayer—oversight of that conduct. How can we reconcile the rights of the artist with the rights of the taxpaying public?

The first answer is this: If Congress is to fund the arts at all, it must take the arts as they are—sometimes less than flattering about American society, sometimes less than approving of recognized and generally held values of American life. To fund artistic expression only if it is “safe” art or “responsible” art is simply to ignore the qualities of art that should lead Congress to fund it in the first place—its freshness of vision, its willingness to look anew at what the rest of us overlook or are incapable of seeing.

Then it follows inexorably from a decision to fund in the first place that some of the funding, duly authorized by a functioning peer review process within NEA itself, will be offensive to some of our fellow citizens. How could it not be so?

It is not, in any event, as if the entirety of the public agrees with every decision made by Congress. Virtually every congressional appropriation, the Supreme Court has observed, will to some extent involve a use of public money to which some taxpayers may object.<sup>44</sup>

Thus, when Congress decides whether to fund the Contras, to provide comprehensive medical care or to raise the salaries of federal officials, a significant minority (sometimes even a majority) of our people will disagree with what they do. This suggests that congressional action, even when it involves congressional funding, cannot and will not please all of the people all of the time.

What is needed, I suggest, is common ground on a basic proposition: That funding will be based upon notions of quality and not of message. Of course, we may differ as to what “quality” means in a particular context but that is precisely why NEA was created in the fashion it was and directed to make just such decisions.<sup>45</sup>

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43. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *Perry v. Sindermann*, 408 U.S. 593 (1972).

44. *Buckley v. Valeo*, 421 U.S. 1, 91-2 (1976).

45. Remarks of Floyd Abrams, before Subcommittee on Post Secondary Education, U. S. House of Representatives, November 15, 1989.



At the same time as NEA directs its attention to choosing art worthy of funding, it is essential that NEA go about its tasks cognizant of the need to fiercely defend and enforce first amendment principles. It is simply unacceptable—no other word will serve—for NEA to fund an exhibition on AIDS and then to withdraw the funding based upon its fear of adverse congressional reaction to a catalogue impolitic enough to criticize members of Congress themselves. Such a decision by NEA may, in the short term, be politically prudent. At the same time it inevitably sends precisely the wrong message to our country's artistic community—that NEA is more concerned about keeping out of trouble with Congress than in presenting hard hitting and powerful, if sometimes disagreeable, exhibitions.

In the end, we must return to the nature of art itself. Unlike *Muzak*, genuine artistic works are not created to soothe us or to make us feel better about ourselves. They may do so but that is not the purpose of the creative process. That process involves a constant willingness to view anew the nature of the human condition, and the results of that process will not always be, could not always be, to everyone's liking or consistent with everyone's sense of propriety.

The difficult task for Congress and NEA is to recognize this and to nonetheless have the fortitude to continue its efforts towards assuring that the arts in this country remain healthy and solvent. This will take some forbearance by Congress and by an NEA understandably disinclined to be attacked or shackled or defunded by Congress. But if the arts are to be funded by Congress—and I, for one, certainly hope they continue to be—the funders should try to remember why they decided to do so in the first place.

To threaten such profoundly established rights of our people with demagoguery does no service to our elected representatives or their constituency. The price of democracy, whether newly discovered or seasoned by two hundred plus years, remains diligence by its citizens. Certainly these threats to our way of life deserve no less a commitment.



# Art, Obscenity and the First Amendment

Judith Bresler\*

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The United States Supreme Court generally provides an accurate reflection of the times. In the late 1980s a political strain of conservatism found voice in such issues as abortion and discriminatory labor practices. This climate may be receptive to limitations on first amendment freedom of expression as witnessed by the recent Mapplethorpe controversy discussed later in this article. Even so, the first amendment does not constitute an unbridled license for freedom of expression. Clearly, an artist may not damage private or public property in the name of artistic expression. Injury to private property would constitute a trespass, enabling the owner to enjoin the activity and recover damages from the artist; damage to public property is usually a crime under the laws of the applicable jurisdiction. Moreover, the laws against obscenity, defamation, invasion of privacy, and speech and conduct likely to cause a breach of the peace provide limits, albeit evolving ones, within which constitutionally protected expression must fall.

Although the Supreme Court has endeavored to deal with the problem, it has never provided a concise definition of obscenity. In 1957, obscenity was held by the Supreme Court to be outside of the protection of the first amendment in *Roth v. United States*.<sup>1</sup> In affirming a conviction of a New York publisher and distributor of books, photographs, and magazines for violating a federal obscenity statute by mailing and advertising obscene materials, the Court attempted to set a standard for defining obscenity—that is, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>2</sup> A final consideration of the allegedly obscene material was whether it had

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1. 354 U.S. 476 (1957). In its holding, the Court rejected the test of *Regina v. Hicklin*, 3 L.R. - Q.B. 360 (1868), which required a judging of the material according to the effect of an isolated excerpt on particularly susceptible persons.

2. *Roth*, 354 U.S. at 489.



"even the slightest redeeming social importance."<sup>3</sup> If it did, the material was constitutionally protected. In a subsequent case,<sup>4</sup> the Court in 1964 held that the standards in *Roth* were national rather than community standards.

In 1966, in *Memoirs v. Massachusetts*,<sup>5</sup> the Attorney General of Massachusetts sought to have the book *Fanny Hill* declared obscene. The Supreme Court refused to do so, holding that the mere risk that a work may be exploited by panderers because of its pervasive treatment of sexual matters is not sufficient to make it obscene. Rather, to establish obscenity, the prosecution had to prove three separate elements: first, the dominant theme of the material taken as a whole appeals to a prurient interest in sex; second, the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and third, the material is utterly without redeeming social value.<sup>6</sup> However, in 1973 the *Memoirs* test was modified substantially, and the national interpretation of standards was overruled.

In *Miller v. California*,<sup>7</sup> the appellant had been convicted under California law for unsolicited mailing of obscene material. He had conducted a mass mailing campaign to advertise the sale of illustrated "adult" material. The Supreme Court noted that the context of review was limited, involving the interest of a state to prohibit the dissemination of obscene material when its distribution carries the "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."<sup>8</sup>

However, nearly eight years after the *Memoirs* decision, the Court, unhappy with the abstract nature of the guidelines established for determining obscenity, decided to try again. Thus, the *Miller* court held that whether a work is adjudged obscene depends on whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and the work, taken as a whole, lacks serious literary, artistic, political, or sci-

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3. *Id.* at 484.

4. *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964).

5. 383 U.S. 413 (1966).

6. *Id.* at 418.

7. 413 U.S. 15 (1973).

8. *Id.* at 19.



entific value.<sup>9</sup>

From those new guidelines emerged two significant revisions in the constitutional standards. First, the Court totally rejected the *Memoirs* requirement that a work must be "utterly without redeeming social value" in order to be obscene.<sup>10</sup> The Court also concluded that the *Memoirs* test too readily permitted an opportunity for the exploitation of obscene works:

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.<sup>11</sup>

Second, the Court promulgated the local community standard guideline, so that a work not considered obscene in one state or county or town may constitutionally be considered obscene in another. The Court opined:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.<sup>12</sup>

The community-standards guideline, however, did not provide the states with free rein to set their own standards of obscenity, nor was that the Court's intention. As the Court made clear, only materials depicting sexual conduct can be limited by obscenity regulation.<sup>13</sup> Although the Court did not attempt to propose specific regulatory guidance for states faced with conforming their obscenity statutes to the *Miller* guidelines, it did provide several examples that could be regulated by state law: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated [and]

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9. *Id.* at 24.

10. *Id.* at 25-26 (quoting *Memoirs*, 383 U.S. at 419).

11. *Id.*

12. *Id.* at 32-33.

13. *Miller*, 413 U.S. at 24.



patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of the genitals."<sup>14</sup>

The Court also made it clear that it considered only hard-core pornography obscene and, therefore, subject to regulation by the states. The Court characterized its holding in *Miller* and its companion cases,<sup>15</sup> known as the *Miller* "quintuplets,"<sup>16</sup> as insuring that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."<sup>17</sup>

The years after *Miller* have found the state courts wrestling with the new standards for determining obscenity. Some of the great difficulties posed for the states have been in attempting to define what constitutes a community for the purposes of ascertaining its moral standards<sup>18</sup> and in drafting a state statute to comply with the Supreme Court's specificity requirement.<sup>19</sup> In addition, courts have grappled with the extent of the discretion permitted communities in determining what is obscene.

In *Jenkins v. Georgia*,<sup>20</sup> the Supreme Court reversed the conviction of the manager of a theater in Albany, Georgia, for showing the film *Carnal Knowledge*, which the trial jury deemed to be obscene. The Supreme Court rejected the state of Georgia's argument that the trial jury's determination of the issue is conclusive. The Court stated:

Even though questions of appeal to the 'prurient interest' or of 'patent offensiveness' are 'essentially questions of fact' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that 'the First Amendment values applicable to the

14. *Id.* at 25.

15. *Miller* had four companion cases: *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, *injunction aff'd*, 231 Ga. 312, 201 S.E.2d 456 (1973), *cert. denied*, 418 U.S. 939 (1974); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-ft. Reels of Super 8MM Film*, 413 U.S. 123 (1973).

16. L. DuBOFF, *THE DESKBOOK OF ART LAW* 258 n.1 (1977 & Supp. 1984).

17. *Miller*, 413 U.S. at 27.

18. *See, e.g.*, *Davison v. State*, 288 So. 2d 483 (Fla. 1973), *stay denied*, 415 U.S. 943 (1974).

19. *See, e.g.*, *Papp v. State*, 281 So. 2d 600 (Fla. 4th Dist. Ct. App. 1973) *vacated*, 298 So. 2d 374 (Fla. 1974).

20. 418 U.S. 153 (1974).



States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary' (citation omitted) but we made it plain that under the holding 'no one will be subject to prosecution for sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct . . . .'<sup>21</sup>

The Court also noted that where hard-core pornography is involved, the states can define obscenity in terms of local community standards either specifically or by referring the issue to the understanding of the local jury. Since, in the Court's view, the motion picture *Carnal Knowledge* did not involve the public depiction of hard-core sexuality for its own sake and for commercial gain, made punishable by *Miller*, the conviction could not stand.<sup>22</sup>

Many of the appellate decisions following *Miller* appear to focus on the method of determining community standards. A number of jurisdictions appear to prefer statistical evidence. For example, it was found that a Texas trial court had erroneously excluded a Harris County theater operator's statistical evidence of community patronage of *Deep Throat* (a film comparable to that shown by the defendant). The evidence was offered as circumstantial evidence of contemporary community standards.<sup>23</sup> Nevertheless, the question of a work's obscenity rests on the local standards of the community in which the work is located or displayed. Thus, a "fine-art multiple"<sup>24</sup> produced in an edition of 200 and marketed nationwide may be subject to as many as 200 local community standards, as well as the federal standard under the Comstock Act<sup>25</sup>, which makes it a criminal act to mail or broadcast obscene material.

The method of marketing a work of art may also be of special significance in determining whether it is obscene. If pandering is present, the work will most likely be considered obscene. Pandering is defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."<sup>26</sup> Thus, it

21. *Id.* at 160.

22. *Id.* at 161.

23. *Keller v. State*, 606 S.W.2d 931 (Tex. Crim. App. 1980). *See also*, *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E. 2d 476 (1980).

24. These are artworks such as lithographs, etchings, engravings, and silkscreens.

25. 18 U.S.C. § 1461 (1988).

26. *Pinkus v. United States*, 436 U.S. 293, 303 (1978).



is conceivable that a jury may determine that a work of art has some slight artistic value, but, nevertheless, find the dealer in whose gallery it is exhibited guilty because the artwork was solely advertised and promoted as sexually provocative.<sup>27</sup>

The Court has restricted the application of obscenity statutes when the materials in question are privately possessed. In *Stanley v. Georgia*,<sup>28</sup> the Court held that although public dissemination of obscene materials may be regulated, states cannot make private possession of those materials a crime.<sup>29</sup> However, the Court did draw narrow boundaries around the zone of privacy afforded by *Stanley*. In *United States v. 12 200-Ft. Reels of Super 8MM Film*,<sup>30</sup> decided at the same time as *Miller*, the Court held that the importation of obscene materials can be regulated even if those materials are intended solely for private use. This case involved the forfeiture of allegedly obscene motion pictures that had been seized at the time of their entry into the United States. By virtue of Court decisions, a gallery open to the public cannot with impunity possess or display obscene works.<sup>31</sup> It is conceivable that the possession of such works in an artist's studio—from which works may be sold—may also be constitutionally unprotected.

Since, in obscenity cases, the Supreme Court considers the rights and the interests of the state and offended viewers, as well as the rights of the speaker, performer or exhibitor works displayed to a captive or unwilling audience are more likely to be deemed constitutionally unprotected than are those not so displayed. In *Close v. Lederle*,<sup>32</sup> decided in 1970, a federal court of appeals held that where there is, in effect, a captive audience, people have a right to protection against "assault upon individual privacy" short of legal obscenity.<sup>33</sup> The plaintiff in the case—the well-known painter Chuck Close, then an art instructor at the University of Massachusetts—exhibited his paintings on the walls of a corridor in the student union. The exhibition, involving clinically explicit nudes, proved to be controversial and was removed after five of the twenty-four days scheduled for its display. The plaintiff, claiming that his constitutional rights were invaded, sought to have the space

27. See, e.g., *Splaun v. California*, 431 U.S. 595, 598 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974); *Ginzberg v. United States*, 383 U.S. 463, 470 (1966).

28. 394 U.S. 557 (1969).

29. *Id.* at 568. See also, *United States v. Reidel*, 402 U.S. 351 (1971).

30. *12 200-ft. Reels*, 413 U.S. at 123.

31. See, e.g., *Slaton*, 413 U.S. at 49; *Orito*, 413 U.S. at 139.

32. 424 F.2d 988 (1st Cir.), cert. denied, 400 U.S. 903 (1970).

33. *Close*, 424 F.2d at 990.



made available for his exhibit for the equivalent of the unexpired period. In dismissing the complaint, the federal appellate court drew an analogy between visual speech and pure speech:

There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper about *Lady Chatterley's Lover*, or in a novel submitted in a creative writing course, take on a very different coloration if they are bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree.<sup>34</sup>

"Freedom of speech," the Court continued, "must recognize, at least within limits, freedom not to listen."<sup>35</sup> Because the paintings were displayed in a passageway regularly used by the public, including children, the Court reasoned that the university officials could consider the primary use of the corridor as a public thoroughfare, with the public, in effect, a captive audience. Therefore, the officials had a right to afford protection against assault on individual privacy.<sup>36</sup>

In a similar vein and citing the decision in *Close*, a Massachusetts federal district court in 1988 upheld a regulation banning nude bathing at a Cape Cod national park.<sup>37</sup> The court held the regulation did not infringe upon the first amendment rights of women to bathe in the nude to protest their exploitation by American society, and noted, "not only is a public beach an unlikely and unnecessary showcase for nude expression, but also nudity there significantly intrudes upon others who did not seek it out and may be offended by it."<sup>38</sup>

In an exhibition of artwork depicting nudity or sexual conduct, consideration should also be given to minors. Works that are not obscene may, nevertheless, be regulated by states to the extent appropri-

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34. *Id.* (citing Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1058 (1969)).

35. *Id.* at 991.

36. *But see* Cohen v. California, 403 U.S. 15, 21 (1971), which has since limited the application of the captive-audience theory to those instances in which "substantial privacy interests are being invaded in an essentially intolerable manner." However, as subsequently noted in *Sefick v. City of Chicago*, 485 F. Supp. 644, 651 (N.D. Ill. 1979), the "facts of *Close* are such that the action of the university might well be justifiable even in light of *Cohen*."

37. *Craft v. Hodel*, 683 F. Supp. 289 (D. Mass. 1988).

38. *Id.* at 294.



ate to protect minors.<sup>39</sup> A New York statute, for example, prohibits the sale to a minor of any artwork depicting nudity, sexual conduct or sadomasochistic abuse.<sup>40</sup>

The denouement of the recent Mapplethorpe controversy took its cue from the Supreme Court's guidelines for obscenity as found in *Miller*. In the Mapplethorpe matter, a storm of protest arose throughout much of Congress in reaction to exhibitions of works by two provocative photographers. These exhibitions were presented by two federally funded groups. The two arts organizations—the Institute for Contemporary Art at the University of Pennsylvania and the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina—subsidized, in part, by the National Endowment for the Arts, sponsored respective photograph exhibitions of the work of Robert Mapplethorpe and Andres Serrano. The work of Mapplethorpe, which included homoerotic scenes, and the work of Serrano, which included a depiction of a plastic crucifix submerged in the artist's urine, were found by some members of Congress to be sacrilegious or indecent. Indeed, Senator Jesse Helms proposed modifying an Interior Department appropriations bill to include restrictions that would bar federal arts funds from being used to “promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion.”<sup>41</sup> The Helms measure would have also barred grants for artwork that “denigrates, debases or reviles a person, group or class of citizen on the basis of race, creed, sex, handicap, age, or national origin.”<sup>42</sup> Although the North Carolina Republican's amendment was originally adopted by the Senate in July of 1989, it was later rejected by Congress in September, 1989.<sup>43</sup>

The following month the Senate approved and sent a proposed bill to the President to sign into law which, while less stringent than the proposed Helms measure, nevertheless restricted, for the first time in the United States, federal arts financing on the basis of content.<sup>44</sup>

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39. *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968).

40. N.Y. PENAL LAW § 235.21 (McKinney 1980 & Supp. 1989).

41. *See* N.Y. Times, July 26, 1989, § 1, at 1 (city ed.).

42. *Id.*

43. *See* N.Y. Times, Oct. 8, 1989, § 1, at 27.



Under the new law, federal monies are barred for:

materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sado-masochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.<sup>45</sup>

Additionally the new legislation requires that the chairman of the National Endowment for the Arts and a council review all art financed through the hundreds of subgrants made each year—and that a commission be established to review the Endowment's grant-making procedures and standards. In determining whether the standards require change, the criteria to be considered include the *Miller* guidelines for determining obscenity.<sup>46</sup>

As noted, passage of the new legislation marks the first time Congress placed a limitation on arts grants on the basis of content. The irony of such limitation becomes breathtaking when viewed against the backdrop of change in the conception of censorship in certain other nations. In the Soviet Union, shifts in what is permitted to be seen, particularly on the stage and in film, are apparently striking enough to warrant the phrase "full-frontal glasnost."<sup>47</sup> In France, where there is little private patronage of the arts and where the Ministry of Culture and Communication is accordingly the "cultural monarch," there is virtually no censorship at all, and the French Parliament generally approves appropriations for the arts without scrutinizing the fine print.<sup>48</sup> In West Germany, to cite still another example, the federal government, largely in reaction to the atrocious misuse of the arts under Nazi rule, has little voice in how its appropriations are used. There, neither politicians nor churches involve themselves in the arts. It is their belief that the "labeling of a work as pornographic or casting a judgment of it as non-art inevitably backfires."<sup>49</sup>

This growing tendency of governments abroad to recognize and even subsidize as art an increasingly diverse array of expression forces

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45. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 304 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 741.

46. *Id.*

47. See N.Y. Times, Aug. 13, 1989, § 2, at 1.

48. *Id.* at 6.



the compelling question: Will the new legislation in the United States, with all its restrictions, quell some of creativity's greatest impulses and harbinger the stillbirth, rather than the realization, of what might have been some of American's finest art?

### Author's Note:

At the time this article went to print, the new restrictive arts legislation had already been tested. While it did not, in this case, prevail, it caused a skirmish between the communities of art and politics and made headlines for weeks throwing into sharp focus the issue of whether the United States Government would continue to provide financial support to art without legislative intervention. In this particular situation, the National Endowment for the Arts, as a result of the new law, withdrew its sponsorship on November 8, 1989, of a New York City art show about AIDS entitled, *Witnesses: Against Our Vanishing*. John E. Frohnmayer, the new chairman of the NEA, in suspending a \$10,000 grant to Artists Space, the nonprofit gallery in the TriBeCa section of Manhattan which commenced its exhibition of the show Thursday, November 16, 1989, originally gave as his reason for the Endowment's withdrawal of support the fact that the exhibition was making a political statement in violation of the spirit, if not the letter, of the law.<sup>50</sup> The exhibition includes images of homosexual acts, and the show's catalogue contains derogatory comments about such public figures as John Cardinal O'Connor, the Roman Catholic Archbishop of New York Representative William E. Dannemeyer, Republican of California, and Senator Jesse Helms, Republican of North Carolina.

When, in the ensuing days, Mr. Frohnmayer's decision evoked a storm of criticism from public figures in the arts as well as lawyers, artists, arts advocates, and educators,<sup>51</sup> he subsequently asserted that his decision to withdraw support was, rather than on any political rationale, based on "an erosion of the artistic focus" in the show.<sup>52</sup> Under continuing heavy protest, including a decision by Leonard Bernstein, the composer and conductor, to refuse the National Medal of Arts award,<sup>53</sup> the NEA chairman on November 16 reversed himself and agreed to restore the \$10,000 grant to the gallery for the exhibi-

50. See N.Y. Times, Nov. 9, 1989, § 1, at 1 (city ed.).

51. See N.Y. Times, Nov. 14, 1989, § 3, at 20 (city ed.).

52. *Id.*

53. See N.Y. Times, Nov. 16, 1989, § 3, at 26 (city ed.).



tion—provided that the monies not be used to pay for the show's catalogue.<sup>54</sup>

54. See N.Y. Times, Nov. 17, 1989, § 1, at 1 (city ed.).

This article only touches on some of the first amendment issues the artist, dealer, and collector must confront. For a detailed analysis of these and other first amendment issues, see Lerner & Bresler, ART LAW—THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS ch. 7 (1989).



## Art Funding: The Fight over Sex, Money and Power\*

Nicols Fox\*\*

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In February 1989, the attention of the Rev. Donald Wildmon was directed to a photograph in an exhibition in Richmond, Virginia, which had closed a month earlier.<sup>1</sup> The photograph was of a crucifix seen through an amber haze. That amber haze was urine—the artist's own urine—and the work was entitled "Piss Christ." The artist who created the work was Andres Serrano and he had received a fellowship of \$15,000 through the Awards in the Visual Arts Program. Some of that money had come from the federal government through the National Endowment for the Arts.<sup>2</sup>

Rev. Wildmon, hearing of the photograph, began urging the readers of his American Family Association newsletter to write letters to Congress protesting the use of tax dollars to support such blasphemy, and write they did.<sup>3</sup> And Congress reacted—with vehemence. Senators rose to the floor and in floods of peroration denounced the work as garbage and blasphemous. Senator Alfonse M. D'Amato, a Republican senator from New York, in an emotional and hotly worded speech, said the work was a deplorable, despicable display of vulgarity.<sup>4</sup> Twenty-two senators signed a letter expressing their outrage and suggested in the strongest terms that the procedures used by the endowment to award and support artists should be reformed.<sup>5</sup>

None of its critics in Congress challenged the right of the work to exist, merely its right to be funded with public money. The funding in

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1. Atkins, *Conscience*, The Village Voice, May 30, 1989, at 87.

2. Buchanan, *Losing the War for America's Culture?* The Wash. Times, May 22, 1989, at D1.

3. Atkins, *supra* note 1, at 87.

4. Honan, *Congressional Anger Threatens Arts Endowment's Budget*, N.Y. Times, June 20, 1989, at C15, col. 1.

5. *Id.* at C20, col. 1.



question was that received by the Southeastern Center for Contemporary Art (SECCA). In its most recent funding year it was granted \$75,000 for the Awards in the Visual Arts Program (AVA), now entering its eighth year. The AVA program received funding—almost twice as much—from two other sources as well: The Equitable Foundation and the Rockefeller Foundation.<sup>6</sup>

Ironically, AVA is carefully designed, as many endowment programs, to ensure broad geographical representation and to identify outstanding artists. Each year 500 artists are nominated by 100 arts professionals. A jury of five arts professionals chosen by SECCA selects ten artists from the pool of 500. Each receives \$15,000, as well as the opportunity to exhibit. The artist then selects the work to be shown in the exhibition.<sup>7</sup>

This brouhaha in Congress over the Serrano photograph appeared to be a spontaneous outburst of emotion; but the endowment had known trouble was brewing for a long time. In fact, the endowment has been in trouble almost from the moment of its birth twenty-five years ago.

Government funding for the arts began in 1964 with the appointment of a Federal Advisory Commission on the Arts. The next year saw the creation of the arts and humanities endowments by an act of Congress. The art endowment was to have a chairman and a National Council on the Arts, a presidential-appointed board of twenty-six art experts who would advise the chairman on the distribution of funds. Principles embodied in that act include a commitment to excellence, professionalism, independence, decentralization, and, from Congress, non-denomination and non-intervention. Says Michael Straight, who served as deputy chairman of the endowment for nine years, "The Act makes it plain that the council is not to be a means of injecting partisan political considerations into the endowment's decisions."<sup>8</sup>

Clearly concerned about the possibility of censorship, Section 4(c) of the Act stated: "In the administration of this Act, no department, agency, officer or employee of the United States shall exercise any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-federal agency, institution, organization or association."<sup>9</sup> Thus,

6. Atkins, *supra* note 1, at 87.

7. *Id.*

8. M. S. Straight, *THE ARTS AND HUMANITIES ENDOWMENTS FOR AN EAGLE'S NEST* 26 (1979).

9. 135 CONG. REC. S12107-01 (daily ed. Dec. 26, 1989).



SECCA was perfectly within its rights to make its own decisions as to how it awarded the money it received from the endowment.

But this disagreement is not necessarily about money; or if it is about money, it is not especially about tax-payer money. It is about money as power.

There has never been total agreement in Congress that the arts should be funded in America. At the time of the birth of the endowment, not only was public support for federal funding of the arts at a high level, according to a Gallup poll, but the arts were in dire need of that support. New operas were not being performed because of the enormous costs of production. Symphonies had problems paying their musicians living wages. Museums were finding it difficult to raise money for such unsexy items as conservation of their collections, and artist's spaces as we know them today simply did not exist.

The endowment was created out of a simple desire to support and encourage culture and creativity in America at a time when enthusiasm was high but funds were low, and we were following on the heels of—in fact, several laps behind—most European countries.

But despite its legislative protection, the endowment has had to perform a tricky balancing act trying to maintain its commitment to art and, at the same time, to please an occasionally skeptical Congress. From the beginning, the endowment foresaw the scrutiny its funding would receive from Congress and the pressures that would be brought to bear on its procedures. Those who established the process for distributing funds devised elaborate systems specifically designed to prevent government officials from dominating decision making and to turn those responsibilities over to acknowledged and respected experts in the field—with the obvious benefit of being able to point the finger elsewhere when the plan backfired. Funding old art would have been easy—funding new art would be as difficult as making a good living at the tracks, and as risky. But even as the endowment understood that art funding—especially funding for the visual and literary arts—came shrink-wrapped with danger, it also acknowledged that to censor—or in any way impose the standards of the government upon what was being sponsored—would render the entire enterprise pointless. Government art—art officially sanctioned and inoffensive, totally apolitical and capable of pleasing all those voters who make a practice of writing their representatives—is virtually guaranteed to be the art that history quickly forgets. The endowment knew that by attempting the essentially dangerous undertaking of supporting and encouraging the best the arts had to offer, it was courting trouble, and trouble came.



Explaining its grants has not always been easy. In its infancy, the endowment funded George Plimpton's American Literary Anthology which paid \$500 for a one word poem: "L-i-g-h-g-h-t."<sup>10</sup> When "Fear of Flying" was published, Erica Jong, who had received a \$5,000 fellowship, dutifully thanked the endowment on the first page. The next page listed the title of a chapter "En Route to the Congress of Dreams, or The Zipless Fuck."<sup>11</sup> More recently the endowment has had to defend homoerotic poetry, an exhibition of pornography entitled "The Second Coming" and now Mapplethorpe and Serrano. Representative Sidney Yates has said, "In 85,000 grants, less than twenty have been found to be objectionable. That's one-quarter of one-tenth of a percent. Actually, the endowment has done kind of a remarkable job."<sup>12</sup>

The endowment has done a remarkable job, but not for that reason. Actually, an arts endowment that had only twenty controversial grants in 85,000 would have some very serious explaining to do. New art is not and has never been safe. In fact, if Congress took it upon itself to examine minutely everything the endowment funded it would undoubtedly find many opportunities to complain. Strict constitutionalists, for example, might worry that the District of Columbia Commission on the Arts, which receives money from the national endowment, sponsors thirty or more gospel groups. Separation of church and state is pretty difficult in a field where religion has been an inspiration to art for much of its history.

Thus, for all of its twenty-five years, the endowment has been operating by a kind of slight-of-hand, understanding its own vulnerability and intent upon keeping a high enough profile to get funding and a low enough one to avoid detection.

Last summer the endowment was especially vulnerable. In keeping with an extreme conservative position which historically views any funding activity of the federal government beyond defense with considerable suspicion, Reagan began his first term in office by calling for a fifty percent cut and eventual de-funding of the endowment. Only when he discovered that many of art's strongest supporters were also major Republican contributors did he back off. But for eight years the budget of the endowment has stayed at virtually the same level—around \$160 million a year. It has held its ground—nothing more.<sup>13</sup>

10. STRAIGHT, *supra* note 8, at 28.

11. *Id.*

12. Honan, *supra* note 4, at C15, col. 3.

13. Honan, *Arts Dollars: Pinched as Never Before*, N.Y. Times, May 28, 1989, 74.



When the situation began to heat up in early June of 1989, the endowment was without a chairman, its appropriation for 1990 had yet to be voted on and its once-every-five-year reauthorization process was about to begin—a stage at which its empowering legislation could be rewritten. The endowment expected to be challenged—potentially embarrassing works have traditionally come to light around budget or reauthorization time—but, as Livingston Biddle, chairman of the endowment during the Carter Administration said, “A confluence of factors has made this the worst firestorm for the endowment in the twenty-five years of its existence.”<sup>14</sup>

However, it is not been simply the endowment which has been at stake, but contemporary American culture. Teaming up, New York City Tribune art critic James Cooper and conservative columnist Patrick Buchanan used recent exhibitions as a hook from which to hang federal funding for the arts in particular, and leftist Modernist culture in general. Buchanan said,

The downhill slide of American culture gathers momentum. . . . America's art and culture are more and more, openly anti-Christian, anti-American, nihilistic. . . . While the right has been busy winning primaries and elections, cutting taxes, funding anti-communist guerrillas abroad, the left has been quietly seizing all the commanding heights of American art and culture.<sup>15</sup>

He quotes critic Cooper:

Conservatives and the religious community that comprise the vast Middle American population should actively support those artists that advocate the same values and ideas as they do. They should also choose to withdraw support and funding from the Modernist culture they profess to despise. In short, they should do what the liberals did long ago—capture the culture.<sup>16</sup>

And Buchanan added, “Surely the place to begin is with the National Endowment for the Arts.”<sup>17</sup>

In the May 25th, 1989, issue of the *Village Voice*, writer Robert

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§ 2, at 1, col 1.

14. Honan, *supra* note 4, at C1.

15. Buchanan, *supra* note 2, at D1, col. 1.

16. *Id.* at D4.

17. *Id.*



Atkins said, "An outright assault on the independence of the Endowment itself may be in the making."<sup>18</sup> Indeed, he has been proven right.

Clearly the work of Andres Serrano was tailor-made for the show that was about to begin. Not only was a religious symbol immersed in a substance considered foul, the title of the work was extremely provocative. The sacred and the profane were juxtaposed in such a way as to both shock and surprise. Who would have thought it?

But no one asked Mr. Serrano what he meant with this work. As critic Jane Addams Allan pointed out, even the inquisition invited Veronese to testify.<sup>19</sup> Serrano, a well-established and widely exhibited artist who previously won an artist fellowship from the National Endowment for the Arts in 1986, says his work is an ongoing investigation of such bodily fluids as milk, blood and urine.<sup>20</sup> Marcia Tucker, director of the New Museum of Contemporary Art, who nominated Serrano for the AVA, says that his use of bodily fluids is discomforting because it indicates the extent to which we are unable to deal with our humanity. That is no doubt, she says, part of the power of his work—"to render the sacred secular and vice versa."<sup>21</sup> Serrano himself says very little; he prefers to leave the interpretation to others. But previously he said, "Complex and unresolved feelings about my own Catholic upbringing inform this work which helps me to redefine and personalize my relationship with God. For me, art is a moral and spiritual obligation that cuts across all manner of pretense and speaks directly to the soul."<sup>22</sup> A clear interpretation of the work is to see it as a protest against the profiteering of sacred imagery—to say, in effect, our society has submerged the Christ figure in urine. In fact, Serrano's work is just the latest in a religion, Protestantism, built upon iconoclastic expressions. It was provocative beyond the artist's wildest dreams. And it may be the Christian symbol of our time. But that will be for others to judge. What is very certain is that Jesus Christ is perfectly capable of defending himself and does not need the assistance of Congress.

But the outrage over Serrano was not an isolated incident. It had to be seen in context. The previous autumn a work showing the late Mayor Washington of Chicago in women's lingerie had been forcibly

18. Atkins, *supra* note 1, at 87.

19. Interview with Jane Addams Allan, former art critic for the Washington Times, in Washington, D.C. (October 15, 1989).

20. Serrano issued this statement on April 24, 1989.

21. *Id.*

22. Statement, *supra* note 20.



removed by two irate aldermen from the gallery where it hung. Last winter a cartoon of president elect George Bush, was removed from a print exhibition at the IMS.<sup>23</sup> Later, in Chicago, a work incorporating an American flag on the floor where it could be walked on was challenged.<sup>24</sup> An exhibition at a community art center on the Eastern Shore of Maryland was, a few months later, termed satanic and was protested. Two works, one showing exposed male genitalia, were removed from an airport exhibition in Richmond, Virginia.<sup>25</sup> This summer "about an inch" was trimmed off the exposed penis of a sculpture in Arlington, Virginia; and an exhibition of photographs by Robert Mapplethorpe, some of an explicit homosexual and sadomasochistic nature, was cancelled by the Corcoran Gallery of Art in mid-June.<sup>26</sup> In all, it was a year of censorship. Our country, as if rediscovering her puritanical roots, was lifting her skirts and with a squeal of indignation saying, "No sex please, we're American."

Throughout this period, a firestorm has raged in Congress. In both houses of Congress, members have risen to their feet to complain about the federal funding of works termed blasphemous and obscene. If the cancellation of the Corcoran exhibition had not fully focused the attention of the art community on what was happening in this, the land of free expression, an amendment to the appropriations bill which would fund the national endowment for the next year, proposed by Senator Jesse Helms, did the trick. Already the house had proposed deducting \$45,000 from the endowment budget, the combined amounts that had gone to support the Mapplethorpe exhibition and the AVA awards which selected Serrano. The Senate had matched them and raised them two by switching money away from visual arts and by proposing a five-year ban on funding to SECCA and to the Institute of Contemporary Art in Philadelphia. Then, late one evening, Senator Helms introduced an amendment which passed—and one which would prohibit the funding of obscene or indecent art or art which offended on the basis of religion or ethnic origin.

It was simply a matter of seeing that tax dollars were not spent on obscene, indecent or offensive art, said Helms and those who supported

23. Swisher, *Protest at IMF Print Show*, Wash. Post, Dec. 10, 1988, at G1, col. 5.

24. Vance, *The War on Culture*, ART IN AMERICA, Sept. 1989, at 39.

25. Baltimore Sun, May 1, 1989.

26. Kastor, *Corcoran Cancels Photo Exhibit*, Wash. Post, June 13, 1989, at C1, col. 5.



him. A simple proposition, perhaps, and one most people would agree with—seemingly basic to what we stand for as decent, upright, taxpaying Americans. Yet something was wrong. In the end, despite threats to label in forthcoming elections those who failed to vote for the amendment as favoring tax supported obscenity, a compromise was reached. Congress agreed not to try to determine what offends on the basis of religion or national or ethnic origin, but simply to avoid the pornographic—and to do so by applying a 1973 Supreme Court ruling which would allow even blatantly offensive works to be redeemed if they demonstrated literary or artistic merit.<sup>27</sup> Despite Mr. Helms' cries of triumph at getting the attention of the nation and having sent a warning shot across the bow of the endowment, clearly the winner was freedom of expression and the right of art to do what it feels it needs to do. . . or was it? No one could be sure. The answer would come from the National Endowment as it decided what course it would take. Members of the arts community watched and waited. They would not have to wait long. In November, the freshly confirmed chairman of the National Endowment, John Frohnmayer, announced that he was withdrawing \$10,000 that had been granted the New York gallery Artist's Space, because the exhibition it planned on AIDS art had changed and was now too "political" to receive federal funding.<sup>28</sup> The NEA is entitled to withdraw funding, he explained, when the original terms of the grant have not been followed.

The problem, however, seemed not to be so much with the art—although neither Frohnmayer nor Susan Wyatt, the gallery's director, would describe precisely the contents of the exhibition—as with an essay in the exhibition catalogue by artist David Worjarnowicz. According to Wyatt, it contains strong language. It is highly critical both of Senator Jesse Helms (R-North Carolina) who led the fight in Congress, and Cardinal John O'Connor of New York who is opposed to condom use and is unpopular with AIDS activists.<sup>29</sup>

Wyatt herself brought the exhibition to the attention of the endowment, pointing out its controversial nature and hoping to create an opportunity for discussion on the subject of censorship. Although she concedes the exhibition has evolved, she maintained that it focused was AIDS and not the controversy over art funding. Wyatt said, "I have no problem with anything in the show or in the catalogue. I didn't want

27. See *Miller v. California*, 413 U.S. 15 (1973).

28. Kaster, *supra* note 26.

29. *Isaacson*, *supra* note 26, at 114; Wyatt, Director of Artists Space, Nov. 12, 1989.



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this work distorted and twisted and used as a tool."<sup>30</sup>

The arts community was shocked and dismayed. Not only did Frohnmayer appear to be eager to please Mr. Helms—and indeed, Mr. Helms was so pleased at Frohnmayer's "good faith effort to live up to the commitment he made to Helms" that he decided "not to stir the pot"—but he went far, far beyond anything Mr. Helms had envisioned.<sup>31</sup> The legislation mentioned nothing about political art being unfundable. Indeed, political was listed right along with artistic and scientific as one of the qualities which might redeem even obscenity.

Two days later John Frohnmayer corrected himself. He had meant to say that there had been an "erosion of the artistic vision" of the exhibition.<sup>32</sup> But his slip hurt, and it was a slip. Politics has been a standard used to deny grants for some time. It has just never been admitted before, and it made clear what many had suspected all along. While Senator Helms may want to avoid having the public offended, Frohnmayer simply wants to avoid having the endowment de-funded.

Says Representative Pat Williams, chairman of the House subcommittee which is in the process of reauthorizing the NEA's legislation, the move was a further "bruising of freedom of artistic expression," by extending the limitations beyond pornography to "anything which is seen as affecting political discourse."<sup>33</sup> If [the cancellation,] he said, "was because the work is political discourse then he made a terrible decision. If it was because the nature of the work had changed from the time of the grant approval, then there is doubt as to his political judgment. Either way he has made a mistake."<sup>34</sup>

If the endowment was in danger before, it was now truly in danger from its own clients, so to speak. Word was spreading that some artists who made up the peer panels that award the grants planned to boycott the endowment. Demonstrations and protests were being organized. One group planned to erect a "Berlin Wall" in front of endowment offices. Leonard Bernstein announced that he would not accept the National Award for Art. Artist Robert Motherwell offered Artist's Space

30. *Id.*

31. Honan, *Arts Endowment Withdraws Grant for AIDS Show*, N.Y. Times, Nov. 9, 1989, at A1, col. 2.

32. Kaster, *NEA Chief Defends Grant Cut*, Wash. Post, Nov. 11, 1989, at C1, col. 5.

33. Interview with Rep. Pat Williams (D-Mont.), chairman of the House subcommittee which is writing reauthorization legislation and is presently holding hearings to prepare for this legislation (Nov. 12, 1989).

34. *Id.*



\$10,000 to compensate for the lost NEA funding. Says Phillip Brookman, the Program Director of the Washington Project for the Arts, the artist's space that hung the controversial Robert Mapplethorpe exhibition after it was canceled by the Corcoran Gallery, "Most artists feel that it is better not to deal with the endowment—not to apply—as long as they know the process has been subverted."<sup>35</sup>

Feeling the heat, and thinking perhaps that to bask in the sunshine of Mr. Helm's approval was no great achievement for the head of the endowment, Mr. Frohnmayr changed his mind again. After taking a look at the exhibition and discussing the matter with a group of artists in new York City, he decided to award the grant after all.<sup>36</sup>

The problem, however, is far from over. Reauthorization hearings have begun, and other controversial grants are sure to come to light; but the endowment has been seriously weakened by its own chairman. Despite his rewording of his original objections to the AIDS exhibition, the suspicion that political content may be a reason for denying or perhaps even giving a grant, has been confirmed; and the endowment's highly praised peer panel system has been severely undermined. A precedent has been established whereby the panels recommend a grant, the National council confirms it, the chairman approves it, the chairman then pulls back and withholds the money, then takes a look at it and changes his mind. Those who serve on the panels and the council might well wonder why they bother.

But it is only reasonable to stop at this point and ask, What is going on here? For instance, are we experiencing censorship? To censor is to examine material and to remove or suppress anything considered objectionable. Certainly the Helms amendment would have done precisely that. Whether Congress would undertake that effort, whether they would delegate it to the to the National Endowment or to the National Council or to the grantees themselves is immaterial. The intention was to suppress, whether through direct action, indirect action or intimidation.

The confusion as to whether this attempt to dictate what art can and cannot be is censorship exists because our definition tends to be dramatic. We think of documents with blackened or cut out sentences and editors imprisoned or publications banned. We know we do not do things that way in America. We do not stand people up against the

35. Telephone interview with Phillip Brookman, (Nov. 12, 1989).

36. *Korman, National Arts Chief in a Reversal, Gives Grant to AIDS Show*, N.Y. Times, Nov. 17, 1989, at A1, col. 1.



wall or imprison them for saying what they want to say—quite the opposite. What we do is simply encourage people to censor themselves by threatening to take away their money, and in a capitalistic society that is a very real threat. Despite the momentary reprieve, the threat is with us still. The endowment is feeling the heat, museums are nervous, arts organizations are sweating, and it may well be that individual artists will think twice before they act. The result might be a period of timid self-serving reactionary art, or it might result in intentionally provocative revolutionary art—depending upon how individuals react to the possibility of being told what they could and could not do. Knowing artists, I tend to think the latter.

But is this not simply an issue about tax dollars and what we can expect our taxes to pay for? Hardly—first of all the federal dollars spent on the arts in this country are minuscule. The endowment's budget is \$160 million a year—about one third the cost of one B-2 bomber—and the defense department is asking for 132 of those for a total cost of nearly seventy four billion dollars. On a per capita basis, we pay seventy seven cents a year for art—which means that each of us contributed one thousandth of a cent to the Mapplethorpe exhibition. No, this isn't about tax dollars. In any case, since when have we taxpayers had a great deal to say about where our tax cents, not to mention our tax dollars go? There are many of us who would protest the production of nuclear weapons or biological weapons or even the billions we are expected to cough up to correct the inability of those we have elected to represent us to correct the blatant abuses in the Savings and Loan industry or the Department of Housing and Urban Development.

The Helms amendment would also affect much more art than federal dollars actually fund. The endowment has long arms. Even though it has very little money, it distributes that money broadly in small amounts. It is doubtful that there is a serious arts organization in the country that does not receive some federal money, perhaps as little as \$1,000. An artist's space or museum, for instance, which received a grant to help hire a curator or professional administrator or to pay for the installation of new lighting would have all the art shown in that space under scrutiny—regardless of who funded the exhibition. Thus, the influence of the legislation would extend far beyond tax dollars to anything associated with tax dollars—which has become virtually every non-profit arts organization in the country.

Is this controversy even about art? Generally in this country we view art as a kind of interesting frill activity indulged in by the mildly



eccentric and of consequence only to culture vultures and namby-pambys—of little real importance in the scheme of things. And yet the state of the arts is causing real debate among people who until now have given it only a passing thought if any thought at all.

We have an enormous deficit. We are facing a crisis in medical care and in the welfare of our children; but is Congress seriously taking on these problems or medicare expenses or waste in the defense department? No, it is going after the vulnerable National Endowment whose entire budget could be eliminated without causing so much as a scratch in the deficit. Could there be at work an effort to appear to be doing something? Is art being used as a canard to divert attention from things that are not being done or are too difficult to tackle?

Columnists such as Patrick Buchanan and James Cooper and Frederick Hart have ceded to art enormous powers—the power to influence and change culture. They are blaming the ills of society on Andres Serrano and Robert Mapplethorpe, if you will—as if art produced society instead of the other way around. Art is the mirror we hold up to our society, whether we like the reflection or not.

We have a drug-ridden, crime-plagued society. We are in the midst of an epidemic of sexually transmitted diseases. Teen pregnancies are at an all time high. There are homeless in the streets, and our jails are overflowing. And who do we blame? Art.

In a way, that is a compliment. The arts have never been given so much credit before. But it is unrealistic in the extreme. Funding the descendants of Norman Rockwell and Winslow Homer, if we could find them, is not going to bring back the days we all wish we could really remember. Art has become a handy target, an easy answer to a touchy problem. It has become a way of expressing the uncertainties and uneasiness we are experiencing collectively. We can sense we are in trouble as a nation. We are rapidly discovering that the gods of instant gratification and individual satisfaction and materialism are empty, and we are looking for something to blame.

Playing on our uncertainties are those who would grasp at obvious symbols for the fulfillment of their own ambitions. Jesse Helms needed to boost his fund raising for his next campaign. Some members of congress simply needed an issue—something obvious and simple, something easily grasped and almost irrefutable. Spend tax dollars on obscenity—who could vote for that? The wonder is that our Congress has enough strong members to do just that—to say this is not an issue simply about tax dollars or even about obscenity. This is an issue about censorship. It may be that we do not want to fund art in this country.



But if we decide that we do, then it is pointless to fund only that art that would please every member of Congress. It is not art's task to simply please our society. It is hard to imagine anything more boring—a kind of chocolate pudding culture of which we should all grow very weary very quickly.

The final question comes down to this: Is this country capable of funding the arts? Is it mature enough to understand that a culture under orders is no culture at all—it is an instrument of the state? When the endowment was created 25 years ago, its independence—its right to carry out its mission of funding excellence without interference from Congress—was made into law. That independence was understood to be critical.

Why do we have to fund art with federal money? It is because our society has changed. The old coalition of church, royalty and private money has been made redundant. Those of immense wealth who in the past supported the works of artists and composers now prefer Lear jets and cellular telephones to sonatas and frescoes. Once we could have left it to the bourgeoisie—to groups like those in Holland in the 17th century who brought us Dutch flower paintings and seascapes. Today the middle class has opted for the medium that brings you *Family Feud* and *Rosanne*, Madonna and Cher and a steady stream of sex, violence and inanity—our favorite art form, free television. We cannot leave it to the intellectuals and the cultured. They cannot afford it.

We are left with asking government to do what we can no longer do for ourselves. The purpose of the National Endowment for the Arts is not to give us what we want, but to give us what we did not know we wanted so we will have it when we need it. Is the endowment always right in its choices? I should hope not. If they were, art would become more of a commodity than it is today. The endowment is there to take chances. The endowment is there to be wrong every once in a while. As always, serious art—that produced with the intention of expanding aesthetic frontiers or challenging the conventional wisdom—must struggle. It is out of respect for those things which do not fare well in the market place—at least not in their own time—that we have chosen to lend the support of government to the arts. But if this support is to produce anything of value, that art must be free to pursue whatever it chooses.

It is axiomatic that what it chooses may intrigue, challenge, provoke, irritate, or even offend; and for all those we can be grateful. Something essential was left out of the Bill of Rights: a right we should nurture and cherish—the right to be offended. There is no reason to be proud of defending from censorship that which pleases you. You must



defend that which offends you. That is what this country is about at its most basic level.

On the night of June 30, the work of photographer Robert Mapplethorpe was seen *on* the Corcoran Gallery of Art, not *in* it. More than 1,000 protestors gazed upward in near-silence as giant projected images turned the outer stone face of the museum into gallery space for works judged too controversial to hang inside.

As his own portrait hung eerily in liquid blue-gray shadows above the crowd, there was triumph in the air. It was, in a sense, "The Perfect Moment" Mapplethorpe had spent his life and art looking for. But it had the transitory and illusory nature of all gestures. In thirty-five minutes the images were gone. Time and history will remember what did not happen at the Corcoran rather than what did.

Mapplethorpe, who died of AIDS in the spring of 1989 at the age of 42, was extremely successful and widely known for an oeuvre which went beyond classic portraiture and sensual photographs of flowers to frank images from the homosexual and sado-masochistic world in which he traveled. Black and white men intertwining their unclothed bodies, wearing exotic garments of leather and performing unusual sexual acts, become, despite the evocative nature of the subject matter, coolly stylish under the direct and sharply focused gaze of his lens.

After the Corcoran cancelled the exhibition, it was shown at the tiny WPA. When it closed, over 49,000 people had filed through the gallery. Many came out of frank curiosity. Some of them seemed remarkably ordinary—not the sophisticated gallery goer but Mom and Pop from Iowa, came to see what all the fuss was about.

The photographs Jesse Helms likes to pull out of a plain brown envelope on his campaign trips to shock little old ladies were grouped in a back room clearly marked with warnings that the material could be offensive to some. It was offensive to many—it shocked. But of those I personally interviewed, not one—not even those who admitted to being shocked—objected to federal tax money being spent for the exhibition.

I was shocked. More than that, there were several photographs that turned my stomach—quite literally. But I knew I had felt that sensation before, and after a moment I remembered where. There was a photograph during the Vietnam war—impossible to forget—of a child running naked down a road, covered with napalm, screaming and one of a man whose head was resounding from the impact of a bullet. They shocked in the same way that a photograph of a bullwhip up a man's rectum shocks. We know that something has gone profoundly amiss. But is it not our duty to clean up the mess? We did not make this mess. We did. All of us.



share some corporate responsibility for the society we live in. Let us put the blame right. In any case, whatever is wrong is more likely to be changed by seeing these photographs, whether the ones from Vietnam or the ones from Mapplethorpe's camera, than by not seeing them. To be offended by harsh reality is not only our right, but our responsibility.



## "Tilted Arc" Destroyed\*

Richard Serra\*\*

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*This article is dedicated to Gustave Harrow*

It is not bad  
to be pissed off  
where there is any  
condition imposed, by whomever, no  
matter how close.

- Charles Olson, *The Maximus Poems*<sup>1</sup>

### I

The United States government destroyed "Tilted Arc" on March, 15, 1989.<sup>2</sup> Exercising proprietary rights, authorities of the General Services Administration ordered the destruction of the public sculpture that their own agency had commissioned ten years earlier. The final desecration followed over five years of misrepresentation, false promises and show trials in the media and in the courtroom, deceptions which in the end not only allowed the government to destroy "Tilted Arc," but which established a precedent for the priority of property rights over free expression and the moral rights of artists. Even last-minute attempts to test the applicability of the Berne Convention (which Congress signed in the fall of 1988, and which went into effect March 1, 1989) proved futile. After an exhaustive analysis of the treaty, my attorneys concluded that the Berne Convention laws as abridged by the U. S. Congress were inadequate to protect my work.

Once my own say in the fate of the sculpture had been finally denied by the federal courts, William Diamond, the regional adminis-

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\*\* Richard Serra, born in 1939 in San Francisco, lives and works in New York City and Cape Breton, Nova Scotia.

1. C. OLSON, *THE MAXIMUS POEMS* (G.F. Butterick 1983).

2. See Appendix at 405-06 for photographs of *Tilted Arc* and its destruction, and of the Federal Plaza taken after *Tilted Arc* was destroyed.



trator of the GSA and the man most responsible for the campaign against "Tilted Arc," acted immediately to have the sculpture removed. In a sinister all-night session on March 15, overtime work crews labored to dismantle "Tilted Arc," brutally sawing and torching the piece. Finally, around 4:30 A.M., "Tilted Arc" was reduced to raw materials, to be carted off and stored in Brooklyn, reportedly pending relocation. "This is a day for the people to rejoice," said Diamond, "because now the plaza returns rightfully to the people."<sup>3</sup>

Diamond has announced repeatedly that he plans to relocate "Tilted Arc" to an alternate site (though a blue-ribbon NEA panel expressly stated that "Tilted Arc" could not be relocated). But "Tilted Arc" was created for one site and one site only. I made this clear from the start. When I first learned of the efforts to remove "Tilted Arc" in December, 1984, I wrote to Diamond and to Donald Thalacker, then the director of the Art-in-Architecture program that originally commissioned the work. At that time, I said, "I want to make it perfectly clear that "Tilted Arc" was commissioned and designed for one particular site: Federal Plaza. It is a site-specific work and as such not to be relocated. To remove the work is to destroy the work."<sup>4</sup> This has been accomplished; "Tilted Arc" is destroyed.

## II

In 1979 I was commissioned by the General Services Administration to build an urban sculpture for permanent installation at 26 Federal Plaza in Manhattan. Although permanency is implicit in the commission of any site-specific work, I explicitly raised this issue with Donald Thalacker and with the GSA project manager, Julia Brown. In response to my insistent questioning, Thalacker said simply, "You get one chance in your lifetime to build one permanent work for one federal building. There is one permanent Oldenburg, one permanent Segal, one permanent Stella, one permanent Calder, and this is your one opportunity to build a permanent work for a federal site in America."<sup>5</sup> Brown, who negotiated the GSA contract, later publicly attested to the fact that "in all stages of the decision-making process, it was under-

3. N. Y. Post, Mar. 17, 1989.

4. Letter from Richard Serra to Don Thalacker, director, Art-in-Architecture, General Services Administration (Jan. 1, 1985) reprinted in RICHARD SERRA'S TILTED ARC 40 (C. Weyergraf, Serra & Buskirk eds. 1988) [hereinafter TILTED ARC].

5. *Id.* at 66, 67.



stood by Serra, and by the government, that Serra was making a permanent work for that specific space.”<sup>6</sup> I felt that it was crucial for the issue of permanence to be fully understood, and I accepted the commission only after I had been assured repeatedly that my work would be, as stated in the GSA Manual, incorporated as “an integral part of the total architectural design.” I was told that the GSA did not want it any other way.

Although Diamond later alleged that the decision to install “Tilted Arc” was made in Washington without any input from New York, his statement was untrue. Representatives from the GSA New York were present at all important meetings in Washington and fully approved the esthetic concept of “Tilted Arc.” The installation also had the support of representatives of the architectural firm that had originally designed the plaza and the office towers at 26 Federal Plaza.<sup>7</sup> Furthermore, the contracting officer of the GSA New York went so far as to request a detailed environmental-impact study for the sculpture, which included answers to, among others, specific questions about its effect on existing pedestrian traffic patterns, about whether it would inhibit surveillance, about what additional lighting would be needed, about whether it would interfere with drainage, etc. The GSA office in New York also requested that I slightly change the location of the steel curve on the plaza, which I did. In 1981, as soon as the final location of the sculpture was agreed upon, “Tilted Arc” was installed and anchored into the existing steel-and-concrete substructure of the plaza. After “Tilted Arc” was dedicated, I was invited by the NEA to the White House and congratulated by then-President Jimmy Carter on my contribution to the cultural heritage of the United States.

During and immediately following the installation of “Tilted Arc,” the GSA received few complaints. However, Chief Judge Edward D.

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6. *Id.* at 84.

7. Although Joseph Colt of Jacobs-Poor-Eggers, the firm that designed the U. S. Customs Court, Federal Office Building and Federal Plaza, participated fully in the nominating process for Tilted Arc, senior members of the firm later wrote vociferous letters in opposition to the work and testified against it at the hearing. See the letters of Alfred Easton Poor, Albert Homere Swanke & Robert Jacobs, *reprinted in Ink, Decision on The Tilted Arc*, U.S.G.S.A. document, May 31, 1985, (Appendices M and O). Jacobs and his wife testified that Tilted Arc violated the architecture of the site; their testimony was cited frequently by officials arguing for removal. Cf. Letter from William Diamond, Regional Administrator, General Services Administration, Region 2, New York to Dwight Ink, Acting Administrator, General Services Administration, Washington, D.C. (May 1, 1985), *reprinted in TILTED ARC*, *supra* note 4, at 142.



Re of the Court of International Trade (located at 26 Federal Plaza) developed a particular hostility toward the work. In July and August of 1981, while the installation was still in progress, he wrote letters to the GSA in Washington in an attempt to prevent the sculpture—which he characterized as a “rusted steel barrier”—from being “permanently affixed to the plaza.”<sup>8</sup> He pointed out that he was not alone in his distaste for the piece, noting that *New York Times* art critic Grace Glueck had described “Tilted Arc” as “the ugliest outdoor work of art in the city.”<sup>9</sup>

Washington officials responded politely to Judge Re, and after the installation of “Tilted Arc” was completed, the criticism died down. According to GSA officials, no further complaints were received until 1984.<sup>10</sup> For three years there were no protests whatsoever against “Tilted Arc.” Then, at the end of 1984, Judge Re resumed his letter-writing campaign to Washington. Not only did he reiterate “esthetic distaste” for the sculpture, but he also held “Tilted Arc” responsible for the plaza’s accumulation of graffiti, waste and litter.<sup>11</sup> He added the bizarre claim that “Tilted Arc” had caused the downtown rat problem. Let me quote: “We have never experienced a rodent problem of the present enormity in this area. Exterminators are called regularly, at considerable expense, to rid our Courthouse of this hazard.”<sup>12</sup> Judge Re equated “Tilted Arc” with garbage, and garbage causes rats. This false causality, which I can only construe as a smear tactic, initiated the government’s anti-“Tilted Arc” campaign. I agree with the judge that the courthouse is overrun with rats, but they were not attracted by “Tilted Arc.” They are of the two-legged variety.

In January 1985, William Diamond, the newly appointed regional

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8. Letter from Edward D. Re, Chief Judge, United States Court of International Trade, New York, to Gerald P. Carmen, Administrator, General Services Administration, Washington D.C. (Aug. 18, 1981), *reprinted in* TILTED ARC, *supra* note 4, at 25-26.

9. Glueck, *An Outdoor-Sculpture Safari Around New York*, N.Y. Times, Aug. 7, 1981, at C20, col. 5.

10. Letter from Ray Kline, Acting Administrator, General Services Administration, Washington, D.C. to Edward D. Re (Dec. 10, 1984) *reprinted in* TILTED ARC, *supra* note 4, at 30; *See also*, Richard Serra v. U. S. Gen. Serv. Admin., 667 F. Supp. 1042 (S.D.N.Y. 1987) (No. 86 Civ. 9656), deposition of Donald W. Thalacker, at 104.

11. Letter from Edward D. Re to Ray Kline, acting administration, General Services Administration, Washington, D.C. (Nov. 5, 1984), *reprinted in* TILTED ARC, *supra* note 4, at 31.

12. *Id.*



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administrator for the GSA, appeared on the scene. He adopted Judge Re's position, then unilaterally held, as part of his own political agenda. My sculpture had been approved, commissioned and installed under a Democratic administration. A Republican administration decided that it should be destroyed. The governmental decree to remove and thereby destroy "Tilted Arc" is the direct outcome of a cynical Republican cultural policy that only supports art as a commodity. Relocation would, in fact, transform "Tilted Arc" into an exchange commodity in that it would annihilate the site-specific aspect of the work. "Tilted Arc" would become exactly what it was intended not to be: a mobile, marketable product.

Diamond, a Reagan appointee, introduced the relocation idea and engineered a full-scale public campaign in order to realize this policy. He was even able to use the *New York Times* to stir up the public. In an article by Grace Glueck, Diamond was quoted as saying, "Tilted Arc" was a mistake which had been made because at the time the impact of the piece was not understood."<sup>13</sup> In the same article, Diamond stated that since the sculpture's installation, the GSA had been inundated with complaints. As Glueck failed to note, these statements were inaccurate. Glueck claimed that "Serra had reservations about the plaza [and was] hostile to the plaza and its context." She concluded that "it was therefore a mistake to take the project on." After I read the article, I immediately phoned Glueck and asked her what gave her the right to make such false statements. She replied that what she wrote was her interpretation. When I asked her to correct her fictional "interpretation," she refused. In effect, Glueck became a mouthpiece for the Reagan administration's misguided cultural policy.

### III

Such distortions of fact in the press established a climate of misinformation that allowed Diamond to proceed with his plan to call a public hearing to decide the issue. Through flyers, posters and personalized letters of invitation, Diamond announced that a hearing would be held at the Court of International Trade on March 6, 1985. The letters that Diamond sent out noted that "the purpose of the hearing is to decide whether or not the art work known as 'Tilted Arc' currently on the east plaza of the Jacob K. Javitz Federal Building in Manhattan should be

13. Glueck, *What Part Should the Public Play in Choosing Public Art?*, N.Y. Times, Feb. 3, 1985, § 2, at 1, 27.



relocated to increase public use of the plaza."<sup>14</sup> The announcement elicited a tremendous response, much of it in favor of "Tilted Arc," particularly from the art community, and eventually the hearing had to be extended to three days to accommodate the 180 people who petitioned to speak (122 in favor of retaining the sculpture, 58 in favor of relocation).

Apparently convinced that the public hearing would yield a majority in favor of removal, Diamond had in the months previous been taking bids on the removal and relocation of "Tilted Arc." In one instance, he tried to sell the work to Storm King Art Center. H. Peter Stern, president of Storm King, told me that Diamond had approached him on this subject in January 1985. Stern was, in fact, quite interested, and hoped to get his bid in early for the work (which he clearly understood was being offered to other institutions as well). But when he heard that I was opposed to relocation, Stern immediately terminated negotiations with Diamond. At the same time, Diamond was attempting to place "Tilted Arc" with the Cooper-Hewitt Museum and with the New York City Parks and Recreation Department.<sup>15</sup> In all, nearly a dozen institutions were approached about accepting the sculpture for relocation. I asked Diamond who had given him the authority to sell my work. I also asked him if that was what he meant by being impartial. He did not reply.

Having already demonstrated his express desire to remove the sculpture, Diamond nonetheless appointed himself chairman of the hearing. Many critics questioned the propriety of such an arrangement. Senator Howard M. Metzenbaum, for instance, wrote to Ray Kline, the acting administrator of the GSA, to express his concern. Metzenbaum observed that "the convening of a hearing by an administrator who, according to news accounts, has already made up his mind about

14. Letter from William Diamond sent out to announce the public hearing concerning "Tilted Arc," reprinted in *TILTED ARC*, *supra* note 4, at 47.

15. There is no clause in my contract which gives the government the right to sell and thereby destroy Tilted Arc. (The contract is reproduced in *Ink*, *supra* note 6, at appendix J. Now that Tilted Arc has been destroyed and the government has once again announced that it wants to sell the remains (this was stated by Richard Schwartz, attorney for the GSA, at the March 13, 1989, hearing requesting a stay of destruction), I am considering the option of bringing a breach of contract suit before the United States Claims Court.

Letters from Barbara G. Gerwin, regional counsel for the GSA, offering Tilted Arc to Storm King, the Cooper-Hewitt Museum, and the New York City Department of Parks and Recreation, are reproduced in *TILTED ARC*, *supra* note 4, at 34-35, 37.



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the art, appears to be a breach of proper procedures and violative of the explicit agreement with the article as to the display of the sculpture."<sup>16</sup> This warning had no effect, however, and Diamond proceeded not only to place himself at the head of the panel, but to choose as two of the four remaining panelists his own staff members.<sup>17</sup> Diamond acted as both prosecutor and judge in this case. He assembled what was in effect a vigilante group, without legal status, to overturn a binding contract that had been concluded three years earlier. In judicial terms, the hearing was a sham, a kangaroo court. It was a mockery of due process.

From the start, Diamond sought to assure majority support for his plan to remove "Tilted Arc." He chose a twofold strategy. First, in order to avoid the accusation of censoring a work of art, he personally refrained from commenting on the esthetic value of "Tilted Arc," both in his statements to the press and in his letters of appeal for participation in the hearing. Instead, he concentrated on the destructive effects which he claimed the sculpture was having on social functions in the plaza. But his second tactic, the campaign he waged within the Federal Building, was quite different in content. Signs, chairs and tables were installed in the lobby of the Federal Building directing employees to sign petitions headed "For Relocation." Signers were encouraged to put an asterisk next to their names if they found "no artistic merit in the Serra art work."<sup>18</sup> Diamond was successful in inciting what amounted to a hate campaign against "Tilted Arc" and in urging federal employees to censor and condemn the esthetics of the sculpture. At the hearing they testified accordingly, using the public forum to air their newly hostile responses to the sculpture. In a remarkable litany of insults, they called "Tilted Arc" "a piece of nonsense or garbage," "an arrogant, nose-thumbing gesture," "the Berlin Wall," "the Iron Curtain," "a scar on the plaza" and "a mistake."<sup>19</sup> Several of the speakers com-

16. Letter from Sen. Howard M. Metzenbaum (N.Y.) to Ray Kline (Feb. 25, 1985), reprinted in *TILTED ARC*, *supra* note 4, at 45.

17. The panelists, in addition to Diamond, were Michael Findlay, vice president of Christie's; Thomas Lewin, a lawyer; Paul Chistolini, acting assistant regional administrator for the G.S.A.'s Public Buildings, and Real Property division; and Gerald J. Turetsky, acting deputy regional administrator of the G.S.A. (Turetsky was the G.S.A. regional administrator—Diamond's job—at the time Tilted Arc was installed).

18. Diamond's "cordial invitation" to the hearing and the "For Relocation" petition are reprinted in *TILTED ARC*, *supra* note 4, at 47, 50.

19. A sampling of comments from those opposed to the sculpture is included in *TILTED ARC*, *supra* note 4, at 109-27.



plained about people pissing on the sculpture or about the obscene content of graffiti scrawled on its surface. Relocation suggestions ranged from scrap yards to the Hudson River. One speaker wanted all those in favor of the sculpture to be taken to Bellevue Hospital and signed into a mental ward.

In the most grotesque and sinister testimony, there were those who insisted that "Tilted Arc" made Federal Plaza a dangerous place to be during political demonstrations. They claimed that the sculpture not only impeded local police surveillance, but that it could also serve as a blast wall for terrorists. A federal physical security specialist employed by the GSA compared "Tilted Arc" to devices used by bomb experts to direct explosive forces. She pointed out that "Tilted Arc" was particularly qualified to function as a terrorist device because it would "vent explosive forces not only upwards but also in an angle towards both buildings."<sup>20</sup> By labeling the sculpture a terrorist device, the government played upon the public's most basic fears and attempted to create an atmosphere of paranoia.

Doubtless, to some people "Tilted Arc" was an eyesore; but the same may be said about every other work of art. There will always be viewers who react negatively, and those who act aggressively. People are entitled to their opinion; but prejudice, even if it is shared by a majority, ought not to be the reason to destroy a work of art.

Although I firmly believe that art, including art in public places, cannot be decided upon by public-opinion polls, I cannot simply ignore Diamond's implied majority claim. He is as careless with numbers as he is with other facts. Very few of those who demanded that "Tilted Arc" be removed mentioned the impediment of social functions of the plaza as cause for their complaint. However, after the hearing, in his removal recommendation of the GSA at the time, Diamond wrote that he was "impressed by the statements of the federal agencies and openness . . . and to its originally designed integrated serenity."<sup>21</sup> Diamond stressed that since "Tilted Arc" was installed, the plaza could no longer be used as a place to hold public events such as military band concerts,

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20. See the testimony of Vickie O'Dougherty, a physical-security specialist for the G.S.A., reprinted in *TILTED ARC*, *supra* note 4, at 115, 116 (stating that the design of "Tilted Arc" "is comparable to devices used by bomb experts to vent explosive forces; for instance, they have bomb trucks designed for this purpose which are cylindrical in shape . . .").

21. Letter from William Diamond to Dwight Ink (May 1, 1985), reprinted in *TILTED ARC*, *supra* note 4, at 141-42.



art shows and so on. Yet, in the plaza's 17 years of existence prior to the installation of "Tilted Arc," there were fewer than 20 such events.

Diamond had an even bigger problem with numbers when it came to determining a majority viewpoint at the hearing. Of 180 people who spoke at the hearing, two-thirds testified in favor of retaining "Tilted Arc" in Federal Plaza. At the same time, letters opposing removal of the sculpture were received by the GSA at the rate of one hundred to one.<sup>22</sup> Confronted with these overwhelming numbers in opposition to his cause, Diamond conceded in a letter to Ink, "One of the things that became extraordinarily clear to me was that certain ground rules would have to be followed. First of all, I would have to avoid any reliance on a 'numbers' game."<sup>23</sup> With only minority support for removal of "Tilted Arc" Diamond—abiding by his own ground rules—ignored the numbers and insisted in statements to the press that "the people" had demanded the sculpture's removal. To me, this was one of Diamond's most despicable misrepresentations, and it was definitely the most damaging.

A major issue in the "Tilted Arc" case involved the misuse of numbers. Therefore, I would like to set the record straight. During the three-day hearing (March 6-8, 1985), the GSA presented 3,791 signatures for relocation and 3,763 signatures against relocation. These nearly equal numbers were never mentioned in Diamond's statements to the press, nor did he ever bother to mention that approximately 12,000 people work in the Federal buildings at 26 Federal Plaza. Given that population of workers, 3,791 signatures for removal do not constitute a majority of any kind. They represent neither a majority of people working in the buildings at 26 Federal Plaza, nor a majority of people working in the federal enclave in downtown Manhattan, nor a majority of people living in the neighborhood.

The press, however, never questioned Diamond's claim that the

22. Memo from Donald Thalacker, Director, Art-in-Architecture and Historic Preservation Programs to Dwight Ink (May 9, 1985) (citing these statistics and noting that of the approximately 10,000 employees in the Federal Building, only 58 testified against Tilted Arc at the hearing), *reprinted in* TILTED ARC, *supra* note 4, at 151.

23. Letter from William Diamond to Dwight Ink (May 1, 1985) *reprinted in* TILTED ARC, *supra* note 4, at 140. Typical of Diamond's boasts to the press about the hearing is that reported in Berger, *Tilted Arc To Be Moved From Plaza at Foley Square*, N.Y. Times, June 1, 1985, at 25, 28 (Metropolitan report): "'The people have spoken and they have been listened to by their government,' said William Diamond, the regional administrator of the federal agency. 'This is a victory for thousands of New Yorkers who live and work in Lower Manhattan.'"



public opposed "Tilted Arc." Over 350 articles in the local and national press perpetuated Diamond's misrepresentation, and their writers felt compelled to take the side of "the majority" or "the people" against the artist. Even writers who supported the sculpture felt a populist need to align themselves with this imagined majority. After a very sensible description of "Tilted Arc" and its context, *New York Times* architectural critic Paul Goldberger went on to say, "After all this, was the piece worth keeping? Ideally, yes. Public art rarely achieves a total consensus of opinion. While the government should not bow to incidental pressure so far as public art is concerned, near total opposition is another matter."<sup>24</sup> Paradoxically, all those critics who sided with "the majority" failed to recognize (or were content to suspect) that what is perceived as majority opinion is often a cynical cover-up for the maneuverings of government. As a result, the impression that a majority of the public wanted "Tilted Arc" removed was perpetuated, and persists.

Populist pandering to the masses took many forms in the media. When the "CBS Evening News" decided to cover the "Tilted Arc" controversy, they asked me if I would help them put together a profile on the subject. They told me that they were going to support the concept of site-specificity by showing other site-specific works. So, I spent a week helping them organize TV crews in Holland, France, Germany and Japan. It seemed like a responsible project, and I was looking forward to the broadcast. When the segment was finally aired, the camera panned across abandoned, wrecked cars; cut to burnt out buildings and urban rubbish; cut to "Tilted Arc" with a voice-over stating: "New Yorkers have had enough of this." I'd been had once again. I should have known that television delivers people, that all public opinion is manipulated opinion. The pragmatic of television do not admit rejoinders or resistance. There is no equal time.

#### IV

Later, the issue of site-specificity that I had tried to clarify for CBS was grossly misrepresented by Diamond. In his removal recommendation, Diamond presumed to disqualify my concept of site-specific sculpture. He was careful to avoid any attempt to prove the "un-specificity" of "Tilted Arc." Instead, he relied on a tactic of diversion based

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24. Goldberger, *Harmonizing Old and New Buildings*, N.Y. Times, May 2, 1985, C23, col. 1.



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on misrepresentation of facts. Without referring to specific works, Diamond wrote, "I understand that both the Port Authority of New York, New Jersey and the City of New York have relocated Serra pieces from downtown Manhattan. Accordingly, I have rejected claims proffered by the proponents of retention, that the sculpture is site specific and cannot be relocated."<sup>25</sup> Once again, Diamond distorted the truth. He was referring to *TWU* and *Rotary Arc*, works sited in Lower Manhattan. But neither the Port Authority nor the City of New York actually owned these pieces, so it would not have been their prerogative to relocate them. Furthermore, neither piece was relocated. Both *TWU* and *Rotary Arc* were originally installed on the basis of temporary permits. After the permits expired, both sculptures were dismantled. During the hearing, Diamond voiced his admiration for *Rotary Arc*, and clearly he was aware that the work was still in place. In fact, *Rotary Arc* was dismantled only in 1987—two years after Diamond made his false statement about its removal and relocation.

Donald Thalacker, the head of the Art-in-Architecture program of the GSA, defended "Tilted Arc" throughout the controversy. He testified at the public hearing against the removal of the sculpture. On May 9, 1985, Thalacker wrote an exhaustive memo to Dwight Ink, the administrator of GSA, correcting factual errors, pointing out distortions in government documents pertaining to "Tilted Arc" and warning of the effects of Diamond's mishandling of the hearing. Although he was seriously ill, Thalacker gave a lengthy deposition in support of my case and placed himself in an embattled, precarious position to defend not only my rights but artists' rights in general. He continued to fight for the integrity of the Art-in-Architecture program until he died in 1987.

In his memo to Ink, later made public, Thalacker noted "a widespread perception that the official GSA-sanctioned actions affecting the pre-hearing activities, the hearings themselves, and the post-hearing activities have been manipulated."<sup>26</sup> Ink ignored Thalacker's admonitions, however, and, backing Diamond's recommendation, called for the relocation of "Tilted Arc." Ink's decision was extraordinary in that he

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25. Letter from William Diamond to Dwight Ink (May 1, 1985) reprinted in *TILTED ARC*, *supra* note 4, at 145. Diamond also attempted to make extensive use of re-siting of Clara-Clara in Paris to forward his arguments for relocation of Tilted Arc; unfortunately for him, that case was entirely different, in that Clara-Clara was specifically created for a temporary site.

26. Ink, *supra* note 7, at 156-76 (Appendix R); See also memo from Donald Thalacker to Dwight Ink, reprinted in *TILTED ARC*, *supra* note 4, at 150, 152.



never stated why "Tilted Arc" should be relocated. The closest he came to providing a reason was his conclusion in which he stated,

In the final analysis, however, I believe the concerns of the many employees who work in the Plaza buildings, the public they serve, and the people who reside in the area, have to be given greater weight than the views we received from members of the art community—most of whom do not live or work near the Plaza—in determining whether efforts should be made to relocate the Arc [as contrasted with the far more drastic option of destruction].<sup>27</sup>

The only other issue worth mentioning in Ink's decision is his drastic misreading of site-specificity: "The Arc was planned very carefully and specifically by the artist for the Plaza. In that sense it is site-specific. I am not persuaded, however, that it would be destroyed if it were removed to another compatible place with adequate viewing space."<sup>28</sup> Ink concluded, "Therefore, the Regional Administrator should seek a new location for the Arc where it would not suffer significant loss of integrity as an artwork."<sup>29</sup> Ink wanted it both ways. On the one hand, he admitted that "Tilted Arc" was site-specific, "carefully and specifically" planned for the Plaza; on the other hand, he ordered the relocation to proceed. Fearful of calling for outright destruction, Ink instead created a new definition of site-specificity that allowed for relocation.

In his report, Ink requested the National Endowment for the Arts to establish a "relocation review panel" to judge the suitability of alternate sites for "Tilted Arc." The NEA assembled a distinguished seven-member panel of artists, architects and legislators to consider the matter.<sup>30</sup> The panel met in New York on Dec. 15, 1987, and visited the Federal Plaza to see "Tilted Arc" in situ. At that time, I presented them with my arguments for the importance of site-specificity in the case of "Tilted Arc," since it is that issue which precludes the possibility of relocation.<sup>31</sup>

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27. Ink, *Decision on The Tilted Arc*, reprinted in *TILTED ARC*, *supra* note 4, at 156-73. Diamond dismissed Ink's directive not to destroy "Tilted Arc" when he ordered workmen to saw and torch the piece during its removal on March 15.

28. *Id.* at 170.

29. *Id.* at 173.

30. The NEA "Tilted Arc" Site Review Advisory Panel included James Ingo Freed, architect; Sam Hunter, art historian; Theodore Kheel (panel chair), legal arbitrator; Brenda Richardson, museum administrator; Jacquelin Robertson, architect; Robert Ryman, painter; and Joel Wachs, councilman from Los Angeles.

31. When Diamond was asked during a television interview to comment on my



As I pointed out, "Tilted Arc" was conceived from the start as a site-specific sculpture and was not meant to be "site-adjusted" or, as Diamond put it, "relocated." Site-specific works deal with the environmental components of given places. The scale, size and location of site-specific works are determined by the topography of the site, whether it be urban or landscape or architectural enclosure. The works become part of the site and restructure both conceptually and perceptually the organization of the site. My works never decorate, illustrate or depict a site.

The specificity of site-oriented works means that they are conceived for, dependent upon and inseparable from their location. Scale, size and placement of sculptural elements result from an analysis of the particular environmental components of a given context. The preliminary analysis of a given site takes into consideration not only formal but also social and political characteristics of the site. Site-specific works invariably manifest a value judgment about the larger social and political context of which they are a part. Based on the interdependence of work and site, site-specific works address the content and context of their site critically. A new behavioral and perceptual orientation to a site demands a new critical adjustment to one's experience of the place. Site-specific works primarily engender a dialogue with their surroundings. Every language has a structure about which one can say nothing critical in that language. There must be another language, dealing with the structure of the first but possessing a new structure to criticize the first.

It is the explicit intention of site-specific works to alter their context. Le Corbusier understood this as early as 1932. He wrote in a letter to Victor Nekrasov:

You have in Moscow, in the churches of the Kremlin, many magnificent Byzantine frescoes. In certain cases, these paintings do not undermine the architecture. But I am not sure that they add to it, either; this is the whole problem of the fresco. I accept the fresco, not as something which gives emphasis to the wall, but on the contrary as a means to destroy the wall violently, to remove any notion of its stability, weight, etc. I accept Michelangelo's Last Judgment in the Sistine Chapel, which destroys the wall; and I accept the Sistine Chapel's ceiling as well, which completely distorts the very notion of ceiling. The dilemma is simple: if the Sistine Chapel's

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assertion that Tilted Arc was a site-specific work, he replied, "Well, that's his opinion. That's not so." *The Freeman Reports*, CNN broadcast, May 7, 1985.



wall and ceiling were intended to be preserved as form, they should not have been painted with frescoes, it means that someone wanted to remove forever their original architectural character and create something else, which is acceptable.<sup>32</sup>

This concept ought to be understood and protected. However, the contextual issues of site-specific works remain problematic. Site-specificity is not of value in itself. Works which are built within the contextual frame of governmental, corporate, educational and religious institutions run the risk of being read as tokens of those institutions. One way of avoiding ideological co-optation is to choose leftover sites which cannot be the object of ideological misinterpretation. However, there is no neutral site. Every context has its frame and its ideological overtones. It is a matter of degree. But there are sites where it is obvious that art work is being subordinated to/accommodated to/ adapted to/ subservient to/required to/useful to . . . . In such cases it is necessary to work in opposition to the constraints of the context, so that the work cannot be read as an affirmation of questionable ideologies and political power. I am not interested in art as affirmation or in art as a manifestation of complicity.

In its recommendation to the GSA, the NEA panel concurred with my definition of site-specificity and said,

We have been presented with a statement by the artist about the site-specific nature of his "Tilted Arc" sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist's statement that relocation of the work would destroy it.<sup>33</sup>

The panel further recommended that the GSA discontinue its search for alternative sites for "Tilted Arc." After years of searching, Diamond had only been able to present two "alternative sites" at the NEA panel meeting. One of the two institutions was in fact not completely committed to accepting the sculpture, and was confused about the implications of relocation. The other institution, which had originally ex-

32. Letter from Le Corbusier to Victor Nekrasov (Dec. 20, 1982), *reprinted in* Starr, *Le Corbusier and the USSR: New Documents*, 23 *OPPOSITIONS*, 132-33 (1981).

33. This quotation from the conclusion of the panel as summarized by Chairman Theodore Kheel is taken from a letter from Frank Hodsoll, chairman of the NEA, to Terence C. Golden, administrator of the GSA (Jan. 5, 1988) *reprinted in* *TILTED ARC*, *supra* note 4, at 193-96.



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pressed interest in accepting "Tilted Arc," withdrew their offer immediately following my presentation to the NEA panel.<sup>34</sup>

One would assume that the GSA, having failed so utterly to uncover a possible site for relocating "Tilted Arc," would have adhered to the procedures established by its own administrator and given up. Instead, the GSA decided to ignore the NEA panel's recommendation. When the government did not get the results it expected from its initial hearing, it manipulated the record. When the government did not get the recommendation it expected from the NEA panel, it ignored the recommendation. In its repugnant and cynical view of democracy, the government showed a total disregard for all processes and institutions that did not affirm its policies.

After it became clear to me that the GSA was not willing to respect the implications of the concept of site-specificity—even though Ink had admitted that "Tilted Arc" was site specific—I took my case to court.<sup>35</sup> The case that my attorneys brought against the U.S. government in December 1986 addressed both the terms of my contract with the GSA and what I took to be abridgments of my constitutional rights. This suit attempted to prevent the government from removing or relocating "Tilted Arc." and it sought to recover damages for breach of contract, trademark violations, copyright infringement and violation of my first and fifth amendment rights. In a decision handed down on August 31, 1987, Judge Milton Pollack of the U. S. District Court dismissed all changed, disallowing the copyright issues and contract claim as being outside his jurisdiction, and striking down the constitutional questions for lack of merit.

An appeal was filed in the United States Court of Appeals on December 15, 1987, calling for a reversal of the decision regarding the constitutional issues. My attorneys contended that insufficient weight had been given to the fact that "Tilted Arc" was created for one site and one site only, and since to remove the work would destroy it, the proposed "relocation" would violate my right to free expression. They

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34. The two institutions originally interested in accepting Tilted Arc were Clemson University and Long Island University (C. W. Post Campus). Clemson withdrew outright when it was clear that I would not participate in site selection on their campus. Long Island University presented a litany of questions which remained unresolved, and the panel members concluded that their participation was "at best, tentative." As Hodsoll noted in his letter, "The unanimous conclusion of this discussion was that both sites were inappropriate." *TILTED ARC*, *supra* note 4, at 194-95.

35. Mr. Serra was represented by Gustave Harrow. See Harrow, *The Role of Creativity in Social and Political Processes*, 14 NOVA L. REV. 545 (1990).



argued that "once a medium of expression—be it writing, film, theater, painting or sculpture—is publicly installed or displayed, first amendment rights attach which prohibit the government from removing the expression on the basis of its content."<sup>36</sup> Cited as a precedent was the case of *Board of Educ. v. Pico*.<sup>37</sup> In that case, the board of education had ordered removed from school library shelves nine books that were deemed "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The Supreme Court found for the plaintiff on appeal, ruling that the books could not be removed simply because the board disliked their content. Applying this principle to the "Tilted Arc" situation, my attorneys noted that "dislike" was the only reason cited by Ink for removal of the sculpture. Following this logic, they concluded,

If the issue here were only *removal* of Tilted Arc, the authorities we have cited would preclude this result [but this] result is put beyond question, we submit, when we recall that to remove "Tilted Arc" is to destroy it. It is no overstatement to say that we here deal with conduct akin to bookburning.<sup>38</sup>

U. S. District Attorney Rudolph Giuliani responded with a brief for the defendants, the GSA. The government argued against the applicability of both the first amendment (free speech) and the fifth amendment (due process of law) in this case. In a remarkable (and unabashedly authoritarian) rebuttal, the government summarized its opinion: "As a threshold matter, Serra sold his 'speech' to the government . . . . As such, his 'speech' became Government property in 1981, when he received full payment for his work . . . . An owner's '[p]roperty rights in a physical thing have been described as the right to possess, use and dispose of it.' "<sup>39</sup> This is a rather incredible statement by the government. If nothing else, it affirms the government's commitment to private property over the interests of art or free expression. It means that if the government owns the book, it can burn it; if the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right to property supersedes all other rights: the

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36. Appeal filed by Richard Serra, *Serra v. General Services Administration*, cite needed, reprinted in *TILTED ARC*, *supra* note 4, at 225, 243 (arguing that summary judgment dismissing the first amendment claim must be reversed).

37. *Id.* (citing *Pico*, 457 U.S. 963 (1952)).

38. *TILTED ARC*, *supra* note 4, at 246.

39. Brief Filed by the Appellees, *Richard Serra v. General Services Administration* (edited version), reprinted in *TILTED ARC*, *supra* note 4, at 251, 253.



right to freedom of speech, the right to freedom of expression, the right to the protection of one's creative works.

The decision of the court of appeals upheld the government's position. Judge Jon O. Newman dismissed my appeal on May 27, 1988. He upheld the decision of the lower court on both questions, free expression and due process. Newman held that "the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual . . . . In this case, the speaker is the United States Government. 'Tilted Arc' is entirely owned by the Government and is displayed on Government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to the GSA."<sup>40</sup> If I had known that the government would claim "Tilted Arc" as its own speech and would consequently claim the right to alter and destroy it, I would never have accepted the deal. "Tilted Arc" was never intended to—nor did it—speak for the United States Government.

A key issue in this case, as in all first amendment cases, was the right of the defendant to curtail free speech based on dislike of the content. Here the court stated that esthetic dislike *is* sufficient reason to destroy a work of art: "To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible . . . . GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable to particular locations."<sup>41</sup> Yet, on this very issue, Supreme Court Justice Oliver Wendell Holmes cautioned over 80 years ago that

it would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works . . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.<sup>42</sup>

Justice Holmes's warning should extend to all government officials, whether they be judges or administrators of government agencies.

With regard to the fifth amendment issue, the denial of my right

40. *Serra v. United States Gen. Serv. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988).

41. *Id.* at 1051.

42. *Bruce v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).



to due process under law in the "Tilted Arc" hearing, the court dismissed my claim. The decision did not even consider the substance of the claims about distortion and manipulation of the hearing, but ruled that "even accepting Serra's factual allegations as true for the purposes of this appeal, we conclude that his due process claim fails as a matter of law . . . . Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due."<sup>43</sup> This was a blatant trashing of democratic procedures.

In the end, I was left with a decision by the federal court of appeals that protected a federal agency (the GSA) and exonerated a federal official (Diamond), even if he was "not entirely impartial." The court's decision merely rubberstamped the official's duplicitous conduct. And in the same sentence the court dismissed my due process claim saying I had received "more process than what was due"—as if I should be thankful for the gratuity of an admittedly manipulated hearing. This cynical decision by the appeals court needs to be challenged, if only by my own desperate and useless denunciation. I have no further protection under the law.

## V

In a sense, Judge Newman was correct when he said that my lawsuit was "an invitation to the courts to announce a new rule . . . that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency."<sup>44</sup> The "new rule" that I am asking for is moral rights legislation. Such coverage now exists in every other civilized country in the world. In the U. S., this new rule would acknowledge a relationship between an artist and his work even after the work had been sold, and no matter to whom.

In the United States, property rights are afforded protection, but moral rights are not.<sup>45</sup> Until last year, the United States adamantly

43. *Serra*, 847 F.2d at 1060.

44. *Id.* at 1051.

45. For facts on the Berne Convention and moral rights legislation, I have relied on an unpublished paper by Veronique Heim titled *America Moves Toward French Moral Rights Legislation*. For a recent update, see Mitgang, *Old Copyright Treaty*:



refused to join the Berne Copyright Convention (1886), the first multi-lateral copyright treaty, now ratified by more than seventy five countries. The American refusal was based on the fact that the Berne Convention grants moral rights to authors. Such a policy was—and is—incompatible with U. S. copyright law, which recognizes only economic rights. Three states—Massachusetts, California and New York—have enacted moral rights statutes on the state level, but federal copyright laws tend to prevail, and those are still wholly economic in their motivation. Indeed, the recent pressure for the U. S. to agree (at least in part) to the terms of the Berne Convention came only as a result of a dramatic increase in the international piracy of American records and films.

In September 1986, Senator Edward Kennedy introduced a bill called the Visual Artists Rights Act (S. 2796). This bill attempts to amend federal copyright laws to incorporate some aspects of international moral rights protection. Kennedy's bill would prohibit the intentional distortion, mutilation or distortion or destruction of works of art after they have been sold. Moreover, the act would empower artists to claim authorship, receive royalties on subsequent sales and to disclaim their authorship if the work is distorted. This legislation would allow the artist (or the artist's heirs) to sue to reverse or redress the alteration of any art work. In the past, such moral rights legislation would have prevented Clement Greenberg and the executors of David Smith's estate from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable — unpainted sculptures. Such moral rights legislation would have prevented a Japanese bank in New York from removing and destroying a sculpture by Isamu Noguchi simply because the bank president did not like it; and such moral rights legislation would have prevented the U. S. government from destroying "Tilted Arc."

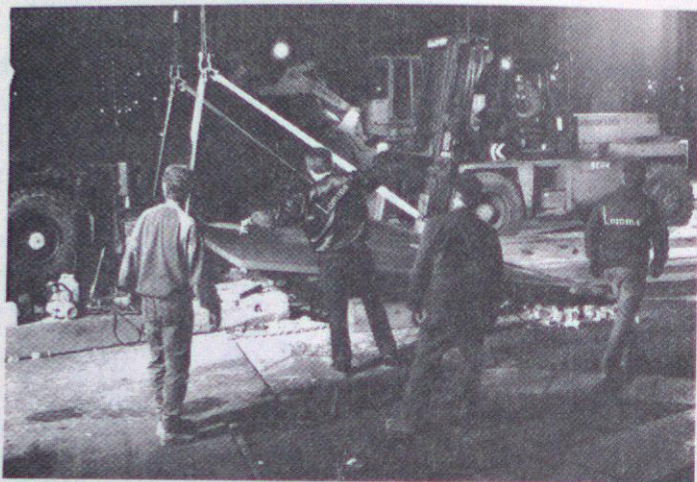
If Senator Kennedy's moral rights bill were enacted, it would be a legal acknowledgment that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by U. S. copyright law is insufficient. The bill recognizes that moral rights are independent from the work as property and that they supersede—or at least coincide with—any pecuniary interest in the work. Moreover, the bill acknowledges that granting protection to moral rights serves society's interests in maintaining the in-



tegrity of its art works and in promoting accurate information about authorship and art. Most important, under the proposed bill (still not passed after over two years), the destruction or mutilation of a work of art would be a federal crime.

On March 1, 1989, the Berne Convention Implementation Act (which President Reagan signed in October 1988) became U. S. law. When I learned on March 13 that the government had started to dismantle "Tilted Arc," I went before the United States district court seeking a stay of the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case. I expected—as would be the case in other countries that became signatories to the treaty—to be protected by the moral rights clause which gives an artist the right, even after a work is sold, to object to "any distortion, mutilation or other modification" that is "prejudicial to his honor and reputation." I learned, however, that for my case (and for others like it) the treaty ratified by Congress is a virtually meaningless piece of paper in that it excludes the key moral rights clause. Those responsible for the censorship of the treaty are the powerful lobbies of magazine, newspaper and book publishers. Fearful of losing economic control over authors, and faced with the probability of numerous copyright suits, these lobbies pressured Congress into stating that the moral rights clause must not be enforced in the United States. Publishers can continue to crop photos, magazine and book publishers can continue to mutilate manuscripts, black-and-white films will continue to be colorized; and the federal government can continue to destroy art.





Jennifer Kotter © 1989

The removal of Richard Serra's *Tilted Arc* from Federal Plaza



Addison Thompson © 1989

The scar left after the removal of *Tilted Arc*.



## Moral Rights

### A Critique of the Visual Artists Rights Act of 1989\*

Edward J. Damich\*\*

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#### I. Introduction

The Visual Artists Rights Act of 1989<sup>1</sup> (hereinafter Kennedy Bill), in general, amends the Copyright Act of 1976<sup>2</sup> to recognize the moral rights of authors of certain works of visual art such as paintings, drawings, sculptures, prints, multiple cast sculptures of a limited edition of 200 or fewer, and photographs produced for exhibition purposes only.<sup>3</sup> The moral rights that are recognized include the right of attribution and the right of integrity. The right of attribution in the Kennedy Bill includes: (1) the right to claim authorship<sup>4</sup> (2) the right to prevent the use of an author's name as author of a work he or she did not create<sup>5</sup> and (3) the right to prevent the use of an author's name as author of a work when that work has been altered or destroyed so as to

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\* This article is based on my testimony of June 20, 1989, before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary of the United States Senate on the Visual Artists Rights Act of 1989 (S. 1198) sponsored by Senator Edward Kennedy.

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1. S. 1198, 101st Cong., 1st Sess. (1989). See appendix, *infra* at 451 for a full citation of the Kennedy Bill.

2. 17 U.S.C. §§ 101-914 (1988) [hereinafter Copyright Act].

3. It is unclear whether works other than multiple cast sculptures and prints are limited to a single copy or to a limited edition of 200 or fewer. Section 2 of the Kennedy Bill provides: "A work of visual art does not include —(1) any version that has been reproduced in other than such limited edition *prints or cast sculptures*" (emphasis added).

4. Kennedy Bill, *infra*, at 452, § 3(a)(1)(A).

5. Kennedy Bill, *infra*, at 452, § 3(a)(1)(B).



violate the right of integrity provided by the bill.<sup>6</sup> The right of integrity in the Kennedy Bill includes: (1) the right to prevent any distortion, mutilation, or other modification of the work which would be prejudicial to the author's honor or reputation<sup>7</sup> and (2) the right to prevent the destruction of a work of recognized stature.<sup>8</sup> These rights endure for the life of the author plus fifty years, and they cannot be waived. The Kennedy Bill preempts state moral rights legislation which recognizes rights equivalent to the moral rights provided by the Bill.<sup>9</sup> The Kennedy Bill further provides for a study of resale royalties.<sup>10</sup>

In addition to the introductory material, this article consists of three parts. In the first part, I identify the reasons for federal legislation to protect the moral rights of authors. In the second part, I relate the concept of moral rights to well-established concepts that already exist in American law. In the third part, I comment on the provisions of the Kennedy bill.

## II. The Basis for Federal Protection of the Moral Rights of Visual Artists

Federal protection of the moral rights of visual artists is based on the recognition that works of visual art communicate an aspect of the artist's personality, namely his creative vision. Just as a United States Senator might be at great pains to make sure his remarks are accurately reported, so the visual artist feels he is entitled to preserve the authenticity of his visual message. This personal aspect helps to define a work of art. The shock and horror that seems so natural over the repainting and stabilizing of a Calder mobile or the destruction of a mural are entirely out of place over the changing of a light fixture or the repainting of a wall. The negative reaction is prompted by indifference to the object as a work of art. The recognition of moral rights compels the owner of a material object to recognize that what he owns is a work of art, the communication of a unique personality.

Society also benefits from the protection of the artist's moral rights. If the arts are promoted by giving authors economic rights in

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6. Kennedy Bill, *infra* at 452, § 3(a) (rights of certain authors to attribution and integrity).

7. Kennedy Bill, *infra*, at 452, § 3(a)(3)(B).

8. *Id.*

9. Kennedy Bill, *infra*, at 454, § 5 (preemption).

10. Kennedy Bill, *infra*, at 456, § 9 (study on resale royalties).



their works, surely they are also promoted when authors are assured that their work will not be tampered with. As Judge Lumbard stated in *Gilliam v. ABC*,<sup>11</sup> "[T]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent." Furthermore, moral rights will help protect our cultural heritage.

In addition to protecting the personal aspect of artistic creation, federal protection of moral rights can be based on our obligations under the Berne Convention for the Protection of Literary and Artistic Works<sup>12</sup> which the United States adhered to March 1, 1989. Article 6bis of the Berne Convention provides for moral rights,<sup>13</sup> and no amount of qualifying language<sup>14</sup> can obscure the fact that by adherence this country has recognized moral rights in principle. Furthermore, the fact that the nascent moral rights protection that currently exists in the United States might have been sufficient to *join* the Berne Convention does not mean that we should not bring United States law more in line with the requirements of article 6bis. The United Kingdom, for example, recently enacted comprehensive moral rights legisla-

11. 538 F.2d 14, 24 (2d Cir. 1976).

12. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

13. The Article states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) (1978) [hereinafter WIPO Guide].

14.

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 3, 102 Stat. 2853 § 3(b) (1988).



tion<sup>15</sup> in order to comply with the requirements of article 6bis, despite the fact that it has been a member of the Berne Union for decades.

Ideally, the goal of federal protection of moral rights should be comprehensive protection of the creative personality. Minimally, the United States should comply with the language of article 6bis.

### III. Moral Rights and the Right Of Personality

Protecting the moral rights of authors cannot be characterized accurately as transplanting a foreign organ into the body of American law. The personal aspect of artistic creativity has been expressly recognized in American law. In *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes stated:

"The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible."<sup>16</sup>

More recently, the United States Supreme Court in *Harper & Row Publishers v. Nation Enters.* noted that the right of first publication in the Copyright Act, §§ 106(1) ((3)), had both a personal and an economic aspect.<sup>17</sup> When *Nation* magazine published excerpts of President Ford's autobiography before the book itself was published, the author was deprived not only of the economic advantage of first publication but also of his personal interest in creative control, i.e., the form, the time, and the circumstances of his communication of his personality to the public. These interests, the Court held, give the right of first publication a particular resistance to the claims of fair use.<sup>18</sup>

The phrase "honor or reputation," found in both article 6bis of the Berne Convention and in the Kennedy Bill also suggests an American connection to moral rights. "Reputation" is familiar enough, but protection of "honor" in American law has not been fully appreciated. The right of privacy, for example, is primarily concerned with injury to honor. The right of privacy, like moral rights, did not exist as a recog-

15. Copyright, Designs and Patents Act, 1988, ch. 48 [hereinafter British Act].

16. 188 U.S. 239, 250 (1903).

17. "The author's control of first public distribution implicates not only his personal interest in creative control but also his property interest in exploitation of prepublication rights. . . ." 471 U.S. 539, 555 (1985).

18. *Id.*



nized cause of action until the beginning of this century, but it is now commonplace. The first step in the recognition of a cause of action for violation of the right of privacy was the identification of the interest to be protected. This was done in the famous article, *The Right of Privacy*, by Samuel Warren and Louis Brandeis.<sup>19</sup> In order to convince the skeptical jurists of their day, Warren and Brandeis had to do more than merely argue that it would be "nice" to have certain aspects of one's life kept from public knowledge. What they had to do—and what they did—was to show how necessary it was for the flourishing of the human personality to have a zone in which experiments could be tried and in which mistakes could be made in fashioning one's individuality. Thus, Warren and Brandeis wrote that the right of privacy was based on the principle of "inviolable personality"<sup>20</sup> and that it was "part of the more general right to the immunity of the persona—the right to one's personality."<sup>21</sup> The right of privacy is not concerned with whether people think worse or better of the person after facets of his personality are revealed to the public. The injury is to the dignity and the autonomy of the individual. Every private person should have the right to reveal his personality when he chooses, to the extent he chooses and under circumstances that he chooses.

The parallel with moral rights is obvious—so obvious that it is not surprising that Warren and Brandeis used a common law copyright case, *Prince Albert v. Strange*,<sup>22</sup> as an example of a cause of action that protected the autonomy of the individual as well as the profit motive.<sup>23</sup> The artistically creative act is a communication to the public of the personality of the artist. Not only should she have the right to control the time, manner, and circumstances of this communication, but also, since it is a continuing communication, the artist has a right that it be authentic and that it be identified as *her* communication. Distorting this communication may cause people to think worse of the artist, but even if they think better of her, the artist has sustained an injury to her personality. No matter what the reaction of the public to the revelation, the artist suffers the indignity of saying what she did not intend to say. The feeling that prompts the rebuke, "Don't put words in

19. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

20. *Id.* at 205.

21. *Id.* at 207.

22. 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (High Ct. of Chan. 1849), *aff'd*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849).

23. Warren & Brandeis, *supra* note 19, at 208.



my mouth," comes close to capturing the essence of prejudice to honor.

In addition to the right of privacy, there are torts that reflect concern with respect for personality. The fact that substantial damages can be recovered in defamation per se, even though no economic, physical, or any other type of definite harm is shown, suggests that the interest that is being protected is the plaintiff's honor.<sup>24</sup> This is also true for assault, battery, false imprisonment, malicious prosecution, intentional infliction of mental distress, alienation of affections, intentional interference with voting, and invasion of analogous civil rights provided by statute.<sup>25</sup> These latter torts have been identified as protecting personality or interests in personal dignity.<sup>26</sup>

Finally, the right of personality and its link with honor has been recognized in American legal philosophy. Roscoe Pound, for example, as early as 1915, identified three interests of personality: (1) the physical person; (2) honor (reputation); and (3) belief and opinion.<sup>27</sup> Pound was very careful to distinguish the protection of honor and dignity from the protection of substance or assets, but he recognized that they could overlap, as in defamation, where injury to reputation could take the form of economic loss as well as loss of self-esteem.

#### IV. The Structure of Federal Protection of the Moral Rights Of Visual Artists in the Kennedy Bill

Since the author's personality is present in all works of artistic creativity, federal protection of moral rights should not be limited to the visual arts. The Berne Convention extends moral rights to all "literary and artistic works,"<sup>28</sup> and the new British Act recognizes moral rights in dramatic, musical or artistic works and films.<sup>29</sup> However, there is nothing wrong in principle in proceeding incrementally, provided it is expressly acknowledged that giving some sort of moral rights protection to a segment of authors neither fulfills our Berne obligations nor provides comprehensive protection. It is also important not to preempt state and common law protection when it provides significantly

24. DOBBS, REMEDIES § 7.3 (1973).

25. *Id.*

26. *Id.*

27. Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 355 (1915).

28. "The expression 'literary and artistic works' shall include every production in the literary and scientific and artistic domain, whatever may be the mode or form of its expression." WIPO Guide, *supra* note 13, at art. 2.

<https://nsuworks.nova.edu/nlr/vol14/iss2/1>  
British Act, *supra* note 13, at § 2.



greater protection. The admission that the Kennedy Bill is only the first step can be accomplished easily enough by appropriate statements in the legislative history, but the preemption provision is worded in such a manner that there is a very real danger that more comprehensive, existing protection will be preempted.

Section 5(f)(1) of the Kennedy Bill preempts state and common law rights "that are equivalent to any of the rights conferred by section 106A [rights of attribution and integrity] with respect to works of visual art to which the rights conferred by section 106A apply."<sup>30</sup> The word "equivalent" is already used in the preemption provision of the Copyright Act of 1976,<sup>31</sup> and it has not been strictly construed to require that the state right be exactly coextensive with the federal right.<sup>32</sup> Thus, it is arguable that the right of pseudonymity, which is granted by the moral rights statute of Senator Kennedy's home state of Massachusetts,<sup>33</sup> would be preempted as "equivalent" to the federal right of attribution contained in the bill. Since the World Intellectual Property Organization (WIPO), which administers the Berne Convention, has taken the position that the right of attribution includes the right of pseudonymity,<sup>34</sup> the result would be to lessen the compliance of American law with article 6*bis*. Doubtless, there are other examples in the ten states that have enacted comprehensive moral rights legislation. More reassuring was the language of one of the earlier versions of the Kennedy Bill: "Nothing in section 106a [rights of attribution and integrity] . . . preempts the common law or statutes of any State except to the extent that such common law or statutes would diminish or prevent the exercise of the rights conferred by, or the implementation of, section 106a . . . ."<sup>35</sup> This approach has been adopted in other federal legislation.<sup>36</sup>

30. Kennedy Bill, *infra*, at 455 § 5(f)(1).

31. 17 U.S.C. § 301 (1988).

32. NIMMER, COPYRIGHT § 1.01[B] (1988).

33. Mass. Gen. Laws. Ann. ch. 231 § 85S(d) (West Supp. 1987).

34. WIPO Guide, *supra* note 13, at com. 6*bis*. 3.

35. S. 1619, 100th Cong., 2d Sess. § 10(e), version marked 10/17/88.

36. See, Federal Trade Commission Act, 15 U.S.C. § 57a-1(e) (1988). "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law" *Id.* at § 57b(e) (1988); Fair Packaging and Labelling Act: "It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States . . . which are less stringent than . . . the requirements of this title. . . ." *Id.* at § 1461 (1988).



### A. Works Protected

If incrementalism is to be the way that comprehensive federal protection of moral rights is to be introduced, it is logical to begin with that class of works which would be lost by irreparable physical changes—paintings, drawings, and sculpture existing in a single copy—as does the Kennedy Bill. It is also logical to extend protection, as the Kennedy Bill does, to multiples, such as prints, multi-cast sculptures in limited editions and photographs, since each print or each casting can be said to be unique, despite the fact that it will resemble the other prints or castings. It is not advisable, however, to limit protection of photographs to those “produced for exhibition purposes only.”<sup>37</sup> Whether a photograph has been produced for exhibition purposes *only* seems to be an unworkable test.

The global exclusion of works made for hire in the Kennedy Bill is also unjustifiable, given the narrow scope of works protected. Since the moral rights in the Kennedy Bill apply to the owners of copyright and to the owners of the material object in which the work is embodied, the work for hire exclusion must be justified for reasons that do not equally apply in those instances. In the case of paintings, drawings, prints, and sculptures existing in single copies, the right of integrity would be violated by physical acts done to the works themselves. In the employer-employee relationship, it would seem that there would be little need to commit such acts. Ordinarily, the acts would consist of acts done to copies of originals in the process of making reproductions. In the case of a publication, for example, it is ordinarily not necessary to alter the original in order to reproduce it in a different form in a newspaper or magazine. Furthermore, the protection of prints in the Kennedy Bill applies only to limited editions of 200 copies or fewer; therefore, it would not apply to newspapers and magazines of mass circulation.<sup>38</sup> In the case of commissioned works, it is again difficult to see why there should be a need for a special freedom to make physical changes to a painting, drawing, print, or sculpture<sup>39</sup> that does not exist in the case of owners of copyright and the material object. The usual case would seem to be publications that use commissioned drawings, but, as in the

37. Kennedy Bill, *infra*, at 451, § 2.

38. The Kennedy Bill also excludes protection of “any reproduction, depiction, [or] portrayal” in a “book, magazine, periodical, or similar publication.” *Id.* at § 2(2) & (4).

39. It is not readily apparent how a sculpture could fit the definition of work made for hire as a commissioned work. See 17 U.S.C., at § 101 (work-made-for-hire).



case of the employer-employee relationship, the Kennedy Bill only applies to prints in limited editions of 200 or fewer. In any event, the above analysis suggests that the proponents of the work-made-for-hire exclusion should have the burden of showing how the limited moral rights recognized by the Kennedy Bill would pose insurmountable problems in their undertakings.

## B. *Rights Recognized*

The Kennedy Bill essentially complies with article 6bis by recognizing the right of attribution and the right of integrity. In the case of the right of integrity, however, there is room for improvement in three areas. First, it would be advisable to indisputably indicate that the right to "prevent" certain acts includes the right to recover damages if they have already occurred.<sup>40</sup> Second, it should be made clear that any change caused by physical act to the work should be a per se violation of the right of integrity without a showing of prejudice to honor or reputation, since, by definition, the honor of the author is injured. An irreparable, physical change to the work effectively causes the work to be lost and to fail to communicate the author's artistic vision.<sup>41</sup> Third, the right against destruction should not be limited to works of recognized stature. Limiting moral rights to works of recognized stature has no justification in moral rights theory or in the Berne Convention, and it is contrary to American copyright tradition to condition rights on artistic merit. Such a limitation does not exist in French law or in the recently enacted British Act.

Presumably, the "of recognized stature" criterion<sup>42</sup> was motivated by concern over law suits stemming from the destruction of insignificant works, such as a child's drawing.<sup>43</sup> It is curious, however, that the "of recognized stature" criterion is not imposed on the right against distortion, mutilation, or other modification, yet it is quite easy to imagine a child's drawing being mutilated rather than destroyed. If the "prejudicial to honor or reputation" qualification<sup>44</sup> is sufficient to make

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40. This point also applies to the right of attribution.

41. A per se rule is not indicated when the right of integrity protects ordinary reproductions, since the original is not lost no matter how distorted the reproduction may be.

42. Kennedy Bill, *infra*, at 452, § 3 (a)(3)(B).

43. Because of the narrow definition of works protected in the Kennedy bill, the right against destruction would not be extended to mass reproduced works.

44. Kennedy Bill, *infra*, at 452, § (a)(3)(A).



law suits unattractive in the case of the right against modification, it would seem to be equally serviceable in the case of destruction. It would seem that just as courts are capable of distinguishing between a pinch and an amputation in the case of pain and suffering, they would be equally capable of distinguishing between the indignity of the destruction of a child's drawing and a Larry Rivers painting.

The right of attribution recognized in the Kennedy Bill does not measure up to the requirements of article 6*bis*, nor does it provide comprehensive protection. WIPO indicates that the right of attribution envisioned by the Berne Convention has the following components: (1) the right to claim authorship, (2) the right to publish pseudonymously or anonymously, (3) the right to reject pseudonymity and anonymity, (4) the right of the author not to have his name associated with a work that is not his, and (5) the right of the author not to have his name associated with a work that he did not create.<sup>45</sup> The Kennedy Bill does not provide for anonymity or pseudonymity at all.

### C. Assignment, Waiver, and Consent

The most courageous and realistic provision of the Kennedy Bill is the provision that makes the moral rights recognized by the bill non-transferable and nonwaivable.<sup>46</sup> This is consistent with WIPO's interpretation of article 6*bis*, and it is required to avoid making federal moral rights legislation an exercise in futility. Without such a provision, given the bargaining power of most authors, the waiver or transfer of moral rights would soon appear as boilerplate in all contracts.

Inalienability of certain rights is not foreign to American copyright law. The power of termination of transfers and licenses granted by the author states: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."<sup>47</sup> The power of termination is the successor to the renewal provision of the 1909 Act, which, as former Register of Copyrights, Barbara Ringer, stated, was provided by Congress because it recognized that "author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability)

45. WIPO Guide, *supra* note 13, at com. 6*bis*, 3.

46. Kennedy Bill, *infra*, at 453, § 3(c).

47. 17 U.S.C. § 203(a).



is necessarily in a poor bargaining position.”<sup>48</sup>

Nontransferability and nonwaivability do not surrender others to the whims and caprices of authors. The meaning of nontransferability is that someone other than the author may not exercise the author's moral rights when he is capable of doing so. The meaning of nonwaivability is that the author cannot contractually bind himself not to assert his moral rights. This does not mean that the author cannot *consent* to what would ordinarily be a violation of moral rights. It simply means that he cannot be held to his consent if he changes his mind before the other party has detrimentally relied on this consent. For example, if an author consents to an irreparable change to his work of visual art, he cannot sue once the change has occurred.

#### D. Remedies

Not enough thought has been given in the Kennedy Bill to whether it is appropriate to adopt wholesale the copyright infringement remedies in the Copyright Act as remedies for violation of moral rights. There is no problem with injunctions, but the language of the act regarding monetary damages is not apt regarding the kind of interests protected by moral rights. As has already been pointed out, violations of moral rights are more akin to violations of the right of privacy, defamation per se, and other right of personality torts. Thus, the Copyright Act's provisions for recovery of actual damages and profits would often be inappropriate.<sup>49</sup> In many cases, the author would be limited to statutory damages, but the amount of statutory damages in some cases would be too high (e.g., \$200 for the mutilation of a child's drawing?) and in other cases would be too low (e.g., only \$100,000 for the intentional destruction of a Jasper Johns painting?).<sup>50</sup> Moreover, statutory damages for American works could be precluded by nonregistration.<sup>51</sup>

It would be a better solution to leave the calculation of monetary damages to the courts, as long as they have been instructed about the nature of the interest protected. It should be noted that monetary damages have not been awarded in an entirely arbitrary and irrational

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48. Ringer, *Renewal of Copyright*, in *STUDIES IN COPYRIGHT* (1960), excerpted in LATMAN & GORMAN, *COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS* 207 (2d ed. 1985).

49. 17 U.S.C. § 504(b).

50. 17 U.S.C. § 504(c).

51. 17 U.S.C. § 412.



manner in the case of such right of personality torts such as the right of privacy. Rather, the courts have focused on factors such as: (1) whether the tort was committed publicly, (2) the nature, motive and extent of the defendant's conduct, and (3) the plaintiff's own motives and misbehavior.<sup>52</sup> It also seems appropriate for the court to consider the value of the work.

### E. Duration

The adoption of the copyright term for the duration of moral rights in the Kennedy Bill is consistent with the requirements of the Berne Convention. However, it may very well be argued that by doing so the secondary benefit of moral rights protection, such as the preservation of our cultural heritage, is weakened. Since there is no register of culturally significant paintings, drawings, prints, and sculptures, in most cases fifty years after the author's death no one will have standing to prevent the destruction or mutilation of such works. Furthermore, a work of visual art does not suddenly stop expressing the author's personality fifty-one years after his death. Therefore, the possibility of perpetual protection should be seriously considered. Moral rights in France are perpetual, and in the United States, even today, common law copyright is perpetual. The constitutional requirement that copyright protection be for "limited times"<sup>53</sup> is not an insurmountable obstacle, since the copyright clause was directed at what we would now call the economic rights as distinguished from the moral rights. Moral rights, as we have seen, are more akin to torts protective of the personality. If moral rights are to be made perpetual, however, it would be prudent not to make the legislation recognizing them part of the Copyright Act.

## V. Conclusion

The Kennedy Bill is a commendable first draft for protecting the moral rights of authors of works of visual art. There is nothing wrong in principle with opting for incrementalism by beginning protection with works of visual art narrowly defined. The most serious concern, though, is that its preemption provision will actually reduce the scope of moral rights protection that already exists in some states, including

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52. See generally, Dobbs, *supra* note 24.

53. U.S. CONST., art. 1, § 8, cl. 8.



New York and California,<sup>54</sup> both states well-known as centers for the arts. Lesser concerns are: (1) the limitation of protection of photographs to those "produced for exhibition purposes only," (2) the seemingly knee-jerk exclusion of works made for hire, (3) the limitation of the right against destruction to works "of recognized stature," (4) the exclusion of anonymity and pseudonymity from the right of attribution, and (5) the "bad fit" that results from applying the Copyright Act provisions for monetary damages to moral rights violations. None of these lesser concerns, however, are serious enough to reject the bill, since they are all susceptible to remedy by later amendment. When these concerns are united to the preemption provision, however, moral rights advocates will have to seriously consider whether they will be in a better provision after the bill becomes law.

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54. See generally Note, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435 (1990).



## Federal Moral Rights Legislation: The Need for Caution

Robert A. Gorman\*

In the wake of United States adherence to the Berne Convention and the attendant examination of the doctrine of moral rights, the 101st Congress is giving considerable attention to the possible passage of legislation that would specifically afford to authors and artists the rights of attribution and integrity. The most thoroughly developed proposals—S. 1198<sup>1</sup> introduced by Senators Kennedy and Kasten, and H.R. 2690 introduced by Representative Kastenmeier—take the form of a Visual Artists Rights Act. These are based in large measure upon the ten state statutes<sup>2</sup> that grant attribution and integrity rights to creators of a variety of works of art. Also under consideration, and the subject of several congressional hearings, are more comprehensive moral rights laws that would reach beyond the visual arts and would embrace a larger variety of creative works, including motion picture films and conceivably literary and musical works.

It is the purpose of this commentary to point out some of the reasons for serious doubt regarding the wisdom of the more comprehensive form of moral rights legislation. At first blush it may seem churlish, indeed "immoral," to attempt to counter the intuitively appealing arguments of the moral rights advocates. Yet, I believe that there are a

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For the past three years, I have served as consultant to the law firm of Proskauer Rose Goetz & Mendelsohn, in which capacity I recently prepared a memorandum on the subject of moral rights at the request of an ad hoc group of representatives of film producers and book and magazine publishers. That memorandum afforded me an opportunity to explore more deeply the arguments for and against the introduction of comprehensive moral rights legislation in the United States. This article states my own views, and is not presented on behalf of the law firm or of the ad hoc group.

1. See appendix, *infra* at 451, for a full reproduction of the proposed Kennedy bill.

2. See Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 Colum-VLA J. Law & Arts 291 (1989); Note, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435, 444 (1990).



significant number of industries and creative works for which a great disservice would be done by the adoption of wide-ranging requirements of attribution and proscriptions upon alterations (and so-called distortions) of creative works. Such legislation may inhibit creativity more than it fosters creativity. As will be noted below, I believe that the Kennedy and Kastenmeier bills, because of their focus upon essentially singular works of fine arts, are not subject to most of the concerns I have about more comprehensive moral rights legislation—and I believe those two bills are deserving of support.

I am deeply committed to the purposes of our copyright system: the promotion and dissemination of information and of the arts, the support of literary, artistic and musical creativity, and the enrichment and preservation of our cultural heritage. Proponents of moral rights legislation are generally motivated by the same objectives. They believe that the arts will be nourished and protected by granting the rights of paternity (or attribution) and integrity. Nonetheless, my own study of moral rights and of the United States cultural and entertainment industries to which comprehensive moral rights legislation would be applied gives me great pause.

Such comprehensive legislation is likely to be ill-advised. It is likely to be impracticable in its application, to be unsettling in its impact upon longstanding contractual and business arrangements, to threaten investment in and public dissemination of the arts, to sharply conflict with fundamental United States legal principles of copyright, contract, property and even constitutional law, and ultimately to stifle much artistic creativity while resulting in only the most speculative incentives to such creativity.

I should like, at the outset, to point out certain characteristics of the arts and entertainment industries—particularly motion picture films (both theatrical and television films) and book, newspaper and magazine publishing—that are pertinent to moral rights legislation.

Most of the product of these industries is intensely collaborative. In film, for example, the producer brings together a director, screenwriter, designers of sets and costumes, cinematographer, composer, actors and all manner of technical and creative contributors. The producer takes the economic risks and exercises business and, commonly, creative control.

Magazine and newspaper publishing is also a collaborative enterprise, where there must be centralized business and creative control in order to coordinate—often under the most exigent time constraints—the work of news writers, feature writers, photographers, lay-



out designers and others. Book publishing, particularly educational publishing, is also collaborative, with the publisher exercising essential control from overall planning to the details of content and writing and pictorial style.

The second pertinent feature of the arts and entertainment industries is their utilization of their works in a variety of "subsidiary" uses. Motion picture films are shown not only in theaters, but also on broadcast and cable television, over satellites and on airplanes, and in foreign nations, and they are marketed in cassette and disc form through rentals and sales. These uses contemplate all varieties of editing in terms of time-frame and content, commercial interruptions, dubbing in foreign languages, and the like.

Published books are also commonly exploited through revised editions and in subsidiary markets, including updated versions, abridgments, foreign-language editions, television and theatrical film versions, and adaptations that take advantage of new technological advancements, such as audiotapes (for trade books) and computer materials (for educational books). Educational books also contemplate frequent revisions in order to update text and pictorial content.

This wide variety of revisions and adaptations of all kinds has made the so-called "subsidiary" uses in fact often the principal determinant of whether an artistic or entertainment vehicle will become profitable, will attract investment, and will therefore be developed and marketed to the public at all.

A third pertinent feature of the entertainment and cultural industries in the United States is that they have historically been regulated through elaborate contractual arrangements, voluntarily negotiated, and often negotiated on behalf of the principal creative contributors by strong and sophisticated labor organizations. These arrangements establish employer-employee relationships among most of the contracting parties and are negotiated within the framework of the "work made for hire" provisions of section 201(b) of the 1976 Copyright Act. They commonly deal with such matters as the creative participation of directors, authors and the like in the development of subsidiary and derivative uses, and the credit to be given in connection with the exhibition, sale and advertising of the work.

The principal entertainment and cultural industries of the United States, in summary, are highly collaborative, contemplate and depend upon a wide variety of derivative forms in their distribution to the public, and are historically regulated by individually and collectively negotiated agreements. The introduction into these industries of a



right—exercisable by any one of a host of collaborative contributors—to protest the alleged distortion or modification of a particular literary or artistic contribution is extremely problematic. At best, it introduces an element of instability and uncertainty, as well as the frequent possibility, because of the increased threat of litigation, of delay in public access to and enjoyment of entertainment vehicles. At worst, it threatens to prevent altogether the dissemination to the United States and international public of a host of cultural and entertainment materials in forms that are varied, appealing and affordable. Any significant limit upon the ability of producers and publishers to disseminate works in these secondary markets—dissemination which commonly can mean the difference between a losing and a profitable business venture—runs a substantial risk of chilling investment in the arts and entertainment fields. This may in turn reduce the financial support of innovative creative endeavor—a result that will obviously be harmful to the public interest. Introduction of moral rights into these industries (particularly if these rights are statutorily declared to be inalienable and non-waivable) will also unsettle the network of contractual agreements that have been developed over many years in the various industries and that appear on the whole to be working quite successfully and fairly.

Before such a drastic step is taken, it would seem that the burden is upon those challenging the present system to show that it has caused serious and pervasive hardships or injustice. The industries under discussion are effectively generating creative works, bringing them to the American public, making them attractive to consumers overseas and thereby dramatically aiding in the United States balance of trade. All of these beneficent effects have been brought about through voluntary arrangements in the commercial marketplace. I do not believe that the case has been made for substituting for these arrangements a congressionally granted power of aesthetic veto to a wide range of creative contributors. In sum, it may be that comprehensive moral rights legislation is a drastic cure for what is a relatively undiscernible malady.

It is natural to ask whether untoward consequences have flowed from the incorporation of moral rights doctrine into the legal systems of many European and Latin American nations. Many of these nations appear to have flourishing creative communities in the arts and entertainment fields. Surely, however, the United States is the world leader in these fields. Whether that is to any major extent attributable to the greater legal and business flexibility accorded producers, publishers and other copyright owners and licensees under our legal system is



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difficult to determine empirically—as it is to determine whether, say, the creative arts in France<sup>3</sup> or Italy<sup>4</sup> would flourish to a greater degree were moral rights abandoned or sharply limited. One can reasonably assume, however, attributing economic rationality to those who invest in the arts and entertainment industries, that such investment will be promoted under a legal system in which authors—many of them working in the context of collaborations or of employment relationships—will not be accorded the right to exercise an aesthetic veto over the initial and secondary marketing of films, magazines, books and the like.

Even apart from economic modeling, moral rights abroad have indeed resulted in some odd limitations upon the display and marketing of works by copyright owners and licensees. Owners of buildings have been limited in making structural changes or in tearing down walls with murals.<sup>5</sup> In a noteworthy case decided under the Canadian moral rights statute, a sculptor who had conveyed to a shopping center his sculpture of geese in flight was afforded an injunction against the center's bedecking the geese with ribbons at Christmas time.<sup>6</sup> Creators of music in the public domain have successfully challenged the use of that music in motion pictures deemed inconsistent with the political views of the composer,<sup>7</sup> and artists have been permitted to challenge the exhibition of their works in a physical or artistic context they believed unsuitable. A textwriter of a book successfully challenged the publisher's selection of an illustrator on the ground that the illustrations were inferior in quality.<sup>8</sup> A songwriter (apparently after having transferred the copyright to another) has secured redress against the performance of his song with parody lyrics.<sup>9</sup> Courts have been invited to sit in judgment upon the nature and number of commercial interrup-

3. France, Law of March 11, 1957, No. 296., arts. 6, 19, 25.

4. In Italy the moral rights of the architect are included. Italy, Law of April 22, 1941, No. 633, § II, arts. 20-22.

5. See NIMMER & GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE at 74, n. 297 (1987).

6. Snow v. The Eaton Centre Ltd, 70 C.P.R.2d 105 (1982).

7. Soc. Le Chant de Monde v. Soc. Fox Europe et Fox Americaine Twentieth Century, Judgment of Jan. 13, 1984 1 Gax Pal. 191 (1954) D.A. 16, 80 (Cour d'Appel Paris).

8. Pres. Dist. Ct. Utrecht, 27 Nov. 1975, discussed in NIMMER & GELLER, *supra* note 5, at 45.

9. Pres. Dist. Ct. Amsterdam, 21 Dec. 1978, discussed in Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1030-31 (1976).



tions in films shown in television. Set designers have successfully challenged the deletion of a theatrical scene in which their set was to appear,<sup>10</sup> and stage directors have successfully challenged the modification or omission of their stage directions.<sup>11</sup>

Moreover, speaking more generically and summarily, employees have asserted rights over employers in the exploitation of works made for hire,<sup>12</sup> one joint author has been able to stop the marketing of a work prepared along with other joint authors, and authors have been able to override negotiated contract provisions with publishers regarding the editing and marketing of their works.

Not to neglect consideration of the right of attribution, foreign courts have ordered radio stations to mention the names of all composers, lyricists, and performers of all broadcast music;<sup>13</sup> have accorded redress to an architect whose name was not mentioned at the ceremony opening his building or in the attendant newspaper articles;<sup>14</sup> and have permitted an author to ignore his contractual promise to produce certain works under a pseudonym.

To some extent, then, moral rights doctrine as developed abroad has indeed resulted in some disturbing inhibitions upon the rights of copyright owners and licensees, and property owners, seeking to disseminate or adapt creative works. It appears however that the arts and entertainment industries abroad have learned to live with moral rights by largely ignoring those rights or substantially watering them down. Rights of attribution and integrity have—by statute or judicial decision—not been enforced when a user is taking action that is consistent with “proper usage” or with the “accepted manner and extent” or that is “reasonable” or “de minimis.” A most significant limitation upon the integrity right, applied in most foreign nations, is the right given to licensees to make alterations and modifications that are appropriate in light of the nature of the work and the purpose of the use; these are

10. *Leger v. Reunion des Theatres Lyriques Nationaux* (1955), 6 R.I.D.A. 146 (Tribunal Civil de la Seine).

11. See Judgment of Aug. 14, 1975, LGE Frankfurt-on-Main, discussed in Da-Silva, at 31.

12. See Perwin, *Drafting “Works for Hire” Agreements After Reid*, 14 NOVA L. REV. 459 (1990).

13. NIMMER & GELLER [Brazil] *supra* note 5, at 77-8. (A broadcaster who fails to comply with the requirements must “disclose the identity of the author or performer . . . for three consecutive days, at the time of day at which the offense was committed.” Copyright Act of 1973, Art. 126.

14. NIMMER & GELLER [Switzerland,] *supra* note 5, at 74.



deemed allowable "adaptations" and are distinguished from "distortions," after the court considers whether the modifications preserve the "spirit, character, and substance of the work."<sup>15</sup>

In many nations, sharp limitations are placed upon moral rights in certain kinds of works, such as musical compositions, useful articles, computer programs, and materials prepared for news publications or broadcasts. Despite the sometimes recited theory to the contrary, it is commonplace to permit moral rights to be waived, either in written or oral agreements or pursuant to the industry's customs and usages. In almost every foreign jurisdiction that recognizes the right of integrity, the author is required to assert that right in a fair, reasonable and good faith manner; the right will not be enforced if it is asserted "arbitrarily" or "vexatiously" or is "misused." A number of national laws incorporate the doctrine of fair use as a defense against moral rights claims (as with copyright claims), or permit certain educational uses or parodies. Frequent adjustments are made for moral rights asserted by employees, or by joint authors, or by creative collaborators in works such as motion picture films, encyclopedias and periodicals.

These exceptions to moral rights have been incorporated in the law of foreign jurisdictions over time and through adjustments that take account of the special dimensions of particular societies and cultures in a variety of nations. It cannot be expected that such ameliorative doctrines could be legislatively incorporated whole-cloth into United States law if a comprehensive moral rights law were to be enacted here. It would be particularly unfortunate if such a law were to be read by our courts as an invitation to strict application, without these ameliorative

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15. The difficulty of making these distinctions, and the unsettling financial impact of uncertainty and litigation, are exemplified by the recent French litigation instituted by the children of film director John Huston, seeking an injunction against the showing over French television of a "colorized" version of Huston's black-and-white film, "The Asphalt Jungle." Apart from the difficult issues whether moral rights in the film, made in the United States, were to be governed by United States law and were properly to be asserted by the film producer or by the director, the court had to decide whether the color version constituted an impermissible distortion or an appropriate adaptation. The lower court concluded the former, and the appeals court concluded the latter. Judgement of July 6, 1989, cours d'appel, Paris (La Societe Turner Entertainment Co., appealing from Angelica and Daniel Huston and Societe Realisation de Filmes (S.R.F.) v. La Societe D'exploitation de la Cinquieme Chaîne de Television, la Cinq). Note, *Artistic Integrity, Public Policy and Copyright: Colorization Reduced to Black and White*, 50 Ohio St. L.J. 1013, 1028-29 (1989). The higher court was influenced in part by the desirability of making the film more readily accessible to the French television-viewing public.



doctrines. However it would not be much better—from the point of view of persons undertaking investment in the arts and entertainment fields—to leave it to the courts to introduce piecemeal a variety of needed exemptions and defenses, particularly when the foreign experience suggests that these exemptions and defenses will almost inevitably turn upon aesthetic and subjective assessments which go well beyond the expertise and proper role of judges and juries.

Perhaps my greatest concern about the comprehensive incorporation of moral rights into United States law is the flat inconsistency between moral rights and a number of fundamental United States legal principles relating to copyright law, to the public domain, to property, to contract, to constitutional law, and to the judicial role.

Moral rights will inevitably conflict with our copyright law by permitting an author to veto certain uses of a work contemplated by the current copyright owner. The copyright owner holds the exclusive right to prepare derivative works. As noted above, the right to adapt, edit, translate, abridge, and the like are perhaps the most important rights of the copyright owner today; they may determine whether investors will support the creation and distribution of that work to the United States and foreign public. No moral rights law with which I am familiar successfully accommodates the rights of the author and of the copyright owner after copyright has been transferred. Also as noted above, moral rights held by individual authors will inevitably conflict with the copyright interests of other joint authors and of employers with works made for hire.

Our legal system has a number of policies that support the cultural enrichment of our public domain. Our fair use doctrine and a host of statutory exemptions contemplate educational uses, news reporting and cultural criticism, parodies and the like. The first amendment to the Constitution incorporates the same values, and the patent and copyright clause of the Constitution contemplates statutory protection for only a limited time.<sup>16</sup> All of these concerns for the public domain—and for fair dissemination and comment—may be jeopardized through the adoption of comprehensive moral rights legislation—particularly if, as in a number of foreign nations, moral rights are deemed to last perpetually, or at least for a longer period than the copyright.

Property laws give the owners of a chattel—including a painting or sculpture—the right to place it, display it, frame it, or store it in any

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16. U.S. CONST., art. I, § 8, cl. 8.



reasonable location or manner (and even probably in unreasonable ones). Owners of structures are commonly understood to have the right to make adjustments in those structures or even to destroy them. The compatibility of moral rights with these property ownership rights has been difficult to ascertain (witness the Canadian Geese litigation).

Moral rights legislation will also create conflicts with the variety of individually and collectively negotiated contracts that permeate the film, broadcasting, and magazine, newspaper and book publishing industries. In the United States legal system, we have traditionally valued the use of freely negotiated contracts to allocate rights and duties of the various participants in an enterprise. Examples are the employment agreement, the agreement among collaborative authors, and the author-publisher agreement. Government will sometimes step in to dictate the terms of contracts, but this is generally done only when the present contractual agreements are regarded as significantly unjust or abusive, or unprotective of central social values. It does not seem to me that the case has been made that the present system of private relationships in the various industries is so dysfunctional as to warrant governmental intervention. It is not clear to me precisely what injustices are being worked by that system.

Finally, as has been suggested above in discussing the foreign experience, the comprehensive incorporation of moral rights into United States law will inevitably bring before judges and juries matters of aesthetics for which they are ill-suited. How will it be determined whether there is prejudice to an author's honor and reputation, or whether certain changes are "adaptations" rather than "distortions," or whether a plaintiff's claims are abusive, or whether a fair use doctrine will apply (and how will it compare to the fair use doctrine in copyright)? Will these standards be determined by a subjective or an objective test? And how will they accommodate the policies that underlie the first amendment?

It is true that certain comparable questions of scope and defenses are treated in the context of other legal doctrines such as defamation, privacy, copyright, and the Lanham Act. But the latter are more familiar to our legal system and those charged with interpreting our legal rules; and those doctrines already take into account a number of countervailing policies that are attentive to the public interest in access to information and culture, such as the first amendment, fair use, the requirement of public confusion in trademark cases, and the termination of the pertinent tort claims upon the death of the plaintiff.

Whether or not similar defenses are incorporated amidst the unfa-



miliar contours of moral rights, the result will be the introduction of great uncertainty and unpredictability into our law. Uncertainty and unpredictability are surely a common feature of our legal system. But I believe that we should be reluctant to introduce them into cultural and entertainment industries that are flourishing, that are attracting investment and providing United States artistic leadership in the world, and that touch upon concerns for free expression and creativity at the core of our constitutional and social system.

Congress has in effect decided, in connection with the enactment of the Berne Convention Implementation Act of 1988,<sup>17</sup> that the United States already accords rights equivalent to moral rights through various existing state and federal laws. I am in substantial agreement with that view. I believe that the most worrisome abuses of authors' and artists' rights can be rectified through our laws of unfair competition, contract, defamation, privacy, trademark, copyright, and artists' rights statutes now in effect in ten states.<sup>18</sup> It is true that even the totality of the United States counterparts falls short of the most far-reaching applications of moral rights theory abroad. But I believe that the limitations in these United States law comport with our obligations under the Berne Convention and, as just noted, that they are on the whole satisfactory if not indeed beneficent as a matter of public policy.

In conclusion, I would note that most of the criticisms I have expressed in this statement with regard to comprehensive moral rights legislation do not apply within the sphere of concern of S. 1198 and H.R. 2690, the Visual Artists Rights Act of 1989. Those bills would bar the physical distortion, mutilation or destruction of what might be called singular works of art (as distinguished from mass-produced works, commercially oriented works, and works made for hire). The works of art protected by the bills do not emerge from a commercial setting akin to that described above in the film and publishing industries. Art works are the product of individual inspiration and not are collaboratively produced under entrepreneurial supervision. Their prin-

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17. Although the United States has recently adhered to the Berne Convention, which requires in Article 6*bis* that signatory nations accord to authors the moral rights of attribution and integrity, the Berne Convention Implementation Act made no explicit reference to moral rights. The relevant congressional sources reflect a belief that such explicit incorporation would have been redundant, in view of the fact that equivalent rights were sufficiently accorded under existing law. See, e.g., H.R. 100-609, 100th Cong., 2d Sess. 32-8 (1988).

18. These states are California, Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Utah.



cial economic value typically rests in their singular manifestation and only rarely in their exploitation in derivative forms and subsidiary markets, and there is typically lacking any kind of elaborate network of contractual relationships that surround the production and marketing of the work. The kind of conduct that the bills would forbid rarely has any redeeming social value or artistic purpose. As Senator Kennedy stated upon introducing S. 1198: "This bill addresses a narrow and specific problem—the mutilation and destruction of works of fine art which are often one-of-a-kind and irreplaceable."<sup>19</sup> As Senator Kasten said: "Works protected by this bill are one of a kind or very limited editions. When these works are altered or destroyed, they are gone—forever. We have a duty to protect them."<sup>20</sup>

The kinds of works protected by the bills, and the kind of conduct they proscribe, all contribute to making a strong claim for this type of moral rights legislation and enactment would have far fewer negative ramifications than I have outlined above regarding more comprehensive moral rights legislation. The fact that artists' rights laws already exist in ten states—including those with greatest importance to artists and to the institutions that support the art market and art world—provides further support for the contention that federal artists' rights legislation will provide valuable uniformity while working very little disruption in existing commercial practices.

Advocates of the moral rights of visual artists should not, however, be unqualifiedly pleased should the proposed federal legislation become law. Both the Kennedy and Kastenmeier bills afford narrower protection in significant respects than do certain of the most important state visual artists statutes, and yet both bills have a broad preemption provision that would displace state laws. Modeled on section 301 of the Copyright Act, which preempts state laws equivalent to copyright, the bills provide that "all legal or equitable rights that are equivalent to any of the rights conferred [herein] with respect to works of visual art to which [those rights] apply are governed exclusively"<sup>21</sup> by the federal law granting rights of attribution and integrity. Although this seemingly unobjectionable provision is well motivated by a desire for national uniformity, as is true of the Copyright Act generally, it carries

19. 135 Cong. Rec. S6810-03 (daily ed. June 16, 1989) (statement of Senator Kennedy).

20. 135 Cong. Rec. S6810-03 (daily ed. June 16, 1989) (statement of Senator Kasten).

21. See The Visual Artists Rights Act of 1989 (Kennedy Bill), *infra* at 451.



with it the likelihood of eliminating significant state protections currently available to artists.

The California statute,<sup>22</sup> for example, which is shaped by the policy of protecting the state's cultural heritage at least as much as the policy of protection the "personality" of artists, does not require that the plaintiff prove prejudice to honor or reputation. Such proof would, however, be necessary under the federal bills, which would rather clearly displace the more lenient state laws on this issue and impose significant proof burdens upon the artist. The New York statute,<sup>23</sup> which is based principally on a concern for the artist's reputation, outlaws not the act of mutilation or alteration itself, but the display or dissemination of the work to the public in such form, including reproductions thereof. Yet the federal bills rather clearly do not outlaw distorting reproductions of the protected work, and this narrower range of protection would clearly displace the more generous New York ban on distorting reproductions.

What is somewhat less certain is the extent to which any federal preemption provisions would also displace state-law protection currently afforded to broader categories of subject matter than embraced within the federal law. The federal bills exclude from their protection such works as posters, applied art, motion pictures and other audiovisual works, photographs produced for purposes other than exhibition, and art works initially produced in multiples greater than 200 (and even smaller sets of multiples if these are not signed and consecutively numbered by the author). These kinds of works are clearly covered under certain state artists' rights statutes, and arguably covered under others. Would such coverage be ousted by virtue of the narrower subject matter in the federal bills?

Because preemption under the federal bills applies only with respect to works of visual art to which the federal attribution and integrity rights apply, this language points toward permitting state laws to protect posters, commercial, photographs, motion pictures and the like. On the other hand, under the present Copyright Act, it is rather clear that states cannot outlaw copying of certain subject matter excluded from the federal statute, such as "any idea, procedure, process, system, method of operation, concept, principle, or discovery,"<sup>24</sup> and useful ar-

22. CAL. CIV. CODE § 987 (West Supp. 1988).

23. N.Y. ARTS & CULT. AFF. LAW § 11.01-14.03 (McKinney Supp. 1986).

24. 17 U.S.C. § 102b (1988); see Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYR. SOC'Y. 560, 602-06 (1982).



ticles whose decorative features are inseparable from their utilitarian aspects.<sup>25</sup> Even though the former, narrower, reading of the federal preemption provisions seems more compelling—as a matter of language and perhaps of policy as well—the drafters of the artists' rights bills could usefully dispel the ambiguity.

In sum, the Visual Artists' Rights bills now pending in Congress have the laudable objective of protecting singular works of fine art against intentionally or carelessly inflicted damage—in the interest of preserving our cultural heritage. But care should be taken to delineate more clearly the adverse preemptive effect upon more generous state laws. Moreover, should Congress consider the extension of moral rights beyond the sphere of the fine arts, the potential adverse impact upon the entertainment, publishing and arts industries, and the problems of coordination with longstanding bodies of United States law, must be carefully weighed.

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25. 17 U.S.C. § 101 (1988) (pictorial, graphic, and sculptural works).



## Moral Rights: The Long and Winding Road Toward Recognition

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In our country, as in every other country and civilization, artists are the recorders, and preservers of the national spirit. The creative arts are an expression of the character of the Nation—they mirror its accomplishments, warn of its failings, and anticipate its future.<sup>1</sup>

At the heart of this statement lies a legal doctrine commonly known as “droit moral” or the moral right. The moral right doctrine goes beyond protecting artists’ mere economic rights and enforces their personality rights.<sup>2</sup>

This note will deal with the doctrine of moral rights in three areas. The first is a brief, limited scope tracing of the components and attributes of the doctrine. The second explores the most recent federal legislation in the United States and surveys leading state legislation. The final area examines why Florida should avoid codifying moral rights protection.

### The Moral Rights: Fundamental Components and Attributes

The concept of moral rights for authors and artists underwent major development in France<sup>3</sup> but is part of the law of over sixty nations of the world.<sup>4</sup> Notwithstanding this broad acceptance, the United

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1. Senator Edward Kennedy’s statement presenting the Visual Arts Rights Act to the Senate. S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11,502 (daily ed. Aug. 6, 1987).

2. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554-55, (1940). The term moral rights originates from the French droit moral which encompasses a broad scope. See, *infra* note 3 through 43 and accompanying text.

3. Merryman, *The Refrigerator of Bernard Buffett*, 27 HASTINGS L.J. 1023, 1025 (1976). France, Law of March 11, 1957, No. 296.

4. Comment, *Copyright: Moral Right—A Proposal*, 43 FORDHAM L. REV. 793,



States does not recognize the moral rights doctrine in any form.<sup>5</sup> Furthermore, while the 1971 revision of the Berne Convention for the Protection of Literary and Artistic Works contains a provision that recognizes selected moral rights,<sup>6</sup> when Congress passed the Berne Convention Implementation Act of 1988 it specifically declined to adopt the moral rights provision.<sup>7</sup> Traditionally the moral rights doctrine has encompassed four major rights: the rights of disclosure, paternity, integrity, and withdrawal.<sup>8</sup> Other formulations of the doctrine also include the right to prevent excessive criticism and the right to prevent assaults upon one's personality.<sup>9</sup> The nations that have codified the moral rights doctrine include at least some combination of these rights, although variations exist among different jurisdictions.<sup>10</sup>

### The Right of Disclosure

The right of disclosure<sup>11</sup> is based upon the notion that only the

5. See, e.g., *Geisel v. Poynter Prods.*, 295 F. Supp. 331, 339-40 n.5 (S.D.N.Y. 1968).

6. The right of paternity and a limited right of integrity are recognized. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10 (1985).

7. On October 20, 1988, both the United States Senate and House of Representatives passed the Berne Convention Implementation Act of 1988, which changed the United States Copyright Law (17 U.S.C. §§ 101-910 (1988)) to conform to the Berne Convention. President Reagan signed this Act into law on October 31, 1988, making the United States the 78th member of the Convention. The moral rights provision of the Berne Convention that the United States did not adopt states:

Article 6bis.

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiration of the economic rights.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

8. Krigsman, *Section 43(a) of the Lanham Act as a Defender of Artists' "Moral Rights"*, 73 TRADEMARK REP. 251, 252-53 (1983).

9. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985).

10. *Id.* at 9-10.

11. Some writers refer to this as the right to create and publish. See, e.g., Roeder, *supra* note 2, at 558. See also Merryman, *supra* note 3, at 1024, (discussing Whis-



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artist can possess any rights in an uncompleted work.<sup>12</sup> This right therefore gives the artist control over his work from the time of creation. Furthermore this right encompasses the artist's right to decide whether a work corresponds to the artist's original conception, at what moment the work is completed, and whether the work is worthy of the artist.<sup>13</sup> The American analog of this right is found in copyright law, which protects the "right of first sale"<sup>14</sup> and the "right of first publication"<sup>15</sup> as soon as the work is fixed in any tangible medium of expression.<sup>16</sup>

### The Right of Paternity

The right of paternity safeguards a creator's right to have her name attached to her work.<sup>17</sup> The derivation of this right is founded upon the injection of the artist's creative personality into her work, thus vesting her right to claim authorship.<sup>18</sup> Generally this right is perpetual, unassignable, and is not barred by statutes of limitation.<sup>19</sup> Moreover, the right of paternity protects against falsely attaching an artist's

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tler v. Eden, [1898] *Recueil Periodique et Critique* [D.P.] II. 465 (cour d'Appel, Paris), an early case involving the right of disclosure).

12. Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 159-60 (1983).

13. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968). See also *Stella v. Mazoh*, No. 07585-82 (N.Y. Sup. Ct. April 1, 1982). Frank Stella, an artist, had placed two of his painting outside his studio for disposal. The paintings later turned up at the defendant's gallery for sale as Stella's works. Stella, through an out of court settlement, recovered the works and destroyed them.

14. 17 U.S.C. § 104 (1988).

15. M. NIMMER, *CASES AND MATERIALS ON COPYRIGHT* 105 (1979).

16. 17 U.S.C. § 102(a) (1988). The copyright clause of the Constitution also provides congressional authority for amendments that would include moral rights. See U.S. CONST. art. I, § 8, cl. 8.

17. Krigsman, *supra* note 8, at 253. The right of paternity also guarantees that an artist's work will appear under an appropriate nom de plume or even anonymously if the artist so requests. Diamonds, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 254-56 (1978).

18. Horowitz, *Artists' Right In The United States: Toward Federal Legislation*, 25 HARV. J. Leg. 153, 156 (quoting DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 26 (1980)).

19. Sarraute, *supra* note 13, at 478.



name to a work she did not create.<sup>20</sup> American courts have not expressly recognized the right of paternity but have granted similar relief on other theories.<sup>21</sup>

### The Right of Integrity

The right of integrity is also known as the right to modify and to prevent deformation. This right prohibits the modification, alteration, or distortion of an artist's work without her permission.<sup>22</sup> The right of integrity, just as the right of paternity, is generally perpetual, unassignable, and free from any statute of limitation.<sup>23</sup> The laws of the United States do not expressly protect an artist's right to integrity. However, American legal protection has been found in the Lanham Act<sup>24</sup> and specific state statutes.<sup>25</sup>

### The Right of Withdrawal

The right of withdrawal permits the author to retrieve her work even though it has been sold or published.<sup>26</sup> When this right is granted, an artist can recall her creation if she experiences a change of heart from that which originally provided her inspiration for the work. However, the artist will usually be required to compensate the individual in

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20. Merryman, *supra* note 3, at 1027.

21. See, e.g., *Ellis v. Hurst*, 66 Misc. 235, 121 N.Y. Supp. 438 (Sup. Ct. 1910) (utilizing the right to privacy); *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y. Supp. 206 (Sup. Ct. 1910) (contract rights); *Fischer v. Star Co.*, 231 N.Y. 414, 132 N.E. 133 (1921) (unfair competition).

22. Kwall, *supra* note 9, at 8-9. This is the oldest and best known of the rights and is often deemed to constitute the whole doctrine. Roeder, *supra* note 2, at 565.

23. Kwall, *supra* note 9, at 12-13.

24. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2nd Cir. 1976). The holding in *Gilliam* may be the closest an American court has come in recognizing protection for artists' moral rights. The primary issue in this case revolved around the editing of tapes of "Monty Python's Flying Circus" by ABC. *Id.* at 17. The defendant (ABC) edited the tapes to fit allocated time slots. *Id.* at 18. The plaintiffs alleged mutilation and distortion. *Id.* The court held for plaintiff on the grounds that ABC had exceeded its license granted by the copyright owner and therefore infringed the copyright. *Id.* at 22-24.

25. See *infra* note 80 through 89 and accompanying text.

26. Sarraute, *supra* note 13, at 477. The decisions in Germany and France do not support the view that the right of withdrawal is recognized by the courts as a component of the moral right. Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 513 (1955).



possession for any losses that the renunciation might cause.<sup>27</sup> The right of withdrawal is founded on the assumption that the public will forget works to which it has previously been exposed.<sup>28</sup> This assumption has caused many commentators to doubt the viability of this right.<sup>29</sup> Where the right of withdrawal is recognized, however, it is generally limited to literary works.<sup>30</sup> The United States does not recognize the right of withdrawal in any form.<sup>31</sup>

### Additional Rights

Two additional aspects of the moral rights doctrine are the artist's right to prevent assaults upon her personality and the right to prevent excessive criticism.<sup>32</sup> Both of these rights clearly illustrate how the moral rights doctrine is aimed at personality rights and not pecuniary interests. Works of art reflect their creator's personality so the creators are entitled to be free from abusive and malicious criticism and from unwarranted attacks upon professional standing or honor.<sup>33</sup> The right does not, however, prohibit reasonable criticism; instead it protects against criticism that is intended only to degrade or abuse the artist.<sup>34</sup> These two rights recognize the enormous power of the press and the destruction that uncontrolled criticism may have upon artists and their works.

### The Droit De Suite

One final component of the droit moral is the droit de suite. The droit de suite, as conceived in France, gives the artist a percentage of the total sales price of her work each time it is sold.<sup>35</sup> Generally, this right is inalienable and inures to the artist for her life plus a defined

27. Sarraute, *supra* note 13, at 477.

28. *Id.*

29. *Id.*

30. *Id.*

31. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 486, 501 (1968).

32. Kwall, *supra* note 9, at 7.

33. Roeder, *supra* note 2, at 572-73. One writer defined "personality" in the context of the moral right as "the outward representation of one's most innermost self." Katz, *The Doctrine of Moral Rights and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 401 (1951).

34. Roeder, *supra* note 2, at 572-73.

35. M. NIMMER, NIMMER ON COPYRIGHT § 8.22(A) (1987).



number of years after death.<sup>36</sup> The *droit de suite* is similar to royalties provided under copyright law.<sup>37</sup> One important difference is that royalty rights are governed by contract law and usually relate only to the first sale, while the *droit de suite* runs with the artwork and applies to each and every resale.<sup>38</sup> Thus, the *droit de suite* recognizes that an artist is bound in some manner to her work regardless of who claims ownership.

The doctrine of moral rights has not been expressly accepted in the United States.<sup>39</sup> However, judicial recognition has been accorded the moral right, albeit indirect and incomplete. American courts wishing to recognize an artist's personality interests have been forced to rely upon substitute causes of action of unfair competition,<sup>40</sup> contract law,<sup>41</sup> defamation,<sup>42</sup> invasion of privacy,<sup>43</sup> and copyright law<sup>44</sup> to remedy grievances implicating moral rights. This indirect recognition of artists' rights has prompted the enactment of state legislation and a recent federal proposal.

## The United States and the *Droit Moral*

### The Federal Perspective

Senator Edward Kennedy (D-Mass.) and Representative Edward J. Markey (D-Mass.) have become leading American proponents for expanding artists' rights. On June 16, 1989, Senator Kennedy introduced S. 1198 (the "Kennedy Bill"), which would amend American copyright law by the addition of selected moral rights.<sup>45</sup> However, simi-

36. DUBOFF, *THE DESKBOOK OF ART LAW* 856 (1st ed. 1978).

37. M. NIMMER, *supra* note 35 at §8.22(A).

38. *Id.*

39. *See, e.g., Geisel v. Poynter Prods.*, 295 F. Supp. 331, 339-40 n.5 (S.D.N.Y. 1968).

40. *See, e.g., Granz v. Harris*, 198 F.2d 585 (2nd Cir. 1952).

41. *See, e.g., Zim v. Western Publishing Co.*, 573 F.2d 1318 (5th Cir. 1978).

42. *See, e.g., Edison v. Viva Int'l Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203 (N.Y. App. Div. 1979).

43. *See, e.g., Giesecking v. Urania Records*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (N.Y. Sup. Ct. 1956).

44. *See, e.g., Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2nd Cir. 1976).

45. S. 1198, 101st Cong., 1st Sess., 135 CONG. REC. S6811 (daily ed. June 16, 1989). Groups that support the Kennedy Bill include AFL-CIO Department of Professional Employees, the American Institute for Conservation of Historic and Artistic Works.



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lar legislation had been introduced by Massachusetts Democrats, but not passed, in 1977,<sup>46</sup> 1979,<sup>47</sup> 1981,<sup>48</sup> 1983,<sup>49</sup> 1986,<sup>50</sup> and 1987.<sup>51</sup>

The Kennedy Bill would provide artists limited, narrow scope protection in contrast to earlier bills that attempted to grant broad moral rights protection.<sup>52</sup> Kennedy's proposal reflects the limited perspective of moral rights as adopted by California, New York, and Massachusetts.<sup>53</sup> This bill, as stated by Senator Kennedy, "recognizes the implicit originality of encouraging a creative environment for artists to work [and] the national responsibility to enrich and enliven our cultural heritage."<sup>54</sup> Kennedy's goals would be specifically achieved with the addition of the rights of paternity and integrity, as well as, a study on resale royalties to section 106 of the copyright law.<sup>55</sup>

The protection accorded by the rights of paternity and integrity in the Kennedy Bill is limited. These two rights only protect a "painting, drawing, print, sculpture, or still photographic image."<sup>56</sup> Furthermore, protected works must be produced for "exhibition purposes only, existing in a single copy, [or] in a limited edition of 200 copies of

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Works, American Society of Magazine Photographers, Bay Area Lawyers for the Arts, California Confederation of the Arts, Graphic Artists Guild, National Artists Equity Association, New York Artists Equity Association, Society of Illustrators, Visual Artists & Galleries Association and the Volunteer Lawyers for the Arts. *Visual Artists Rights Amendment of 1986: Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*. 99th Cong., 2d Sess. (1986) [hereinafter *Hearing*].

46. H.R. 8261, 95th Cong., 1st Sess., 123 CONG. REC. 22, 733 (1977).

47. H.R. 288, 96th Cong., 1st Sess., 125 CONG. REC. 440 (1979).

48. H.R. 2908, 97th Cong., 1st Sess., 127 CONG. REC. 5689 (1981).

49. H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. H578-79 (daily ed. Feb. 17, 1983).

50. S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12,185 (daily ed. Sept. 9, 1986); H.R. 5722, 99th Cong., 2d Sess., 132 CONG. REC. E3682 (daily ed. Oct. 16, 1986).

51. S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. H7352 (daily ed. Aug. 6, 1987). H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. H7352 (daily ed. Aug. 7, 1987); see also *id.* at E3425 (Representative Markey's extended comments).

52. The "public display" requirement in the 1987 bill was absent from the earlier bill. S. 2796, *supra* note 50. Further, the original Kennedy bill would have applied a quality test to all claims not just for acts of destruction. *Id.*

53. See *infra* notes 90 through 125 and accompanying text.

54. S. 2796, *supra* note 50, appendix to bill submitted by Senator Kennedy.

55. S. 1198, *supra* note 45, at §§ 3-9.



fewer."<sup>57</sup> Moreover, protection is not extended to any poster, map, globe, chart, model, motion picture, or other audio-visual work.<sup>58</sup> The proposed rights of paternity and integrity share other limiting attributes. Both rights are descendible to the artist's estate, limited to fifty years post mortem.<sup>59</sup> Neither of the rights may be waived or transferred.<sup>60</sup> Furthermore, the rights of paternity and integrity extend protection even if the artist no longer owns the copyright to her work.<sup>61</sup> However, the copyright owner may assert these two rights only if she is the creator of the work.<sup>62</sup> This limitation prevents a purchaser from separating the copyright from the artist by purchase thereby gaining control over the respective right.<sup>63</sup>

The Kennedy Bill also addresses the economic exploitation of art via a study on resale royalties.<sup>64</sup> This is in sharp contrast to the earlier Kennedy Bill which would have permitted artists to share the increased commercial value of their work through resale royalties.<sup>65</sup> These royalties would have amounted to seven percent of the difference between the seller's purchase price and the resale price.<sup>66</sup> Furthermore, this royalty right would have been descendible and payable to the artist's estate upon death.<sup>67</sup> These royalty rights may have been deleted because they would only benefit a small number of artists.<sup>68</sup>

The passage of the Kennedy bill would mark the beginning of an era of federal protection of artists' moral rights in the United States. The bill represents a significant advance from the current protection of moral rights offered by other legal theories.<sup>69</sup> However, the bill fails to make as large and dramatic a step as needed.

The most profound shortcoming is the limited class of protected works. The two-fold requirement of "visual art . . . produced for exhi-

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Horowitz, *supra* note 18, at 204.

64. S. 1198, *supra* note 45, at § 9.

65. S. 1619, *supra* note 51, at § 3.

66. *Id.*

67. *Id.* The earlier Kennedy bill provided for payment of posthumous royalties to the National Endowment for the Arts. S. 2796, *supra* note 50, § 3.

68. See, e.g., S. WEIL, BEAUTY AND THE BEAST (1983). Stating that between 90 and 99 of every 100 artists never see an increase in the value of their work.

69. See *supra* notes 40 through 44 and accompanying text.



bition purposes only" seriously hampers the scope and effectiveness of the bill. This two step requirement inevitably will generate litigation that is a battle of experts. Moreover, the Kennedy Bill may be needlessly rigid by making its rights absolutely unassignable and unwaivable.

Two theories have been advanced in defense of the bill's narrow scope.<sup>70</sup> The first theory involves the political strength of affected parties whose opposition would likely defeat a broad moral rights enactment.<sup>71</sup> Groups that oppose moral rights include publishers, broadcasters, and motion picture producers.<sup>72</sup> The interest displayed by these groups derives from the fact that their livelihood depends upon exploitation of a created work.<sup>73</sup> Currently, these groups' interest are protected and recognized by existing copyright law.<sup>74</sup> Therefore, any attempt to infringe upon copyright law directly affects the livelihood of these groups, triggering their opposition.

Another attempt to explain the limited scope deficiency of the federal bill relates to enforcement problems.<sup>75</sup> Differing opinions between artists and art displayers or writers and producers, as to a work's interpretation, may implicate first amendment concerns.<sup>76</sup> Also, it may be difficult to determine who can assert a moral rights claim because it is often a quagmire to establish who created the work.<sup>77</sup> The Kennedy bill avoids both of these problems through its limited breadth.

Congress has attempted for over ten years to pass moral rights legislation.<sup>78</sup> The Kennedy bill represents the evolution of the United States towards recognition of artists' rights.<sup>79</sup> However, Congress' in-

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70. Horowitz, *supra* note 18, at 207.

71. *Id.*

72. Roeder, *supra* note 2, at 577. The opposition of these groups has been instrumental in preventing the United States from joining the Berne Convention. Nimmer, *Implications of the Prospective Revision of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 518 (1967).

73. Roeder, *supra* note 2, at 577.

74. *Id.*

75. Horowitz, *supra* note 18, at 207.

76. *Id.* (citing Tribe, *First Amendment Endgame*, Boston Globe, Dec. 15, 1984, at 19, col. 4). First amendment protection has been extended to alterations of works as symbolic speech. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

77. Horowitz, *supra* note 18, at 207.

78. See *supra* notes 45 through 51 and accompanying text. During this period legislation has been introduced to offer limited recognition of artists' moral rights; however, no federal legislation has been passed.

79. See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107



ability to approve any legislation has led many states to take the initiative and adopt statutes of their own.

## The State Perspective

In 1976, prior to any federal action, California led the nation as the first state to enact legislation specifically aimed at protecting artists' moral rights.<sup>80</sup> New York<sup>81</sup> and Massachusetts<sup>82</sup> followed in 1983 and 1985, respectively. Other states that have since enacted moral rights legislation include Connecticut,<sup>83</sup> Louisiana,<sup>84</sup> Maine,<sup>85</sup> New Jersey,<sup>86</sup> Pennsylvania,<sup>87</sup> Rhode Island<sup>88</sup> and Utah.<sup>89</sup> California, New York, and Massachusetts, as the nation's leaders and innovators of moral rights legislation, have provided the foundations for other moral rights statutes as well as the most recent federal legislation--the Kennedy Bill.<sup>90</sup> These three state laws, while similar, exhibit differences in their purpose and breadth of protection.

## The California Art Preservation Act

The California legislature is selective in the moral rights it protects. The statute is modeled on two aspects of the moral rights doctrine--the rights of paternity and integrity. These rights are protected through remedies that include actual damages, injunctive relief, and, in certain instances, punitive damages.<sup>91</sup> The legislature expressly codified

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(1978). "[A]ll 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." *Id.*

80. CAL. CIV. CODE § 987 (West Supp. 1988).

81. N.Y. ARTS & CULT. AFF. LAW §§ 11.01, 14.03 (McKinney Supp. 1986) (formerly codified at §§ 14.51-14.59).

82. MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988).

83. 1988 CONN. ACTS 284 (Reg. Session).

84. LA. REV. STAT. ANN. §§ 51:2151-51:2156 (West 1987).

85. ME. REV. STAT. ANN. tit. 27, § 303 (Supp. 1987-88).

86. N.J. STAT. ANN. §§ 2A: - 2A:24A-8 (West 1987).

87. PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purden Supp. 1987).

88. R.I. GEN. LAWS §§ 5-62-2 to 5-62-6 (1987).

89. UTAH CODE ANN. § 64-2a-9 (1985).

90. *Visual Artists Rights Amendment of 1986: Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) (statement of Senator Kennedy that the California and Massachusetts moral rights statutes formed the basis for the federal legislation).

91. The punitive damages are awarded to educational or charitable organizations



"that physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction."<sup>92</sup> Furthermore, the statute declares "a public interest in preserving the integrity of cultural and artistic creations."<sup>93</sup> These codified statements demonstrate a state objective that extends not only to the artist's personality rights but also to the public's right to preservation. Artists are further protected by two additional sections of the act aimed at enforcement. The first specifies that rights provided in the act vest in the artist for life plus fifty years post mortem to the estate or any heirs.<sup>94</sup> The second declares that the statute of limitations runs for three years or one year from the date of discovery of a violation, whichever is longer.<sup>95</sup> Consequently, artists' rights are preserved even if damage is not discovered for a substantial period of time.<sup>96</sup>

The California Act is limited in that protection is extended only to "fine art."<sup>97</sup> The act defines fine art as "an original painting, sculpture, or drawing, or original work of art in glass, of recognized quality, but [not] work prepared under contract for commercial use by its purchaser."<sup>98</sup> Thus, left unprotected are scripts, movies, reproductions,<sup>99</sup> works that are not of "recognized quality"<sup>100</sup> and commercial use art.<sup>101</sup>

The most serious defect in the California Act is the artist's ability to waive her rights, provided the waiver is expressed in writing and

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of the court's choosing. CAL. CIV. CODE § 987 (West Supp. 1988).

92. *Id.*

93. *Id.*

94. CAL. CIV. CODE § 987(g)(1) (West Supp. 1988).

95. *Id.* at § 987(i).

96. Horowitz, *supra* note 18, at 187.

97. CAL. CIV. CODE § 987(b)(2) (West Supp. 1988).

98. *Id.*

99. *Id.*

100. Recognized quality is determined by the trier of fact based upon expert opinion. CAL. CIV. CODE § 987(f) (West Supp. 1988). The use of expert opinion was prompted by California legislators' concerns that without experts protection may be extended to childrens' finger painting, products of art clubs and "Sunday painters." MERRYMAN & ELSSEN, LAW, ETHICS, AND THE VISUAL ARTS 160 (1987).

101. Commercial use is defined as a work used "in advertising, magazines, newspapers, or other print and electronic media."

CAL. CIV. CODE § 987(a)(6) (West Supp. 1988).



signed.<sup>102</sup> The waiver provision is juxtaposed to the historical fact that most artists lack sufficient bargaining power.<sup>103</sup> This defect in the act clearly demonstrates that primary interest is placed on preserving works for the public interest, not in protecting the artist.

Noticeably absent from the California Act is the *droit de suite*. However, resale rights were independently established three years prior as the Resale Royalties Act.<sup>104</sup> Under this earlier Act, an artist's resale right is unwaivable,<sup>105</sup> in contrast to the complete waivability of rights under the California Act.<sup>106</sup> This irreconcilable disparity in waiver provisions demonstrates California's confused attempt to preserve art whether it is founded in an artist's right or in a public interest right.

### Massachusetts

Massachusetts entered the moral rights arena in January 1985.<sup>107</sup> The Massachusetts legislation, in most respects, mirrors the California Act. The rights of integrity and paternity are similarly defined and protected works must be of recognized quality.<sup>108</sup> Further similarities are found in the treatment of waiver,<sup>109</sup> descendibility,<sup>110</sup> and duration.<sup>111</sup>

The distinctive difference in the Massachusetts legislation is the broader definition accorded "fine art." Massachusetts defines "fine art" as "any original work of visual or graphic art of any media which shall include, but is not limited to, any painting, print, drawing, sculpture, craft, object, photograph, audio or video tape, film, hologram, or any combination thereof . . . ."<sup>112</sup> Therefore, Massachusetts, unlike California, extends protection to movies, scripts, and reproductions.

The Massachusetts statute has several other subtle differences.

102. CAL. CIV. CODE § 987(g)(3) (West Supp. 1988).

103. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976). "An artist can largely only protect himself if he can succeed in insisting upon contractual provisions; and few artists are in a bargaining position to do that." *Hearing*, *supra* note 45, at 27 (statement of Gustave Harrow).

104. CAL. CIV. CODE § 986 (West Supp. 1988). This is significant since no other state moral rights legislation includes resale rights.

105. *Id.* at § 986(a).

106. *See supra* note 102 and accompanying text.

107. MASS. GEN. LAWS ANN. ch 213, § 85S (West Supp. 1988).

108. *Id.* at § 85S(a)(b)(f).

109. *Id.* at § 85S(g).

110. *Id.*

111. *Id.*

112. *Id.* at § 85S(b).



The statute of limitations is restricted to two years from the violation or one year from discovery, whichever is greater.<sup>113</sup> Additionally, the Attorney General of Massachusetts can assert a deceased artist's rights on behalf of the public.<sup>114</sup> Finally, Massachusetts does not require intent in the case of alteration or mutilation; gross negligence need only be shown.<sup>115</sup>

## New York

New York, in 1983, passed the New York Authorship Rights Act to protect selected moral rights.<sup>116</sup> The goal of the Act is to prevent changes in a work from adversely affecting the artist's reputation and to recognize New York as "the home of many artists of international repute."<sup>117</sup> One commentator has classified New York's approach as one of attribution since the statute focuses on the artist's reputation and only protects the right of paternity.<sup>118</sup>

The New York statute, as does the Massachusetts statute, includes a broad spectrum of works. New York defines "fine art" as "a painting, sculpture, drawing, or work of graphic art, and print."<sup>119</sup> This definition is further expanded by the absence of a "recognized quality" showing, as required by the California Act. Additionally, New York codified protection for reproduction of "fine art" and "photographic print or sculpture of limited edition multiples of not more than three hundred copies."<sup>120</sup> However expansive the New York statute appears, no protection is available unless the work is publicly accessible, or published or reproduced in New York.<sup>121</sup> This leads to the assumption that New York believes an artist's reputation cannot be harmed through a private showing unless the work is published or reproduced in New York.

113. MASS. GEN. LAWS ANN. ch. 260, § 2c (West Supp. 1987).

114. MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West Supp. 1986). The art work must be in the public view before the Attorney General can take action. *Id.*

115. *Id.* at § 85S(c).

116. N.Y. ARTS & CULT. AFF. LAW §§ 11.01, 14.03 (McKinney Supp. 1986).

117. New York Artists' Authorship Rights Act, ch. 994, § 1, 1983 N.Y. Laws (statement of purpose).

118. Davis, *State Moral Rights Law and The Federal Copyright System*, 4 CARDOZO ARTS AND ENT. L.J. 223, 241 (1985).

119. N.Y. ARTS AND CULT. AFF. LAW § 11.01(9) (McKinney Supp. 1987).

120. *Id.* at § 14.03(1).

121. *Id.* at § 14.03(3)(e).



The New York Act further decreases its scope of protection via another limitation. The law's protection against mutilation or alteration is applicable only when "damage to the artist's reputation is reasonably likely to result . . . ."<sup>122</sup> Further, an unidentified artist of an altered or mutilated work has no cause of action unless the work is reasonably regarded as her work and damage to her reputation is a reasonable consequence.<sup>123</sup> This pair of limitations may put an insurmountable burden of proof on the artist and therefore block any recovery.

The New York Act has other attributes in common with the Massachusetts and California statutes. New York provides a limited right to disclaim paternity for a "just and valid reason."<sup>124</sup> Similarly, the Act is governed by a three year statute of limitation or a one year discovery rule.<sup>125</sup> Finally, the Act is silent on whether artists can waive their statutory moral rights.

The existing states' moral rights legislation is severely limited both in the rights recognized and the scope of protected works. More sweeping moral rights legislation on the state level may have been deterred by uncertainty over copyright preemption, the constitutionality of the state enactments, or conflict of law questions.<sup>126</sup> Whatever the reason, the states are simply applying first aid to a wound that needs a Congressional transplant.

## FLORIDA: THE NEED TO DO NOTHING

Florida is a member of the majority in the United States that does not recognize the moral rights doctrine. Consistent with the majority, Florida does indirectly offer moral rights protection through substitute causes of action such as unfair competition, contract law, defamation, and the right of privacy.<sup>127</sup> Although most commentators praise states

122. *Id.* at § 14.03(1).

123. *Id.*

124. *Id.* at § 14.03(2)(a).

125. *Id.* at § 14.03(4)(b).

126. Note, *The New York Artists' Authorship Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 170-71 (1984).

127. In addition Florida does offer laws affecting the creation and administration of statewide art organizations such as the Florida Arts Council and the Florida Cultural Affairs Symposium. FLA. STAT. § 265.281 (West 1988). Furthermore, Florida specifically makes it a crime to destroy art works in public buildings. FLA. STAT. § 806.14 (West 1988).



that have codified direct moral rights protection,<sup>128</sup> fundamental questions involving Constitutional attacks, copyright preemption, and the need for uniformity demonstrate the predictable failure of state legislation as the source of artist protection.

A threshold question in the enactment of any state moral rights protection is whether the statute violates the federal Constitution. A challenge might arise under the contract,<sup>129</sup> takings,<sup>130</sup> or due process<sup>131</sup> clauses. Furthermore, the effectiveness of the state law will be diminished by the associated delay and cost of constitutional litigation.<sup>132</sup> The fact that constitutional issues are unlikely to be resolved in the near future has deterred states from passing comprehensive moral rights protection.<sup>133</sup> The result is ad hoc state legislation that is confusing, inconsistent, and inadequate.

Another constitutional challenge is whether state statutes are preempted by federal copyright law.<sup>134</sup> A state law is preempted if it addresses works within the subject matter of copyright law and grants rights "that are equivalent to any of the exclusive rights within the general scope of copyright . . . ." <sup>135</sup> The key issue is whether state law creates rights "equivalent" to copyright since covered works appear to be identical. Consequently, those arguing against preemption will argue that moral rights laws cover personality rights and not economic rights as guaranteed by copyright law.<sup>136</sup> Whether preemption will be upheld is unanswered;<sup>137</sup> however, this uncertainty should prove sufficient to chill Florida legislation.

Another deterrent to state-level protection is the concomitant in-

128. Horowitz, *supra* note 18, at 193.

129. See, e.g., *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980). The court held that freedom to contract was not seriously impaired and that the state had a valid purpose in enactment.

130. No court has addressed this issue.

131. See, e.g., *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980).

132. Horowitz, *supra* note 18, at 199.

133. Note, *The New York Artist's Authorship Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 170-71 (1984).

134. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

135. 17 U.S.C. § 301(a) (1982).

136. Damich, *The New York Artists' Authorship Right Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1737-38. (1984).

137. See, e.g., *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980) (upholding the California Act against a preemption challenge); 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.22[B] (1987). Nimmer's view is that any law inhibiting works protected by copyright law should be preempted.



terstate conflict of laws. Purchasers and sellers of art seeking to avoid moral rights control may cross state lines to finalize deals in unprotected states.<sup>138</sup> In order to continually avoid moral rights statutes, buyers and sellers may relocate to an unprotected state, thereby reducing available art and artists in states that codify the *droit moral*.<sup>139</sup> The uniformity provided by federal legislation would prevent this unwanted exodus.

The examination of these fundamental problems, as well as the specific limitations of state level moral rights protection, should lead Florida to the only acceptable conclusion: Florida should not adopt its own moral rights statute but should channel its efforts towards federal protection for artists' personality rights.

### Conclusion

The United States has long ignored direct legal recognition of artists' rights. Moreover, indirect recognition provided by substitute legal theories and state statutes is limited and incomplete. This may be due to domination of economic expansion which overshadowed artists as individuals and the value of their work for other than commercial reasons.<sup>140</sup> However, America is no longer consumed by economic expansion.<sup>141</sup> Therefore, the time is ripe for the United States to join in direct and affirmative recognition of artists' rights by adopting federal moral rights protection.

*Jack A. Cline*

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138. *Hearing, supra* note 45, at 106 (statement of Ron Feldman, co-director of Feldman Art gallery in New York City).

139. The ten year period from 1970 through 1980 saw Florida experience a 140 percent increase in its number of resident artists, the largest percentage growth in the United States. See Miami Herald, Jan. 13, 1985, at 6L.

140. Rosen, *supra* note 12, at 187.

141. *Id.*



## Appendix

### Senate Bill S. 1198 - *The Kennedy Bill*

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### Sec. 1. *Short Title*

This Act may be cited as the "Visual Artists Rights Act of 1989".

#### Sec. 2. *Work of Visual Art Defined*

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "widow" the following:

"A 'work of visual art' is a painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes only, existing in a single copy, in a limited edition of 200 copies or fewer, or, in the case of a sculpture, in multiple cast sculptures of 200 or fewer. A work of visual art does not include—

"(1) any version that has been reproduced in other than such limited edition prints or cast sculptures;

"(2)(A) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio visual work, book, magazine, periodical, or similar publication;

"(B) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

"(C) any portion or part of any item described in subparagraph (A) or (B);

"(3) any work made for hire;

"(4) any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in paragraph (1), (2), or (3); or

"(5) any work not subject to copyright protection under section 102 of this title".

#### Sec. 3. *Rights of Attribution and Integrity*

"(a) Rights of Attribution and Integrity—Chapter 1 of title 17, United States Code, is amended by inserting after section 106 the following new section:

"§ 106 A. Rights of certain authors to attribution and integrity.

"(a) Rights of Attribution and Integrity—Subject to section 107 and independent of the exclusive rights provided in section 106, the



author of a work of visual art -

"(1) shall have the right -

"(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

"(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work as described in paragraph (3); and

"(3) subject to the limitations set forth in section 113(d), shall have the right—

"(A) to prevent any distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional or grossly negligent distortion, mutilation, or modification of that work is a violation of that right, and

"(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature. Evidence of commercial exploitation of a work as a whole, or of particular copies, does not preclude a finding that the work is a work of recognized stature.

(b) *Scope and Exercise*—The author of a work of visual art has the rights conferred by subsection (a), whether or not the author is the copyright owner, and whether or not the work qualifies for protection under section 104. Where the author is not the copyright owner, only the author shall have the right during his or her lifetime to exercise the rights set forth in subsection (a).

"(c) *Exceptions*—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification was the result of gross negligence in maintaining or protecting the work."

"(2) The modification of a work of visual art which is the result of conservation is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence."



“(d) Duration of Rights—(1) With respect to works of visual art created on or after the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author and fifty years after the author’s death.

“(2) With respect to works of visual art created before the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, but not published before such effective date, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

“(3) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

“(e) Transfer and Waiver—(1) Except as provided in paragraph (2), the rights conferred by subsection (a) may not be waived or otherwise transferred.

“(2) After the death of an author, the rights conferred by subsection (a) on the author may be exercised by the person to whom such rights pass by bequest of the author or by the applicable laws of intestate succession.

“(3) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any fixation of that work, or of a copyright or any exclusive right under a copyright in that work.”

(b) Conforming Amendment—The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 106 the following new item: “106A. Rights of certain authors to attribution and integrity.”

#### Sec. 4. *Removal of Works of Visual Art from Buildings.*

Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

“(d)(1)(A) Where—

“(i) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106(A)(3), and

“(ii) the author or, if the author is deceased, the person described in section 106A(e)(2), consented to the installation of the work in the building in a written instrument signed by the owner of the building and the author or such person,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply, except as may otherwise be agreed in a written instru-



ment signed by such owner and the author or such person.

"(B) An agreement described in subparagraph (A) that the rights conferred by paragraphs (2) and (3) of section 106(A) shall apply shall not be binding on any subsequent owner of the building except where such subsequent owner had actual notice of the agreement or where the instrument evidencing the agreeing was properly recorded, before the transfer of the building to the subsequent owner, in the applicable State real property registry for such building.

"(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

"(A) the owner has made a diligent, good faith attempt without success to notify the author or, if the author is deceased, the person described in section 106A(e)(2), of the owner's intended action affecting the work of visual art,

"(B) the owner did provide such notice by registered mail and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

If the work is removed at the expense of the author or the person described in section 106A(e)(2), title to that fixation of the work shall be deemed to be in the author or such person, as the case may be. For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the last known address of the author or, if the author is deceased, to the person described in section 106A(e)(2).

"(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, or persons described in section 106A(e)(2) with respect to that work, may record their identities and addresses with the Copyright Office. The Register shall also establish procedures under which such authors or persons may update the information so recorded, and procedures under which owners of building may record with the Copyright Office evidence of their efforts to comply with this subsection."

### Sec. 5. Preemption

Section 301 of title 17, United States Code, is amended by adding at the end the following:



“(f)(1) On or after the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

“(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

“(A) any cause of action from undertakings commenced before the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989; or

“(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art.”

#### Sec. 6. *Infringement Actions*

“(a) IN GENERAL—Section 501(a) of title 17, United States Code, is amended—

(1) by inserting after “118” the following: “or of the author as provided in section 106A(a)”; and

(2) by striking out “copyright” and inserting in lieu thereof “copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).”

(b) Exclusion of Criminal Penalties—Section 506 of title 17, United States Code, is amended by adding at the end thereof the following:

“(f) Rights of Attribution and Integrity—Nothing in this section applies to infringement of the rights conferred by section 106A(a).”

(c) Registration not a Prerequisite to Certain Remedies—(1) Section 411(a) of title 17, United States Code, is amended in the first sentence by inserting after “United States” the following: “and an action brought for a violation of the rights of the author under section 106A(a).”

(2) Section 412 of title 17, United States Code, is amended by inserting “an action brought for a violation of the rights of the author under section 106A(a) or after “other than”.

#### Sec. 7. *Statute of Limitations*

Section 507(b) of title 17, United States Code, is amended by ad-



ding at the end the following: "For purposes of an action brought for infringement of the rights under section 106A(a) of an author of a work of visual art, the claim accrues when the author (or person described in section 106A(e)(2), as the case may be) knew or should have known of the violation of the author's rights under section 106A(a)."

#### Sec. 8. *Fair Use*

Section 107 of title 17, United States Code, is amended by striking out "section 106" and inserting in lieu thereof "sections 106 and 106A.:

#### Sec. 9. *Study on Resale Royalties*

(a) In General—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing -

(1) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(2) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

(b) Groups to be Consulted—The study under subsection (a) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

(c) Report to Congress—Not later than 28 months after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this section, and any recommendations that the Register may have as a result of the study.

#### Sec. 10. *Effective Date*

(a) In General—Subject to subsection (b) and except as provided in subsection (c), this Act and the amendments made by this Act take effect 6 months after the date of the enactment of this Act.

(b) Applicability—The rights created by section 106A of title 17, United States Code, shall apply to works created but not published before the effective date set forth in subsection (a), and to works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in sec-



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tion 106A(a)(3) of such title) of any work which occurred before such effective date.

(c) Section 9—Section 9 takes effect on the date of the enactment of this Act.



## Protection of Artists

### Drafting "Work For Hire" Agreements After *Community for Creative Non-Violence v. Reid*

Jean S. Perwin\*

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When the United States Supreme Court, in *Community for Creative Non-Violence v. Reid*,<sup>1</sup> resolved a split in the circuit courts regarding the definition of "work for hire"<sup>2</sup> and the definition of "employee"<sup>3</sup> under the Copyright Act, the Court put to rest many of the legal issues involving work for hire. For those of us who have to advise clients, on both sides of the negotiating table, on the best way to protect copyright rights, however, *Reid* is just the beginning.

This article will look at the practical effects of the *Reid* decision. For example, what does the decision mean for free-lance artists? What

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1. 109 S. Ct 2166 (1989).

2. § 17 U.S.C. § 101 (1988) defines a "work for hire" as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work is a work prepared for publication as a secondary adjunct to a work by another author for the revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instrumental text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

3. The copyright Act contains no definition of the term "employee" or "scope of employment." 1 M. NIMMER, *NIMMER ON COPYRIGHT*, § 5.03[B][1].



will agreements with independent contractors look like in the face of the new Supreme Court requirements in work for hire situations? What will *Reid*'s impact be on joint works, on works created before the decision and on other copyrights issues?

### The *Reid* Decision

The facts in *Reid* provide a typical scenario where work is commissioned pursuant to oral agreements with no discussion of copyright ownership or rights. The Community for Creative Non-Violence (hereinafter CCNV) conceived the idea of a modern nativity sculpture of three homeless people huddled on a street-side steam grate placed on a pedestal. James Reid, a Baltimore sculptor, agreed to sculpt the three human figures; CCNV agreed to make the steam grate and pedestal. A budget and timetable were agreed to and the sculpture was made and exhibited. A dispute over ownership ensued later, with each party filing a certificate of copyright registration. CCNV sued Reid seeking a determination of copyright ownership and the return of the sculpture.<sup>4</sup>

The district court found that the sculpture was a work for hire and awarded the copyright and the sculpture to CCNV.<sup>5</sup> The District of Columbia Court of Appeals reversed, finding no work for hire, and the Supreme Court upheld this decision.<sup>6</sup>

### Implications of *Reid*

The ramifications of the *Reid* decision for the practitioner are difficult to assess. Definitive drafting guidelines were not set forth in the opinion. However, several things are clear. The Court has created a strong presumption in favor of copyright ownership in the creator of free-lance art work.<sup>7</sup> It now appears, as a practical matter, that in the absence of a written agreement, only the traditional, salaried employer-employee relationship will suffice to create an undisputed work for hire copyright in created work. Even with the new presumption, written agreements will have to be drafted carefully to clearly reflect copyright ownership. It also seems clear that joint authorship will replace work for hire in many disputed situations.

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4. *Reid*, 109 S. Ct. at 2167.

5. 652 F. Supp. 1453 (D.C. Cir. 1987), *rev'd* 846 F.2d 1485 (1988).

6. 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988).

7. *Reid*, 109 S. Ct. at 2178.



The critical element in the determination of whether an employer was an author for purposes of copyright was whether the work was created at the "insistence and expense" of the employer and whether the employer had the right to "direct and supervise" the manner in which the work was to be performed.<sup>14</sup> Applying this test, the *Murray* court concluded that an employment relationship existed and that work for hire applied.<sup>15</sup>

Since *Murray*, the 1976 Copyright Act was enacted, and some significant changes in the work for hire provisions were made.<sup>16</sup> Under the 1909 Act, the definition of "employer" and "work for hire" in then Section 62 of the Act was left to the courts.<sup>17</sup> Section 101 of the 1976 Act contains a two-part definition of work for hire, defining it first as work prepared by an employee within the scope of his or her employment and, second, as specially ordered or commissioned works within nine enumerated categories if there is a writing between the parties.<sup>18</sup>

### The Four Interpretations of "Employment"

With the 1976 Act changes, the definition of "employment," which was not defined in the 1976 Copyright Act, was interpreted in four major ways by the various circuit courts. The first interpretation involved the "right-to-control" test which remained the law in Florida and the Eleventh Circuit after *Murray*. Under this test, if the hiring party retains the right to control the art work—to have final approval or disapproval—the work created for that party will be considered work for hire under Section 101 and the hiring party will own the copyright.<sup>19</sup>

The second interpretation of employment was the "actual-control" test, as espoused by the Second Circuit in *Aldon Accessories Ltd. v.*

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(9th Cir. 1965); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940).

14. See, e.g., *Bourne*, 457 F.2d at 1213; *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966).

15. 566 F.2d at 1311.

16. See 17 U.S.C. § 101(1)-(2) (1988).

17. Section 62 of the 1909 Copyright Act, 17 U.S.C. § 26 (1988) reads the "word 'author' shall include an employer in the case of works made for hire."

18. 17 U.S.C. § 101 (a)-(b) (1988).

19. See, e.g., *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1988); *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).



*Spiegel, Inc.*<sup>20</sup> This interpretation required that the hiring party exercise actual control over the art created. This created a standard more favorable to employers than to free-lancers and was adopted by other circuits.<sup>21</sup> In *Aldon Accessories*, the plaintiff had hired artists to create porcelain statuettes. The plaintiff was involved in every detail of all sketches, models and prototypes. Thus, the actual control exercised by the plaintiff over the design process was enormous and undisputed.

The third interpretation of the definition of employment was made in *Dumas v. Gommerman*<sup>22</sup> by the Ninth Circuit. Under this view, the one most favorable to free-lancers and independent contractors, only formal salaried employees would meet the definition of employees under Section 101. Although this view was not adopted by the *Reid* court, it may ultimately prove to be the only work for hire where copyright will be owned by someone other than the person who created the work.

The fourth view, and the one finally adopted by the Supreme Court, is the view that the determination of whether a hiring party is an employer for purposes of Section 101 should be made by applying traditional agency law principles, only one of which may be the right to control or the exercise of actual control.<sup>23</sup> The determination of whether the creator of a commissioned work is an employee or an independent contractor will now require the application of a more complex standard.

Relying heavily on the legislative history of the 1976 Copyright Act revisions, the Supreme Court concluded that the right to control the art work was only one of the factors to be taken into account when determining whether a hired party is an employee or an independent contractor.<sup>24</sup> The other factors listed by the Court are 1) the skill required, 2) the source of the instrumentalities and tools, 3) the location of the work, 4) the duration of the relationship between the parties, 5) whether the hiring party has the right to assign additional projects to the hired party, 6) the extent of the hired party's discretion over when and how long to work, 7) the method of payment, 8) the hired party's

20. 738 F.2d 548 (2nd Cir.), cert. denied, 469 U.S. 982 (1984).

21. See, e.g., *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987).

22. 865 F.2d 1093 (9th Cir. 1989).

23. The Fifth Circuit enunciated this view in *Easter Seal Society v. Playboy Enterprises*, 815 F.2d 323 (5th Cir.), rehearing en banc denied, 820 F.2d 1223 (5th Cir. 1987) cert. denied, 108 S. Ct. 1280 (1988).

24. 109 S. Ct. 2166 (1989).



role in hiring and paying assistants, 9) whether the work is part of the regular business of the hiring party, 10) whether the hiring party is in business, 11) the provision of employee benefits, and 12) the tax treatment of the hiring party.<sup>25</sup> The Court emphasized that no one of these factors is determinative.<sup>26</sup>

### The New Work For Hire Agreements

It is these factors enumerated above which will most affect the drafting of work for hire agreements in the future. These agreements in Florida, and elsewhere, should change in the following ways:

1) The clarity of the delineation between employees and independent contractors will become much more important. For example, few existing contracts spell out the duration of a free-lance relationship, where the work will be performed, or whether additional projects will be assigned by the hiring party to the free-lancer. Now, many of them will.

2) Copyright assignment provisions will become a staple of both employment contracts and independent contractor contracts. For employers and hiring parties this may well be the only way to fully protect themselves against claims of free-lance independent contractors of copyright rights in the created work. Free-lance independent contractors will need to be very careful in the negotiations of copyright rights in their work in the face of full assignment clauses.

The effect of *Reid* on visual artists and their contracts will occur in two primary areas—first, in the area of specially commissioned fine art or sculpture as in *Reid* and, second, in the free-lance graphic design business.

In the case of specially commissioned art work, the best way to protect the rights of the artist has been with a two-step contractual agreement—one contract for the initial design and one for the actual execution of the piece. Examples of contracts for commissioned work appear on page 468-69. Since these contracts were drafted for the benefit of the artist, they make it clear that copyright ownership in commissioned work remains with the artist. It is also clear in these contracts that artistic discretion remains with the artist. The contracts do not provide for things like the source of the pens, paints and brushes, the location of the work, or the duration of the relationship. It would

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25. *Id.* at 2178.

26. *Id.* at 2179.



improve the strength of the artists' case in a dispute if the contracts did include subterms.

It is not in the specially commissioned work, though, that the bulk of the foreseeable problems will be found. Fine art commissions which do not have written agreements will at least have the benefit of being analogous to the *Reid* situation. The presumption of copyright ownership will now be with the artist. Those that do have written contracts will hopefully have well-drafted ones. As a result of *Reid*, free-lance graphic designers and artists who contract regularly with large organizations are the ones who will see the most changes in the contracts they sign.

The contract which appears on page 470 is a common free-lance agreement used by artists who are hired to create art for a specific purpose—advertising, magazine covers, signs, etc.. The contract makes it very clear which rights are being transferred and which are being reserved. But this contract was drafted for the benefit of the artist. The contracts drafted for the benefit of art-buying organizations will likely contain copyright assignment clauses, at worst, and joint authorship agreements, at best.

The changes in these contracts after *Reid* should make it clear that the artist is an independent contractor, that discretionary decisions will remain with the artist and that there is no joint authorship intended with the project.

The following additional clauses should be added to these contracts:

It is agreed that the copyright in (the work) belongs to artist and that this (the work) is not for hire. The parties do not intend that (the work) be a work of joint authorship. Artist is an independent contractor.

Except as otherwise noted, all work under this agreement will be performed at artist's place of business, using artist's materials. Artist will make all determinations regarding when and how long work will be done on (the work).

### Joint Works

The joint authorship issue will become more significant now that work for hire will be difficult to obtain.

In *Reid*, the Supreme Court remanded the case back to the district court for a determination of whether the parties prepared the



sculpture with the requisite intent for it to be considered a joint work under Section 101.<sup>27</sup>

Under Section 101 of the 1976 Copyright Act, a "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or "interdependent parts of a unitary whole." The typical joint work copyright holder is the person who wrote the music to a song to which someone else wrote the lyrics. Both authors hold a copyright in the song.

The cases involving joint work do not yet deal with work which has been commissioned. When the district court in *Reid* makes its decision, it will be easier to predict the direction of court-made law in this area. From a purely practical standpoint, because joint authors have full use of their copyright—i.e., they can license, sell, contract their copyright subject only to an accounting by the joint owner—an employer concerned about protection from claims of a work for hire creator would be well protected with a joint work copyright. From the artist's viewpoint, while a joint work copyright is not as good as sole ownership, it is vastly better than nothing. Nothing is often what an artist in a work for hire or commissioned work situation or commissioned work ends up with. With the Supreme Court's imprimatur of approval on the possibility of using joint works in these situations, such use will most certainly become more common in the future with some significant positive effects for artists.

### Existing Works

There is one area the Supreme Court failed to address in *Reid* that will certainly produce lawsuits in the future. The Copyright Act of 1976 took effect on January 1, 1978. The Supreme Court's decision in *Reid* was rendered on June 5, 1989, but it was not explicitly made retroactive. What happens to work for hire created between 1978 and 1989? Which law applies? Is it the various circuit court decisions making four different results in different states, or is it the *Reid* decision? Many creators of commissioned work could be entitled to enormous amounts of lost royalties if *Reid* were applied retroactively to their situations. One of them, no doubt, will ask the courts for an answer.

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27. *Reid*, 109 S. Ct at 2180.



## Conclusion

The practical effects of *Community for Creative Non-Violence v. Reid* are not easily determined. The presumption of copyright ownership has shifted from the hiring party to the creator of the work. For free-lance artists and artists commissioned to create fine art, this is a welcome change in the law. The written agreements between free-lancers and art-buying organizations will change with the organizations making sure that their copyright interests are protected with assignment clauses and joint work clauses. Small changes to the existing free-lance contracts drafted for the benefit of artists should suffice to protect their independent contractor status. The marketplace will, of course, continue to dictate the terms of those agreements, but *Reid* promises an improved legal position for free-lance artists in Florida and elsewhere.



## ARTWORK COMMISSION AGREEMENT

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, \_\_\_\_\_ (Collector) has selected the design and given the final approval for \_\_\_\_\_ (Artist) to proceed with the creation of this Work of Art:

Title: \_\_\_\_\_  
 Materials: \_\_\_\_\_  
 Approximate size upon completion: \_\_\_\_\_  
 Price: \_\_\_\_\_  
 Description of the Art Work: \_\_\_\_\_  
 Scope of the Artist's work: \_\_\_\_\_

### 1. PROGRESS SCHEDULE AND PAYMENTS

- (A) Collector agrees to pay to Artist one-third ( $\frac{1}{3}$ ) of the price of the Work (\$\_\_\_\_\_) at this time or within ten (10) days.
- (B) Collector agrees to pay an additional one-third ( $\frac{1}{3}$ ) of the cost of the Work (\$\_\_\_\_\_) when the Work is approximately two-thirds ( $\frac{2}{3}$ ) completed. Documentation of the progress of the Work may be made by photographs of the Work or by the personal inspection of the Collector at the discretion of the Artist.
- (C) Upon nearing completion of the Work, the Artist will give the Collector five (5) days advance notice of specific date of delivery so that Collector will be ready to receive the Work, make the final payment (\$\_\_\_\_\_), and sign a Purchase and Sales Agreement. Sales tax will be paid at this time (\$\_\_\_\_\_).
- (D) It is understood and agreed that it may not be possible to recreate the Work exactly as depicted in the design, and the Artist shall be bound to use his best aesthetic judgment to create the Work according to the style and intent of the design. The Artist is free to make design modifications as the Work progresses.

### 2. FINAL DELIVERY

- (A) The parties agree that final delivery of the Work will be made on or about \_\_\_\_\_. The Artist will make every effort to honor and meet this deadline. It is agreed, however, that this delivery date is an estimate only and that Artist shall not be responsible for any general, special or consequential damages for failing to deliver by this date. The Artist will immediately notify Collector of any delay occurring or anticipated.
- (B) In the event the Artist is unable to finish the Work within sixty (60) days of the estimate delivery date, or is unable to produce the Work for any reason, the Artist shall be liable for no special general or consequential damages, but the Artist shall return all payments received. The Artist shall retain all rights to the concept, design and the Work itself.

### 3. DELAYED PAYMENTS

- (A) In the event Collector fails to make the progress payments when due, interest at the rate of three fourths percent ( $\frac{3}{4}\%$ ) per month shall be assessed against the unpaid balance due. In addition, the Artist has the right to retain all previous payments plus all rights to the Work until full payment is made. It is understood that delay of any payment may proportionately extend the time required to complete the Work.

### 4. TERMINATION OF AGREEMENT

If Collector does not find the Work as it progresses fulfilling his expectations or needs and therefore wishes to terminate the agreement, Collector shall immediately notify the Artist of the termination. The Artist shall thereupon be entitled to retain all payments which Artist has received or was entitled to receive pursuant to this agreement prior to such notification. Further, the Artist shall retain all rights to the concept, design and Work itself, including the right to complete, exhibit and sell the Work.

### 5. TRANSFER OF WORK OF ART

It is hereby stated and acknowledged that Artist retains all rights and title to the Work until final payment has been received and the Purchase and Sale Agreement has been duly completed and signed by the parties.

### 6. ATTORNEY'S FEES

In any proceeding to enforce any part of this contract, the aggrieved party shall be entitled to reasonable attorney's fees in addition to any available remedy.

IN WITNESS WHEREOF, the parties have hereunto set their hands:

By \_\_\_\_\_ By \_\_\_\_\_  
 (Artist) (Collector)



## COMMISSION AGREEMENT FOR DESIGN OF ARTWORK

The Collector \_\_\_\_\_ residing at \_\_\_\_\_  
acknowledges sufficient familiarity with the style and quality of the work of the Artist  
\_\_\_\_\_ residing at \_\_\_\_\_ the parties have  
made and entered into this Agreement on this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

1. DESCRIPTION. The Artist in consideration of the covenants and agreements herein contained, agrees to design \_\_\_\_\_ (hereinafter "Work") for an approximate production budget of between \$ \_\_\_\_\_ and \$ \_\_\_\_\_. The Work is described as follows:  
 (a) Approximate size of finished work: \_\_\_\_\_  
 (b) Material and construction: \_\_\_\_\_  
 (c) Scope of the Artist's work: \_\_\_\_\_
2. DESIGN AGREEMENT. The receipt of good and valuable consideration of \$ \_\_\_\_\_ on this day for the design work to be provided by Artist after signing of this Agreement is hereby mutually acknowledged.  
 (a) Artist agrees to provide reasonable study sketch or maquette of the Work to the Collector on or about \_\_\_\_\_ (date). Upon receipt of design, the Collector shall notify Artist within ten (10) days of any proposed changes in design.  
 (b) Artist will provide a maximum of \_\_\_\_\_ designs or revisions for this Work. Additional designs or revisions shall cost an additional design fee of \$ \_\_\_\_\_ per hour.  
 (c) If Collector decides to *not* proceed with creation of the Work, all designs must be returned to Artist, Artist shall retain the design fee, and this Agreement shall be terminated.  
 (d) If Collector determines to proceed with creation of the Work pursuant to a selected design, the ARTWORK COMMISSION AGREEMENT must be completed and signed by both parties, and the first one-third progress payment will be paid at that time.
3. COSTS. Collector is responsible for all expenses including but not limited to airfare and ground transportation, room and board, film and developing costs, shipping, insurance and delivery charges. Artist will supply an itemized expense sheet including receipts.
4. COPYRIGHT. It is agreed that all designs are instruments of service and shall remain in the possession of and the property of the Artist, and thereby Artist retains the exclusive right to use and create Works according to the designs. Collector agrees to make no public display or commercial use of the designs, or any copy or facsimile thereof, without the Artist's consent. It is agreed that if consent is granted for commercial use, the Artist shall be entitled to a minimum of ten percent (10%) of any and all consideration paid or exchanged for such commercial use.

IN WITNESS WHEREOF the parties have hereunto set their hands:

By \_\_\_\_\_ By \_\_\_\_\_  
(Artist) (Collector)



# ARTIST/INDEPENDENT CONTRACTOR AGREEMENT

TO \_\_\_\_\_ DATE \_\_\_\_\_

DESCRIPTION OF ASSIGNMENT \_\_\_\_\_

DELIVERY DATE \_\_\_\_\_ FEE \_\_\_\_\_

BUYER SHALL REIMBURSE ARTIST FOR THE FOLLOWING EXPENSES:

THE BUYER PURCHASES THE FOLLOWING EXCLUSIVE RIGHTS OF USAGE:

Title or Product \_\_\_\_\_

Category of Use \_\_\_\_\_

Medium of Use \_\_\_\_\_

Edition (of book) \_\_\_\_\_

Geographic Area \_\_\_\_\_

Time Period \_\_\_\_\_

Artist reserves any usage rights not expressly transferred. Any usage beyond that granted to buyer herein shall require the payment of a mutually agreed upon additional fee, subject to all terms below.

## TERMS:

1. TIME FOR PAYMENT. All invoices shall be paid within thirty (30) days of receipt.

2. CHANGES. Buyer shall make additional payments for changes requested in original assignment. However, no additional payment shall be made for changes required to conform to the original assignment description. The Buyer shall offer the Artist first opportunity to make any changes.



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3. **EXPENSES.** Buyer shall reimburse Artist for all expenses arising from this assignment, including but not limited to all those listed above, and the payment of any sales taxes due on this assignment. Buyer's approval shall be obtained for any increases in fees or expenses that exceed the original estimate by 10% or more.

4. **CANCELLATION.** In the event of cancellation of this assignment, ownership of all copyrights and the original artwork shall be retained by the Artist, and a cancellation fee for work completed, based on the contract price and expenses already incurred, shall be paid by the Buyer.

5. **OWNERSHIP OF ARTWORK.** The Artist retains ownership of all original artwork, whether preliminary or final, and the Buyer shall return such artwork within thirty (30) days of use.

6. **CREDIT LINES.** Credit line shall be in the form:

© \_\_\_\_\_ 19\_\_

The Buyer shall give Artist and any other creators a credit line with any editorial usage.

7. **RELEASES.** Buyer shall indemnify Artist against all claims and expenses, including reasonable attorney's fees, due to uses for which no release was requested in writing or for uses which exceed authority granted by a release.

8. **MODIFICATIONS.** Modification of the Agreement must be written, except that the invoice may include, and Buyer shall pay, fees or expenses that were orally authorized in order to progress promptly with the work.

ARTIST'S SIGNATURE \_\_\_\_\_

COMPANY NAME \_\_\_\_\_

AUTHORIZED SIGNATURE \_\_\_\_\_

NAME AND TITLE \_\_\_\_\_



# Florida's Art Consignment Statute: A Trap For The Unwary Artist?

Cathryn Mitchell Heise\*

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## I. Introduction

On October 1, 1986, Section 686.501-506 Florida Statutes, became effective, making Florida one of the twenty-six states with an Art Consignment statute. This article will explore the statute itself, as well as its sparse legislative history. It will also consider the principles of law which governed consignment relationships prior to the enactment of the statute, and will present some unanswered questions about the way in which Florida courts are likely to apply the statute to relationships which, until recently, have been governed by a smile and a handshake. The primary significance, however, of Florida's new art consignment statute lies in not only its effect on legal relationships between artists, galleries, and consumers. This recognition was a response, in part, to the fact that Florida is quickly becoming a haven for artists and art connoisseurs of all kinds. As this article points out, however, the statute's effect on these relationships is uncertain and perhaps likely to be contrary to legislative intent.

## II. Background—Legal Protection For Art as a Product of the Mind

Webster's Third New International Unabridged Dictionary gives eight separate definitions for the word "art."<sup>1</sup> The noun "art" is defined as "the disposition and modification of things by human skill, to answer the purpose intended." In this sense, Webster's continues, "art stands opposed to nature."<sup>2</sup> This seemingly common word is further defined as "creative work generally, or its principles; the making or doing of things that have form and beauty: art includes painting, sculpture, ar-

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1. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 122 (3d ed. 1976).

2. *Id.*



chitecture, music, literature, drama and dance."<sup>3</sup> Although Webster includes many different definitions of the word, they all have one thing in common: they are creative expressions of the human mind.

The law has historically protected creations and products of the mind, while always clearly rejecting any legal protection for mere abstract ideas or mental conceptions. It has long been settled that, even independent of copyright or other similar legislative protection, a creation or product of the mind which has been put into tangible form is the subject of property.<sup>4</sup> Thus, there may be property rights in particular combinations of ideas or in the form in which the ideas are embodied.<sup>5</sup> Copyright protection, which is the protection most often sought for works of art, provides the holder of such protection with the right to reproduce, distribute, and display the work.<sup>6</sup>

### III. Relationships Between Artists and the Outside World: The Need for Legal Protection

Because creations and products of the human mind have long been recognized as property worthy of protection, various legal relationships have evolved over the years to provide predictability and certainty to persons involved in transactions involving works of art.

Many artists and gallery owners believe that the relationship between an artist and the gallery in which the artist chooses to display and promote her work is somehow different from the ordinary business transaction, and thus too "special" or "unique" to require a written formalization of the parties' understanding.<sup>7</sup> Although it defies ordinary custom and usage to suggest that the artist-art dealer relationship be memorialized in some way, many commentators who have studied

3. *Id.*

4. 17 U.S.C. § 102(a) (1982) states that copyright protection is extended to "original works of authorship fixed in any tangible medium of expression."

5. See, e.g., *Schonwald v. F. Burkhart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7 (1947); *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56, *reh. den.*, 254 N.Y. 563, 173 N.E. 867 (1930).

6. In order to be entitled to copyright protection, however, a work of art must embody some "creative authorship" in its delineation or form. See, *Pictorial, graphic, and sculptural works*, 37 C.F.R. § 202.10(a) (1989). This requirement exists because without creativity, there can be no work of art. See, e.g., *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968).

7. See, generally, F. FELDMAN, S. WEIL & S. DUKE BIEDERMAN, *ART LAW* § 3.1 (1986) [hereinafter *ART LAW*].



the dynamics of these relationships strongly recommend that the parties negotiate an agreement that establishes the parameters of the relationship. These authorities suggest that such documentation of the intent of the parties offers the parties an opportunity to confront in advance many of the issues and potential problems that may arise during the course of the association.<sup>8</sup> Memorializing the parties' understanding offers them an opportunity to anticipate many of the difficulties that surface as a result of these relationships, and may prevent potential future disagreements which may destroy a profitable and successful relationship. A clear understanding at the inception of such a relationship may also prevent costly litigation to determine the parties' intent at the time they entered into the agreement.<sup>9</sup>

An informal survey of gallery owners, however, would likely reveal that most have never, and would never, formalize such agreements with the artists whose works they display and promote.<sup>10</sup> Many artists are opposed to such agreements as well. According to one artist, "a written contract indicates a strange relationship—a lack of trust."<sup>11</sup> This reac-

8. *Id.* at § 3.1.1, at 342.

9. The New York case of *O'Keeffe v. Bry*, 456 F. Supp. 822 (S.D.N.Y. 1978) stands as a monument for the need to memorialize agreements between artists and galleries, and other agents acting on the artist's behalf. In *O'Keeffe*, a disagreement ensued between Georgia O'Keeffe and Doris Bry, O'Keeffe's commissioned sales agent, who was authorized to sell both O'Keeffe's artwork, and her late husband Alfred Steiglitz's photographic works. Following the disagreement with Bry, O'Keeffe demanded that Bry return of all of her works. When Bry refused to return the works, O'Keeffe sued her for their return. Bry counterclaimed for breach of contract and recovery of the works (after a preliminary injunction had required their removal to a safe place pending the outcome of the case), and O'Keeffe moved to dismiss the counterclaim pursuant to the statute of frauds. The court held that because no "core document evidencing a promise" was present, and thus the contract alleged in Bry's first counterclaim was not evidenced by a writing signed by O'Keeffe, its enforcement was barred by New York's statute of frauds. See also ART LAW, *supra* note 7, § 3.1.3, at 350 (commenting on the importance of written agreements in view of the statute of frauds provisions).

10. In a seminar held on March 23, 1989, that was sponsored by the Florida Bar Entertainment, Arts and Sports Law Section, five prominent Miami gallery owners were questioned about their relationships with artists. Surprisingly, none of these panelists used contracts to memorialize their agreements with the artists, and cited as reasons the fact that the relationship was one of "love" and "trust," much like mother and child, and that no such agreements were required because "they would never want to require an artist to stay with their gallery if the artist did not want to."

11. See, ART LAW, *supra* note 7, § 3.1.1, at 342 (citing to Art Letter, Feb. 1977, at 2) (providing summary of arguments espoused for and against written agreements between galleries and artists)).



tion is similar to that which one might encounter when suggesting that two persons planning to marry execute a pre-nuptial agreement. The mere mention of the necessity for such agreement suggests that a lack of trust exists between the parties, and many persons believe that the marital relationship is, like that between the artist and gallery, too unique to be governed by a written contract. These agreements can, however, guard against one party's subsequent loss of memory, or confusion as to details, accident, illness or death.<sup>12</sup> Thus, because the relationship between an artist and gallery is essentially a business association entered into for the benefit of both parties, a contract that defines its parameters appears to make good business sense.<sup>13</sup>

#### IV. Artist/Gallery Consignment Relationships

##### A. *In General*

Although artists and galleries may be involved in a variety of different transactions, the consignment relationship is the one which appears to be the most prevalent in the United States.<sup>14</sup> A consignment arrangement allows both the artist and the gallery flexibility, because if the work has not been permanently sold, the artist, subject to the agreement between the parties, has the opportunity to remove the work from the gallery if not completely satisfied with the gallery. Furthermore, under a consignment relationship, the gallery is not required to make a tremendous initial investment in the work. This arrangement can also benefit the little-known artist, by giving the gallery the opportunity to "test-market" the work without taking a tremendous financial risk that the work will not be popular among the art-purchasing

12. *Id.*

13. In F. CONNER, P. KARLEN, J. PERWIN, & D. SPATT, *THE ARTIST'S FRIENDLY LEGAL GUIDE*, 57-60 (1988), Jean S. Perwin, Esq., discusses the advantages of contracts as "business tools" to "prevent the hearer and the speaker from attaching different meanings to the same words." In answering the hypothetical question of "when do you [the artist] need something in writing," Ms. Perwin answers, "always." Ms. Perwin also suggests that the following contract terms should be "red flags" to any artist: manner of payment, copyright rights, reproduction rights, termination and cancellation, artistic control, insurance and delivery costs, expenses, independent contractor status, and a "time is of the essence" clause.

14. *ART LAW*, *supra* note 7, § 3.1.1, at 342. (The outright sale to a gallery of a unique work of art has traditionally occurred more often in Europe than in the United States).



public.<sup>15</sup>

## B. Common Law Governing Artist/Gallery Consignment Relationships

### 1. The Principal-Agent Relationship

Prior to Florida adopting the provisions of the Uniform Commercial Code, the consignment of goods did not create the relation of seller and buyer between the consignor and consignee, but rather that of principal and agent.<sup>16</sup> Thus, under general principles of agency law, "the agent steps into the shoes of [the] principal and acts for him pursuant to the grant of authority vested in him by the principal."<sup>17</sup> Thus, the general rule was that a "sales agent was authorized to do whatever [was] necessary and usual to carry out the purpose of the agency" (the sale).<sup>18</sup> In the absence of any express limitation to the contrary, the usages and customs of the business in which the sales agent is employed furnished the rules by which the authority was measured.<sup>19</sup>

15. In ART LAW, *supra* note 7, § 3.1.1, 343-48, the authors provide a comprehensive checklist of principles which should, depending upon the specific factual circumstances involved in the particular instance, be considered regarding the agreement between the artist and gallery. These principles include duration of consignment, scope of consignment, shipping, storage, insurance, artistic control, gallery exhibitions, other forms of promotion, reproduction rights, damage or destruction of consigned works, selling prices, compensation of the gallery, and advances to the artist.

16. See, *Edwards v. Baldwin Piano Co.*, 79 Fla. 143, 83 So. 915 (Fla. 1920). In *Edwards*, the defendant was a piano dealer. The parties executed a contract which provided that all pianos ordered or received by the defendant were to be "held on consignment for sale," and that title to the instruments, and the proceeds when paid, were to remain with the plaintiff. The issue in the case was whether the pianos in question were consigned to the defendant for sale, or whether the defendant was a purchaser of the pianos which would render him liable to levy and execution. According to the court, after ascertaining the intent of the parties from the language of the contract, the parties intended a consignment relationship, which did not create a relationship of vendor and purchaser, but of principal and agent. See also *Lee v. Smith*, 198 So. 197, 199 (Fla. 1940) (consignment agreement indicated no passage of title to goods, and thus plaintiff, a merchant, was merely an agent of the manufacturing company).

17. *King v. Young*, 107 So. 2d 751 (Fla. 2d Dist. Ct. App. 1958) (citing 2 AM. JR. 2D AGENCY § 2, at 13 (1962)).

18. See, e.g., *Myers v. Stephens*, 233 Cal. App. 2d 104, 43 Cal. Rptr. 420 (1965).

19. See, e.g., *Cornell Computer Corp. v. Damion*, 530 So. 2d 497, 499 (Fla. 3d Dist. Ct. App. 1988); cf. *Southern Crane Rentals, Inc. v. City of Gainesville*, 429 So.



## 2. *The Uniform Commercial Code—Section 672.326, Florida Statutes*

Florida has substantially adopted Article 2 of the Uniform Commercial Code (UCC) in §§ 671.201-724 of the Florida Statutes. Under the UCC, many transactions that might have been regarded as consignments creating a principal-agent relationship under pre-Code law are regarded as sales, at least in instances where claims by creditors of the consignee are at issue, or as "sale or return" transactions. Section 672.326 of the Florida Statutes distinguishes two somewhat similar situations, "sale on approval" and "sale or return." Each of these transactions allows the buyer to return the subject goods to the seller without breaching the contract.<sup>20</sup> The Code distinguishes between these two transactions based upon whether the goods at issue are to be used or resold by the purchaser.<sup>21</sup>

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2d 771, 773 (Fla. 1st Dist. Ct. App. 1983); *National Merchandise Co., Inc. v. United Service Auto. Assoc.*, 400 So. 2d 526 (Fla. 1st Dist. Ct. App. 1981).

20. See, Official Comment 1 to U.C.C., § 2-326.

21. FLA. STAT. § 672.326(1) (1989) provides the following:

*Sale on approval and sale or return; consignment sales and right of creditors*

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) A "sale on approval" if the goods are delivered primarily for use, and

(b) A "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

(a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or



Consignments of goods are regarded as "sales" under the code because of a code provision which states that where goods are delivered to a person for sale and he maintains a place of business where he deals in goods of the kind involved, under a name other than that of the person making delivery, the goods are considered a "sale or return" transaction; and such goods are subject to the claims of the buyer's creditors while in the buyer's possession.<sup>22</sup> This principle allows persons who deal with the person who is in possession of the goods to assume that the goods are unencumbered unless public records or their own knowledge suggests the contrary. This rule applies even if an agreement states that it reserves title in the person who makes delivery until the goods are paid for or resold, or expressly provides that the goods are being delivered "on consignment."

A person who delivers goods under such a "sale or return" transaction may, however, take certain steps to protect her rights. According to § 672.326(3), the person making delivery does not relinquish priority to the goods in favor of the buyer's creditors where the person making delivery evidences his interest in the goods by a sign, establishes that the buyer is generally known by his creditors to be substantially engaged in selling the goods of others, or complies with the filing provisions for secured transactions in Chapter 679, Florida Statutes.<sup>23</sup>

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(c) Complies with the filing provisions of the chapter on secured transactions (chapter 679).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (§ 672.2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (§ 672.2-202).

22. FLA. STAT. § 672.326(3) (1989).

23. *Id.* Many Florida cases have discussed the application of this section, primarily in the bankruptcy context. *See*, Walter E. Heller & Co. S.E. v. Riviana Foods, Inc., 648 F.2d 1059, 1060-61 (5th Cir. 1981); Georgia-Pacific Corp. v. Walter E. Heller & Co. S.E., Inc., 440 So. 2d 666, 669 (Fla. 1st DCA 1983); Bakst v. Wheeler Oil Co., Inc. (*In re* The Denmark Co.), 73 Bankr. 325, 327 (S.D. Fla. 1987); Gennet v. Oriental Rug Agency (*In re* Florida Consumer's Furniture Warehouse, Inc.) 9 Bankr. 7, 9 (S.D. Fla. 1981); *In re* New York Diamond and Jewelry Exchange, Inc., 26 B.R. 32, 33-34 (S.D. Fla. 1982). For an interesting case decided under Texas law, *see* Leverett Co. v. Arthur A. Everts Co. (*In re* Arthur A. Everts Co.), 35 Bankr. 706, 707-708 (N.D. Tex. 1984).



## V. Art Consignment Statutes in General

In addition to the various contractual or other relationships that may exist between artists and art dealers, many states have enacted statutes specifically governing the consignment relationship. These statutes, often referred to as artist-art dealer consignment statutes, have been enacted in twenty-six states as of the date of publication of this article.<sup>24</sup>

New York was the first state to enact an artist-art dealer consignment statute.<sup>25</sup> Significantly, this statute, enacted in 1966, for the first

24. These statutes can be found at the following citations: ARIZ. REV. STAT. § 44-1771 - 1778 (Supp. 1984); ARK. STAT. §§ 68-1806 - 1811 (Supp. 1983); CAL. CIV. CODE §§ 1738 and §§ 1738.5 - 9 (Deering 1981 & Supp. 1990); COLO. REV. STAT. §§ 6-15-101 - 104 (Supp. 1984); CONN. GEN. STAT. §§ 42-116K - 116M (West Supp. 1985); FLA. STAT. §§ 686.501 - 1506 (1988); GA. CODE ANN. § 8-5.7 (1985); IOWA CODE ANN. §§ 556D.1-5 (West 1988); ILL. REV. STAT. Ch. 121 ½ §§ 1401 - 08 (Supp. 1987); KY. REV. STAT. §§ 365.850 - 990 (Bobbs-Merrill Supp. 1986); MD. COM. LAW CODE ANN. §§ 11-8A-01 - 04 (1983) & § 11-8A-03 (Supp. 1984); MASS. ANN. LAWS ch. 104A, §§ 1 - 6 (Law. Co-op. Supp. 1985); MICH. COMP. LAWS § 442.311 - 315 (West Supp. 1985); MINN. STAT. ANN. §§ 324.01 -.05 (West Supp. 1987); MO. REV. STAT. §§ 407.900 - 910 (Vernon Supp. 1985); MONT. CODE tit. 22 §§ 2-501 - 2-505 (1985); N. M. STAT. §§ 56-11-1 - 3 (Supp. 1984); N. Y. ARTS & CULTURAL AFFAIRS LAW §§ 12.01 - 03 (McKinney Supp. 1990); N. C. GEN. STAT. §§ 25C-1 - 5 (Supp. 1983); OHIO REV. CODE ANN. §§ 1339.71 - 78 (Anderson Supp. 1984); OR. REV. STAT. §§ 359.200 - 240 (1983); PA. STAT. tit. 73 §§ 2121 - 30 (Purdon Supp. 1987); TENN. CODE §§ 47-25-1001 - 1007 (1984); TEX. BUS. & COM. CODE ANN. art. 9018 (Vernon Supp. 1985); WASH. REV. CODE §§ 18.010.010 - 905 (Supp. 1985); WIS. STAT. ANN. §§ 129.01 - .08 (West Supp. 1984).

25. New York's art consignment statute provides the following:

### § 12.01. Artist-Art Merchant Relationships

1. Notwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:

(a) Whenever an artist or craftsperson, his heirs or personal representatives, delivers or causes to be delivered a work of fine art, craft or a print of his own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsperson and such art merchant with respect to the said work, and:

(i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;

(ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

(iii) any proceeds from the sale of such work are trust funds in the



time established a consignor-consignee relationship between the artist and art merchant, notwithstanding the existence of any custom, practice, or provision of the Uniform Commercial Code governing transactions involving goods other than works of art.<sup>26</sup> The statute also expressly created a principal-agent relationship between the consignor and consignee, and made the art merchant a fiduciary for the artist, such that the work of art is trust property while in the hands of the merchant, and any proceeds from the sale of the work are held in trust for the benefit of the artist.<sup>27</sup> Significantly, contrary to the Uniform Commercial Code § 2-326, the provision previously governing works of art as well as sales of other goods, the work would not, under any circumstances, be subject or subordinate to any claims, liens or security

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hands of the consignee for the benefit of the consignor;

(iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; provided that, if such work is resold to a bona fide third party before the consignor has been paid in full, the resale proceeds are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full; and

(v) no such trust property or trust funds shall be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever.

(b) Waiver of any provision of this section is absolutely void except that a consignor may lawfully waive the provisions of clause (iii) of paragraph (a) of this subdivision, if such waiver is clear, conspicuous, in writing and subscribed by the consignor, provided:

(i) no such waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve month period commencing with the date of the execution of such waiver;

(ii) no such waiver shall be valid with respect to the proceeds of a work initially received on consignment but subsequently purchased by the consignee directly or indirectly for his own account; and

(iii) no such waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under this subdivision.

2. Nothing in this section shall be construed to have any effect upon any written or oral contract or arrangement in existence prior to September first, nineteen hundred sixty-nine or to any extensions or renewals thereof except by the mutual written consent of the parties thereto.

N.Y. ARTS & CULT. AFF. LAW §§ 12.01 - .03 (McKinney Supp. 1990).

26. N.Y. ARTS & CULT. AFF. LAW §§ 12.01(a) (McKinney Supp. 1990).

27. *Id.*



interest of any kind, and the statute is specific in stating that any waiver by the artist of the protections of the statute may not inure to the benefit of the art merchant's creditors in any way that would be contrary to the rights of the artist under the statute.<sup>28</sup>

In an attempt to clarify the effect of the New York statute, the New York legislature amended the statute in 1969 to expressly provide that the proceeds from the sale of works of art were entitled to the same protection as the works themselves.<sup>29</sup> In a memorandum of the Attorney General of New York regarding the fiduciary obligation of the art dealer created by the statute, the Attorney General specifically states that the dealer is not relieved of his fiduciary obligations regarding the work until the transaction is completed, and the proceeds from the sale of the work have been delivered to the artist or other consignor.<sup>30</sup> The Attorney General rendered this opinion in response to complaints that had been made against art dealers for the alleged wrongful withholding or appropriation of proceeds from the sale of works of art. While New York prosecutors had recognized that similar conduct regarding the actual works of art constituted larceny under the statute, they had been reluctant to entertain such complaints where the proceeds of the sale of the work were at issue.<sup>31</sup> Thus, the Attorney General's opinion clarified the legislative intent that the statute requires the art dealer to handle the proceeds of the sale of works of art as a fiduciary as well.<sup>32</sup>

## VI. Florida's Art Consignment Statute

On May 13, 1986, the Florida legislature followed New York's lead and enacted § 686.501-06—the Florida Art Consignment statute. Section 686.502, Florida Statutes, provides the following:

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28. *Id.* at § 12.01 (1)(b)(iii).

29. ART LAW, *supra* note 7, § 3.2.2, at 366.

30. *Id.* at 367 (reprinting Memorandum of the Attorney General of New York concerning Article 12). The memorandum indicates that the New York Attorney General relied on *Britton v. Ferrin*, 171 N. Y. 235, 244 (1902) for support regarding this principle.

31. ART LAW, *supra* note 7, § 3.2.2, at 367.

32. For an application of the New York statute, see *Becque v. Egan* (In re Matter of Wilhemina Friedman), 407 N.Y.S.2d 999, 64 A.D.2d 70 (1978), where the Court held that, in light of the New York art consignment statute, an agreement which provided that an art dealer was to put forth his best efforts to sell the works and pay the widow one-half of the sales price was properly treated as a consignment.



686.502. Consignment relationship; notice; proceeds of sales held in trust; contract requirements.—

(1) Whenever a consignor delivers, or causes to be delivered, a work of art to a consignee for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation, the delivery to and acceptance thereof by the art dealer is deemed to be "on consignment"; and, with respect to the work of art, such consignee shall thereafter be deemed to be the agent of such consignor.

(2) Whenever a consignor delivers or causes to be delivered a work of art to a consignee; such consignor shall give notice to the public by affixing to such work of art a sign or tag which states that such work of art is being sold subject to a contract of consignment, or such consignee shall post a clear and conspicuous sign in the consignee's place of business giving notice that some works of art are being sold subject to a contract of employment.

(3) The proceeds of sale of such a work of art shall be held in trust by the consignee for the benefit of the consignor. Such proceeds shall be applied first in payment of any amount due to the consignor.

(4) Any provision of a contract or agreement whereby the consignor waives any of the provisions of this section is void.

The only legislative history regarding the purpose and intent of this statute is the Senate Staff Analysis and Economic Impact Statement.<sup>33</sup> This Senate staff analysis first recognized that, although Chapter 672, Florida Statutes, covered sales generally, Florida had no statutory law that specifically regulated the sale of art by consignment.<sup>34</sup> This report further recognized that Section 672.326, Florida Statutes, does provide generally that goods held "on consignment" are subject to claims of creditors while in the buyer's (consignee's) possession.<sup>35</sup> Although the scant legislative history did little more than restate the provisions of the statute, it specifically referred to the most significant provision of the statute—namely, that *the statute includes provisions creating a priority in favor of the artist over the claims, liens or security interest of the creditors of the art dealers to whom the art is consigned*.<sup>36</sup> The Senate report is unequivocal that their new statute supercedes § 672.326 and gives the consignor (artist) priority over the art

33. Florida State Archives, Department of State, Series 18, Carton 1557.

34. *Id.*

35. *Id.*

36. *Id.*



dealer's creditors.<sup>37</sup>

Although the history of the development of the New York art consignment statute unambiguously reflects a legislative intention that the statute circumvent previously applicable Uniform Commercial Code provisions,<sup>38</sup> it is exactly this issue that is currently at the heart of Florida's first case interpreting this recently enacted statute.<sup>39</sup> In that case, the plaintiff artist consigned sixteen of his paintings to John Guggenheim, an individual who allegedly misled the plaintiff into believing that he was a member of the Guggenheim family of New York City, nationally renowned patrons of the arts. The plaintiff consigned these paintings to Guggenheim for display and sale at Mr. Guggenheim's "gallery." The plaintiff transferred possession of these paintings to Mr. Guggenheim in November 1986, July 1987 and August 1987. The only "consignment agreement" entered into between Messrs. Shuttie and Guggenheim was an undated and unsigned document on stationery of the Guggenheim Gallery that listed over thirty "works on consignment by Zois Shuttie" with the corresponding prices for the various works. This document was the exclusive written memorial for the consignment agreement, although the parties agreed that all other terms of the consignment relationship were governed by oral agreements or the custom and practice of the art industry.

The plaintiff testified that neither he nor, to his knowledge, Mr. Guggenheim, affixed any sign or tag to the consigned works to notify third persons that the displayed works were being sold subject to a contract for consignment. In November 1987, Mr. Guggenheim approached Robert Inglesias, the owner of the Festa Restaurant in Miami, and suggested that plaintiff's sixteen paintings be displayed at

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37. *Id.*

38. Interestingly, a New York state Senator anticipated that the U.C.C. would act as such a "foil" in as early as 1975, and clearly enunciated the New York legislature's intent. In the MEMORANDUM OF NEW YORK STATE SENATOR ROY GOODMAN CONCERNING ARTICLE 12, N. Y. 1975 Legis. Ann. 96, reprinted in ART LAW, *supra* note 7, § 3.2.4, at 369, Senator Goodman introduced a bill to clarify that the New York art consignment statute is the exclusive governing statute regarding the consignment relationship between artists and art — dealers, and creditors of art dealers may not, in light of the statute, avail themselves of the rights under U.C.C. § 2.326 or any other provision of the U.C.C. to assert claims against consigned works of art or the trust funds resulting from the sale of such works.

39. *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (03), 11th Judicial Circuit, Dade County, Florida (July 27, 1989) (general master decision); *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (03), 11th Judicial Circuit, Dade County, Florida (Dec. 13, 1989) (final judgment).



the restaurant.<sup>40</sup> The transfer of the paintings from Guggenheim to Festa was evidenced by a two-page document on the stationery of "The Guggenheim Collection" listing sixteen paintings by Zois Shuttie and a price for each. As security for these paintings, Festa loaned Guggenheim \$25,000. When he learned of the transfer of the paintings to Festa, the plaintiff unsuccessfully sought the return of their possession. Therefore, the plaintiff filed a replevin action seeking the return of the paintings that had been transferred in violation of his consignment agreement, and became the first person to seek the protection of Florida's Art Consignment statute.

The circuit court, however, affirmed the Report of the Special Master which stated that, under the circumstances, Mr. Shuttie was not entitled to the protections afforded by the statute because of his failure to comply with the statutory provisions regarding the posting of a sign or tag on consigned works to provide notice to third persons of the artist's interest in the work.<sup>41</sup> Therefore, the court denied plaintiff's replevin claim, and allowed Festa Restaurant to maintain possession of the paintings as security for the loan to Mr. Guggenheim.<sup>42</sup> The plaintiff then appealed this finding to the Third District Court of Appeal of Florida where the case is currently pending.<sup>43</sup>

Although minimal legislative history exists regarding Florida's Art Consignment statute, it is unlikely that the legislature envisioned such a result. Instead, the Florida legislature, like the New York legislature, intended that this statute provide increased protection for artists, and did not intend that the statute be interposed as an additional procedural hurdle for an artist to overcome to ensure that the artist's interest in the work is maintained. Advocates of artists' rights, however, will have to hope that the appellate court either reverses the holding of the circuit court, or that the legislature amends the statute to ensure that protection of the artist—the primary purpose of the statute—remains the focus of the judiciary in interpreting the statute.

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40. The terms of the transfer were the following: 1) possession of the paintings would be transferred to the restaurant without cost except for maintenance and insurance of the paintings, 2) persons interested in purchasing the paintings would be referred to Mr. Guggenheim, and, 3) in the event a sale was consummated, the restaurant would receive a commission of twenty percent of the selling price of the work.

41. *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (103), 11th Judicial Circuit, Dade County, Florida, Final Judgment (Dec. 13, 1989).

42. John Guggenheim was never made a party to the lawsuit because he disappeared from Dade County.

43. Case, No. 90-85.



## VII. Conclusion

Although artists should be encouraged by the growing number of states that have enacted art consignment statutes in an effort to protect the rights of artists and their work, the artistic community should be aware of the requirements of such statutes. As Mr. Shuttie learned, these statutes, while intended to increase the protection previously afforded the artist under the Uniform Commercial Code, contain their own procedural quagmires, and the failure to comply with them can prove disastrous to an artist seeking the protection of the statute. As a result, these statutes may be simply a "trap for the unwary artist."



# Art and First Amendment Protection in Light of *Texas v. Johnson*<sup>1</sup>

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## I. Introduction

A work of art has been defined as: "any human work made with the specific purpose of stirring human emotions; something displaying artistic merit: . . . all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture."<sup>2</sup>

Few people would disagree that the intentional burning of the American flag stirs human emotions. The flag is the symbol of our nation and has come to represent patriotism and freedom.<sup>3</sup> Certainly, burning the American flag does not constitute art as most Americans would define it. However, is an artist who incorporates the flag into one of his art pieces protected by the first amendment against government suppression, through flag desecration statutes, of his freedom of expression? The case of *Texas v. Johnson*<sup>4</sup> addresses the issue of the scope of first amendment protection that courts are willing to afford expressive speech in the form of flag desecration. Many Americans believe this U.S. Supreme Court decision has gone too far.<sup>5</sup>

During the 1984 Republican National Convention in Dallas, Gregory Lee Johnson participated in a flag-burning protest in front of City Hall.<sup>6</sup> Johnson, a member of the Revolutionary Communist Youth Brigade<sup>7</sup> was arrested and convicted under a Texas statute<sup>8</sup> classifying the

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1. 109 S. Ct. 2533 (1989).

2. 6A C.J.S. *Arrest* § 291 (1975).

3. *Halter v. Nebraska*, 205 U.S. 34, 43 (1907).

4. 109 S. Ct. 2533 (1989).

5. Jacoby, McDaniel, McKillop, *A Fight for Old Glory*, NEWSWEEK, July 3, 1989, at 18.

6. *Johnson*, 109 S. Ct. at 2536.

7. Isaacson, *O'er the Land of The Free: A Decision Upholding the Right To Burn the Flag is the Best Reason Not To*, TIME, July 3, 1989, at 14.

8. TEX. PENAL CODE ANN. § 42.09. (Vernon 1989) provides in full:

§ 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates

(1) a public monument;

(2) a place of worship or burial; or



U.S. flag as a venerated object and permitting the criminal prosecution of those who desecrate it. Johnson was sentenced to a year in jail and fined \$2,000.<sup>9</sup> The Texas Court of Criminal Appeals reversed the decision on constitutional grounds, holding that Johnson was engaged in symbolic speech protected by the first amendment and that the state's interests were insufficient to support Johnson's conviction.<sup>10</sup> John Vance, District Attorney for Dallas County, asked the U.S. Supreme Court to reinstate the conviction and to "squarely address" whether the state has the right to protect the flag as a "symbol of national unity and to jail those who dare to desecrate it by sending it up in smoke."<sup>11</sup> On a writ of certiorari, the U.S. Supreme Court held (a) Johnson's burning of the American flag was expressive speech and therefore protected by the first amendment, (b) Texas could not show that the interests it sought to protect ("preserving the flag as a symbol of national unity and preventing breaches of the peace") were important governmental interests justifying any limitations on first amendment freedoms; and (c) Government's prohibition on expression, resulting from society's offense or disagreement with the idea expressed, is inappropriate.<sup>12</sup>

Historically, first amendment theories have been centered around political expression.<sup>13</sup> In the views of courts and commentators, the effect of this centrality of political expression in first amendment theories has been the relegation of other types of non-political expression to second class status.<sup>14</sup> However, the impact of the decision in this case reaches beyond political expression, since every art piece incorporating the flag is not necessarily politically inspired.

An important concern of artists is whether their creations are protected forms of speech. When artwork is attacked under a statute prohibiting the physical use of the American flag, is the creation entitled to the same constitutional protection that the first amendment pro-

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(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

9. N.Y. Times, June 22, 1989, at A1, col. 6.

10. Johnson, 109 S. Ct. at 2537.

11. Garbus, *The 'Crime' of Flag Burning*, THE NATION, MAR. 20, 1989, at 369.

12. Johnson, 109 S. Ct. at 2538-48.

13. See Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment*, 1987 WIS. L. REV. 222.

14. *Id.*



vides to the spoken and written speech of literature, journalism and political discourse? The question is not simply one of immunity from potential harassment; in a sense, it goes to the very dignity of what artists do. Are they mere decorators of surfaces and environments, or are they engaged in a form of communication that ought to be treated by the law in ways comparable to other forms of communications?

It may be helpful to first look at the evolution of first amendment protection of symbolic speech. Then by seeing the interrelationship between symbolic speech and art one can get a better understanding of why the Court's holding in *Johnson* will affect artistic expression.

## II. Historical Development of First Amendment Protection of Symbolic Speech

Freedom of speech has been recognized as one of the preeminent rights of Western democratic theory, the core of individual liberty.<sup>15</sup> Justice Cardozo characterized it as "the matrix, the indispensable condition of nearly every other form of freedom."<sup>16</sup> The application of this theory, however, has often resulted in public controversy. As Justice Holmes observed, "it is . . . not free thought for those who agree with us, but freedom for the thought that we hate"<sup>17</sup> which gives the theory its most enduring value.

One can readily appreciate the wisdom of Professor Thomas Emerson's emphasis on the importance as well as the difficulty of arriving at an understanding of the system of freedom of expression as envisioned by the language of the first amendment. "[T]he theory of freedom of expression is a sophisticated and even complex one . . . . It does not come naturally to the ordinary citizen but needs to be learned . . . . It must be reiterated not only for each generation, but for each new situation."<sup>18</sup>

The first amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or

15. *Dunagin v. City of Oxford*, 489 F. Supp. 763, 769 (N.D. Miss 1980), *rev'd on other grounds*, 701 F.2d 335 (5th Cir. 1983) (per curiam).

16. *Palko v. Connecticut*, 302 U.S. 319 (1937).

17. *United States v. Schwimmer*, 279 U.S. 644, 654-54 (1929) (Holmes, J., dissenting).

18. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1963). See Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982) for an excellent introduction to, and analysis of, the free speech clause.



of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."<sup>19</sup> These first amendment freedoms rest upon four main premises:

First, freedom of expression is essential as a means of ensuring individual self-fulfillment . . . . Second, freedom of expression is an essential process for advancing knowledge and discovering truth . . . . Third, freedom of expression is essential to provide for participation in decision making by all members of society . . . . Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.<sup>20</sup>

The first amendment, however, does not confer an absolute right to speak.<sup>21</sup> The State in the exercise of its police power may promulgate regulations restricting this freedom if it is necessary to advance a state interest.<sup>22</sup>

Few areas of first amendment law are as confused, or as perplexing, as the case law involving the protection of "symbolic speech."<sup>23</sup> While accepting the necessity of balancing competing interests of the government's need to regulate certain forms of expression against the speaker's first amendment freedoms,<sup>24</sup> the United States Supreme

19. U.S. CONST. amend. I.

20. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970).

21. *Stromberg v. California*, 283 U.S. 359 (1931).

22. *Id.* The importance of the state interest is determined by the scrutiny level that the Court applies. The second prong of the *O'Brien* test is "if [the regulation] furthers an important or substantial governmental interest . . . ." 391 U.S. 367, 377 (1968). On judicial review, the Supreme Court usually applies one of the three primary scrutiny levels depending on the interests involved in the case. At strict or high scrutiny, a regulation will be upheld if it is necessarily related to a compelling state interest and has the least drastic effect on the alleged constitutional right. At middle or intermediate level scrutiny, a regulation will be upheld if it is substantially related to an important state interest and has a lesser drastic effect. At low or rational basis scrutiny, a regulation will be upheld if it is rationally related to a legitimate state interest. Under *O'Brien*, therefore, expressive conduct is placed in the intermediate level of scrutiny. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, 530-37 (3d ed. 1986).

23. See generally M. NIMMER, *FREEDOM OF SPEECH* § 3.06 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* §§ 16.48, 16.49 (3d ed. 1986).

24. For a discussion of the competing "absolutist" approach, see Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).



Court's discussions tend to concentrate primarily on the government's side of the balance rather than on the nature and extent of the speaker's interest.<sup>25</sup>

The development of first amendment protection for nonverbal speech has spanned a mere fifty-eight years, but significant processes have taken place during that period. The Supreme Court recognized that speech may be nonverbal and throughout the years has set limits on the amount of first amendment protection for symbolic expression by enunciating several tests.<sup>26</sup>

The Supreme Court first recognized that first amendment rights were not confined to verbal expression in 1931.<sup>27</sup> In *Stromberg v. California*,<sup>28</sup> the appellant displayed a red flag in a public place in violation of a state statute that prohibited displaying a red flag "as a sign, symbol, or emblem of opposition to organized government . . . ." <sup>29</sup> A California Superior Court convicted Stromberg for violating that statute.<sup>30</sup> The United States Supreme Court found the statute unconstitutional on vagueness grounds and reversed.<sup>31</sup> Although it appeared that the action was merely conduct, the Court overturned the conviction and gave Stromberg's activity the constitutional protection of free speech, reasoning that the action was a means of free political discussion.<sup>32</sup>

Twelve years later, in *West Virginia State Board of Education v. Barnette*,<sup>33</sup> the Supreme Court gave first amendment protection to another form of nonverbal speech. In *Barnette*, school officials expelled students who refused to salute the American flag.<sup>34</sup> The Court recognized that the "act" of refusing to salute the flag was "a form of utter-

25. For a discussion of balancing in first amendment cases, see M. NIMMER, *supra* note 23, at §§ 2.02-2.06; Carrafiello, *Weighing the First Amendment on the Scales of the Balancing Test: The Choice of Safety Before Liberty*, 8 S.U.L. REV. 255 (1982); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

26. See *infra* notes 51 & 76 and accompanying text.

27. *Stromberg v. California*, 283 U.S. 359 (1931).

28. *Id.*

29. *Id.* at 361.

30. *Id.* at 360.

31. *Id.* at 369-70.

32. *Id.* at 369.

33. 319 U.S. 624 (1943).

34. *Id.* at 629-30. The children, Jehovah Witnesses, refused to salute the flag on religious grounds.



ance,"<sup>35</sup> and therefore held that it was entitled to first amendment protection.<sup>36</sup>

In *Brown v. Louisiana*,<sup>37</sup> decided in 1966, Justice Fortas reemphasized that first amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest . . . ." <sup>38</sup> The Appellants in *Brown*, five Negroes, were convicted of breaching the peace because they participated in a peaceful sit-in to protest the denial of equal treatment in a segregated public library.<sup>39</sup> The Supreme Court overturned their convictions and once again extended first amendment protection to nonverbal speech.<sup>40</sup> The Court first recognized that "sitting" in a library usually has nothing to do with making a statement and is not the type of conduct that an observer normally would construe as expressive.<sup>41</sup> But, after balancing the appellant's first amendment rights and the state's interest in keeping the peace, the Court found that in that particular context, the "sitting" was "powerfully expressive,"<sup>42</sup> and therefore, constitutionally protected.<sup>43</sup>

Although the Court had previously recognized that certain expressive conduct warranted first amendment protection, it was not until the landmark case of *United States v. O'Brien*<sup>44</sup> in 1968 that the Court developed a test setting forth the boundaries for first amendment protection of symbolic expression. The United States District Court for the District of Massachusetts convicted O'Brien for burning his selective service certificate on the steps of the South Boston Courthouse.<sup>45</sup> His action violated the Universal Military Training and Service Act of 1945,<sup>46</sup> which provided that a person would be guilty of an offense if he "forge[d], alter[ed], knowingly destroy[ed], knowingly mutilate[d], or

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35. *Id.* at 632.

36. *Id.* at 642.

37. 383 U.S. 131 (1966).

38. *Id.* at 142.

39. *Id.* at 136-37.

40. *Id.* at 143.

41. *Id.* at 139.

42. *Clark v. C.C.N.V.*, 468 U.S. 288, 306 (1954) (Marshall, J., dissenting) (citing *Brown*, 383 U.S. at 139).

43. 383 U.S. at 143.

44. 391 U.S. 367 (1968).

45. *Id.* at 369.

46. *Id.* at 370.



in any manner change[d] any such certificate . . . ."<sup>47</sup>

O'Brien argued free speech abridgement, but the Supreme Court refused to accept that argument. The Court stated: "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>48</sup> The Court stated that even had it assumed O'Brien's conduct contained a communicative element to implicate the first amendment, the conduct would not have received automatic first amendment protection.<sup>49</sup> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms."<sup>50</sup>

The Court in *O'Brien* then laid out the framework for the regulation of nonverbal speech in a four-prong test:

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>51</sup>

Applying this test, the Court in *O'Brien* first noted that the "power of Congress to classify and conscript manpower for military service [was] 'beyond question.'"<sup>52</sup> Thus, the regulation met the first prong of the test. In considering the second prong of the test, the Court held that the government had a vital interest in raising armies, and the continued availability to each registrant of his selective service certificate furthered the proper functioning of that system.<sup>53</sup> Further, the Court found the requirement that the governmental interest be unrelated to the suppression of free expression satisfied because the regulation was

47. *Id.*; see also Universal Military Training and Service Act of 1948, 50 U.S.C. § 462(b)(3) (1982).

48. 391 U.S. at 376.

49. *Id.*

50. *Id.*

51. *Id.* at 377.

52. *Id.*

53. *Id.* at 381.



in no way based on content.<sup>54</sup> The Court also found no alternative means that would have narrowly assured the continued availability of the selective service certificates more than was essential to the furtherance of the governmental interest.<sup>55</sup>

Since the second prong of the *O'Brien* test requires an important or substantial governmental interest, the Court implied that cases concerning expressive conduct would be reviewed at the intermediate level of scrutiny similar to that applied in equal protection cases.<sup>56</sup> Under this rationale, the Court should weigh the expressive conduct against the governmental interest, and in order to justify first amendment impingement, the governmental interest should be a substantial one.

One year later, the Court faced another symbolic expression case—*Tinker v. Des Moines School District*.<sup>57</sup> In *Tinker*, three students were suspended from a public school for wearing black armbands in protest of the Vietnam War.<sup>58</sup> A school policy adopted two days earlier prohibited the wearing of black armbands to exhibit opposition to the Vietnam War.<sup>59</sup> On certiorari to the United States Supreme Court, the Court characterized the wearing of armbands as an action that involved "direct primary first amendment rights . . . ." <sup>60</sup> Even though the Court did not specifically apply the *O'Brien* test in *Tinker*, it appears that the school regulation would have failed the third prong of the test; the regulation was not unrelated to the suppression of free expression.<sup>61</sup> In *Tinker*, the Court balanced the student's exercise of first amendment rights against the school's interest in maintaining discipline and order.<sup>62</sup> According to the Court, wearing armbands was not disruptive action, but was only "silent, passive expression of opinion . . . ." <sup>63</sup> Therefore, the regulation was constitutionally

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54. *Id.* at 381-82.

55. *Id.* at 381.

56. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 530-37 (3d ed. 1986).

57. 393 U.S. 503 (1969).

58. *Id.* at 504.

59. *Id.*

60. *Id.* at 508.

61. *Id.* at 510-11.

62. *Id.* at 513. The Court said that a regulation that did not show the students' activities would materially or substantially disrupt the work and discipline of the school would violate the constitutional rights of the students.

63. *Id.* at 508.



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impermissible.<sup>64</sup>

Litigation surrounding flag desecration statutes is another area in which the Supreme Court has been called upon to elaborate the test it established in *O'Brien*. The first case was *Street v. New York*.<sup>65</sup> In response to the slaying of a civil rights leader, Street burned his personally-owned flag on a street corner in New York while "talking out loud" to a group of approximately thirty people.<sup>66</sup> The Court overturned Street's conviction in a narrow holding which avoided the issue of constitutionality of a statute prohibiting flag desecration by action. The case was decided in terms of the first amendment protection afforded verbal expression. On the basis of the record, it was possible that Street's words alone or his words and actions together were the basis of his conviction. According to the Court, a conviction based on Street's words, totally or in part, would be unconstitutional.

It is interesting that the *Street* Court focused not on the first amendment protection for expressive action discussed in *Barnette*, but rather on general first amendment protection for speech. While citing *Barnette*, one of the early cases in symbolic speech, the *Street* Court would not consider two of Street's contentions that the statute "is vague and imprecise because it does not clearly define the conduct which it forbids," and that publicly destroying or damaging an American flag as a means of protest is constitutionally protected expression.<sup>67</sup>

In 1974 the Supreme Court in *Spence v. Washington*<sup>68</sup> departed from several assumptions it had made in *O'Brien*, in which the Court refused to consider the individual's motive in communicating and the communicative nature of the activity.<sup>69</sup> In addition, *Spence* seemed to answer questions left opened by *O'Brien* regarding the kind of "conduct" that may be labeled "speech."<sup>70</sup> Three Seattle police officers ar-

64. *Id.* at 511.

65. 394 U.S. 576 (1969).

66. *Id.* at 578.

67. *Id.* at 580-81.

68. 418 U.S. 405 (1974) (per curiam).

69. In *O'Brien*, the Court considered only whether the regulation furthered a substantial governmental interest that was unrelated to the suppression of free expression and was no greater than was essential to the furtherance of that interest. The Court in *O'Brien* did not consider O'Brien's motive for burning his selective service certificate. The Court simply assumed there was a communicative nature in his activity. 391 U.S. at 377.

70. *CCNV v. Watt*, 703 F.2d 586, 602 (D.C. Cir. 1983) (Edwards, J., concurring) (quoting *O'Brien*, 391 U.S. at 376).



rested Spence for displaying an American flag with a peace symbol attached to it.<sup>71</sup> The flag was Spence's way of demonstrating against the Kent State killings and the invasion of Cambodia.<sup>72</sup> The trial court found Spence guilty under Washington's "improper use" statute forbidding exhibition of a United States flag to which is attached extraneous material.<sup>73</sup> The Washington Supreme Court sustained the conviction.<sup>74</sup> On appeal, the United States Supreme Court openly considered both the nature of Spence's activity and the factual context in which it was conducted.<sup>75</sup> The Court then overturned Spence's conviction because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."<sup>76</sup> The Court in *Spence*, therefore, appeared to have made a subtle shift from the rigid four-prong test of *O'Brien* to a more general balancing of first amendment rights against alleged governmental interests.

This shift became more apparent when the *Spence* Court went on to apply an analysis similar to the one employed in *Street v. New York*.<sup>77</sup> Only now the *Street* framework of governmental interests was balanced against expressive activity rather than against words. The Court concluded that none of the four possible governmental interests was compelling enough to uphold Spence's challenged conviction, according to the facts of the case. However, the Court did leave open the possibility that there could be a legitimate state interest in preserving the flag as an "unalloyed symbol of our country."<sup>78</sup>

The Court concluded that even if there were a legitimate governmental interest, it would be unconstitutional as applied to Spence's activity. The Court did not conclude, on the other hand, that no governmental interest in preserving the flag as a national symbol is strong enough to outweigh first amendment considerations. This state interest, yet to be found, may fulfill the requirements of the first two parts of the four-part *O'Brien* test.

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71. 418 U.S. at 406.

72. *Id.* at 408.

73. *Id.* at 407.

74. *Id.* at 408.

75. *Id.* at 410.

76. *Id.* at 410-11. The *Spence* test, therefore, involves two considerations: (1) whether an intent to convey a particularized message is present; and (2) whether the likelihood was great that the message would be understood by those who viewed it.

77. 394 U.S. 576 (1969).

78. 418 U.S. at 412-14.



### III. Art as Protected Symbolic Expression

The first amendment prohibits the enactment or enforcement of any law "abridging the freedom of speech, or of the press."<sup>79</sup> Despite the use of the words "speech" and "press" instead of the general term "expression," it is generally true that other kinds of expression are also protected. The Supreme Court held that the first amendment protects forms of political expression, such as conducting a political demonstration,<sup>80</sup> carrying a red flag as a political protest,<sup>81</sup> wearing a black armband in protest against the Vietnam war,<sup>82</sup> and now the burning of the American flag.<sup>83</sup> In addition, nonpolitical forms of expression with aesthetic value, such as books<sup>84</sup> and motion pictures,<sup>85</sup> are protected. On the other hand, "conduct" has been treated differently than "speech," even when the conduct is intended to be a form of communication. The extent to which art objects are akin to pure speech or to conduct with speech elements is uncertain.

Even if a work of art is akin to pure speech, as some courts have held,<sup>86</sup> the first amendment would not grant an artist license to explore every subject matter that may appeal to him. Traditional exceptions include obscenity, libel and so-called "fighting" words, or words which in themselves tend to cause a breach of the peace.<sup>87</sup>

The protection of self-fulfillment is one of the purposes underlying the first amendment.<sup>88</sup> In many symbolic speech cases, the individual's expressive conduct similarly is more cathartic than communicative.<sup>89</sup>

79. U.S. CONST. amend. I. The first amendment applies directly to prohibit only federal restrictions of free speech. The fourteenth amendment, however, has been held by the Supreme Court to restrict state action to the same extent. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

80. *Cox v. Louisiana*, 379 U.S. 536 (1965).

81. *Stromberg v. California*, 283 U.S. 359 (1931).

82. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

83. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

84. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion).

85. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

86. *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); *Close v. Lederle*, 303 F. Supp. 1109 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir.), *cert denied* 400 U.S. 903 (1970).

87. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

88. T. EMERSON, *supra* note 20, at 6. Self-fulfillment also has other aspects. Emerson refers to it as "the realization of [man's] character and potentialities as a human being." *Id.*

89. M. NIMMER, *FREEDOM OF SPEECH* § 1.03 (1984). *See also Baker, Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).



These cases pose some of the most analytically difficult problems in the law governing symbolic expression. In the words of Professor Gunther of Stanford University Law School, a first amendment claim based on self-fulfillment conduct is virtually "indistinguishable from the autonomy aspects of substantive due process," that is, from the claim that "'liberty' is broad enough to protect all individual behavior that does not harm others."<sup>90</sup>

This insight is at the core of Professor Schauer's definition of freedom of speech as freedom to communicate.<sup>91</sup> It suggests that the Court should permit greater governmental control of symbolic expression when it is not communicative—when it is motivated primarily by a desire to achieve self-satisfaction rather than to communicate to others.<sup>92</sup> Otherwise we must resort to drawing an artificial line between speech and conduct to prevent the first amendment from undermining the legitimate exercise of governmental police powers.

If the exhibiting of art objects is a form of conduct with speech elements,<sup>93</sup> then in addition to the exclusions noted, other incidental limitations may be imposed where there is a sufficiently important governmental interest in regulating the "nonspeech element" in such conduct.<sup>94</sup>

No facts could more sharply focus the question of whether artworks are entitled to consideration as "symbolic speech" than those surrounding the case of Stephen Radich, a New York City art dealer. In 1966, Radich was arrested and convicted of exhibiting art pieces which "desecrated" the flag.<sup>95</sup> Radich displayed the sculptural constructions of Marc Morrel which prominently incorporated the United States flag in several settings, including the flag in the shape of a phallic symbol and in the shape of a human body hanging from a yellow noose. Despite no verbal speech being involved, both Morrel and Radich asserted that the purpose of the exhibit was to protest the Vietnam war. Radich was found guilty of violating New York's flag desecration law. Affirming his conviction, the New York Court of Appeals

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90. G. GUNTHER, CONSTITUTIONAL LAW 1089 n.12 (11th ed. 1985). See also F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50-59 (1982).

91. See F. SCHAUER, *supra* note 90, at 53.

92. *Id.* at 92-106.

93. See *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *aff'd* 401 U.S. 531 (1971). Radich's conviction was affirmed by an equally divided court, so the decision has no precedential value for subsequent cases.

94. *United States v. O'Brien*, 391 U.S. 367 (1968).

95. *Radich*, 26 N.Y.2d at 114, 257 N.E.2d at 30, 308 N.Y.S.2d at 846.



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## Comment

rejected Radich's argument that his conduct was protected under the first amendment and found that the purpose of the flag statute was to preserve the public order, not to suppress ideas.<sup>96</sup> Most noteworthy was Chief Judge Fuld's dissent—an opinion prophetic of the federal court decision that would clear Radich some four years later.<sup>97</sup>

In his dissenting opinion, Chief Judge Fuld rejected the majority's contention that any danger to the public order resulted from Radich's display of antiwar art. He emphasized that in the quiet atmosphere of Radich's upstairs Madison Avenue art gallery, there was no danger to the public order. Judge Fuld further stated, "it is evident that the only reason why these works . . . were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message those sculptures were intended to convey."<sup>98</sup>

The Court had the opportunity to solve some of the uncertainty surrounding rights of artistic expression under the first amendment, but the Court's decision in effect delayed any conclusive determination of first amendment rights for artistic works.

A recent Illinois case involving the flag and an art exhibit occurred in Chicago. A student at the School of the Art Institute of Chicago displayed an exhibit entitled "What is the Proper Way to Display a U.S. Flag?"<sup>99</sup> The exhibit contained a photocollage depicting shots of coffins draped with flags and South Koreans burning the American flag. A guest book was placed on a shelf for visitors to answer the question posed by the exhibit's title, and an American flag on the floor extended from the wall so visitors would walk upon the flag to view the exhibit and sign the guest book.<sup>100</sup> In response to the exhibit, the United States Senate, the Chicago City Council and both houses of the Illinois Legislature passed measures to bar such an exhibit by making it a crime to "knowingly display the flag on the ground;"<sup>101</sup> however, the Supreme Court's decision in *Johnson* nullifies these legislative

96. *Id.*

97. See *United States ex rel, Radich v. Criminal Court of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974). In this subsequent habeas corpus proceeding, in a rambling yet thoughtful opinion, the court granted the writ, holding the New York flag statute unconstitutional as applied to Radich.

98. *Radich*, 26 N.Y.2d at 128, 257 N.E.2d at 39, 308 N.Y.S.2d at 857.

99. Hochfield, *Flag Furor*, ART NEWS, Summer 1989, at 43.

100. *Id.*

101. *Id.*, 1989, at B8, col. 1



acts.<sup>102</sup> The student's case will not go to the Supreme Court since a lower court granted him the right to display the exhibit.<sup>103</sup> Judge Kenneth Gillis of the Cook County Circuit Court said, "Certainly the artist (student) succeeded in this particular case of communicating ideas and feelings, and it is good to know that the flag has not lost its ability to communicate and motivate as well."<sup>104</sup>

#### IV. Conclusion

For those artists and others engaged in political protest, the use of the American flag has been a focal point for assertion of first amendment rights. The Supreme Court has decided several flag desecration cases over the past twenty years, always overturning the convictions in narrow holdings and never definitively deciding if flag burning could be banned.<sup>105</sup> Similarly, there has not been a satisfactory judicial determination of the constitutional rights of artists to create and exhibit flag art, and until *Johnson*, the scope of the flag desecration statutes had not been satisfactorily defined.

The *Johnson* case does not stand for the proposition that flag desecration statutes are unconstitutional or that any action taken with respect to the flag is expressive and thus constitutionally protected. The Court found that to characterize such action for first amendment purposes, the context in which it occurred must be considered.<sup>106</sup> Another finding by the Court was that the State may have a sufficiently important governmental interest justifying incidental limitations on freedom of expression, but preserving the flag as a symbol of national unity is not such an interest.<sup>107</sup> The Court provided that the "function of free speech under our system of government is to invite dispute . . . [i]t may indeed best serve its high purpose when it induces a condition of unrest, dissatisfaction with conditions as they are, or even stirs people to anger."<sup>108</sup> Furthermore, the Court set forth that the first amendment does not prevent a State from preventing "imminent lawless action."<sup>109</sup> When Defense counsel argued that if the flag over time was ignored

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102. *Id.*

103. L.A. Daily J., Mar. 22, 1989, at 1, col. 4.

104. See Hochfield, *supra* note 99, at 44.

105. *Waiving The Flag*, THE NEW REPUBLIC, Jan. 23, 1989, at 7.

106. See Hochfield, *supra* note 99, at 44.

107. *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989).

108. *Id.* (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

109. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).



and abused, it would lose its symbolic value, Justice Scalia shot back saying that the emotions stirred by actions like Johnson's increase the flag's symbolic value rather than decrease it.<sup>110</sup>

In response to the *Johnson* decision, Congress passed the Flag Protection Act of 1989,<sup>111</sup> amending 18 U.S.C. § 700 to protect the physical integrity of the flag.<sup>112</sup> Almost immediately after the statute took effect, a protest occurred in front of a post office in Seattle, Washington and a flag was burned.<sup>113</sup> The participants were arrested and charged with violating the Flag Protection Act.<sup>114</sup>

In its first court test, U.S. District Judge Barbara Rothstein relied on *Johnson* to hold the Flag Protection Act unconstitutional and dismissed the charges against the defendants.<sup>115</sup> Judge Rothstein held "pursuant to the decision in *Johnson*, the asserted governmental interest in protecting the symbolic value of the flag cannot survive the exacting scrutiny which this court must apply."<sup>116</sup>

Judge Rothstein's ruling may automatically be appealed directly to the United States Supreme Court because of a provision inserted in the statute by Congress.<sup>117</sup> As of this printing, the Supreme Court has not yet heard the appeal. While Judge Rothstein's holding technically is only binding in the Western district of Washington, federal judges elsewhere may be reluctant to rule otherwise pending the Supreme Court's review, especially in light of the Supreme Court's recent holding in *Johnson*.

For now, artists who incorporate the flag into their works are safe from prosecution under 18 U.S.C. § 700. However, a caveat is necessary since the government can assert a compelling interest to infringe upon first amendment rights in order to prevent breaches of the peace. The Supreme Court will likely affirm Judge Rothstein's decision and finally eliminate any uncertainty concerning first amendment protection

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110. *The High Court Stands 5-4 On a Burning Issue*, U.S. News & World Report, July 3, 1989, at 8.

111. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified as amended at 18 U.S.C. § 700 (1989)).

112. *Id.*

113. *United States v. Haggerty*, No. CR89-315R (W.D. Wash. Feb. 21, 1990) (LEXIS, Genfed library, Dist. File).

114. *Id.*

115. *Id.*

116. *Id.*

117. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified as amended at 18 U.S.C. § 700 (1989)).



of symbolic expression in the form of flag desecration, thus insuring the protection of flag art.

*Jeffrey N. Schwartz*



# The Business of Art

## The General Practice of Art Law

Ira M. Lowe and Paul A. Mahon\*

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### What Is Art Law?

Art law is a general specialty since what we call art law is always some other type of law in the first instance—contract law, copyright law, tax law, estate and trust law, constitutional law—which happens to involve artists or art work.<sup>1</sup> The field of art law has achieved recognition as a specialized practice only within the past twenty years<sup>2</sup> and is sufficiently outside the mainstream practice of law to be considered a

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1. Thus, *Community For Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1988), the Supreme Court's decision clarifying application of the Copyright Act's work made-for-hire provision involving a sculpture, is an important copyright decision concerning ownership of reproduction rights. Similarly, *Estate of David Smith v. Commissioner*, 57 T.C. 650 (1972), in which the court applied the concept of "blockage discount" to the large body of art work in an artist's estate for a reduced estate tax valuation, is a landmark tax law decision. In *Serra v. United States Gen. Serv. Admin.*, 847 F.2d 1045 (2d Cir. 1988), the challenge to the removal of Richard Serra's controversial sculpture *Tilted Arc* in Foley Square in Manhattan, was decided on government contract and constitutional law grounds. See Serra, "*Tilted Arc*" Destroyed, 14 NOVA L. REV. 385 (1990). It is only because these decisions impact on the creation and ownership of art work that they become art law cases.

2. A number of texts have been published concerning the practice of art law since 1974. See, e.g., *THE BUSINESS OF ART* (L. Caplin ed. 1989); F. FELDMAN, S. WEIL & S. DUKE BIEDERMAN, *ART LAW* (1986); R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS AND COLLECTORS* (1977); L. DUBOFF, *ART LAW* (1984); J. MERRYMAN & A. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* (1979); L. DUBOFF, *THE VISUAL DESKBOOK OF ART LAW* (1977); See also *ART LAW RESEARCH PROJECT, THE VISUAL ARTIST AND THE LAW* (1977); *ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE VISUAL ARTIST AND THE LAW* (1974). The most recent major work in the field in R. LERNER & J. BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEAL-*



"boutique practice." But unlike boutique firms focused on the minutiae of relatively obscure areas of the law, art lawyers generally pursue the varied demands involved in representing individuals and entities involved in artistic creation.

While art lawyers must be expert in negotiating and drafting contracts for the protection and advancement of their clients' artistic properties, the practice of art law extends considerably beyond mere transactional representation of the art work. After all, the artist who trusts an attorney with his art also wants that attorney to represent him in his divorce or if he is arrested, to deal with his landlord or review his real estate transactions as well as to advise him on his will, estate, insurance, and financial planning, to handle tax and other regulatory inquiries, and to be a sounding board for strategic business planning as well as personal decision-making. Similarly, the attorney representing a company or institution involved in the arts will frequently be called upon to advise that client on all aspects of its business operations, including litigation, corporate, tax, bankruptcy, and employment issues. Throughout, art lawyers must be sympathetic to the energies and frustrations of the creative process; and, since an individual has created something of value with her hands from her vision, it is almost impossible to separate the artist from the art work. Art work and its creators are not fungible, and the art lawyer must recognize his clients' unique circumstances in even the most routine task.

Probably the best way to describe what the art lawyer does is to review a sampling of varied matters requiring an art lawyer's involvement. Where mandated by settlement agreements or client obligations, confidential details have been maintained unless disclosure has been permitted by the artist or persons involved.

### I. Negotiation of Commission Agreements<sup>3</sup>

One of the primary tasks an art lawyer handles is the negotiation and drafting of contracts for the commission of fine art.

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3. Memorandum of Understanding between William Woodward and Ringling Bros. and Barnum and Bailey Circus, Inc., dated May 11, 1989. The parties to this agreement have requested that the authors keep the terms confidential beyond the discussion herein.



## A. Mural Commission

William Woodward was commissioned by Ringling Bros. and Barnum & Bailey Circus to depict the circus in one of the largest murals of the century (22' X 42') for the entrance foyer of its new International Headquarters. (See Illus. 1). Woodward, who is the first individual to design both sides of a United States coin with his Bicentennial of the Congress Silver Dollar minted last year, has created other large murals.

The agreement referenced the circus' obligations to provide satisfactory site construction, foundation and support for the mural. Copyright ownership, reproduction and display rights were carefully negotiated in light of the importance of the image of the circus and the valuable reproduction rights for depicting the mural on a variety of publications, displays and products. As with any important work of art requiring considerable time to create and involving staggered payments, the possibility of the artist's death or disability prior to completion of the mural was also addressed.

There are often desirable spinoffs from the main objective of a commission contract, and the opportunity arises to promote the artist in unusual creative ways as part of the overall deal. In this agreement, to maximize the benefit to the artist of such a monumental work, a provision was negotiated requiring the circus to provide Woodward with a special exhibition in conjunction with the circus' dedication ceremonies. This exhibition will promote the sale of Woodward's preliminary studies, drawings, sketches, and similar artistic property prepared in connection with creation of the mural and will feature various circus attractions at the opening.

Since sufficient moral rights protection for the artist's work must be by contract in the United States,<sup>4</sup> a number of provisions for maintaining the integrity of the mural were obtained. The circus agreed to:

\*reasonably maintain and protect the mural on a regular basis;

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4. There are a number of state statutes providing some form of moral rights protection, but complete protection, and protection in those states lacking moral rights legislation, must be by contract (if the commissioning party will agree). For a thorough discussion of state moral rights law, see generally, Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 J.L. & ARTS, 291-347 (1989); Note, *Moral Rights: The Long and Winding Road Toward Recognition*, 14 NOVA L. REV. 435 (1990).



- \* not alter or modify the mural without the artist's permission;
- \* alert the artist to any proposed disruption to the site of the mural which would affect the intended character and appearance of the mural;
- \* give the artist, in the event repairs or restoration are required, the right to approve the repairs and to supervise the restoration for a negotiated fee;
- \* discuss with the artist all intended publications, reproductions and displays of the mural; and
- \* give credit to the author in publications, reproductions and displays.

### B. *Purchasing Art Multiples: Award Sculpture*<sup>5</sup>

Where a purchaser desires exclusive ownership of an existing sculpture and control of its reproduction rights, she may either acquire the copyright or obtain an exclusive purchase arrangement. When a prominent institution sought a sculpture for use as an award to honor individuals at an annual presentation ceremony, it selected a sculptor's work and for two years purchased the required number of bronze sculptures for award recipients. Prior to ordering sculptures for the third annual awards ceremony, the institution realized it had no exclusive understanding with the sculptor and presented her with a one-sided contract which, among other things, called for transfer of the artist's copyright to the institution upon the artist's death. Before presenting the contract, and without the artist's approval, the institution had printed and sold a large number of posters of the sculpture touting the awards ceremony. The institution had acted with complete disregard for copyright ownership, incorrectly believing that its prior use of the sculpture as an award in its ceremony somehow gave it rights superior to the copyright owner.

Rather than negotiate the proffered contract, two new agreements were drafted on behalf of the artist for the institution to consider: one transferring the copyright for a large lump sum and the other providing for an exclusive annual purchase arrangement. The in-house lawyer handling the negotiations for the institution was expert in those areas in which the institution was involved, but was unfamiliar with the types of copyright and art law concerns at issue, and a great deal of effort was spent alerting him and his client to the artist's legal rights and

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5. The authors are required to maintain the confidentiality of the parties.



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concerns. An agreement for annual purchases was eventually concluded, requiring credit to the artist to be printed adjacent to two-dimensional reproductions and, requiring in certain reproductions, that a statement from the artist about her work also be printed.

It would have been in the institution's interest to have attempted purchase of the reproduction rights to the sculpture prior to using it at the first annual award ceremony. Having identified the unique sculpture as its official award, though, the institution was in a poor bargaining position with respect to its asserted argument that it could choose another sculpture.

### C. *Interpretation of Commission Agreements*<sup>6</sup>

Some commission agreements are unclear and need to be scrutinized for contract sufficiency, as was the case with a national organization seeking to place a memorial on the Mall in Washington, D.C. During the early days of the organization, it had entered into an agreement for the creation of a figurative sculpture advancing the organization's interests. The Board of Directors negotiated the contract without the benefit of counsel and the parties did not contemplate requirements beyond their control. For example, although the agreement called for the sculpture to become a national memorial on the Mall, the agreement did not cover those requirements for regulatory review and approval beyond the control of the parties and the possibility that the sculpture would not be approved for the space. What is more, the National Capital Memorials and Commemorative Works Act<sup>7</sup> was passed by Congress a year and six months after the agreement was signed, creating an arduous and exacting approval process unanticipated at the time the contract was entered into. The dispositive impact of the unforeseen regulatory process made performance of the agreement impossible and its very purpose frustrated.

### D. *Breach of Commission Agreements*

Even in cases where there exists an enforceable commission agreement, the commissioning party may desire to avoid its obligation, as seen in the following cases involving rejected sculpture commissions.

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6. The authors are required to maintain the confidentiality of the parties.

7. Pub. L. 99-652 (Nov. 14, 1986), 100 Stat. 3650, as codified at 40 U.S.C.A. §



## 1. *Failure to Honor Commission: Cancellation*<sup>8</sup>

When a sculpture competition was announced for a memorial at the harbor of a large Eastern city, a sculptor prepared a model and submitted his proposal. He was then notified that his design had won the competition and his commission was announced at a press conference. For two months the artist developed an enhanced model, evaluated technical considerations, and obtained estimates for enlarging, casting, insurance and installation expenses. He rented a larger studio solely for preparation of the memorial. Notwithstanding his selection and the two month's effort in reliance on the commission, the artist was later notified that the commission had been cancelled and no compensation for his sizeable lost commission fee and expenses was offered.

The commissioning organization was contacted in an effort to explore alternate placement of the sculpture in a public space with equivalent exposure. Although these efforts were unsuccessful, a satisfactory cash settlement and a brief favorable press release were ultimately achieved in light of the difficulties in establishing the speculative nature of damages from lost professional exposure.

## 2. *Failure to Honor Commission: Removal of Sculpture*

Sculptor Ella Tulin was commissioned by a Washington, D.C. real estate developer to produce an enlarged version of her work *Adam and Eve* for the lobby of a new office building in Northern Virginia.<sup>9</sup> The bronze sculpture selected by the developer's art advisors features a naked man and women in bas-relief and, upon request by the developer, Tulin agreed to place a dancer's skirt on Eve and tights on Adam. (See Illus. 2).<sup>10</sup> Tulin made the changes at her foundry and the sculpture was delivered and installed. The day after installation, the sculpture was shrouded with a tarp and was then removed from the lobby.<sup>11</sup> Upon inquiry, the developer indicated that several tenants planning to move into the building had objected to the ample proportions of Adam's groin bulge.<sup>12</sup>

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8. The parties to this matter agreed to a confidentiality provision in settling the claim and, accordingly, the authors are unable to provide information beyond the discussion herein.

9. Hsu, *Adam and Eve Recalled*, Wash. Post, Jan. 14, 1987, at B1.

10. *Id.* at B2.

11. *Id.*

12. *Id.*; Wash. Post, Jan. 15, 1987, at D7.



The *Washington Post* referred to the controversy as "The Battle of the Bulge."<sup>13</sup> Wesley Pruden, Managing Editor of the *Washington Times*, commented, "Surely Adam, of all people, would be granted a little freedom: When you're the progenitor of the entire human race even a snow suit isn't likely to hide much."<sup>14</sup>

The artist had produced a sculpture to the commissioning party's requirements, had incurred casting and transportation costs and had neither received the final payment due her nor, most importantly, the contemplated exposure of her work. In its defense, the purchaser argued that it had relied upon Tulin's two dimensional sketches of Adam in leotards which it claims to have differed from the resulting sculpture's anatomically-correct features. An understanding was reached, however, whereby the sculpture was installed in front of an office building in downtown Washington two blocks from the White House where it received a good deal more attention and acclaim than at the rejected site.

## II. Other Art Law Contracts

In addition to the commission agreement, there are a wide variety of contracts required by artists arising from the creation of their art work and dealer representation. But the nature of any agreement depends on the relationship between the parties, and many artists are comfortable without a written contract since they are satisfied that the relationship, personal friendship or mutual trust will be sufficient guarantee of performance. Lengthy contracts may kill some transactions, but are mandatory for others, and the art lawyer must ascertain the psychology of the players, as well as the terms. An effective way to memorialize the arrangement is to reduce the agreement to a concise "memorandum of understanding" which minimizes the formality of the agreement but is still legally binding.

### A. Gallery Contracts

One of the areas of frequent advice is that of responding to a dealer's initial proposed representation agreement after determining which party is more anxious to consummate an agreement. Many of these contracts are straightforward, and a number are oral based on

13. Hsu, *supra* note 9, at B1.

14. Wash. Times, Jan. 19, 1987, at 2A.



successful past dealings.

### B. *Miscellaneous Agreements*<sup>15</sup>

There is tremendous diversity in the variety of contracts used for the commercial sale of art work. A stock photo agency recently desired to license photographic images for use in high-tech electronic media products for electronic printing, publishing and advertising. With technology-driven products, the licensing agreements must contemplate what the technology is capable of doing in order to protect the underlying rights to the images. In this case, both a detailed joint venture agreement with the manufacturer and a license agreement for purchasers were negotiated.

Similarly, a partnership agreement was drawn up between a painter, who had created a number of fabric designs, and an apparel industry promoter to license her designs for reproduction on fabrics and textiles. The deal was simple in that the painter would provide the designs and the other party the cash, management and expertise.

### C. *Financial Agreements*

Where it is expensive for an artist to create her art, bank loans may not always be available to finance creation of inventory for a show or satisfy an unexpected obligation. It is often necessary to devise innovative financing alternatives to enable the artist to raise capital.

#### 1. *Sculpture Casting—Investment Corporation*<sup>16</sup>

When a sculptor required cash to cover her considerable casting expenses for upcoming shows, and assist her with living expenses, an agreement was negotiated with a group of individual investors to provide the needed funds. The investors formed a corporation to provide a substantial line of credit to the sculptor enabling her to create life size and pedestal size castings, and providing for transportation and other expenses related to the production of bronzes. It was anticipated that the investors might also assist in selling the sculptures for a favorable commission. Seventy percent of the investment funds was allocated to paying costs associated with producing sculptures and the remaining

15. The authors are required to maintain the confidentiality of the parties.

16. The authors are required to maintain the confidentiality of the parties.



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thirty percent was allocated to providing the artist with a monthly stipend for personal expenses. When a sculpture financed by the corporation's funds was sold, the adjusted cost (including casting expenses, interest and stipend) was to be deducted from the sales price to determine profit from the sale. This profit was then to be distributed in different ways depending on the identity of the party responsible for selling the sculpture (artist, investor or gallery). The expenses to prepare for a cast sculpture one-person exhibition are staggering, and this arrangement makes possible the development, casting, and exhibition of the sculpture with artist and investor sharing in resulting profits.

## 2. Dealer Loan<sup>17</sup>

An artist faced a pressing financial obligation which he was unable to satisfy, having spent considerable funds preparing for an upcoming show of his unique, large paintings. In order to raise the necessary money, a sizeable loan was obtained from his dealer and two investors with repayment designated in percentages from the sale of his work. The investors received favorable terms and the dealer was assured that the painter would be financially able to continue his work without financial concerns disrupting his creative energies. The arrangement was recited in a simple two page memorandum of understanding.

## III. Ownership of Art Work

Works of art sometimes end up in the possession of individuals other than the owner. It is often impossible to determine the exact manner in which the art and the owner were separated, given the uncertain and complicated trail often over many years. The following are two cases involving fine art ownership and possession issues.

### A. Stamford High School Daugherty Murals<sup>18</sup>

In 1934 James Daugherty, under the Works Progress Administration (W.P.A.) Art Project, painted a 100' x 8' mural on the octagonal walls of the Stamford High School auditorium (See Illus. 3). The mural depicts scenes of New England traditions in the powerful expressionist style for which many W.P.A. painters, and Daugherty in partic-

17. The authors are required to maintain the confidentiality of the parties.

18. *Hoelzer v. City of Stamford*, Conn., 722 F. Supp. 1106 (S.D.N.Y. 1989).



ular, are now well-regarded. When the city decided to renovate the school in the late 1960s, the mural was taken down to permit necessary work to be performed during the 1970 summer vacation. Thereafter, it disappeared.<sup>19</sup>

In reconstructing what happened nineteen years before, it became apparent that a former graduate of Stamford High passing through school grounds in the summer of 1970 found the mural cut into approximately 30 pieces and placed outside the auditorium, either on top of a heap of construction trash or next to a dumpster overflowing with construction debris. Appreciating the importance of the mural, the former student managed to get the pieces into his car and drove them to his home where he stored them in his garage.<sup>20</sup>

More than a year later, the former student read an article about the efforts of the Fine Arts Inventory Project, a part of the United States General Services Administration, which was supervising restoration and relocation of W.P.A. art work. The student wrote to the director of the Project, Karel Yasko, describing how the mural came into his possession and inviting Mr. Yasko to consider restoration and placement of the mural. Mr. Yasko commended the student for rescuing the mural and suggested that his summer intern, who resided in Stamford, should inspect the mural. At Mr. Yasko's direction, the intern took the mural in October 1971 and delivered it to the home of an art conservator in Armonk, New York, who had previously restored W.P.A. art for the Fine Arts Inventory Project. The intern recalled that he delivered the mural pieces to the conservator on behalf of the United States government with the understanding that they would be stabilized and the mural restored when funds became available.<sup>21</sup>

The conservator brought the mural to his studio and workshop in Manhattan and in April 1972 sent Mr. Yasko a letter outlining the deteriorated condition of the mural and providing a proposal for restoration services in the amount of \$6,400. Notwithstanding prior communications, the conservator was never directed how to proceed by the General Services Administration and he retained the mural at his studio. Although the Stamford Public School System subsequently became alerted to the fact that the mural was still in existence and was located at the conservator's studio, neither the School System nor the City con-

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19. *Id.* at 1107.

20. *Id.* at 1107-8.

21. *Id.* at 1108.



tacted the conservator concerning return of the mural.<sup>22</sup>

During the Summer of 1986, the conservator, believing the G.S.A. to be the owner of the mural, asked the agency to disclaim ownership of the mural. The G.S.A. replied by providing the conservator with a copy of the W.P.A. 1934 policy memorandum providing that all works of art executed with the intent that they occupy a particular place in a public building are to be treated as a part of that building. The General Services Administration concluded that since the mural fell within this category, the Federal Government lacked a claim to ownership and that the restorer should resolve the matter directly with the City.<sup>23</sup>

In September 1986, the city's Corporation Counsel wrote to the conservator indicating that the city had learned the murals were in his possession and that as owner, the city was anxious for their return. The conservator replied that because the murals had been "knowingly trashed"<sup>24</sup> by the city more than fifteen years earlier, the city had no valid claim, and that the murals belonged to him. After suit was filed, the conservator indicated that Sotheby's had appraised the mural's value in 1987 at \$1,250,000 and that he was claiming their 1988 value at \$1,400,000.

The ensuing litigation in the United States District Court for the Southern District of New York<sup>25</sup> focused on the issue of abandonment and, as is common with cases involving stolen art, on whether the city's claim of ownership is barred by the statute of limitations.

The conservator's abandonment claim was based on both the mural's placement in the proximity of construction trash and the city's alleged failure to investigate the location of the mural since it disappeared. But the conservator was unable to establish the requisite voluntary and positive intention by the city to part with ownership of the mural at the time of the physical action by which the mural pieces were placed outside the school.<sup>26</sup> Accordingly, the court held that the mural had not been abandoned by the city during the 1970 recess.<sup>27</sup> The court pointed to the last known intent of the city contained in a 1967 letter from the Superintendent of Schools stating that the Board

22. *Id.*

23. *Id.* at 1110.

24. *Id.*

25. *Id.*; See also, *Once Moldy, Now Worth \$1 Million, a Mural Starts a Fight*, N. Y. Times, Feb. 13, 1989, at B1.

26. *Hoelzer*, 722 F. Supp. at 1111.

27. *Id.*



of Education wanted the architects to remove the mural from the wall and roll it for proper storage.<sup>28</sup> That this intent was not fulfilled by the construction crew does not establish that the city intended to part with ownership of the mural. With respect to the city's failure to investigate the missing mural, the court concluded that the city merely believed the mural was in storage per its instructions, and neither the former student who found the mural, Mr. Yasko, nor the conservator had asked the city whether it had any interest in the mural.<sup>29</sup>

Since the city is entitled to the mural only if it brought its claim within the relevant statute of limitations, the court determined that New York's three year statute for the recovery of chattels applied and that the statute runs from the owner's demand for return of the property, which demand cannot be unreasonably delayed. The court distinguished the case law requiring an owner to apply reasonable diligence in attempting to locate missing works of art by noting that the conservator does not fall into the category of a good faith purchaser whom the cases protect from the penalty of having to return work which had been purchased for value. The conservator did not give value for the mural expecting to own it, but rather he expected to return it to the appropriate owner at a future time.<sup>30</sup>

The court also found that the city did not act with unreasonable delay since its knowledge that an art conservator had possession of the mural was consistent with its belief that the mural was in storage. The court noted that the conservator had made a number of statements before 1986 as a custodian and not as an owner, and he had failed to alert the city to his adverse claim before rejecting the city's request to return the mural in 1986. Given his silence, it was therefore reasonable for the city to believe that the conservator held the mural as a custodian or bailee.

This decision has been appealed by the conservator. In the event the trial court decision is upheld, the only pending issue in the case will be resolution of the conservator's *quantum meruit* claim for the reasonable value of his services in preserving and restoring the mural while in his possession.<sup>31</sup>

Although complicated and uncertain, the case was decided on fundamental legal rules, and the art lawyer must be familiar with the re-

28. *Id.* at 1111.

29. *Id.*

30. *Id.* at 1113.

31. *Id.*



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quirements of black letter law as well as creative in its application.

## B. *World War II Confiscated Art*<sup>32</sup>

A German art collector established a collection of approximately fifty-eight important works of art during the period from 1909 to 1931. When the collector and his wife left Germany in 1938, the collection was placed with a storage and freight firm. According to German archive records, in December, 1941, the firm transferred forty-one paintings from the collection to Nazi Culture Leader Rosenberg at the Art Bureau of the NSDAP (Nazi Party). These paintings were considered to be "non-art," were not allowed to be exhibited in public, and narrowly avoided intentional destruction on at least one occasion.

After the war, the collector attempted to regain possession of the confiscated art work and was told by different sources alternatively that the warehouse had been bombed, that the paintings had been sold, or that shipments of the art work had been sent to the Tyrol. Without any successful leads, the collector accepted a restitution payment from the West German government with the understanding that if any works of art were located, the collector would own them subject to repayment of a pro rata share of the restitution proceeds.

In May 1989, one of the 41 paintings was identified by the collector's heirs as hanging in an East German art museum, and they sought return of the painting through correspondence with the German Democratic Republic Ministry of Culture. In September, the heirs were informed that the museum had purchased the painting in 1926 and that it therefore could not be the same painting as the heirs claim had been confiscated in 1941. The Ministry of Culture enclosed a copy of the museum's inventory book as documentation of the acquisition.

The heirs contend that the painting presently in East Germany was in the collection through 1938. The factual conflicts concerning the identity and attribution of the painting and the authenticity of the museum's purchase record are made more complicated by the deaths of the principals, and more information is required to develop a compelling evidentiary showing as to the heirs' ownership of the painting and perhaps locate the other paintings.

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32. The authors are required to maintain the confidentiality of the parties.



#### IV. Damage to Art Work

##### A. Museum Liability—Sculpture

Liliane Lijn's sculpture often integrates high technology to effect its expression. One installation, *Woman of War* and *Lady of the Wild Things*, (See Illus. 4) features two eight foot performing sculptures which, when activated by the presence of a spectator, confront each other in a six minute interactive ritual dance to a song of the artist's synthesized voice. As the ritual begins, the wings of one of the sculptures unfold and the song activates a series of lights within the colored fibers of the other sculpture. As the song progresses, a laser beam, reflected against a cloud of smoke, shoots from the head of one dancing sculpture to the prism-head of the other.<sup>33</sup> The installation was painstakingly fabricated by hand from painted metal alloys woven with synthetic fibers, electronic and mechanical systems, as well as sophisticated audio and electronic sound-to-light systems, and a helium laser and smoke machine, all coordinated by a computer. This installation was featured in the 1986 Venice Biennale.

The artist accepted an opportunity to exhibit the installation at a museum in Canada during 1988.<sup>34</sup> Given the delicacy of the work, she dismantled the sculptures and shipped their parts in crates specially designed to prevent movement, pressure or shock to the work. She also travelled to the museum to install the sculptures. Since the work would be shipped back to her London studio at the end of the show, she provided carefully-detailed installation and packing instructions, and even attached photographs to the inside of the crates depicting the manner in which the pieces were to be packed. During the exhibition, a second Canadian museum expressed interest in the work for exhibition at the end of the current show.

A short time later, the artist was notified that an accident had occurred and that one of the sculptures had been damaged when an attendant knocked it over. The artist was surprised to hear this since the sculpture was firmly mounted and very difficult to knock down without tremendous force. The museum's director assured her that the work was not badly damaged, although he stated that a metal breast-plate had been replaced by a prominent conservator. He indicated that

33. For a detailed description of these performing sculptures, see Lijn, *Imagine the Goddess! A Rebirth of the Female Archetype in Sculpture*, 20 LEONARDO 127-29 (1987).

34. *Id.* at 130 n.14.



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the sculpture operated as usual after this work had been performed. The artist was concerned and requested that the sculptures not be packed or shipped to the second museum until she arrived in two weeks to supervise the transfer. The director agreed to retain the sculptures until that time.

Notwithstanding this understanding, when she arrived at the first museum, the artist learned that the works had been packed and shipped to the second museum, apparently because the institution's insurance was about to expire. The artist was assured that the dismantling and packing had been done very carefully. When the crates were opened at the second museum, she was horrified to see that the fragile components of the sculptures had been indiscriminately jammed into the containers. Coarse rope had been tied around the wings to pull them tightly against the body in order to force the entire sculpture to fit into one case, rather than the separate cases designed for the dismantled components. The wings had protruded from the crate, which had been forced shut bending the alloy surface of the wings and the mechanical systems. Several fiber plates had simply been torn off since the packers had not understood how to properly remove them. It also became apparent that the earlier damage to the sculpture—when it had been knocked over—had resulted in broken switching mechanisms in the wings which had not been properly corrected. As a result, the sculptures had been operating for more than a month with uncontrolled wing movement, further damaging the bodywork, the motors and the mechanical systems. The artist carefully documented the sculpture's condition during the unpacking.

The sculptures cannot be restored, given their precise engineering and assembly and the tremendous trauma which they incurred; nor can they be replaced since the works are unique and, unlike cast sculpture, there are no molds with which to create a new copy. Further, the artist had obtained spare materials from craftsmen which would be cost prohibitive if ordered in minimal quantities, and the specialized craftsmen themselves are no longer available to devote the time to remanufacture the numerous parts.

Negotiations are continuing with the museum's insurance carrier for damages resulting from the museum's negligence which include the value of the sculptures, lost revenue from the cancelled museum exhibition, and lost exhibition opportunities and likely resulting sales. The sculptures took tremendous time to create and the artist's inability to exhibit the works and sell them has hurt her business. The insurance company has recently sent its expert to the artist's London studio to



inspect the damaged sculpture, and discussions over the value of the work are in progress. The sculpture is so unique that the artist's past reputation and sales history will be particularly important in determining value.

### B. *Purchaser Liability—Painting on Approval*<sup>35</sup>

An art dealer was sued for breach of contract and fraud resulting from the sale of a painting he attributed to a highly-regarded seventeenth Century Dutch painter. According to the complaint, the dealer indicated he would accept return of the painting and reimburse the purchaser for the full purchase price if the painting was found not to have been painted by the attributed artist. The complaint recited that the purchaser took the painting to France where he ascertained that the painting had been improperly ascribed and that the dealer then refused reimbursement upon demand.

What the complaint overlooked is that the purchaser, while ostensibly verifying attribution, had the painting's glossy varnish removed and replaced with a matte varnish which he believed was more attractive to the European market. Removing varnish on an old painting is particularly hazardous since underlying paint may be inadvertently removed. This is especially true where, as in this case, the work was thinly painted. When the painting was returned to the dealer, he was appalled to see that the painting had been ruined by the application of varnish and that a crack had appeared in the top portion of the panel as well. The dealer objected to the return of a work which had been altered while on approval, while the purchaser was adamant that he had been misled as to the painting's attribution.

In an effort to avoid the expense and delay of litigation, counsel for the purchaser was agreeable to attempting a creative alternative dispute resolution exercise. An agreement was negotiated calling for a neutral expert art conservator to examine the painting and, after hearing presentations from the purchaser and dealer, to determine whether any damage occurred to the painting while in the purchaser's possession which adversely affected its value.

The conservator concluded that the painting's value had been adversely affected while in the purchaser's possession. Notwithstanding this determination, but perhaps because they were brought together in a less formal effort to resolve the matter, the parties agreed to settle

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35. The authors are required to maintain the confidentiality of the paintings.



the dispute by jointly owning the painting, agreeing on a conservator to correct the damage, reselling the painting, and splitting any resulting profit or loss.

### C. *Landlord Liability—Destruction of Inventory*<sup>36</sup>

For over twenty years an artist had used a large space in the basement of an apartment building as his studio and storage area for his archival paintings and sculptures. The artist was a close friend of one of the building's owners and would, from time to time, give him a work of art in lieu of rent. Although in the past few years the artist had primarily worked in another city, he retained his archival works of art in storage and permitted other artists to share the studio space.

He received a call one day from the owner's secretary asking him to remove his property from the studio. The artist agreed to visit the studio that weekend to evaluate how to undertake the removal, considering the tremendous amount of art, supplies and furniture which had to be packed, crated and transported. Three days later, he visited the studio and discovered that his art work, which had been stored in the shelves over the years, had been removed and thrown into a huge pile with debris from the building, including abandoned furniture, construction materials, maintenance supplies, and other garbage. (*See Illus. 5*). Most of the art work had been damaged or destroyed. The artist spoke with one of the building's maintenance staff who indicated he had been given instructions to throw the art work into a pile in the middle of the room. He was apparently unaware of the work's value.

It is hard to comprehend the loss associated with the sudden destruction of twenty years' inventory. Examples of these works are represented in museums and important private collections. The artist carefully recorded the destruction of his work, taking numerous photographs of the pile as it was reduced. All told, fifty-two works were damaged with a value of over \$300,000.

The artist has carefully prepared documentation for each of the damaged works outlining its specifications, a description of damage, its appraised value, and identifying any important factors relevant to its valuation. This completed claim and supporting documentation (over four inches thick) has been presented to the building's management company as proof of loss on the claim. Ideally, a settlement will be

36. This matter is not in litigation and the authors are unable to disclose confidential information beyond what is included here.



concluded without recourse to litigation.

## V. Copyright Issues

### A. In General

Considerable time is spent advising clients on all aspects of copyright law, including work made for hire in the context of graphic art and commission agreements.<sup>37</sup> Pursuing copyright infringement is also a frequent practice area and it is necessary to initially determine if and when the artist registered her copyright for the infringed work.

Where the artist whose work has been infringed failed to secure registration prior to the date of infringement, it can be difficult in most cases to achieve a satisfactory recovery, since only actual damages and the profits of the infringer attributable to the infringement—if any—are recoverable.<sup>38</sup> This is particularly true where the infringer is a poor businessman and lost money—there being no profits to disgorge—or is a low-profit or no-profit enterprise such as a local newspaper. And it is often difficult to quantify profit given the large array of expense items and apportioned overhead which is deducted from gross revenues to determine profit.<sup>39</sup> Even where it is possible to establish that the infringer made a profit, the artist's recovery is limited to the proportion of the infringing work to the overall product.<sup>40</sup> Thus the use of one illustration in a 200-page magazine represents only a tiny portion of overall profit.

While most artists are aware that registration is not required for copyright to exist in a work, they are unaware of the benefits registration provides the copyright plaintiff, including the availability of statu-

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37. See, Perwin, *Drafting "Work for Hire" Agreements After Community for Creative Non-Violence v. Reid*, 14 NOVA L. REV. 459 (1990).

38. 17 U.S.C. § 504(b) and 17 U.S.C. § 412 (1988). Actual damages are defined as "the extent to which the market value of a copyrighted work has been injured or destroyed." *Frank Music Corp. v. Metro-Goldwyn-Mayer*, 772 F.2d 505, 515 (9th Cir. 1985).

39. 17 U.S.C. § 504(b) (1988).

40. Recoverable profits of an infringer are limited to those "attributable" to the infringing material, 17 U.S.C. § 504(b) (1988). See *Cream Records, Inc. v. Joseph Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985). This case was subsequently remanded to the district court which awarded the copyright owner one percent of the profits derived from the infringement. This award was vacated and again remanded to the lower court. *Cream Record v. Joseph Schlitz Brewing Co.*, 864 F.2d 668 (9th Cir. 1989).



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tory damages<sup>41</sup> and payment of attorney's fees.<sup>42</sup> Artists are well advised to register any work which will be widely distributed or which has a particular commercial appeal.

One pending matter involves an artist whose art work was infringed several times in a book by a large New York publisher.<sup>43</sup> The artist had previously registered his copyrights, and statutory damages are therefore available. The publisher blames the author and the author blames a "reputable, independent artist" who provided the art work, and both claim they were innocent infringers under the copyright law.<sup>44</sup> The infringements were copied from both a national magazine and a best-selling book.

If it is demonstrated that the infringement was willful, then substantial damages would be available at the discretion of the court.<sup>45</sup> Counsel for the infringers argues that a willful infringement requires more than a defendant's knowledge that he is copying, but also knowledge that what he is doing in fact constitutes copyright infringement.<sup>46</sup> The case would be brought in New York, though, and the Second Circuit has expanded culpability for willful infringements. While it is true that a defendant's knowledge that her actions constitute an infringement establishes willfulness, "several district courts have held that something less than proof of actual knowledge will suffice to establish knowledge, and hence willfulness" for the purposes of awarding statu-

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41. 17 U.S.C. § 412 (1988). The authors are required to maintain the confidentiality of the paintings.

42. 17 U.S.C. § 505 (1988).

43. The authors are required to maintain the confidentiality of the parties.

44. See 17 U.S.C. § 504(c)(2) (1988); 3 NIMMER ON COPYRIGHT § 14.04 [B][2] (1988). If an infringer is able to establish that he was not aware and had no reason to believe his acts constituted an infringement of copyright, then statutory damages could be limited to only \$200 per infringement occurring after March 1, 1989, or \$100 per infringement prior to March 1, 1989.

45. 17 U.S.C. § 504 (c)(1) (1988). "The broad discretionary power given courts to make [a statutory] award serves dual purposes of the Copyright Act: to compensate copyright owners and to provide a deterrent for would-be infringers." *Lauratex Textile Corp. v. Allton Knitting Mills*, 519 F. Supp. 730, 733 (S.D.N.Y. 1981) (citing *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F. Supp. 651, 657 (2d Cir. 1978)). "Flexibility when fashioning an appropriate award . . . is entirely consonant with the broader goal of providing the copyright owner with a potent arsenal of remedies against the infringer." *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984)).

46. See 3 NIMMER ON COPYRIGHT § 14.04 [B], at 14-38.2 and 38.3 (1988).  
<https://nsuworks.nova.edu/nlr/vol14/iss2/1>



tory damages.<sup>47</sup> The Southern District found willful infringement where defendant acted with reckless disregard for the copyright owner's rights.<sup>48</sup> The Southern District has also found a prima facie case of willful infringement where the defendant publisher of a copyrighted newspaper "was or should have been aware" that its activities were infringing.<sup>49</sup>

A good example of the extension of the willfulness standard in the visual arts—and a case with remarkable similarities to the one described here—is *Engel v. Wild Oats, Inc.*<sup>50</sup> In *Engel*, the daughter of a prominent photographer brought suit against a garment manufacturer and its retailer for printing a copyrighted photograph on T-shirts without authorization. Defendants conceded liability and left the issue of damages before the court. There was testimony that the defendant's art director "admitted to having produced the design from a photograph, explaining that he had found a photograph in a book."<sup>51</sup> The court concluded that the infringement was willful:

The art director knew or should have known that the unauthorized reprinting of a photograph from the book was a copyright violation. Although the court finds no direct proof of the art director's actual knowledge of the copyright infringement, the compelling circumstantial evidence of his reckless disregard for, if not actual knowledge of, plaintiff's rights in the photograph is sufficient to establish willfulness.<sup>52</sup>

Reckless disregard and constructive knowledge are sufficient bases to establish willfulness in the Southern District, in the event actual knowledge is not established at trial.

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47. *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1095, 1100 (2d Cir. 1986) (infringement on copyright of comic books).

48. *Lauratex Textile Corp. v. Allton Knitting Mills*, 519 F. Supp. 730, 733 (S.D.N.Y. 1981) (fabric design); *accord*, *Wow & Flutter Music v. Len's Tom Jones Tavern, Inc.*, 606 F. Supp. 554, 556 (W.D.N.Y. 1985) (plaintiff's burden to establish willfulness met by "showing that defendants should have known their conduct was infringing or acted in reckless disregard of plaintiff's rights.").

49. *Fallaci v. New Gazette Literary Corp.*, 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983).

50. 644 F. Supp. 1089 (S.D.N.Y. 1986).

51. *Id.* at 1090.

52. *Id.* at 1092 (citations omitted).



## VI. Estate Planning

Art lawyers direct their client's estate planning and must provide for smooth transfer of assets according to the artist's wishes with the least diminution in value to beneficiaries. Such favored estate planning approaches as annual gift-giving, trusts, life insurance and charitable donations are used to provide for and protect the client's intentions and estate assets. With the artist's estate, though, the attorney must specifically provide for the treatment of art work and copyrights as well.

In order to plan the artist's estate, it is necessary to acquire an accurate inventory of the artist's work and a familiarity with the artist's pricing structure. Too often artists fail to consider the potential value of art in the studio or in storage, or fail to realize the appreciating value of forgotten, rejected or even unfinished works. It is often the case that only a small part of an artist's inventory has been sold prior to death, followed by startling appreciation in value thereafter. Ideally, for both general business and estate planning purposes, the artist should clearly identify, sign, and date each work, and keep an inventory with accurate descriptions as to size, media, date, exhibitions, insurance value, sales price, current location, awards and any facts relating to provenance. Photographs of the art work facilitate identification and are a valuable part of the inventory record.

Having identified the artistic assets in the estate, it is necessary to value them in order to advise on overall estate planning and to minimize the impact of federal estate and gift taxes. In some cases, the art work may be the bulk of the estate. The problem of how to value these works has plagued artists, dealers, appraisers, insurance agents, lawyers, judges, and tax collectors, and each may claim a different value, depending on the objective of the valuation. The quality and period of the work, recent comparable sales, costs of selling, preparation for exhibition, framing, shipping and transportation, terms of sale, time and place of sale, and any unusual circumstances which affect price all should be considered in reaching an appraisal of fair market value. Any sudden increase or decrease in valuing of a work requires justification. The personal representative of the estate bears the burden of supporting the estate's valuation and will be assisted by records kept by the artist prior to death. Simply by distinguishing between "finished" and "unfinished" works, for example, an artist can greatly assist his executor in making these valuations. In some instances, the Internal Revenue Service has actually accepted the artist's own valuations.

In drafting wills, special provisions for the transfer of art work and



copyrights must be addressed. For example, artists frequently designate one or more individuals familiar with their work to be art advisors for their estate and the personal representative is directed to consult with them concerning timing and prices for the sale and/or placement of art work, as well as other decisions benefitting from a detailed knowledge of inventory and sales history. Or the individual close to the artist who is familiar with the work may simply be named outright as the personal representative.

Many clients prefer that their personal representative have the discretion to place a certain portion of the estate's art work, whether by sale or donation, in such museums or institutions as will enhance and perpetuate the artist's reputation and provide tax benefits to the estate. This provides tremendous flexibility for the estate in terms of making charitable transfers and is an effective post mortem estate planning tool. Such a transfer may also be made during lifetime.

For donations to museums, though, the artist should select the institution with care. The museum will also be exercising care in selecting the artist: many institutions have wall space for as little as five percent of their collection. The artist should, therefore, be realistic. A consultation should be held with an appropriate staff member before the will is drafted to determine whether the bequest will be accepted and whether conditions or restrictions concerning exhibition, reproduction, insurance, loan of the work, deaccessioning or any other special concern may be stipulated. A separate agreement with the institution should be prepared to recite the understanding, particularly regarding displays of the work, and alternate organizations should be specified in the will in the event circumstances change and the preferred institution is unable to receive the bequest.

Artists may desire to establish their own non-profit corporation or foundation set up for their special purposes, either during their lifetime or in the will. For example, Andy Warhol left his entire estate to a foundation for "the advancement of the visual arts" and gave the foundation's board complete discretion to disburse funds.

The relationship with a dealer is another estate planning consideration. Unless the dealer's contract specifically extends his "agency" status beyond the lifetime of the artist, then the contract terminates immediately on the date of death of either party. The dealer cannot negotiate sales or continue to represent the artist's estate without specific authorization in writing, either by the original contract or by subsequent agreement with the executor. A provision in the dealer's contract which may greatly facilitate estate matters, as well as meet the



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need for immediate liquidity, is one obligating the dealer to advance an amount of cash to the estate while continuing to hold certain art work for sale. Where the artist has a long-standing dealer relationship and profitable sales record, it may be possible to include a buy-out agreement in case of the artist's death. In exchange for a favorable bulk price as specified by the artist, the dealer would agree to purchase within a limited period of time a certain number of works consigned to the gallery. The cash received by the estate would be available for administrative costs, taxes, and immediate family needs. This has the advantage of liquidating part of the estate without necessarily forcing public sale of art work under unfavorable conditions to meet such large obligations as estate tax payments.

The dealer may agree to purchase life insurance on the artist's life payable to the gallery in order to provide liquidity for the purchase of a specified number of works on his death. This could be a term policy, renewable as long as the artist and dealer continue their relationship. The insurance policy should be structured so that it is not taxable in the artist's estate at death.

Just as the artist is intuitive in the creation of work, the art lawyer should be intuitive in protecting it. In one instance, prior to a determination in the David Smith estate tax valuation case,<sup>53</sup> it became apparent in chambers that the judge was likely to support the position of the Internal Revenue Service that the value of the 425 sculptures in the estate was \$4,284,000. Providentially, the estate's attorney, who was also one of the executors, immediately requested hearing by the court *en banc*. As it turned out, the initial judge was the only one of the twelve members of the Tax Court to adopt the government's position,<sup>54</sup> but the full court concluded that the valuation of the works at the time of Smith's death was only \$2,700,000.<sup>55</sup>

The artist should be encouraged to approach estate planning with the same creative thinking that she expresses in her work; and for the artist's estate, the attorney must be prepared to resolve fine art valuation, preservation and distribution issues.

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53. Estate of David Smith v. Commissioner, 57 T.C. 650 (1972).

54. *Id.* at 662.

55. Estate of David Smith, 57 T.C. at 655. The court considered the decision to be a "Solomon-like pronouncement." *Id.* The resulting deficiency was determined to be only \$69,944.50 in contrast to the nearly \$2½ million claimed by the government plus interest of about three quarters of a million dollars.



## VII. Sales of Art Work

From time to time, clients may express an interest in purchasing and selling art work and it is natural for them to discuss such transactions with their attorney. In some cases, the art lawyer may be able to both arrange for a sale and legally protect the client in the transaction. This is particularly true with important paintings whose value requires discrete efforts to establish provenance and arrive at clear understandings between parties. Efforts to establish authenticity and attribution may be directed by the art lawyer.

In one matter, a client had received a painting in the late 1950s as payment of a debt and hung it on his wall.<sup>56</sup> He only recently noticed that it was signed "Johns '57." The style and color of the painting was not inconsistent with works created by Jasper Johns during that important transitional period in the development of his art. An inquiry was made into the manner in which the painting had been received and into Jasper Johns' work at that time. Various authorities were consulted on whether the painting was a Jasper Johns, with a number expressing their belief that it was unlikely. After considerable investigation, and over 30 years after it was painted, the other Johns was located and confirmed that it was his work and not *the* Jasper Johns.

Art dealers, whether with galleries or acting privately, seek legal advice in furtherance of their art sales and for their general business operations (from contracts with artists to worker's compensation and other routine business matters). The intricacies of deals for important works of art do not always go as planned and often involve a number of individuals who, having helped put buyer and seller together, expect to share in any resulting commissions. The opportunity for disgruntled parties or middlemen is tremendous, especially given the discrete nature of such transactions and the art lawyer may be called upon to assist in resolving claims and misunderstandings.

## VIII. Other Practice Areas

Every legal concern of the artist and arts organization is brought to the art lawyer first. Artists trust their attorney and, since he knows their work and personal circumstances, he is often the only one they want for the legal job, whatever it may involve.

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56. The authors are required to maintain the confidentiality of the parties beyond the information provided.



When the artist gets divorced, the art lawyer must be familiar with negotiating and drafting property settlement agreements and conducting contested divorce trials. Favorable treatment of the art work and copyrights in a divorce settlement is critical, especially where the artist is not yet well known, as the potentially valuable inventory may be retained by the artist for a small financial quid pro quo to the spouse.

When the artist buys or sells property, the art lawyer is often asked to review the settlement papers and to be present at settlement. Art lawyers are also frequently called upon to be landlord and tenant practitioners with every imaginable situation concerning artist's homes and studios. When the artist is arrested or involved in a criminal investigation, the art lawyer calls upon his criminal defense experience.

Artists frequently require advice on handling IRS deficiency or levy notices. In some cases, the artist may not have filed income tax returns and faces federal and state demands. Similarly, sales tax and other state collections may be overlooked by an artist until an auditor contacts him. Strategically responding to these requests, coordinating required information and settling arrearage are routinely performed by the art lawyer.

Art lawyers practice constitutional law when they pursue censorship concerns and Freedom of Information inquiries, and practice insurance law when they negotiate all types of insurance settlements.

Art lawyers advising organizations must be familiar with the corporate and non-profit statutory scheme, employment and tax matters. A familiarity with bankruptcy is desirable, as is knowledge of the mechanics and concerns surrounding the sale of a business.

Occasionally the art lawyer may even be instrumental in assisting his client with the creation of a work of art. Artist Ed McGowin changed his name legally once a month over a year in order to create a work under each pseudonym in a different style of expression.<sup>57</sup> The *Name Change* project features twelve diverse works involving film, videotape, holography, vacuum-formed plastics, fiberglass, urethane foam and silkscreen prints. McGowin, responding to the contention that an artist's work need develop in a logical, sequential progression, became twelve different artists to demonstrate that an artist can explore dissimilar aesthetic expression simultaneously. One of the works featured silkscreen replicas of the twelve court orders changing his

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57. Renata Danese, *Ed McGowin: Name Change*, The Baltimore Museum of Art, Exhibit Monograph, 1972.



names.

Art lawyers provide much more than legal and business advice, and have selected the practice area because of their interest in the arts, empathy for the artist's creative abilities and appreciation for the completed work. A desire to offer support and encouragement is as much a requirement for the art lawyer as a law degree, and representing the artist legally means having a concern for him personally. Knowing your client is one of the benefits the art lawyer has over many other legal fields, and is a source of considerable satisfaction. So too is the challenge of responding to the unexpected and interesting requests for counsel generated by the varied endeavors of artists.





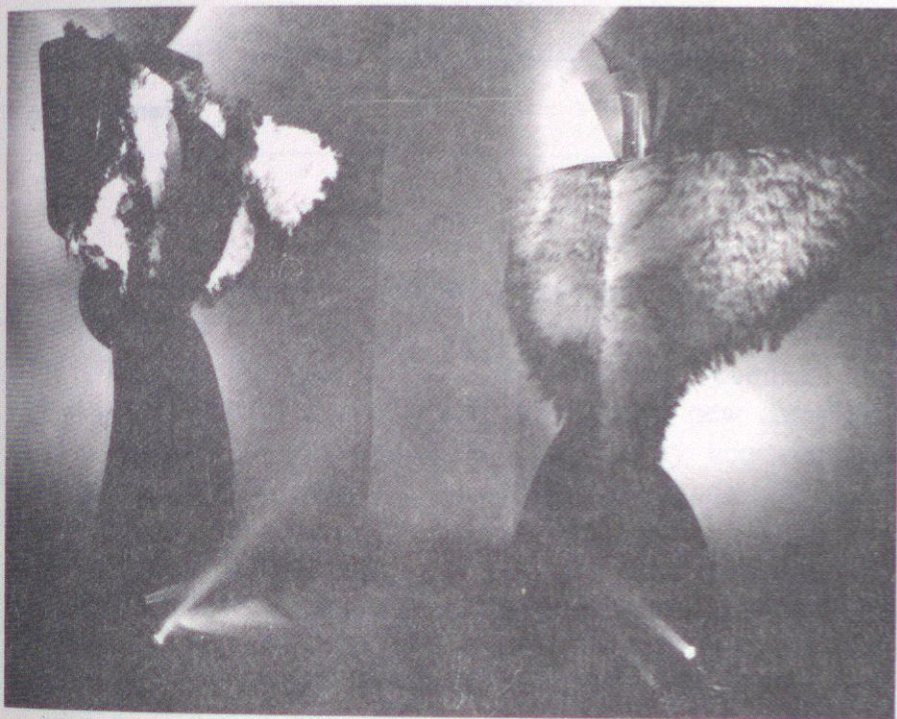
*Illustration 1. William Woodward at work on the Ringling Bros. and Barnum & Bailey circus mural.*





*Illustration 2.* Ella Tulin's original *Adam and Eve* sculpture (left). For the commission, she included tights for Adam and a dancer skirt on Eve (right).





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Illustration 3. Li liane Ljin's performing sculptures *Woman of War* and *Lady of The Wild Things* before they were irreparably damaged.



Illustration 4. The artist's work as it appeared in the pile of debris.



# Art and Income Taxes—The Changing Scene

Ralph E. Lerner\*

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Almost every year brings about a new tax bill and new provisions that affect works of art. Most recently, the Tax Reform Act of 1986,<sup>1</sup> the Revenue Act of 1987<sup>2</sup> and the Technical and Miscellaneous Revenue Act of 1988<sup>3</sup> have added new complexities. The purpose of this article is to generally acquaint the reader generally with some of the tax provisions pertaining to works of art.

## Charitable Transfers

### Generally

The lifetime transfer of a work of art to a charitable organization saves the donor income taxes because of the allowable income tax deduction.<sup>4</sup> For example, a painting that cost the collector \$1,000 some years ago may have a fair market value of \$10,000 today. A contribution of the painting to a public charity (not a private foundation) that properly satisfies all the tax rules produces an allowable charitable deduction of \$10,000. For someone in the twenty-eight percent tax bracket, such a contribution saves \$2,800 in federal income taxes.<sup>5</sup> Since the donor's out-of-pocket cost was only \$1,000, the taxpayer has made a \$1,800 tax-free economic profit and has enjoyed the painting through its years of ownership.

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\* © Ralph E. Lerner, 1989. All rights reserved. Mr. Lerner is an attorney-at-law and a partner in the law firm of Sidley & Austin in New York City, N.Y. Mr. Lerner is the co-author of the recently published book, *ART LAW—THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS* (1989), published by the Practising Law Institute.

1. All section references in this article are to the amended Internal Revenue Code of 1986, 26 USC §§ 1-9602 (1988) unless otherwise indicated.

2. Revenue Act of 1987, Pub. L. 100-203, 102 Stat. 1330.

3. Technical and Miscellaneous Revenue Action of 1988, Pub. L. No. 100647, 102 Stat. 3342.

4. I.R.C. § 170 (1988).

5. *Id.* at § 1, 63 (1988).



## Reduction of Tax Rate

The Tax Reform Act of 1986 lowered the maximum ordinary income tax rate from fifty percent to 38.5 percent for 1987 and twenty-eight percent for 1988. The maximum tax rate on capital gains was increased from twenty percent for 1986 to twenty-eight percent for 1987 and years thereafter. A thirty-three percent ordinary income tax rate applies in 1988 and thereafter to specified ranges of income, e.g., between \$71,900 and \$149,250 for married individuals filing joint returns and for surviving spouses.<sup>6</sup> Obviously, when the tax rate was at fifty percent there was a greater incentive for individual taxpayers to make charitable contributions since the taxes saved would be greater. For example, a contribution of a painting with a fair market value of \$10,000 to a public charity would, under the old law, have produced a \$10,000 deduction that saved \$5,000 in taxes. Under the new twenty-eight percent rate, only \$2,800 in taxes is owed. However, taxes are still saved, and, if properly done, there are still tax advantages to contributing appreciated works of art to a public charity.

## Related Use Rule

The Tax Reform Act of 1986 amended section 170(e)(1)(B)(i) of the Internal Revenue Code of 1986 (hereinafter the "Code") to change the prior forty percent reduction rule to a one hundred percent reduction rule for failure to satisfy the related use rule.<sup>7</sup>

The related use rule applies to capital gain property that is "tangible personal property" contributed to a public charity.<sup>8</sup> The term "capital gain property" means property which, if sold, would result in a long-term capital gain.<sup>9</sup> The term "tangible personal property" includes paintings and art objects not produced by the donor.<sup>10</sup> The related use rule requires that the use of the tangible personal property by the donee organization be related to the purpose or the function constituting the basis for the donee's exemption under section 501.<sup>11</sup> If the use of the work of art by the donee organization is unrelated to the purpose or the function constituting the basis for the donee's exemption, the

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6. *Id.* at § 1(g) (1988).

7. *Id.* at § 170(e)(1)(b)(i) (1988).

8. *Id.* at § 170(e)(1)(b)(i) (1988).

9. *Id.* at §§ 1221, 1222 (1988).

10. *Id.*

11. *Id.* at § 170(e)(1)(B)(i) (1988).



amount of the charitable deduction must be reduced by one hundred percent of the appreciation in value of the work of art contributed to the donee organization.<sup>12</sup> In other words, failure to comply with the related use rule now results in limiting a taxpayer to his cost for appreciated works of art contributed to a public charity.<sup>13</sup>

It is therefore helpful to review what the Internal Revenue Service expects in order to show compliance with the related use rule. The regulations provide that a taxpayer may treat a contribution of a collection as meeting the related use rule if:

1. The taxpayer establishes that the collection is not in fact put to an unrelated use by the donee; or

2. At the time of contribution it is reasonable to anticipate that the collection will not be put to an unrelated use by the donee organization.<sup>14</sup>

If a collector donates a collection to a museum and the collection is of a general type normally retained by museums for museum purposes, it is reasonable for the donor to anticipate, unless he or she has actual knowledge to the contrary, that the collection will not be put to an unrelated use by the donee.<sup>15</sup> This is so whether or not the collection is later sold or exchanged by the donee.<sup>16</sup> On the other hand, if an item is donated for the purpose of sale at an art auction to be run by the charity, that is an unrelated use, and one hundred percent of the appreciation in value is lost as a charitable deduction.<sup>17</sup>

*Example 1:* The related use rule is satisfied when an art museum that is a charity, prominently and publicly displays a contributed painting.<sup>18</sup> The contribution is deductible to the extent of the fair market value of the property up to thirty percent of the taxpayer's contribution base.<sup>19</sup> The contribution base is generally the taxpayer's adjusted gross income.<sup>20</sup>

*Example 2:* If the same painting is contributed to the Red Cross, which is a public charity and which from the outset intends to—and in fact promptly does—sell the painting, the deduction must be reduced

12. *Id.*

13. *Id.*

14. Treas. Reg. §§ 1.170A-4(b)(3)(ii), (i) (1988).

15. *Id.*

16. *Id.*

17. *Id.*; see also I.R.C. 170(e)(1)(B)(i) (1988).

18. *Id.*

19. I.R.C. § 170(b)(1)(B)(i) (1988).

20. I.R.C. § 170(b)(1)(F) (1988).



by one hundred percent of the appreciation in value, with the balance deductible up to fifty percent of the taxpayer's contribution base.<sup>21</sup>

The regulations also indicate that the related use rule is satisfied even if the donee sells or otherwise disposes of only an "insubstantial" portion of the collection.<sup>22</sup>

To date there have been few litigated cases on the subject of related use. However, a number of Private Letter Rulings in this area do shed some light on what the IRS considers a related use.

In *Private Letter Ruling 7751044*, the IRS held that the related use rule was satisfied when lithographs were displayed in a camp and center devoted to handicapped and retarded children, since the lithographs were used in connection with an art appreciation program.<sup>23</sup>

It was held in *Private Letter Ruling 8009027* that the related use rule was not satisfied when a donor gave an antique car to a university, since the university did not offer a course in antique car restoration. However, in *Private Letter Ruling 8143029*, the IRS held that the related use rule was satisfied when a donor gave his collection of porcelain art objects to a public charity operating a retirement center, since the display of the art was related to the charity's exempt purpose of creating a living environment for its residents.

Finally, in *Private Letter Ruling 8208059*, the IRS held that the related use rule was satisfied when a donor gave his stamp collection to a college, since it would be exhibited and since the college taught engraving as part of its curriculum. The donor included in the ruling request letters from the college, explaining in detail how it would use the collection.

It is important to make sure a proper paper trail shows that it was reasonable for the taxpayer to anticipate that the property would not be put to an unrelated use by the donee.<sup>24</sup>

21. See *Isabell v. Commissioner*, 44 T.C.M. (CCH) 1143 (1982); see also I.R.C. §§ 170(b)(1)(B)(ii), 170(e)(1)(B)(i) (1988).

22. Treas. Reg. § 1.170A-4(b)(3)(ii) (1988).

23. See also Priv. Ltr. Ruls. 7911109 and 7934082 (reaching similar results dealing with the exhibition of works of art).

24. See also Priv. Ltr. Rul. 8536022 (condominium to charity: unrelated use); Priv. Ltr. Rul. 8439005 (manuscripts to university: related use); Priv. Ltr. Rul. 8333019 (art collection to museum: related use). See *Coleman v. Commissioner*, 56 T.C.M. (CCH) 710 (1988) (horse to American Cancer Society: unrelated use); *Jennings v. Commissioner*, 56 T.C.M. (CCH) 595 (1988) (paintings to cancer society, hospital, and college: unrelated use).



## Alternative Minimum Tax

The Tax Reform Act of 1986 added a further complication to the process of charitable giving. Beginning in 1987, any long term appreciation in value of property donated to a charitable organization is considered a preference item for purposes of computing the alternative minimum tax (AMT).<sup>25</sup> The effect of that provision is to gradually eliminate the benefits of donating appreciated long-term capital gain property. In other words, being subject to the AMT can, depending on the taxpayer's mix of income and deductions, have the economic effect of limiting the contribution to the taxpayer's cost or adjusted basis in the property.<sup>26</sup> However, this is only true if other items of tax preference and deductions have made the taxpayer subject to the AMT before the contribution of the appreciated property. When that happens, appreciation in value of charitable contributions produces little tax benefit, since the appreciation is subject to tax at the twenty-one percent rate. However, in many situations it will be the contribution of the appreciated property that moves the taxpayer into the AMT area. Accordingly, the appreciation in value still produces a tax benefit, although it is reduced by the AMT payable.

A taxpayer with no other preferences probably can make a contribution of appreciated property up to twenty-five percent of his or her taxable income without being subject to the AMT. This is because the AMT tax is at twenty-one percent, and the maximum income tax rate is at twenty-eight percent. Therefore, the AMT will not come into play unless the tax preferences are more than twenty-five percent of taxable income.

In determining whether the AMT applies in any year, it is important to understand precisely what amount is the tax preference as a result of the charitable contribution. Section 57(b)(6)(A) defines the amount of the tax preference as "[t]he amount by which the deduction allowable under section 170 would be reduced if all capital gain prop-

25. I.R.C. § 57(a)(6) (1988). A detailed description of the alternative minimum tax is beyond the scope of this article. See generally Kern, *The Alternative Minimum Tax for Individuals*, TAXES (1987).

26. See JOINT COMMITTEE ON TAXATION STAFF, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX REFORM ACT OF 1984, at 444 (1984); Auten & Rudney, *Tax Reform and the Price of Donating Appreciated Property*, 33 TAX NOTES 285 (1986); Brachtel & Peller, *The Chilling Effect of the AMT on Charitable Contributions*, 128 TR. & EST. 24 (1989); Sanders & Toolson, *Planning for Charitable Giving After The Tax Reform Act of 1986*, TAXES 359, 362 (June 1987).



erty were taken into account at its adjusted basis." The statute uses the term "deduction allowable under section 170."<sup>27</sup> This means that when the fair market value of the property contributed exceeds 30 percent of the taxpayer's contribution base, the amount above the 30 percent limitation is disregarded in determining the AMT.<sup>28</sup> In other words, the amount of the tax preference is determined by disregarding any amount of the charitable contribution that is carried forward to another taxable year. When a portion of the charitable contribution is carried forward because it exceeds the applicable percentage limitation on contributions for the year, the portion so carried forward cannot increase the amount of the tax preference item until it is allowable as a deduction for regular tax purposes.<sup>29</sup>

*Example 1:* Mr. Collector has a contribution base of \$100,000. He contributes capital gain property with a fair market value of \$50,000, in which he has a basis of \$10,000, to a public charity. The related use rule is satisfied.<sup>30</sup> Mr. Collector is allowed a deduction of \$30,000 (thirty percent of 100,000) and a carryover of \$20,000. His tax preference amount is \$20,000 (\$30,000 minus \$10,000). In the next year, assuming no other contributions, his deduction is \$20,000 and his tax preference is \$20,000 (\$20,000 carried over minus the remaining basis of zero).

*Example 2:* Assume the same facts as above, only the basis is now \$40,000. Mr. Collector is allowed a deduction of \$30,000 (thirty percent of \$100,000) and a carryover of \$20,000. His tax preference amount is zero since the deduction allowable does not exceed his cost basis. In the next year, assuming no other contributions, his deduction is \$20,000 and his tax preference is \$10,000 (\$20,000 carried over minus the remaining basis of \$10,000).

*There is no substitute for making the mathematical calculations before making any contribution.* It may come as a surprise to many taxpayers to learn that the AMT will not apply to them. My calculations indicate that the tax benefits of contributing appreciated property gradually disappear as the amount of AMT taxable income increases. Proper planning should ensure that the taxpayer does not cross over into the AMT area or, if that is unavoidable, that the amount of income subject to the AMT is at a minimum. A technique for avoiding

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27. I.R.C. § 57 (1988).

28. *Id.*

29. *Id.*

30. *Id.* at § 170(e)(1)(B)(i) (1988).



the AMT when a large charitable contribution is made is discussed below.

There are bills pending in the House (H.R. 173)<sup>31</sup> and the Senate (S. 1577)<sup>32</sup> that would repeal the appreciation in value on charitable contributions as a tax preference item subject to the alternative minimum tax. These bills are strongly supported by museums, universities and other charitable organizations. It is hoped that some action can be taken on these bills in the not too distant future.

### Avoiding the AMT

The collector who wants to give away a collection and still enjoy its possession on a part-time basis should convey an undivided fractional interest in the property to a charity. The transfer of an undivided fractional interest is *not* a transfer of a future interest that would not be deductible under section 170 (a)(3) or section 170(f).<sup>33</sup> Therefore, an immediate charitable deduction is allowable for the value of the undivided fractional interest donated. However, the period of initial possession by the donee should not be deferred for more than one year, or the entire charitable deduction may be lost. In *Winokur v. Commissioner*,<sup>34</sup> the court held that it is the right to entitlement or possession, not actual physical possession, that controls whether a purported present interest is to be regarded as a future interest.

*Example:* Ms. Collector transfers an undivided one-fourth present interest in a painting to an art museum by deed of gift. She is entitled to possession of the painting for nine months each year, and the museum is entitled to possession for three months each year. She can deduct one-fourth of the fair market value of the painting on the date of the gift, subject to the permissible maximum, as a charitable contribution.

The IRS position is to accept as the allowable charitable deduction the undivided percentage of the fair market value given to the charitable organization. Presumably, that is based on Revenue Rule 57-293,<sup>35</sup>

31. H.R. 173, 101st Cong., 1st Sess. (1989).

32. S. 1577, 101st Cong., 1st Sess. (1989).

33. Treas. Reg. §§ 1.170A-5(a)(2), 1.170A-7(b)(1)(i) (1988); I.R.C. § 170(f)(3)(B)(ii) (1988).

34. *Winokur v. Commissioner*, 90 T.C. 733 (1988); see also Priv. Ltr. Rul. 833019; Priv. Ltr. Rul. 8535019.

35. Rev. Rul. 57-293, 1957-2 C.B. 153; see also Priv. Ltr. Rul. 7728046; Priv. Ltr. Rul. 7934082; Note, *Contributions of Partial Interest to Charity*, 52 J. TAX'N 112



which gives a specific example covering that situation. The part of that ruling dealing with a gift of a future interest is no longer applicable because of section 170(f).

Of course, when the collector dies, the value of the undivided fractional interest that was kept by the collector is includable in his estate.<sup>36</sup> Because of Revenue Ruling 57-293, it would be difficult to argue that, if the retained undivided interest is bequeathed to a noncharitable beneficiary, there should be a discount for the minority undivided interest retained. There is, however, no decided case on that point. If the bequest is made to a person who does not own the other part, the taxpayer should have a fair chance of convincing the IRS to allow some discount for the fractional interest. If the bequest is made to the museum that already owns a partial interest in the painting, the estate tax charitable deduction should be the percentage owned by the decedent multiplied by the full fair market value of the painting on the decedent's date of death. Generally, before a museum will accept a fractional gift, it will want assurances that it will receive the balance of the undivided interest when the collector dies. The museum does not want to be left owning a fractional interest in a work of art with the donor's heir's fighting over the remaining fractional interest. Therefore, always discuss such a gift with the museum prior to making it.

It may be possible to increase the total charitable deduction through the use of fractional gifts. In the example stated above, the collector could deduct one-fourth of the fair market value of the painting on the date of the gift. A number of years later, the collector could make an additional gift of a one-fourth interest in the same painting. At that time, the painting may have increased in value not only because of the passage of time but also because it is now exhibited in a museum. Therefore, one-fourth of the fair market value on the later date may exceed the one-fourth value on the first date. If that process was carried on until the entire painting was donated, the total charitable deduction could exceed the total value of the painting on the date of the first gift. Of course, an appraiser would have to verify the increases in value each time an undivided fractional interest was donated to the museum.

The technique of making charitable contributions of undivided fractional interests has the added benefit of giving the taxpayer the ability to avoid the alternative minimum tax (AMT) that might result

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(1980).

36. I.R.C. § 2033 (1988).  
<https://nsuworks.nova.edu/nlr/vol14/iss2/1>



when appreciated property is contributed to charity. As discussed earlier, the appreciation in value of capital gain property is now a tax preference item that could result in the total or partial loss of the appreciation as a charitable deduction because of the application of the AMT. The AMT can be avoided by controlling the amount of appreciation in value (the tax preference) that is contributed to charity in any one year. This can be accomplished by calculating the maximum amount of appreciated property that can be contributed to charity in the year without incurring the AMT, and then making an undivided fractional interest gift within that limitation. Future undivided fractional interest gifts could then be made in later years to use up the full charitable deduction. At the same time, the donor can wind up over a period of years with a charitable deduction that exceeds one-hundred percent of the value of the work of art on the date the first part was donated to the museum.

### Exchanges

It is a common practice for collectors to exchange items, each intending to improve his or her collection. Dealers often encourage collectors to trade in works of art purchased from them in exchange for other works of art. Section 1031(a) allows certain "like kind" exchanges to be made tax-free. The statute limits such exchanges to property held for productive use in a trade or business or for investment that is exchanged solely for property of a like kind to be held for productive use in a trade or business or for investment.<sup>37</sup>

In the usual case, a collector is engaged in a hobby, not a business. The collector may argue that he or she is an investor and held the property for investment. The term "investment" is not defined in section 1031. Relying on *Wrightsmen v. United States*<sup>38</sup> and sections 162, 165, 212, and 183, the term most likely means property acquired and held primarily for profit. The burden of proof for the collector who wants to be an investor is difficult under section 1031(a) because of the lack of authorities and the difference in terminology from sections 212, 165 and 183. Therefore, for the collector, the difference between the

37. I.R.C. § 1031(a) (1988); Treas. Reg. 1.1031(a)-1(b) (1988); see *California Fed. Life. Ins. Co. v. Commissioner*, 680 F.2d 85 (9th Cir. 1982), *aff'g* 76 T.C. 107 (1981) and Rev. Rul. 76-214, 1976-1 C.B. 218; Rev. Rul. 79-143, 1979-1 C.B. 264; Rev. Rul. 82-96, 1982-1 C.B. 113; Rev. Rul. 82-166, 1982-2 C.B. 190.

38. 428 F.2d 1316 (Ct. Cl. 1970).



fair market value of the property received and the basis of the property given up results in a taxable gain. The investor, on the other hand, may be able to avoid any taxable gain under the umbrella of section 1031(a). Note, however, that even if an individual can carry the difficult burden of proof of being an investor, there may still be a problem on the exchange as to what constitutes "like-kind" property. In *Private Letter Ruling* 8127089, the IRS said that artwork in one medium (lithographs) exchanged for artwork in another medium (oil paintings) is not similar property.

The taxpayer who is considering an exchange must be familiar with section 1031, as discussed above, as well as the following provisions:

Section 67 generally limits miscellaneous deductions to those that exceed two percent of adjusted gross income.

Section 162 allows a taxpayer to deduct from gross income all ordinary and necessary expenses incurred in a trade or business.

Section 212(1)-(2) allows a taxpayer to deduct expenses incurred in the production or collection of income.

Section 165 allows a taxpayer to deduct losses sustained in a trade or business or in a transaction entered into for profit.

Section 183 qualifies the foregoing provisions by specifically disallowing, with certain exceptions, deductions attributable to activities not engaged in for profit.

Section 262 denies a deduction or loss for expenses that are personal in nature.

Investment intent can be shown by the factors listed in regulation section 1.183-2. These factors are as follows:

1. The manner in which the taxpayer carries on the activity. A businesslike manner with complete and accurate books and records is more likely than not to be profit-motivated.

2. The expertise of the taxpayer or the taxpayer's advisers. Preparation for the activity by an extensive study of accepted business, economic, and scientific practices or by consultations with experts may indicate a profit motive.

3. The time and effort expended by the taxpayer in carrying on the activity. Spending a great deal of time and effort is more likely than not to indicate a profit motive.

4. The expectation that assets used in the activity may appreciate in value. The term "profit" does encompass appreciation in value of the assets, but unrealized appreciation alone is not sufficient. The taxpayer must show that his or her primary purpose is ultimately to realize



appreciation.

5. The success of the taxpayer in carrying on other similar or dissimilar activities for a profit.

6. The taxpayer's history of income or losses with respect to the activity. A series of realizations of income may indicate a profit motive.

7. The amount of occasional profits, if any, that are earned.

8. The financial status of the taxpayer. The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that the activity is engaged in for profit.

9. Elements of personal pleasure or recreation. The regulations indicate that the greater the pleasure, the less likely it is that there is a profit motive. Although not required by the Internal Revenue Code or *Wrightsmen*,<sup>39</sup> a physical segregation of the art investment property out of the taxpayer's personal residence or office will generally help the taxpayer prove his or her profit motive.

No one of the above factors is determinative, and the determination of a profit motive is not limited to the above factors. The test is: based on "all the facts and circumstances," is a profit motive present?

Regardless of whether an exchange is a taxable or nontaxable transaction for federal income tax purposes, it is treated as a sale, and a sales tax may be payable on the exchange. Generally, if the exchange is between a dealer and a collector, the dealer should collect and pay over the sales tax.<sup>40</sup>

## Conclusion

Anyone involved in any aspect of dealing with valuable works of art must be aware of the tax implications of their actions. It is always best to think about the tax impact of contributing works of art to charity or exchanging works of art before taking such action rather than have any unhappy surprises later.<sup>41</sup>

39. 428 F.2d at 1316.

40. See N.Y. Comp. Codes R. & Regs. sections 526.5(f), 526.7(d).

41. This article only touches on some of the tax problems involved with valuable collectibles. For a detailed analysis of these and other tax issues see R. LERNER & J. BRESLER, *ART LAW--THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS* chs. 11-13 (1989).



## *Philosophy of Law and Art*

### The Role of Creativity in Social and Political Processes

Gustave Harrow\*

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Creativity, art and the artist, rather than simply embellishing society and constituting "culture," can have a real pragmatic and effective role in the entire social process. This role arises in answer to society's tendency, generally, to stabilize itself in favor of the existing power structure through lies which anesthetize. Because of this anesthetization, creativity, as a truth-seeker plays a highly significant role in society.

The dominant organs of society are attempting to tranquilize society through various media in a way that will not permit dislodging of the existing power structure or rapid changes in that structure. This action discloses a disregard for life itself and especially spiritual life. The significance of creativity through art and the artist is that it opposes the maintenance of the status quo of the power structure by searching for truth. Thus, in our contemporary world, creativity becomes a necessity in saving our spiritual lives. Through its search for truth, creativity opposes the manner in which the modern world secures the power structure—which is determined to instill a certain numbness of feelings—by anesthetizing and lying through various media.

The power elite can stabilize itself only through inuring society to the vast cruelties, both domestic and abroad, which emotionally deaden the human spirit and inner core. This again dis-

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closes a disregard for the essences of life. The failure of humanness in the modern world results in loss of compassion, empathy and sympathy. The truth-seeking role of art and creative processes saves us from being receptive to lies and cruelties, which foster this deadening of the human mind and spirit. Humanity seeks meaning, which cannot be obtained without this pursuit of truth. This has been true since the dawn of humanity, when cavemen drew their understanding of nature—the sun, the rain and their natural habitat—in caves.

The vast population is deceived into believing that they have a certain spiritual and emotional life when in fact that life is rapidly being eroded. The power elite administers this narcotic effect by portraying the ideologies of our society in a way which is deceptive; this anesthetizing effect is administered not simply through physical or chemical narcotics, but also through psychological and sociological means. These seductive methods are effected by various inducements represented through advertising in the portrayal of what is true, beautiful and heroic. Thus, lies are perpetuated as to the meaning of the dominant ideology of the day, or as to the facts of the ideology itself.

Art can and has functioned as a very real tool in exposing the lies that are perpetuated and reinforced by almost every mass media. In this way art can be said to have the capacity to save our spiritual lives. In other words, the lives that are below the surface need exposure to the truth to survive. Art and the artist, and creativity, therefore, can be seen as the exact opposing parallels to the vehicles employed in the numbing of the human spirit. Art, in its search for truth, enables the piercing of the narcotic effect; which of course is the antithesis of the lying effects of narcotics whether they are actual, physical narcotics, or whether they are a social vehicle for controlling the mind. Art and creativity have the capacity to pierce the veil which sets in when narcotics are taken to excess.

Creativity involves a precise attack on the pervasive lies that are perpetuated by society's power structure. Art has been part of humanity since cavemen began portraying an understanding of their perception of nature on cave walls. Art and creativity enable human beings to relate to other human beings in a form of



love, which is the bond of humanity and the essence of life. To be indifferent to cruelties and suffering is in itself a cruelty and hardens the inner self, making it difficult to relate to other human beings. Art saves us from being numbed to the suffering around us.



# Avant-Garde, Kitsch and Law

Anthony Chase\*

## I

Fifty years ago, in the Fall, 1939, issue of *Partisan Review*, Clement Greenberg published an essay titled, *Avant-Garde and Kitsch*.<sup>1</sup> Described by his editors at the time as "a young writer who works in the New York customs house,"<sup>2</sup> Greenberg would become, along with Meyer Schapiro, Harold Rosenberg, and very few others, universally recognized as one of America's most significant art critics. His *Avant-Garde and Kitsch* soon became the most influential critical essay ever written within the confines of American art and its culture.<sup>3</sup> In his effort to confront the dynamics of cutting-edge artistic production, Greenberg relied upon and effectively deployed three distinct concepts or categories. The first of these was the notion of an *avant-garde*—a cadre engaged in antithetical cultural activity. "It is among the hopeful signs," Greenberg stated, "in the midst of the decay of our present society that we—some of us—have been unwilling to accept this last phase for our own culture,"<sup>4</sup> this last phase being equivalent to a "motionless Alexandrianism, an academicism in which the really important issues are left untouched because they involve controversy . . ."<sup>5</sup> At the same time, overwhelming capitulation to bourgeois values, what Robert Warshaw described in a different context as the broad smile of an id-

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1. Greenberg, *Avant-Garde and Kitsch*, 6 *PARTISAN REVIEW* 34-49 (1939); reprinted in C. GREENBERG, *ART AND CULTURE: CRITICAL ESSAYS* 3-21 (1961); 1 CLEMENT GREENBERG: *THE COLLECTED ESSAYS AND CRITICISM* 5-22 (J. O'Brian ed. 1988).

2. Clark, *Clement Greenberg's Theory of Art*, in *POLLOCK AND AFTER: THE CRITICAL DEBATE* 47, 48 (F. Frascina ed. 1985).

3. See I. SANDLER, *THE NEW YORK SCHOOL: THE PAINTERS AND SCULPTORS OF THE FIFTIES* (1978); D. ASHTON, *THE NEW YORK SCHOOL: A CULTURAL RECKONING* (1973); Frascina, *Introduction*, *POLLOCK AND AFTER: THE CRITICAL DEBATE* (F. Frascina ed. 1985).

4. GREENBERG (1961), *supra* note 1, at 4.

5. *Id.*



iot,<sup>6</sup> spread across the face of American culture and this "rear-guard"<sup>7</sup> was constituted by, according to Greenberg, "that thing to which the Germans give the wonderful name of *Kitsch*: popular, commercial art and literature with their chromeotypes, magazine covers, illustrations, ads, slick and pulp fiction, comics, Tin Pan Alley music, tap dancing, Hollywood movies, etc. etc."<sup>8</sup> Kitsch represents, of course, that thing to which Americans have given the democratic label "popular culture."<sup>9</sup>

The final, less obvious but still essential, category used by Greenberg was that of the *political*: the social and historical moment of American capitalism. There could be no confusing the straightforward Marxist perspective of America's most persuasive and original critic of contemporary painting and sculpture. After quoting at length from Greenberg's identification of the avant-garde as an aspect of revolutionary thought in Europe, T. J. Clark adds: "By this last he means, need I say it, preeminently the thought of Marx, to whom the reader is grimly directed at the end of the essay, after a miserable and just description of fascism's skill at providing 'art for the people'. . . ."<sup>10</sup> Had the future champion of the work of the Abstract Expressionists really directed his readers to the revolutionary criticism of Marx? Here is how Greenberg concludes his essay, "Avant-Garde and Kitsch":

Here, as in every other question today, it becomes necessary to quote Marx word for word. Today we no longer look toward socialism for a new culture—as inevitably as one will appear, once we do have socialism. Today we look to socialism *simply* for the preservation of whatever living culture we have right now.<sup>11</sup>

In his political critique of American culture, Greenberg analyzes the relationship between state and society in terms of elite and popular culture, but it is just as easy to slightly shift focus and argue that "[t]he distinctive relationship between state and society is reflected in the le-

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6. Warshow, *Movie Chronicle: The Westerner*, in *THE IMMEDIATE EXPERIENCE* (1971); see *FILM GENRE READER* (B. K. Grant, ed. 1986).

7. GREENBERG (1961), *supra* note 1, at 9.

8. *Id.*

9. See P. BRANTLINGER, *BREAD AND CIRCUSES: THEORIES OF MASS CULTURE AS SOCIAL DECAY* (1983); I. CHAMBERS, *POPULAR CULTURE: THE METROPOLITAN EXPERIENCE* (1986); *MEDIA, CULTURE AND SOCIETY: A CRITICAL READER* (R. Collins, J. Curran, et al. eds. 1986).

10. Clark, *supra*, note 2, at 48.

11. GREENBERG (1961), *supra* note 1, at 21.



gal order."<sup>12</sup> Thus we have a clearcut juxtaposition of a high art organized around "practices of negation,"<sup>13</sup> a state-endorsed popular culture "using for raw material the debased and academicized simulacra of genuine culture,"<sup>14</sup> and a political backdrop now hidden, now revealed, by the legal order—in short: avant-garde, kitsch and law.

## II

Two elements of Greenberg's analysis stand up well. First, he was dead right in his Marxian critique of American society, what Bruce Cumings calls "liberal totalitarianism,"<sup>15</sup> an increasingly stagnant and declining world power in desperate embrace of stock speculation, flag burning amendments, and arts control legislation by day, as well as Gestapo-like destruction of public sculpture and invasion of undefended foreign republics by night, which subject both life and art to a ritualized domination by the masters of technology and violence.<sup>16</sup> Second,

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12. Arnason, *The Modern Constellation and the Japanese Enigma*, 17 *THESES ELEVEN* 4, 24 (1987); see *THE POLITICAL ECONOMY OF LAW* (Y. Ghai, R. Luckham & F. Snyder eds. 1987); P. Q. HIRST, *LAW, SOCIALISM AND DEMOCRACY* (1986).

13. Clark, *supra* note 2, at 55.

14. GREENBERG (1961), *supra* note 1, at 10.

15. Cumings, *Who We Are in 1989: Northeast Asia*, 21 *BULLETIN OF CONCERNED ASIAN SCHOLARS* 196 (1989); see B. CUMINGS, *THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES 1945-1947* (1981).

16. See, e.g., A. COCKBURN, *CORRUPTIONS OF EMPIRE* (1987); PUBLIC ART, PUBLIC CONTROVERSY: THE TILTED ARC ON TRIAL (1987); D. SILVERMAN, *SELLING CULTURE: BLOOMINGDALE'S, DIANA VREELAND, AND THE NEW ARISTOCRACY OF TASTE IN REAGAN'S AMERICA* (1986); Chase, *Cockburn on Empire*, 40 *MONTHLY REV.* 51 (1988); Cooper, *Puppet Show*, *VILLAGE VOICE* Jan. 9, 1990, at 21; Hochfield, *Caught in the Crossfire: Art and the NEA*, *ARTNEWS*, Jan. 1990, at 146; Solomon, *Our Most Notorious Sculptor*, *N.Y. Times*, Oct. 8, 1989 (Magazine) at 38; see also, Garten, *Japan and Germany: American Concerns*, 68 *FOREIGN AFF.* 84, 90 (1989-90):

Recessions have come and gone, of course, but this time Washington lacks the usual tools to dig its way out. In the past, for example, it could increase government spending and stimulate consumer demand. Now, however, existing budget deficits are so large that any more spending would create fiscal havoc. In the past, the Federal Reserve could have lowered interest rates to spur investment. But with deficits and debt putting the dollar in so precarious a position, an easier monetary policy could encourage foreign holders to dump their dollar holdings and send the greenback into a free fall.

Lipietz, *The Debt Problem, European Integration and the New Phase of World Crisis*, 178 *NEW LEFT REV.* 37, 37 (1989):

'The Old' is the economic order which, since the Korean War and under



he was correct in attributing considerable capacity to avant-garde culture to negate the petrified wisdom of the zombies who run the show. It was precisely the group of abstract artists first promoted by Greenberg who generated so sharply adversarial an arts community in New York in the nineteen-forties and nineteen-fifties;<sup>17</sup> and it was in the arts review, *Possibilities*, that Harold Rosenberg and Robert Motherwell asserted that "[n]aturally, the deadly political situation exerts an enormous pressure,"<sup>18</sup> adding that "[i]n his extremism, [the avant-garde painter or writer] shows that he has recognized how drastic the political presence is."<sup>19</sup> A few years earlier, in 1944, Motherwell had contended that

[t]he remoteness of modern art is not merely a question of language, of the increasing 'abstractness' of modern art. Abstractness, it is true, exists, as the result of a long, specialized internal development in modern artistic structure. But the crisis is the modern artists' rejection, almost *in toto*, of the values of the bourgeois world. In this world modern artists form a kind of *spiritual underground* . . . The social condition of the modern world which gives every experience its form is the spiritual breakdown which followed the collapse of religion. This condition has led to the isolation of the artist from the rest of society. The modern artist's social history is that of a spiritual being in a property-loving world.<sup>20</sup>

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the aegis of Pax Americana, allowed the developed capitalist countries twenty years of unprecedented growth. This order has now broken down and the search for a new model of growth, for a new international order, has been proceeding by a process of trial and error. The financial crash of 1987 merely revealed the obstacles which made illusory the previously attempted solutions.

MacEwan & Tabb, *The Economy in Crisis: National Power and International Instability*, 19 SOCIALIST REVIEW 57, 67 (1989):

A primary feature of the current international disarray has been a relative decline in the position of the U.S. Conflicts of the 1950s and 1960s that undermined U.S. hegemony weakened the stability of the world economy, ushered in an era of relative stagnation, and set in motion a period of crisis.

17. See, Greenberg, "American-Type" Painting, in ART & CULTURE: CRITICAL ESSAYS 208-29 (1961); D. ASHTON, *supra* note 3.

18. ROSENBERG & MOTHERWELL, POSSIBILITIES 1 (1947-48), *quoted in* READINGS IN AMERICAN ART SINCE 1900: A DOCUMENTARY SURVEY 129 (B. Rose ed. 1968).

19. READINGS IN AMERICAN ART, *supra* note 18, at 130.

20. Motherwell, *The Modern Painter's World*, DYN, VI (1944), *quoted in* READINGS IN AMERICAN ART, *supra* note 18, at 131.



"Greed," says the investment broker in Oliver Stone's popular movie, *Wall Street* (1988), repeatedly presented in panoramic surveys of the decade as the emblematic persona of America in the nineteen-eighties, "for lack of a better word, is good."<sup>21</sup> The "spiritual being in a property-loving world" ought reasonably to have been driven to an art of fierce resignation or absolute defiance by the new aristocracy of Reagan and Bush. But this was not necessarily the case and helps reveal some of the ways in which Greenberg's 1939 critique of avant-garde culture did not adequately anticipate events.

It may be, of course, that even at the time, Greenberg unrealistically opposed avant-garde to popular culture.<sup>22</sup> Perhaps the two were

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The participants in the 1980s aristocratic movement do not share with their Gilded Age predecessors a commitment to the presumed unity between wealth and obligation, and no longer engage in social legitimation through civic education projects. The Gospel of Wealth under Ronald Reagan worships material success and self-centered individualism, and consigns the Social Gospel to the dustbin of 'dependency.' Further, the Reaganite aristocratic project unites the sphere of historical culture and conspicuous consumption kept separate by Gilded Age elites. Veblen's early twentieth-century giants of industrial capitalism have been replaced by the directors of advanced consumer capitalism, for whom conspicuous consumption has a very different meaning and function.

D. SILVERMAN, *supra* note 16, at 17.

22. Rather than being opposites, avant-garde and popular culture may complement each other; see, e.g. Crow, *Modernism and Mass Culture in the Visual Arts*, in POLLOCK AND AFTER: THE CRITICAL DEBATE 233-34 (F. Frascina ed. 1985):

From its beginnings, the artistic avant-garde has discovered, renewed, or re-invented itself by identifying with marginal, 'non-artistic'; forms of expressivity and display—forms improvised by other social groups out of otherwise devalued or ephemeral commodities. . . . For both Manet and Baudelaire, can we separate their invention of powerful models of modernist practice from the seductive and nauseating image the modern city seemed to be constructing for itself? . . . The identification with the social practices of mass diversion—whether uncritically reproduced, caricatured, or transformed into abstract Arcadias—remains a durable constant in early modernism . . . Even the most austere and hermetic twentieth-century abstractionist, Piet Mondrian, in his final 'Boogie-Woogie' series, anchored the results of decades of formal research in a delighted discovery of American traffic, neon, and commercialized black music. In recent history, this dialectic has repeated itself more vividly in the paintings, assemblages, and happenings of the artists who arrived on the heels of the New York School: Johns, Rauschenberg, Oldenburg, and Warhol.

Also, compare the following observations. Greenberg quotes Dwight MacDonald: "Why after all should ignorant peasants prefer Repin (a leading exponent of Russian



not entirely at loggerheads to begin with. In any event, it is evident from our vantage point today that Greenberg underestimated the capacity for avant-garde art—even avant-garde alienation—to themselves become commodified within the political economy of American culture. To be sure, Greenberg had no illusions about the relation between the avant-garde and its “social basis,”<sup>23</sup> observing candidly that

[n]o culture can develop without a social basis, without a source of stable income. And in the case of the avant-garde, this was provided by an elite among the ruling class of that society from which it assumed itself to be cut off, but to which it has always remained attached by an umbilical cord of gold.<sup>24</sup>

But this “real paradox”<sup>25</sup> was nevertheless, for Greenberg, the necessary source of survival for the avant-garde, not the source of its likely transformation into a commodity—into just another expression of kitsch.

In the wake of Abstract Expressionism’s “financial success,” however, as well as the shift in the center of the world art market to the United States and the gradual eclipse of the avant-garde,<sup>26</sup> it is now

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academic kitsch in painting) to Picasso. . . . [I]f the masses crowd into the Tretyakov (Moscow’s museum of contemporary Russian art: kitsch), it is largely because they have been conditioned to shun ‘formalism’ and to admire ‘socialist realism.’” Dwight Macdonald, *quoted in* GREENBERG (1961), *supra* note 1, at 12-13 (emphasis added).

The rise of Abstract Expressionism to its leadership of the avant-garde, and from there to its position of official art, is replete with irony. First, because the very term ‘avant-garde,’ as proudly vaunted as Baudelaire’s ‘modernism,’ was first used in art by *socialist* artists in the nineteenth century, and its meaning then was very close to what we have come to call *Social Realism*.

Shapiro & Shapiro, *expressionism: The Politics of Apolitical Painting*, in POLLOCK AND AFTER: THE CRITICAL DEBATE 135, 147-48 (latter emphasis added) (F. Francina ed. 1985). Thus both avant-garde and kitsch can, in a sense, be made equal to an independent, third term: social or socialist realism.

23. GREENBERG (1961), *supra* note 1, at 8.

24. *Id.*

25. “The paradox is real. And now this elite is rapidly shrinking. Since the avant-garde forms the only living culture we now have, the survival in the near future of culture in general is thus threatened.” *Id.*

26. See, e.g., Rosenberg, *What’s New: Ritual Revolution*, in ART ON THE EDGE: CREATORS AND SITUATIONS 251 (1975). “It is inherent in modernism, in art as in politics, that the desire for an avant-garde persists even when all avant-gardes have vanished or grown tiresome.” *Id.*



apparent that virtually *all* art practice has been brought within the commodity culture and given the character of kitsch. In a recent American Council for the Arts report, Richard H. Brown observes:

Art has become a commodity. It is now purchased not so much for use value as for exchange value. No longer an item of merely aesthetic, political or commemorative significance, it has become an investment. This quite recent historical development has profoundly affected the artist. Today's artist is no longer seen as a craftsperson, as in preindustrial times, nor as the seer or desperado pictured in the romantic counterimage of the industrial era. The commodity market for art has created a star system in which the successful artist has become both a mass-producer of icons for sale as investments and a commodity himself.<sup>27</sup>

This sounds a good deal like Greenberg's analysis, but of *kitsch* rather than the avant-garde's practices of negation. "Currently, some artists are striking back," adds Brown, "by representing in their art, with conscious irony, the very system that seeks to debase them and their works, but even these protest pieces tend to become commodities."<sup>28</sup> So much for the contemporary catch-22 in which the avant-garde finds itself trapped.<sup>29</sup>

Finally, if Greenberg underestimated the ability of consumer society to render ineffective the critical practice of avant-garde culture, he may also have underestimated the ability of popular culture to complete an opposite move: to escape the totalitarian role assigned to it by the rulers<sup>30</sup> and perform its own negative or critical functions within

27. R. H. Brown, *Art as a Commodity*, in *THE MODERN MUSE: THE SUPPORT AND CONDITION OF ARTISTS* 13, 13 (C. R. Swaim ed. 1989); see McGuigan, *The Selling of Andy Warhol*, *NEWSWEEK*, April 18, 1988 at 60; Myers, *The Art Biz*, *N.Y. REV. BOOKS*, Oct. 13, 1983 at 60; Ratcliff, *The Marriage of Art and Money*, *ART IN AMERICA* 76 (July, 1988).

28. Brown, *supra* note 27, at 14.

29. See, e.g., P. BURGER, *THEORY OF THE AVANT-GARDE* (M. Shaw trans. 1984); H. HAACKE, *FRAMING AND BEING FRAMED* 121 (1975); Piccone, *The Crisis of One-Dimensionality*, 35 *TELOS* 43 (1978); Luke, *Culture and Politics in the Age of Artificial Negativity*, 35 *TELOS* 55 (1978).

30. See, e.g., GREENBERG (1961), *supra* note 1, at 19:

Where today a political regime establishes an official cultural policy, it is for the sake of demagogy. If kitsch is the official tendency of culture in Germany, Italy and Russia, it is not because their respective governments are controlled by philistines, but because kitsch is the culture of the masses in these countries, as it is everywhere else. The encouragement of kitsch is



particular social and historical conjunctures.<sup>31</sup> Having thus established, at least in outline, the need for revision of Greenberg's critique of *avant-garde and politics*, given the fact, as true of the world-system today as it was in Marx's time that "no social order ever disappears before all the productive forces, for which there is room in it, have been developed"<sup>32</sup> we now turn to a much more detailed examination of *kitsch and politics*, or more specifically: popular culture and the legal order.

### III

Although the relation between popular culture and the law has only recently begun to receive concentrated, scholarly attention,<sup>33</sup> that relation preexisted not only Greenberg's 1939 critical intervention but the nineteenth century's invention of the *avant-garde* as well. Indeed, popular legal culture was there all the time. From the pamphlets and broadsides, tavern ballads, and political cartoons of the American Revolution, to the blockbuster movies, "reality television," and rock music videos which characterize contemporary public life, popular culture has always provided the mass audience with a unique point of access to images and ideas about law and American lawyers. Given the

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merely another of the inexpensive ways in which totalitarian regimes seek to ingratiate themselves with their subjects.

Milchman, *Book Review*, 6 *SOCIALISM & DEMOCRACY* 198, 203 (1988): "The supposed evidence of a mass media awash with the rumblings of anti-capitalist discontent and subversion, reflecting the creativity of the masses in their daily lives, strikes me as so much evidence for the totalitarian domination of capitalism over the 'leisure' activity of the mass of the population."

31. See, *POPULAR CULTURE IN AMERICA* (P. Buhle ed. 1987); Chase, *An Obscure Scandal of Consciousness*, 1 *YALE J.L. & HUMANITIES* 105, 114-19 (1988).

32. K. MARX & F. ENGELS, 1 *SELECTED WORKS IN TWO VOLUMES* 363 (1955), quoted in R. A. MEDVEDEV, *THE OCTOBER REVOLUTION* 57 (G. Saunders trans. 1979).

33. For bibliographic reference, see Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 *AM. B. FOUND. RES. J.* 281; Chase, *On Teaching Law and Popular Culture*, 3 *FOCUS ON LAW STUDIES: TEACHING ABOUT LAW IN THE LIBERAL ARTS* 7 (1988); Chase, *Toward a Legal Theory of Popular Culture*, 1986 *WIS. L. REV.* 527. For interesting new work in the field of popular culture studies, see J. BURCHILL, *GIRLS ON FILM* (1986); N. CARROLL, *MYSTIFYING MOVIES: FADS AND FALLACIES IN CONTEMPORARY FILM THEORY* (1988); L. W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988); E. M. MIZRUCHI, *REGULATING SOCIETY: BEGUINES, BOHEMIANS, AND OTHER MARGINALS* (1983); M. RYAN & D. KELLNER, *CAMERA POLITICA: THE POLITICS AND IDEOLOGY OF CONTEMPORARY HOLLYWOOD FILM* (1988).



appearance over half a century ago of Thurman Arnold's classic *The Symbols Of Government*<sup>34</sup> and *The Folklore Of Capitalism*<sup>35</sup>, it would be incorrect to imply that a recent focus upon popular legal culture is entirely new. Yet there appears to have developed over the last few years a sharpened or quickened interest (among writers from various disciplines) in coming to terms with what Americans think about law, courts, or constitutional rights by examining artifacts of *popular* legal consciousness.

Historians, legal scholars, sociologists, and film critics have brought different concerns and approaches to the field. "Ordinary citizens derive their impressions of the legal system," asserts historian Max Bloomfield, "largely from the newspapers and magazines they read, the novels they buy, the movies and television programs they watch."<sup>36</sup> Taking a close look at the relationship between public values and the "idea of legal meaning as multiple and contestable,"<sup>37</sup> while utilizing materials from labor movement legislative initiatives, American family law, and an "obscure New York pig-law case,"<sup>38</sup> legal scholars Forbath, Minow, and Hartog seek to "highlight the contribution to the meaning of law made by people with no official roles in the hierarchy of legal authority,"<sup>39</sup> yet who may well represent an ultimately decisive popular legal viewpoint. Legal sociologist Stewart Macaulay argues that if we are going to "understand people's knowledge of and attitudes toward the legal system," we need to "look beyond the behavior of judges [and] lawyers" and try to visualize the landscape of popular legal consciousness itself.<sup>40</sup> Social and political "attitudes are formed, influenced, and reinforced by boring and colorless high school history books, arbitrary exercises of authority by teachers and coaches, episodes of *Miami Vice*, and morality plays staged by organizations such as the Badgers, Bucks, Brewers, and Packers."<sup>41</sup> Film critic Kathleen Rowe, following up Macaulay's reference, argues that (taken to-

34. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

35. T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

36. Bloomfield, *Law and Lawyers in American Popular Culture*, in C. SMITH, J. MCWILLIAMS & M. BLOOMFIELD, *LAW AND AMERICAN LITERATURE* 125, 127 (1983).

37. Forbath, Hartog & Minow, *Introduction: Legal Histories From Below*, 1985 WIS. L. REV. 759, 759.

38. *Id.* at 760.

39. *Id.*

40. Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC. REV. 185, 186 (1987).

41. *Id.*



gether) Miami and Los Angeles "map the American psyche in terms of power and ideology" and confront audiences with

[T]he alluring violence, the seductive dreamlike world of *Miami Vice*, the underside of power that one hour later is tamed, humanized and 'yuppified' in *L.A. Law*. In the terms of anthropologist Claude Levi-Strauss, the power that is raw in *Miami Vice* is cooked with platitudes and ideology in *L. A. Law*; the law of the streets and the jungles of South America refined into leatherbound legal volumes and robed judges."<sup>42</sup>

While not ambitious enough to draw upon the structuralist theories of investigators like Claude Levi-Strauss,<sup>43</sup> the following comments do try to extend the developing critique of popular visual art a bit further into the legal terrain, somewhat more deeply into the forbidding realm of the American criminal justice system, as observed through the eye of the camera.

#### IV

"I can't. I've got Lady Godiva in two minutes," replies *L. A. Law*'s resident prosecutor, Grace Van Owen (Susan Dey), to an amorous proposition from attorney Michael Kuzak (Harry Hamlin) that she accompany him to Chinatown for breakfast. "Excuse me?" inquires Kuzak. "A stripper," says Van Owen, shuffling folders around her office, "she's filing charges against three lawyers who apparently went too far with the unveiling." "Oh," says the skeptical Kuzak, "sounds like a real winner to me." Van Owen almost agrees: "Well, I don't know . . . I'll listen to what she has to say but I'm thinking about kicking it." The teenage, strip-o-gram delivery girl, on her first expedition in a new job, turns out to have been sufficiently abused by "party animal" lawyers in their Century City office—behind doors conveniently locked against her exit—that Van Owen decides to press on

42. Rowe, *Power In Prime Time: Miami Vice and L. A. Law*, 33 JUMP CUT 20, 20 (1988).

43. See R. GUIBERT, SEVEN VOICES: SEVEN LATIN AMERICAN WRITERS TALK TO RITA GUIBERT 421 (F. Partridge trans. 1972): "Guibert: Can you say something about the works of Levi-Strauss? Guillermo Cabrera Infante: They seem to be excellent. Very durable. I've had two for several years, although I wear them almost every day. Guibert: Two? Two what? Infante: Pairs of trousers, of Levi's, made by Levi-Strauss and Co. of San Francisco, Calif."



with young Ms. Morris's case. Surprised, and obviously impressed by the woman's sincerity and sense of outrage, Van Owen concludes the interview: "If you're prepared to go all the way with this, so am I."

But these brave words preface a chapter of *L. A. Law* more complicated than either complaining witness or state's attorney probably anticipate. Morris is made to feel degraded as much in court as out, as much during cross-examination as during her initial confrontation with the defendants who now stand accused of sexual battery. Van Owen is subjected to greater pressures than Kuzak's initial and casual skepticism. "We're talking three lawyers, families, nice careers," Van Owen's superior in the district attorney's office explains to her. "A felony conviction," he continues, "means getting hauled before the bar on moral turpitude—they could get suspended or worse." When Van Owen fails to show sympathy for the defendants, her boss becomes aggravated: "What is this, some kind of feminist chip on your shoulder?" "What is that supposed to mean?" responds Van Owen, though the meaning is clear enough. "This is a stupid case," asserts the male prosecutor, "we shouldn't be taking this to trial. I'm going to ask you to get off your soap box here and dispose of this case." Neither this clear instruction nor the practical joke played on Van Owen by her male colleagues in the state attorney's office—who send *her* a surprise strip-o-gram at work—manage to derail her commitment to steamrolling the opposition. A serious obstacle seems placed across the tracks when an old pal of Van Owen's in the prosecutor's office, a *woman* ("It's nice to see you now," says Grace, "I could use a friendly face"), actually joins the enemy: "You know, everybody in the office is grumbling that you have become some kind of humorless, radical feminist . . . What you're doing only reinforces their attitude that the girls can't be one of the guys . . . Sometimes you've got to go along to get along." Grace expresses her disappointment at Sarah's failure to back her up in no uncertain terms, conceivably ending their friendship, and (back in court) provides the kind of closing argument to the jury that causes middle-aged viewers of *L. A. Law* to recall the pioneering social relevance and television seriousness of lawyer dramas like *The Defenders* (1961-65) and hard-hitting serials like *East Side, West Side* (1963-1964). "You did it," exclaims Ms. Morris after the jury returns with unanimous verdicts of guilty against all three attorneys, and Van Owen replies, "*You* did it." "I just want you to know that I'm going to remember you the rest of my life," says Morris, and Van Owen repeats, "I don't think I'll be forgetting you either." The way in which Grace replicates the younger woman's feelings in this pair of exchanges is a metaphor for the way in



which Van Owen has, to a degree, replicated Ms. Morris's sense of anger, built the structure of her own moral commitment to prosecuting this crime upon that of its female victim. When the two women embrace as the courtroom empties (and the convicted attorneys are told when to appear for sentencing), it is clear that it is not the relationship between women attorneys (e.g., Van Owen and the prosecutor, Sarah, who told her to "cool out"; Van Owen with the woman member of the team of defense lawyers) but, rather, the relationship between the woman attorney and the woman crime victim which provides the dramatic dynamo energizing this particular episode of *L. A. Law*.<sup>44</sup>

Moreover, it is this specific relationship which links *L. A. Law* to Jonathon Kaplan's film, *The Accused* (1988). Admittedly, *L. A. Law*'s story of a young woman's right to retrieve her dignity represented but a single strand in the continuing saga of McKenzie, Brackman.<sup>45</sup> Further, the *L. A. Law* serial has received, of course, its share of criticism, including dissatisfaction with its gender politics.<sup>46</sup> But *L. A. Law* at its best and the motion picture, *The Accused*, both seem to provide a feminist critique of the operation of the criminal justice system which is more progressive than the conventional wisdom of American culture.<sup>47</sup>

44. This episode had a story by Steven Bochco and Terry Louise Fisher and was directed by Rick Wallace. Terry Louise Fisher served as Supervising Producer.

45. The same episode included Arnie Becker's overhearing two women refer to him as having a "body by Pillsbury" and coping with the ensuing emotional fallout, Douglas Brackman's painful hours spent anxiously awaiting the verdict from an HIV blood test, etc.

46. See, e.g., Mayne, *L. A. Law and Prime-Time Feminism*, DISCOURSE: JOURNAL FOR THEORETICAL STUDIES IN MEDIA AND CULTURE, Spring-Summer, 1988, at 30. Mayne specifically provides a different reading of the episode of *L. A. Law* discussed here as a result of her emphasis upon the way in which "[i]ndividual episodes of *L. A. Law* tend to include anywhere from two to four major storylines, at least one of them a courtroom trial. The storylines are complicated not only by the relations between them, but also by the overlapping personal and professional lives of the lawyers." *Id.* at 36. Apparently regarding the impact of the closing sequence as sufficient to erode the central storyline (the courtroom trial of the attorneys charged with sexual battery), Mayne suggests that her

point was made strikingly in a second season episode in which Grace Van Owen was accused of being a 'humorless radical feminist' in her defense of a teenage stripper sexually molested by a group of lawyers. In the concluding shot of the episode, Van Owen and Kuzak inhale helium from a balloon and talk in funny voices as they embrace, so that at least the 'humorless' and 'radical' parts are temporarily dispelled.

*Id.* at 44.

47. For extremely important feminist critique, see S. ESTRICH, *REAL RAPE*



Indirectly based on the Big Dan's Bar rape trial in Massachusetts, a trial broadcast live by public television, *The Accused* again presents a somewhat self-satisfied, upper-middle class female prosecutor whose professional and personal situation is turned upside down by a victim of sexual violence against women, someone difficult to fathom at first because she is from a working-class background. But after the prosecutor has a civilized dinner party broken up by an enraged crime victim transparently displeased with the plea bargain in her case, the state's attorney (Kelly McGillis) and the rape victim, (Jodie Foster, who won an Academy Award for this role), develop a sense of mutual trust which serves them well during the difficult trial ahead.

The film is more complicated than one with a simple opposition between women and men, and like the *L. A. Law* episode discussed above, some of the women characters equivocate: a waitress at the bar who can provide key testimony at trial is clearly reluctant to do so; there is not surprisingly a woman defense attorney in the film who attempts to place blame on the victim. Although the inclusion of a graphically violent staging of the crime itself makes *The Accused* an especially grim picture for most audiences, its resolution, like *L. A. Law*, finds the women characters triumphant. Their solidarity pays off with a guilty verdict. A line is thus drawn on the traditional acceptance of sexual crimes against women as part of the nature of things, somehow not worth exhausting criminal justice resources to try to deter.

## V

*Shakedown*, (1988), like *L. A. Law* as well as *The Accused*, includes a particularly strong woman character in the form of an assistant district attorney. Susan Cantrell (Patricia Charbonneau) performs a function in *Shakedown* similar to that of Debra Winger's character in *Legal Eagles* or even that of Mrs. Christine Manson, wife of Dr. Andrew Manson, in King Vidor's 1938 film version of A. J. Cronin's novel, *The Citadel*. She is keeper of the conscience, moral lightning rod for a professional husband/boy friend who may become lost in the turbulence of clashing public and private obligations and desires. Tempted to abandon a criminal client he believes is innocent and ready to move into corporate legal practice via a well-chosen marriage to the name partner's daughter, Roland Dalton (Peter Weller) momentarily re-

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(1987); C. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).



trieves an old liaison with Cantrell. Having breakfast on her porch above the streets of Manhattan and looking out over a vista of Central Park, Cantrell challenges her old flame: "So you're going to take fourteen years of legal aid and chuck it out the window?" "You don't get it do you," replies the irritated public defender, "I mean you got me as some kind of retrograde Clarence Darrow or something . . . You keep thinking I'm leaving legal aid because I want to be something else? I'm out'a here babe because it's kicking the life out of me . . . So what if I want things, *Susan*. People want shit, you know. I want things!"

But *Shakedown* has more in common with *True Believer* (1989) and *The Thin Blue Line* (1988) than it has with *L. A. Law* or *The Accused*. The woman prosecutor in *Shakedown* is critical to Dalton's renewed commitment to fighting the good fight but she is not at the dramatic center of the film. What *Shakedown* has in common with *True Believer* and *The Thin Blue Line* is that it represents ultimate criminality not in the form of sexually abusive male attorneys or even a gang of drunks in a bar cheering on a rape; not in the form of urban youth gang members selling drugs and knifing their opponents or, even, the random savagery of serial killing; but rather in the precise, calculated, almost impersonal logic of state violence and terror: the criminal conspiracies perpetrated by police and prosecutors and the shadowy forces standing behind them. The truth does finally emerge in two of these films—in a sense, from *The Thin Blue Line* as well. In *Shakedown*, not a very well made film and one, certainly, with a great deal of sensationalism and brutality, the finale is virtually a kind of *Smokey and the Bandit* or *Blues Brothers* auto smash-up cartoon. Having stuck with his client and nearly been executed by the police for his zealotry, Dalton crashes a taxicab into the official cordon blocking his entry to court where he plans, exculpatory evidence in hand, to save the defendant from conviction. The police attempt to arrest him on the spot (and, no doubt, prepare an accident for him) as the cover-up continues. But Judge Maynard (Augusta Dabney) parades into position between Dalton and the secretly drug-dealing police. She then announces: "On the streets you are the law but on the steps of this courthouse, I am the law. If this police officer does not lower his gun," the robed judge instructs her bailiff, "arrest him for obstructing justice." To be sure, Mr. Big, the hoodlum who wears fancy clothes and rules over a criminal empire where cops are mere errand boys, is not brought down to earth and back to justice without pyrotechnics. He is not subjected to the rule of law without some extra-legal crime fighting by a lawyer/rogue cop buddy team, a team which turns up in modified form in films as



different from each other as *Dirty Harry* and *Mississippi Burning*, or without modification in works of popular art as different as the television serial, *Crime Story*, and the bestselling novel, *Presumed Innocent*.<sup>48</sup>

## VI

Generally received by the critics as an extremely well-made and well-acted film, *True Believer* revolves upon the intense characterization James Woods provides politically hip, criminal defense attorney Eddie Dodd.<sup>49</sup> The professional conscience elsewhere provided by Christine Manson or Susan Cantrell, by Laura Kelly and Chelsea Deardon in *Legal Eagles*, and by crime victims in *L. A. Law* and *The Accused*, becomes a kind of moral Marshall Plan in *True Believer*. The film includes an idealistic young lawyer right off the University of Michigan Law Review staff, a private investigator who still clings to her faith in Dodd, and the immigrant mother of an unjustly convicted Korean-American youth,<sup>50</sup> all of whom commit their complete energy and resources to waking up Eddie from his marijuana-induced indifference and reminding him that the words of the Constitution mean something—or at least *should*. *True Believer*, according to *New Yorker* film critic Pauline Kael, “can be said to be about Dodd’s finding his lost ideals, but it’s basically about pace and drive. The director doesn’t use the movie to congratulate himself on sharing Eddie’s ideals; he uses it to make us share the excitement of Eddie’s recovering those ideals.”<sup>51</sup> Of course it can be argued that director Joseph Ruben’s emphasis upon the medium rather than the message makes the message about keeping in touch with the progressive if, perhaps, idealistic values of youth more self-effacing and thus provisionally attractive than would have been the case were the message constantly given center stage. This may be Ruben’s own way of responding to the old Hollywood adage, “If you have a message, send it by Western Union.”

But there is, I think, another way to look at *True Believer*, beyond noting Eddie Dodd’s revitalized radicalism or the “marriage of purpose

48. See Chase, *supra* note 31, at 122-26.

49. See, e.g., Schickel, *Beyond the Fringe*, TIME, Feb. 20, 1989, at 94.

50. She seems modelled on the mother of another innocent prisoner in Henry Hathaway’s 1948 film, *Call Northside 777*.

51. Kael, *The Current Cinema: Marriages*, THE NEW YORKER, Feb. 20, 1989, at 95, 96.



and adrenaline"<sup>52</sup> which keeps the film hurtling forward to its conclusion, the release of Shu Kai Kim from Sing Sing. Consider the significance of actor Kurtwood Smith's role as District Attorney. Eddie Dodd first begins to wonder if Shu Kai Kim may not actually have been framed when the district attorney, out of the blue, offers to let the Korean convict out of jail in a few years if Dodd refrains from trying to reopen the case. This deal, this bargain, represents a proffered trade-off. It is designed by Kurtwood Smith to keep under wraps the *real* trade-off, the original Machiavellian justification for the state's decision to frame Shu Kai Kim for a murder actually committed by a valued police informant. "The end justifies the means," a classic prescription for official tyranny from Orson Welles' extraordinary motion picture, *Touch of Evil*,<sup>53</sup> through the grand conspiracy underlying the real life Iran-Contra affair,<sup>54</sup> may represent the ultimate focus and concern of *True Believer*. Kurtwood Smith's bone-chilling defense of his conduct (in court, at the climax of Shu Kai Kim's new proceeding)—the choice of evils which he resolved by subordinating the young gang member's legal rights to reasons of state which must (in the end) trump abstract individualism—is reminiscent of a speech Kurtwood Smith made in his last major film role prior to *True Believer*, that of a CIA-linked, Oliver North-style soldier of freedom, in William Tannen's *Flashpoint* (1984). Masquerading as Inspector Carson, a supposed DEA agent, Smith asks Kris Kristofferson (playing a southwest border patrol guard): "You don't actually believe you're doing something worthwhile out here, do you?" Kristofferson denies that he has exiled himself to the desert because he was not tough enough to handle the post-Vietnam pressures of undercover counter-insurgency. No, it was the politics that he says got to him. "Politics!" exclaims Smith, "This whole fucking nation is politics . . . You work for the same law that pays all our salaries: the law of supply and demand. Think about it whiz kid . . . that's the American way, pal. Supply and demand. And when the supply is lacking, you create it." Whether it is fear of drug-related street crime or of illegal immigration or of subversion and terrorism, the government creates it—*must* create it—since it is the function of the state to engineer social consensus and insulate power from criticism, hopefully even from

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52. *Id.*

53. See *TOUCH OF EVIL* (T. Comito ed. 1985); B. LEAMING, *ORSON WELLES: A BIOGRAPHY* 420-25 (1985).

54. See, e.g., L. COCKBURN, *OUT OF CONTROL* (1987); N. CHOMSKY, *THE CULTURE OF TERRORISM* (1988).



identification.<sup>55</sup> "Who are you?" asks Kristofferson, as it gradually dawns on him that he is not speaking with your basic, dollar-a-dozen narcotics officer. "I'm a fixer," says Smith, smiling obliquely, "I fix things." In *True Believer*, he's fixing a drug bust in New York to make it look like the government is actually combatting (rather than managing) the cocaine economy—fixing a frame for Shu Kai Kim when things (similar to the arms for hostages trade in the Reagan Administration) do not go exactly according to schedule. At all costs, the D. A. believes, you have to make certain that you cover your tracks.<sup>56</sup>

The only eye-witness in *True Believer* who claims that Shu Kai Kim is innocent is a hapless fellow confined to a mental institution who also thinks that John F. Kennedy was assassinated on orders from the telephone company. By the end of *True Believer*, everyone in the film is wondering what the phone company could possibly have had against Kennedy! And that is exactly what Kurtwood Smith has to fix in *Flashpoint*: an unravelling cover story about who was responsible for the events in Dallas in late 1963. Some viewers or critics may regard films about the criminal justice system in which the prosecution emerges as a deceitful and potentially draconian force or, more generally, "conspiracy films" (e.g., *The Manchurian Candidate*, *Seven Days in May*, *All the President's Men*, *The Formula*, *The Border*, *Suspect*), including three which feature Hal Holbrook in Kurtwood Smith's "fixer" role (*Magnum Force*, *Capricorn One*, *The Star Chamber*), as further regrettable evidence of "the paranoid style of American politics."<sup>57</sup> "Clandestinitism," responds Carl Oglesby, is not the figment of paranoid imagination, exploited by Hollywood as with any other form of popular craze or madness, but rather "is a disease of republican twilight. Its coming bespeaks the degeneration of the constitutional republic into the military empire."<sup>58</sup> Even former speechwriter for President Lyndon Johnson and now public television commentator, Bill Moyers, observed in a nationally televised documentary on the origins of the Iran-Contra affair:

55. See, e.g., N. CHOMSKY, ON POWER AND IDEOLOGY: THE MANAGUA LECTURES (1987).

56. This admonition is not lost on officials even at the highest levels of government; see, e.g., Stille, *The Other Iranian Arms Case*, NAT'L L.J., March 13, 1989, at 1.

57. See R. HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS (1965); M. ROGIN, RONALD REAGAN THE MOVIE & OTHER EPISODES IN POLITICAL DEMONOLOGY (1987).

58. C. OGLESBY, THE YANKEE AND COWBOY WAR: CONSPIRACIES FROM DALLAS TO WATERGATE 43-44 (1976).



It isn't the first time that men who express reverence for democracy in public have violated the values of democracy in practice. The secret government is an interlocking network of official functionaries, spies, mercenaries, ex-generals, profiteers and superpatriots, who for a variety of motives operate outside the legitimate institutions of government. Presidents have turned to them when they can't win the support of the Congress or the people, creating that unsupervised power so feared by the framers of our Constitution. Just imagine that William Casey's dream came true. Suppose the Enterprise grew into a supersecret, self-financing, self-perpetuating organization. Suppose they decided on their own to assassinate Gorbachev, or the leader of white South Africa. Could a president control them? And what if he became the Enterprise's Public Enemy Number One? Who would know? Who would say no?<sup>59</sup>

Oglesby subtitles his book on America's addiction to covert politics, "Conspiracies From Dallas To Watergate."<sup>60</sup> Errol Morris's documentary, *The Thin Blue Line*, with which we will conclude this selective overview of recent films about American criminal justice, could have been subtitled, "From Watergate To Dallas."

## VII

About the same time that the initially convicted Watergate conspirators were being released from prison and were wondering, perhaps, how long they might have to wait before applying for readmission to the Bar, twenty-eight year old Randall Dale Adams made his own fateful trip to Dallas, Texas. After the opening credit sequence, *The Thin Blue Line* continues this way: Shot 1 (darkness); Shot 2 (tower with a lighted ball silhouetted against deep-blue, night sky/Philip Glass music begins); Shot 3 (post-modern skyline of Dallas at night with small flashing light); Shot 4 (skyscraper closer up, flashing orange light brighter); Shot 5 (again, Dallas urban architecture at night, now more horizontal emphasis on cars moving but no people); Shot 6 (Randall Adams in a white shirt, open collar, against indoor wire fence like a locker room): "In October, my brother and I left Ohio. We were driving to California. We got into Dallas on a Thursday night. . ."; Shot 7

59. Moyers: *The Secret Government . . . The Constitution in Crisis* (A. H. Perlmutter, Inc. & Public Affairs Television, Inc., Nov. 4, 1987).



(first use in film of full-screen, revolving red police light, pulsating in the dark).

Shot 8 (David Harris in an orange-red prison jumpsuit against a kind of tile background): "[T]his all started, David's running away from home. He takes . . . I took a pistol of my dad's and a shotgun. Took a neighbor's car. . . ." While Harris speaks, we see: Shot 9 (the pistol, immaculate, silver with a pearl handle, against a white background, floating forward in space); Shot 10 (back to Harris): ". . . ended up com'in to Dallas."; Shot 11 (post-modern skyscraper with top like an Egyptian pyramid); Shot 12 (architectural structure covered with tiny lights blinking on and off like a spaceship just landed); Shot 13 (close-up of pyramid from shot 11); Shot 14 (back to Randall Adams): "I went to work and no one showed up . . . On the way home I ran out of gas . . . A person at that time pulled over . . . He stopped and asked me if I needed any help."; Shot 15 (travelling aerial shot of Dallas showing many square miles of development): "I'm drivin' down some street," says Harris (voice over), "somewhere in Dallas. . ."; Shot 16 (roadmap of Texas/Dallas Vicinity): "I'd just turned sixteen," continues Harris (voice over); Shot 17 (closer up, same roadmap): "and there was a guy over there. I think he run out'a gas. . ."; Shot 18 (still closer, Dallas is now large on the map); "This," concludes Harris (voice over); Shot 19 (highways around Dallas in full view on roadmap): "was Randall Adams."; Shot 20 (yellow sign reading "Comfort Motel" in front of huge highway billboard/next "movement" of the film begins).

It is impossible to adequately convey through this partial summary the intensity achieved by the combination of separate monologues, Philip Glass score, and juxtaposition of images in Errol Morris' composition of *The Thin Blue Line*. Perhaps this illustration provides, however, an indication of Morris' filmmaking style. Suffice it to say that this approach to directing film draws upon multiple artistic resources which would include Godard in motion pictures,<sup>61</sup> Francis Ponge in poetry,<sup>62</sup> Robbe-Grillet in fiction,<sup>63</sup> pop art and photo-realism in paint-

61. See, e.g., GODARD ON GODARD (J. Narboni & T. Milne, eds. 1972); A. GUZZETTI, *Two or Three Things I Know About Her: Analysis of a Film by Godard* (1981).

62. See, e.g., THINGS: SELECTED WRITINGS OF FRANCIS PONGE (C. Corman trans. 1986).

63. See, e.g., A. ROBBE-GRILLET, *THE ERASERS* (R. Howard, trans. 1964); A. ROBBE-GRILLET, *FOR A NEW NOVEL: ESSAYS ON FICTION* (R. Howard trans. 1966).



ing;<sup>64</sup> and from a number of recent films, all of which are interesting in their own right: *Blood Simple* and *Blue Velvet* (affectless speech and, as Rosellini described it late in his career, having the courage to go slow),<sup>65</sup> *Repo Man* and *Paris, Texas* (for the feel of the southwest and the roadmaps to nowhere),<sup>66</sup> Jim McBride's *Breathless* (the drive-in and the omnipresence of mass culture), and *Liquid Sky* (the use of contemporary music as well as silence, and the futuristic emptiness of cities without people). Equivalents of the close-up shots in *The Thin Blue Line* of a psychiatrist's handwritten symbols and a police stenographer's notes initially appeared in films like Godard's *Le Meppris* (1963) and *Pierrot Le Fou* (1965), and in many respects, Randall Adams' experience of Dallas is equal to that of Godard's Lemmy Caution in *Alphaville* (1965). Richard Roud's analysis of timelessness in Godard can readily be used to better comprehend what Errol Morris is doing within the documentary aesthetic:

Of course, one of the essential characteristics of the filmed image is its eternal presence: as Robbe-Grillet said, in the cinema the verbs are always in the present tense. And yet, some paintings have also captured the eternal present. One thinks first of all of Vermeer, who was also, in a sense, a painter of reality, one whose subjects were drawn from the banality of everyday life. But often the beauty in both Vermeer and Godard comes from gestures or movement. The shot in almost every Godard film of a girl agitating her hair is not so different from Vermeer's capturing for all time a girl trying out a necklace in front of a mirror, or a servant pouring out milk into a jug: the necklace poised in mid-air, the milk caught passing from pitcher to bowl. . . . Time is made to stop, the eternal flux is seized at an ideal moment and retained. Furthermore, Vermeer glories in ordinary subjects, ordinary objects. For both Godard and Vermeer, a window, a chair, can be—are made to be—seen as objects of extreme beauty.<sup>67</sup>

A police officer is murdered in Dallas and, partly on the strength of David Harris' testimony against him, Randall Adams is convicted of capital homicide. What Morris does with this story is show the incredi-

64. See, e.g., S. STICH, *MADE IN USA: AN AMERICANIZATION IN MODERN ART, THE '50s & '60s* (1987).

65. See P. BRUNETTE, *ROBERTO ROSSELLINI* (1987).

66. See *PARIS, TEXAS* (C. Sievernich ed. 1984).

67. R. ROUD, *JEAN-LUC GODARD* 81 (1970).



ble ordinariness with which Adams is chosen for prosecution,<sup>68</sup> the way everyday objects themselves conspire against him, the almost casual disinterest of everyone but Adams' lawyers in whether he actually killed anyone, and (like "the milk caught passing from pitcher to bowl")<sup>69</sup> the chocolate Burger King shake frozen in slow motion as it flies across the night and drains out into the roadside. The latter image reveals everything that is wrong with the prosecution's manufactured story of what happened and yet, at the same time captures a majestic and unalterable moment in the "eternal flux" which is moving ineluctably toward its destination: putting Randall Adams to death. This sense of timelessness—a kind of dream state, outside of normal sensory experience—perfectly characterizes the feeling these events engender in both Randall Adams and David Harris. "You get numb," says Adams, "you get . . . it's like a bad dream. You want to wake up but you can't do it. Fifteen times, twenty times a day, I hear this same story about what happens when a man's electrocuted." "I don't know why but it's always seemed like time just stopped, you know," recalls Harris, describing for Morris' camera the moment when the police officer was shot, "I mean it didn't seem like any time passed, you know . . . just seemed like it (Boom!), time stopped or something. I don't know what it is . . . like a flash." "I've often thought to myself," remarked Errol Morris in a taped interview shown on the March 21, 1989, ABC network broadcast of *Nightline*, "what is this story about? It is a story about a terrible miscarriage of justice. But it is a story about how easy it is to slip between the cracks, how easy it is just to disappear and never to be seen or heard from again. Randall Adams is a person who became trapped in a real life *Twilight Zone* episode."

An attorney in *The Thin Blue Line* states that Adams' trial judge had occasion to ask why anyone was concerned about the defendant in the first place since "he's just a drifter." The man who fell between the cracks nearly disappeared permanently, coming within three days of execution in a Texas death house prior to having his sentence reduced to life. Then in March of 1989, on the same day when Teri Garr and

68. Both Adams' defense attorney Edith James (interviewed in *THE THIN BLUE LINE*) and filmmaker Errol Morris (interviewed on the ABC News program, *Nightline* (March 21, 1989)) suggest that the Dallas County prosecutor may have sought to convict Randall Adams of a murder he did not commit primarily because he was old enough to be eligible for the death penalty in Texas, whereas the likely killer, David Harris, was only sixteen years old at the time of the crime and thus too young to be a candidate for execution.

69. ROUD, *supra* note 67.



David Letterman had a discussion on the popular Letterman, late-night talk show about whether *The Thin Blue Line* was a "documentary or a movie," the Associated Press put this report on the wire service:

The man whose guilt was questioned in the documentary movie, *The Thin Blue Line*, had his conviction overturned on Wednesday, giving him hope of freedom after more than 12 years in prison . . . Adams' case attracted attention last year with the release of Errol Morris' documentary, *The Thin Blue Line*. It suggests that David Harris, the prosecution's chief witness in the 1977 trial, committed the crime . . . The appellate judges said prosecutor Doug Mulder suppressed evidence and knowingly allowed perjured testimony during Adams' 1977 trial. The court said the state knowingly suppressed evidence that witness Emily Miller had failed to identify Adams in a police lineup; that a police officer advised her she did not identify Adams, and that the officer told her the person she should have identified.<sup>70</sup>

The Texas Court of Criminal Appeals decision to set aside Randall Adams' conviction is lengthy, represents a systematic elaboration of the significance of the fourteenth amendment for criminal courts in the state of Texas, and at times manifests a barely concealed contempt for the kind of "process" which Randall Adams received from the prosecutor's office in Dallas County.<sup>71</sup>

### VIII

In *Shakedown*, the government tolerates corrupt police officers who even, in an extreme case, attempt to eliminate a defense attorney who is on to their game. In *True Believer*, the state (again) becomes tainted by its close relation to the narcotics business<sup>72</sup> and goes so far as to frame an innocent man to cover up a crime committed by one of its own. In *The Thin Blue Line*, the government (in its everyday guise: that of prosecutors and police) also crosses the line. Had the Dallas County prosecutors, or the trial judge himself, ever read the Supreme Court's famous *Olmstead* dissent? "If the Government becomes a law-

70. Associated Press, *Court Overturns "Thin Blue Line" Conviction*, FORT LAUDERDALE NEWS, Mar. 2, 1989, at 3A.

71. See, Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process*, 9 PACE L. REV. 275 (1989).

72. Cf., Salholz, Miller, Waller & Kaplan, *No Sympathy for the Devil*, NEWSWEEK, Jan. 1, 1990, at 19.



breaker," argued Brandeis, "it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution."<sup>73</sup>

Based on his comments in *The Thin Blue Line* and a subsequent statement made in an official proceeding in Texas during December, 1988, it would appear that David Harris became, indeed, a "law unto himself." But many other questions remain open. In spite of Brandeis' stirring words, the sentiment he expressed clearly in *Olmstead*, what possible "retribution"—what sanction—would be enforced against Dallas County? What damages would be paid if prosecutors are immune from civil liability? Would the Texas Bar Association investigate the professional ethics of attorneys with many criminal convictions notched on their belts—legendary crime fighters?

In spite of "the thin blue line" of law enforcement which precipitated, rather than prevented, anarchy, a documentary film managed to play a critical role, at least in this one instance, in the release of an innocent man from prison.<sup>74</sup> At the same time, it provides the widescreen projection of a searing image and the mass communication of an unforgettable story of what happens when legal rules become little more than Kabuki screens, strategically placed across a stage whose drama has a conclusion inscribed from the first act. In *The Thin Blue Line*, Errol Morris managed to put this human condition, the very definition of our dystopian politics, right there "in the *mise en scene* itself."<sup>75</sup> The result is a convergence of avant-garde and kitsch which even the youthful Clement Greenberg might have found reason to defend.

73. *Olmstead v. United States*, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

74. See Fricker, *Crime and Punishment in Dallas*, ABA J., July 1989, at 52.

75. See comment by Jean-Luc Godard, quoted in ROUD, *supra* note 67, at 129:

It may be true that one has to choose between ethics and aesthetics, but it is no less true that whichever one chooses, one will always find the other at the end of the road. For the very definition of the human condition should be in the *mise en scene* itself.



# The Lawyer as an Artist

Roger I. Abrams\*

## I. Introduction

The lawyer as an artist. It must seem an oxymoron. A lawyer searches for predictability, certainty, logical analysis, and clarity in thought and words. The artist seeks feeling, essence, grace, style and line. They have little in common. Even research on brain specialization suggests different parts of the brain are responsible for skills associated with legal thought and artistic expression.<sup>1</sup> Yet lawyers who are creative and imaginative may steer the law through uncharted waters. These lawyer-as-artists drive the law forward.

In this essay I will attempt to describe in broad strokes the training and work habits of lawyers and artists. Of course, the topic requires chapters, not paragraphs, but the outlines are instructive. I then describe those few lawyers who use artistic talents, some as practitioners to protect and promote their client interests, other as judges to reshape the way we think about legal issues, and still others as legal scholars to rethink the bases of our principled legal system. Those lawyers-as-artists are the creative generators of new doctrine, new voices, and, perhaps, legal redemption.

My colleague, Professor Michael Richmond, has written eloquently of how practicing lawyers can use the lessons of literature<sup>2</sup>, and there is a growing body of writing on the topic of educating lawyers through study of the work of expressive artists.<sup>3</sup> I find it difficult to

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1. The left hemisphere "specializes in logic" and language meaning; the right hemisphere "specializes in processing emotions" and "in perceiving the orientation of objects in space." Raymond, *Creative Works by Neurologically Impaired Artists Provide Scientists With a Window on the Brain*, 35 Chronicle of Higher Education, June 21, 1989, at A6.

2. Richmond, *Can Shakespeare Make You a Partner?*, 20 ST. MARY'S L.J. (1989); Richmond, *In Defense of Poesie* 57 FORDHAM L. REV. 901 (1989).

3. See, e.g., J.B. WHITE, *HERACLES' BOW* (1985); J. B. WHITE, *THE LEGAL IMAGINATION; STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973); Weisberg, *Coming of Age Some More: 'Law and Literature' Beyond the Cradle*, 13 NOVA L. REV. 107 (1988). See generally, Anshaw, *The Rebirth of the Renaissance*



argue with this approach.<sup>4</sup> Lawyers can use literature, as well as economics, social science and even common sense in carrying out their important societal functions. As I shall try to explain below, however, the lawyer-as-artist moves one step beyond the important work of the legal craftsman.

## II. The Lawyer

The law is a system of shared principles used to regulate human interaction. It is sustained by the ideal of certainty. Lawyers make the legal system operate because they have learned to predict how those shared principles will apply in given circumstances.<sup>5</sup> Lawyers take the chaos of the facts of life and order it within boundaries to create boxes of facts with understood meanings. Thus, one box of facts is a deed, another a binding contract, and a third a violation of the Constitution. New combinations of facts must fit within preestablished categories. Lawyers share a complex system of symbols and "the scattered prophecies of the past."<sup>6</sup> The law abhors surprises, and lawyers long for certainty in method and outcome.<sup>7</sup>

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*Lawyer*, 18 STUDENT LAWYER, Sept. 1989, at 16.

4. *But cf.* R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988). Garrett Epps perceptively describes the current variegated state of law school intellectualism in *Bar Wars*, 21 WASH. MONTHLY, May 1989, at 50.

5. It has been suggested:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is such much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). K. LLEWELLYN, *What officials do about disputes is . . . the law itself*, in THE BRAMBLE BUSH 9 (2d ed. 1951). See generally, H.L.A. HART, THE CONCEPT OF LAW (1961); L. FULLER, THE MORALITY OF LAW (2d ed. 1969).

6. Holmes, *supra* note 5, at 457.

7. Obviously, lawyers may disagree as to the "box" within which a set of facts fits. They agree on the potential set of boxes, however. A system of adjudica-



It is not unexpected then that law schools train attorneys—the priests of the legal system—in the image of that system. To think “like a lawyer” is to think along paths already trod by others. Lawyers are taught how to order disorganized facts into patterns, then compare these patterns with established ones and give them meaning and effect.<sup>8</sup>

A lawyer can draft a will in a way that will protect the testator’s intent. He or she knows what meaning courts have given to certain phrases, what formalities are required to assure authenticity, and what traps of ambiguity to avoid. The lawyer can advise a client whether there is a cause of action in simple negligence. Has there been an actionable failure of care, in other words, conduct actually and proximately causing injury to the plaintiff that fell below the standard of ordinary prudence? The overriding need is for certainty and uniformity of treatment.<sup>9</sup> Subjectivity is too uncertain a measure.<sup>10</sup>

The lesson of this simplified description is that lawyers and the legal system they administer could not operate in an environment where rights and obligations shift like the direction of the wind. No good lawyer promises his or her client that a strategy will always work. But unless the lawyer’s craft involves far more than random chance, it is not a legal system—it is a lottery or palm reading.

Traditional legal education equips lawyers to play their crucial role as ministers of justice. To this end, the essential task of a law school is to train initiates to sort facts and predict outcomes. Absent the common framework of ordered thinking, a legal system composed of lawyers acting as free and creative spirits could not exist. A bar of poets will not do.

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tion—courts, administrative tribunal, arbitration, for example—will then set the correct designation.

8. As J.B. White explains: Lawyers must “bring to bear the materials of the past upon a present question, remaking those materials as they do so, with the idea of creating a new set of relations in the present and the future.” J.B. WHITE, *HERACLES’ BOW* xiii (1985).

9. Of course, there is a role for discretion in legal analysis, but only within limited bounds. “[A]ll rules have a penumbra of uncertainty where the judge must chose between alternatives.” H.L.A. HART, *supra* note 5, at 12. A court can “oil” the system to account for compelling circumstances, but not in a way that risks the system itself.

10. Adherents of legal realism remind us of the human element in the legal process. It is naive to ignore the fact that humans must operate the system, but they attempt to do so in a way that seeks objectivity and predictability. It is no surprise that sometimes they fall short.



### III. The Artist

The artist translates feeling, emotion and perception into a medium others can perceive, a process very different from the lawyer's job of fact analysis, pattern comparison and prediction. The artist and the lawyer work at different ends of the thought spectrum, and their training reflects these essential differences.<sup>11</sup> Visual artists are trained in a systematic fashion to interpret what they see through "forms, lines, shades and colors."<sup>12</sup>

Artists see life with their senses and emotions. Van Gogh's main concern was his "freedom to express his emotions"<sup>13</sup> and his painting was only a "vessel for personal emotions."<sup>14</sup> Cezanne disregarded "the logic of external appearance for the sake of the inner logic of the design," his purpose being to "uncover the permanent qualities beneath the accidents of appearance."<sup>15</sup> Of course, at any given time in history there are artistic protocols, but these bounds prove elastic as creativity presses beyond established limits.<sup>16</sup> Modern visual artists, such as Jackson Pollock, have demonstrated the "continuity and expansiveness of the creative process."<sup>17</sup> "[P]rivate fantasy" and "the leap of the imagination," not reason and logic, control.<sup>18</sup> "Disparate moments of inspira-

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11. Of course, it is presumptuous for a lawyer to attempt to describe the training and work habits of an artist. Rather, it is best to rely on the thoughts of artists themselves and others who are expert in the field, in particular, E.H. Gombrich and H.W. Janson. Much of this analysis draws upon their classic works, E.H. GOMBRICH, *ART AND ILLUSION* (1956) and H.W. JANSON, *THE HISTORY OF ART* (1974).

12. JANSON, *supra* note 11, at 12.

13. *Id.* at 506.

14. *Id.* at 507.

15. *Id.* at 504-05.

16. The strict rules established by art academies of the Nineteenth Century, for example, did not deter Impressionists, Cubists and Expressionists from sharing their vision through art. See, e.g., W. Kennick, *Does Traditional Aesthetics Rest on a Mistake?* in *PROBLEMS IN CRITICISMS OF THE ARTS* (H.G. Duffield ed. 1968). "The assumption that . . . all works of art must possess some common nature, some distinctive set of characteristics which serves to separate Art from everything else . . . constitutes what I consider to be the first mistake on which traditional aesthetics rests." *Id.* at 193.

17. JANSON, *supra* note 11, at 546.

18. *Id.* at 525. Accord Pei, *The Nature of Urban Space*, in *MODERN CULTURE AND THE ARTS* (J.B. Hall & B. Ulanov eds. 1968). "[F]actors . . . relevant to the aesthetics of urban spaces . . . are hard to rationalize and harder yet to measure, for urban space is a medium that still remains illusive, immeasurable, and often more successfully approached by intuition than by logic and mathematics." *Id.* at 510.



tion determine what becomes the artist."<sup>19</sup>

H.W. Janson draws a very useful distinction, in his introduction to *History of Art*, between the work of an artist and that of a crafts-person.<sup>20</sup> The artist displays talent; the craftsperson shows only aptitude. The artist is unpredictable; the craftsperson is measurable, constant and specific. "Originality . . . distinguishes art from craft."<sup>21</sup> That same line can be used to distinguish the artist from the lawyer.<sup>22</sup>

A good lawyer can write an excellent brief to the court using all the skills of his or her craft. Well-chosen arguments, clear and concise prose, apt metaphors and even literary allusions will make the brief a fine piece of work—a work showing craft but not art.<sup>23</sup> For the lawyer to move from craft to art requires more, as we shall see, and it may be something law schools cannot teach at all.<sup>24</sup>

Training an artist first requires the development of skills and an appreciation of the past. The artist builds on a tradition, "the firm platform from which the artist makes his leap of the imagination."<sup>25</sup> Janson explains how an artist moves from craft to art:

Every budding artist starts out on the level of craft, by imitating

19. Danto, *What Becomes An Artist Most*, ARTNEWS, Nov. 1987, at 149.

20. JANSO, *supra* note 11, at 12.

21. *Id.*

22. JAMES B. WHITE, in the Introduction to *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* xxxiv-xxxv (1973), says that "law is not a science . . . but an art. And this course is directed to you as an artist." He posits that a lawyer is as free as an artist to imagine and discover. The legal system could not operate if every attorney functioned as White envisioned. Moreover, while the wonderful material covered in the growing number of law-and-literature courses enriches the work ways of the attorney, it does not, and should not, remove the practitioner from the mainstream of legal practice.

John Nivala recognized this distinction in his important and creative article, *From Bauhaus to Courthouse: An Essay on Educating for Practice of the Craft*, 19 U.N.M. L. REV. 237 (1989), comparing the work of Walter Gropius and Karl Llewellyn. Nivala begins, "The practice of law is, at its heart, a craft. In the hands of a gifted few, it may on occasion rise to artistry. But underlying the artistry is a mastery of the craft." *Id.* at 237.

23. It is here, for example, where the law-and-literature school can have the greatest impact, in the way traditional lawyers go about their tasks, with flair and erudition.

24. Sculptor Louise Nevelson thinks some artists are "born ready-made. It's not a matter of decision." Danto, *What Becomes An Artist Most*, ARTNEWS, Nov. 1987, at 149, 150. Perhaps it is the same with the lawyer-as-artist.

25. JANSO, *supra* note 11, at 15.



other works of art. In this way, he gradually absorbs the artistic tradition of his time and place until he has gained a firm footing in it. But only the truly gifted ever leave that stage of traditional competence and become creators in their own right. No one, after all, can be taught how to create; he can only be taught how to go through the motions of creating. If he has talent, he will eventually achieve the real thing.<sup>26</sup>

The artist creates what he or she perceives using various media. Michelangelo carved his stone "liberating the figure from the marble that imprisons it," and he was not always successful.<sup>27</sup> Others use canvas and paint, metal and fabric, but always imagination.<sup>28</sup> Through choosing from among levels of abstraction and fields of perception, artists offer their personal insights into life and the world.<sup>29</sup> Thus, the artistic process is one of selectivity in the re-creation of reality.<sup>30</sup>

The artist experiments because art is a process of creation.<sup>31</sup> Uncertainty is "the essence of the artist's work,"<sup>32</sup> and success is not always assured:

In the creative process, we are constantly faced with our own limitations. The impulses within us are forced through a tortured labyrinth, with opportunities for failure at every corner . . . . It do not think any real creativity can take place without acknowledging our limitations . . . . It is from the *actual* failure that one grows.<sup>33</sup>

26. *Id.* at 16.

27. JANSON, *supra* note 11, at 10.

28. "[T]he more imaginative the work, the more profoundly it allows us to share the artist's experience of the visible." J. BERGER, *WAYS OF SEEING* 10 (1972).

29. Cezanne said: "A minute in the world's life passes! To paint it in its reality, and forget everything for that! To become that minute, to be the sensitive plate . . . give the image of what we see, forgetting everything that has appeared before our time." *Id.* at 31.

30. A. RAND, *THE ROMANTIC MANIFESTO* 45 (1969).

31. In the words of Swiss artist Paul Klee:

I have tried pure drawing; I have tried pure chiaroscuro painting; and I have tried all sorts of experiments with color as these arose out of my meditations on the color wheel. . . . Sometimes I dream of a work of vast expanse which would encompass the whole realm of elements, objects, content and styles. Doubtless that will remain a dream, but it is good occasionally to imagine this possibility. . . .

Klee, *The Shaping Forces of the Artist*, in *MODERN CULTURE AND THE ARTS* 13 (J.B. Hall & B. Ulanov eds. 1968).

32. JANSON, *supra* note 11, at 11.

33. Croghan, *The Psychology of Art*, *AMERICAN ARTIST*, Aug. 1988, at 18, 82.



But art is successful in telling us "which aspects of . . . existence are to be regarded as essential, significant, important."<sup>34</sup> The artist teaches us how to look at our existence.<sup>35</sup>

#### IV. The Lawyer As Artist

In each generation, a few lawyers move beyond craft into art. They do so not to consciously break the bonds of prior protocols of practice, but to further the interests of the clients they represent. They might not even appreciate that they possess these rare talents. The lawyer-as-artist perceives reality, interprets it, and then uses all tools available—be they traditional or newly invented—to pursue his or her goals. The lawyer-as-artist sees the endless possibilities of creative lawyering, drawing feelings from the emotional and creative side of life.<sup>36</sup> It can be said that the lawyer-as-artist paints on a blank canvas with a palette of many colors.

How then does this lawyer-as-artist function? If the concept of lawyer-as-artist is to have meaning, candidates must know the job description. Much like the artist trained first as a craftsperson, the lawyer-as-artist is schooled in the ways of established law and practice. The lawyer-as-artist must know what precedent commands and how good lawyers carry on their craft.<sup>37</sup> As an artist, however, he or she can

34. A. RAND, *supra* note 30, at 45.

35. This description of the artist is as oversimplified as that of the lawyer, and it may rely too heavily on outmoded idealism. Many current artists have a much less grand conception of their work. Sculptor Richard Serra, for example, "adamantly denies his sculptures possess psychological content," let alone feeling, emotion and perception. When asked whether his works "address traditional themes like nature and death and transcendence," Serra responds: "That's a lot of literary claptrap!" Solomon, *Richard Serra, Our Most Notorious Sculptor*, N.Y. Times, Oct. 8, 1989, § 6 (Magazine), at 39, 74. See also Serra, *'Tilted Arc' Destroyed*, 14 NOVA L. REV. 385 (1990). Musicologists reflect this view as well.

Composing (in the early 20th Century) was, after all, just another manufacturing process aimed at satisfying external demands. So the composer should give up all the 'highfalutin' claims to self expression—why should the listener have any interest in the composer's 'inner-psyche state'?—and view himself once again as an honest craftsman . . .

A. JANIK AND S. TOULMIN, *W. H. GENSTEIN'S VIENNA* 251 (1973).

36. For example, Justice Brennan notes that lawyers must view their profession as a socially creative skill and not as a science. Brennan, *What's Ahead for the New Lawyer?* 47 U. PITT. L. REV. 705 (1986).

37. A critical weakness in legal writing, for example, is not that attorneys lack an artistic prose style, but instead, "[the] problem is that lawyers cannot write clearly



rethink unbounded. Where might we insert ordinary feelings of everyday people, discard old ways and substitute new ones more in tune with human values? Where might inventive use of nontraditional means of advocacy effect change? The lawyer-as-artist acts as a bridge between two distinct cultures—the lawyering culture that is and the lawyering culture that could be.

Does the lawyer-as-artist write contracts? Certainly, but those papers might not sound like familiar documents. They might contain plain English words that ordinary people could understand. That might not seem to be a great breakthrough now, but the first lawyers who tore away at legalisms to enhance understanding were artists of the first rank.

Does the lawyer-as-artist litigate? He or she does in interesting ways, using untraditional methods. A few examples will suffice. Louis Brandeis was a great lawyer-artist. His famous brief in *Muller v. Oregon*<sup>38</sup> drew upon sociological data, an astounding break from lawyering precedent.<sup>39</sup> Lawyers who filed an amicus brief in behalf of non-English speaking Chinese children in *Lau v. Nichols*<sup>40</sup> wanted to explain to the Supreme Court the importance of bilingual education. How could they demonstrate to the Justices what it would be like for a student to attempt to learn in a class taught in a foreign language he did not understand? Attorney J. Harold Flannery, now a Massachusetts state trial judge, creatively proposed writing a footnote in the brief in Chinese, certainly a dramatic example of artistic lawyering.

Other lawyers-as-artists have moved the law along as legal com-

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unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of law.” Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 621 (1986).

38. 208 U.S. 412 (1908).

39. Similarly, Thurgood Marshall’s brief in *Brown v. Board of Education*, 347 U.S. 483 (1954) used psychological data to attack segregation and the amicus brief filed by a pro-choice group in the recent abortion case, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), related stories of women who had had abortions in order to support its position that women should retain control over their own bodies.

Not all lawyer-artists are well known. See, Salerno, *The Toxic World of Allan Kanner*, 75 A.B.A. J. 58 (July 1989). The late Judge Robert Vance of the Eleventh Circuit described his former law clerk: “Kanner’s sort of like a shooting star. . . . He flashes in every direction, but he has a brilliant mind. He capable of original thought. Now hear what I’m saying: He is capable of absolutely original thought. There’s not one person in a thousand you can say that about.” *Id.*



mentators. All academics have their favorite ground-breaking article.<sup>41</sup> Even law students have participated. Ms. Naomi Sheiner as a student at Fordham Law School<sup>42</sup> drafted a law review note proposing a revolutionary method for allocating loss in the toxic tort case.<sup>43</sup> Justice Mosk and a majority of the California Supreme Court found her market share liability theory meritorious<sup>44</sup> and many other courts followed suit.<sup>45</sup> She changed the direction of the law.

Judges too, can be artists—Cardozo, Traynor, Douglas<sup>46</sup>, to name a few. Their thoughtful writing challenged their generation of lawyers. Lawyers-as-artists working as practitioners, scholars and judges may not always find the right answers, but they search for them in new and creative ways. They reach out beyond traditional notions of law and policy to move the law to better serve society.

As suggested above, it may not be possible—or even wise—for law schools to train lawyers-as-artists. Dean Soia Mentschikoff thought otherwise. In her Robert S. Marx Lecture delivered at the University of Cincinnati College of Law in 1981, Dean Mentschikoff called on law schools to train artists of the law. “There are three necessary ingredients to the study of law as a liberal art: technical competency; intellectual integrity . . . ; and the spiritual aspect, or the quest of the art for service and beauty.”<sup>47</sup> She recognized that it would not be simple for law schools to achieve this goal; “Neither rainbows nor the pot of gold

41. My personal choice is a paper written by Dean Harry Shulman of Yale Law School, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955), which explained for the first time the proper function of labor arbitration, my field of interest. Again Louis Brandeis must be ranked high based on his article co-authored work with Dean Samuel D. Warren that first described a right of privacy protected against tortious invasion: *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

42. Ms. Sheiner is now an Assistant United States Attorney in New York City.

43. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

44. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

45. See generally Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987).

46. My selection of judge-artists reveal personal preferences. I would add Judge Frank M. Coffin of the First Circuit, for whom I clerked. Judge Coffin is an artist both in his opinions and in his workshop. His creative spirit has energized a generation of clerks. Some might also argue with justification that Judge Richard Posner and other judicial adherents to the law-and-economic school should be added to the list. Their greatest impact on the development of the law lies ahead.

47. Mentschikoff & Stotsky, *Law—The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 742 (1986).



can be obtained, nor would be worth the having if it were. But the search is good."<sup>48</sup> Hers was a glorious vision.<sup>49</sup>

## V. Conclusion

Lawyers and artists are different kinds of people, but a lawyer with an artist's vision may succeed in driving the legal system forward when a good craftsperson lawyer would not. Legal education trains traditional practitioners to pursue the calling, and it must continue to do so. Without the cadre of competent, dependable professionals, the legal system would fail to serve its important structural functions. But we must also maintain an educational environment where some few lawyers can become artists of the law. The lawyer-as-artist serves an essential function within our profession, to rethink those principles we have come to see as fixed and immutable and to reshape the ways of the practice.

Art is human creativity and the law serves as its protector, as this fine Symposium demonstrates. Without law, art cannot perform its purpose to help us rejoice in the human spirit and expand the boundaries of our perceptions. The best lawyer-craftspersons allow the law to serve as an effective guidepost for peaceful human interaction, and, in turn, allow the artist to humanize us all.

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48. *Id.* at 744-45.

49. Recently, there has been a corresponding call from Professor Carol Becker of the School of the Art Institute of Chicago to improve art students' analytic skills. Becker, *Art Students Require a Truly Rigorous Core Curriculum, to Help them Develop Intellectually as Well as Artistically*, 35 CHRON. HIGH. EDUC., June 21, 1989, at B1.