1-1-2010

Imagining the Law: Art

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Recommended Citation

Farley, Christine Haight. "Imagining the Law." In Law and the Humanities: An Introduction, edited by Austin Sarat, Matthew Anderson, and Cathrine O. Frank, 292-312. New York: Cambridge University Press, 2010.

Law and the Humanities

AN INTRODUCTION

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521899055

First published 2010

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Law and the humanities : an introduction / edited by Austin Sarat,
Matthew Anderson, Cathrine O. Frank.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-521-89905-5 (hardback)
1. Law and the humanities. I. Sarat, Austin. II. Anderson, Matthew,
III. Frank, Cathrine O.
K487.H86L39 2009
344'.097 – dc22 2009019749

ISBN 978-0-521-89905-5 Hardback

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Imagining the Law

Art

Christine Haight Farley[1]

Street photographer Philip-Lorca diCorcia took candid images of passers on the streets of New York City without their knowledge. From twenty feet away, he operated a system of strobe lights and a camera attached to construction scaffolding aimed toward a fixed point on the sidewalk. Eighty-four-year-old Erno Nussenzweig, a retired diamond merchant from New Jersey, was one such passerby who had his image captured. DiCorcia selected Nussenzweig's image, along with sixteen others of the numerous photographs taken over a two-year period, edited them and blew them up into 48- by 60-inch posters, which he sold for between $20,000 and $30,000 each. Nussenzweig, as an Orthodox Hasidic Jew and member of the Klausenberg Sect – which was nearly eliminated during the Holocaust – possessed a deeply held religious conviction that diCorcia's use of his image violated the second commandment's prohibition against graven images. Nussenzweig sued diCorcia for invasion of privacy.

In dismissing the suit in 2006, a New York court determined the photograph in question to be "art," and thus immune from such challenges.[2] In so concluding, however, the case prompts further inquiries. How was the court able to make this determination when so many art experts are confounded by the question of what is art? What guidance, if any, does the law offer in making these determinations? Should these determinations be made by law? Has the law adopted an aesthetic theory? How does law appreciate the creative acts of the photographer? Does law appreciate the power of the image and should it police that power? These are some of the questions provoked be the curious interactions between art and law that some scholars have sought to explore.

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[2] *Nussenzweig v. diCorcia*, 11 Misc.3d 1051(A), 814 N.Y.S.2d 891 (N.Y. Sup. 2006).

Rather than comprehensively surveying this broad field, this chapter will indicate the kind of scholarly work that has been done at the various points where law and art meet. It first suggests the different areas of law that regulate – protect or censor – art. I then tease out the major themes and subjects that dominate art law. The focus, however, is on the way that law imagines art – even the status of images within law, and the way that law is imagined in art.

Art is in fact regulated in multiple ways – it is not apart from the law. The interactions between law and art are spread across a variety of legal disciplines including contract law, tort law, constitutional law, criminal law, intellectual property law, tax law, commercial law, and international law. Within these domains law regulates the international movement of art during times of war and peace and is utilized to preserve art and cultural property. Law regulates artists' business relationships with commissioners, sellers, and purchasers and is brought to bear on museums. Of course the state is present here too when it censors art, regulates obscenity, and selectively funds public art. Law seeks to be instrumental in our cultural policies by rewarding creation and prohibiting copying.

Thus, there is no body of law that is "art law"; rather, the law encounters art as random, seemingly isolated events. Any discussion of art law, therefore, is usually focused on the treatment of art within one area of the law. As used in this chapter, "art law" will refer to the broad array of legal issues raised by art, artists, and the art world.

The subject of art law is inherently cross-disciplinary because it is situated between disciplines. Of course, art itself is of interest and concern to a variety of disciplines, implicating the disciplines of anthropology, art history, archeology, museum studies, arts administration, history, and philosophy, among others. When law is included, the list of other disciplinary approaches to consider also includes criminology, economics, and development studies, among others. The multidisciplinary approaches used by researchers and decision makers are recognition that the problems that art law disputes raise are too complex for a single disciplinary approach.

Spread as it is across so many diverse areas of the law, art law, as a field of study appears haphazard and incoherent. At first glance, it would seem not to possess any unifying themes that could bring it together in some meaningful or useful way. A casual observer may wonder what art law is other than the study of what happens to art in various areas of the law. As Stephen Weill, one of the early practitioners of art law, stated, art law is a fascinating subject to study if only because of the "extraordinary dramatis personae by which [art objects] are surrounded."[3] However it is not the artists and collectors who are the most interesting subjects in these legal interactions. It is the art and our relationship with art that is a worthy subject of scholarly attention.

[3] Stephen E. Weil, "Introduction: Some Thoughts on 'Art Law,'" 85 *Dickinson Law Review* 555, 558 (1980).

Art is different. As a society, we imbue artworks and cultural objects with our values and aspirations in a way that is different from our relationship with all other things, save perhaps sports teams. We reflect onto art objects fundamental attitudes about culture and society. These reactions to art occur regularly and seem natural. For the most part they go unexamined; however, legal determinations about art often push these ideas about art to the surface. When the object of the legal dispute happens to be art, participants tend to argue that artworks should be subject to special legal rules or that standard legal rules should be given particular interpretations when they are applied to artworks. At base, the only justification for these special approaches is that art occupies a different and unique space in our society vis à vis other objects and practices.

Relative to other subjects of Law and Humanities research, scholarship on law and art is a fairly recent development: It has a life of less than fifty years. Although there are some early scattered accounts of particular issues in art law, the 1970s saw a sharp increase in scholarly attention to the special problems of the art world.[4] In 1971, *The Visual Artist and the Law* treatise was published defining the field for practitioners.[5] In 1979, Stanford professors John Merryman and Albert Elsen first published *Law, Ethics, and the Visual Arts*, a more scholarly survey of the issues presented when law and art collide.[6] This work opened up the field to further study and this attention by an established legal scholar and an established humanities scholar gave gravitas to the subject. Following this work, art law has gained an increasing acceptance as a valid course of study in law schools, graduate programs, and undergraduate studies. More recently, art law has received increased attention from practitioners, students, and scholars due in part to the enormous growth of the art market – both the legal investment market and the multibillion dollar annual international illicit trade. In addition to the financial high stakes, the current art markets arouse interest by raising questions about history, ownership, and cultural identities as they reveal narratives such as the restitution of Nazi-looted art and poor, "art-rich" countries exporting art to rich, "art-poor" countries.

Because the intersection of art and law is so rich and interesting, many published works in the last thirty years provide accounts of what happens when the law addresses art. For the most part these accounts are not theoretically based, and they are not addressed to larger phenomena in law. This chapter seeks to organize the scholarship on law and art under central themes that have concerned scholars (and only

4 Franklin Feldman and Stephen E. Weil, *Art Works: Law, Policy, Practice* (New York: Practicing Law Institute 1974); Scott Hodes, *What Every Artist and Collector Should Know About the Law* (New York: E. P. Dutton 1974).

5 *The Visual Artist and the Law* (New York: Associated Council of the Arts, 1971).

6 John Henry Merryman and Albert Elsen, *Law, Ethics, and the Visual Arts* (Philadelphia: University of Philadelphia Press, 1979).

scholarship that can be so organized is included): studies of the law as art, the law of art, the law of creativity, and the collision of art and law. Because of the impossibility of providing an exhaustive survey, this chapter instead suggests the most significant branches, texts, and authors in the field. I then concentrate on a few key areas of inquiry: law and its relationship to creative cultural practices and, more specifically, aesthetic judgments rendered in the domain of law and art.

The Law of Art and the Art of Law

This chapter will be devoted mostly to scholarship on the law's treatment of art or the law of art. I pause here, however, to note that some scholars have chosen to look at the relationship from the opposite direction: at the art of law. This body of work can further be divided into scholarship that looks at law as an artistic form, and scholarship that investigates art's depiction of law and finally, law's fascination with the image.

On the relationship between art and law, some scholars have suggested that law is a form of art.[7] Akin to a law and literature analysis, some scholars argue that what lawyers and artists do is the same. James Boyd White, for example, refers to the legal practitioner "as an artist" and certain legal problems as "high art."[8] Those who assert that there is an aesthetic value in the work of lawyers consider the use of rhetoric only a starting point. Oftentimes, legal writing is so well crafted and stylized that it becomes an art form. In this vein, Nathaniel Berman compares legal modernism and artistic modernism as expressed in Pablo Picasso's Les Demoiselles d'Avignon.[9] Thus some easily conclude that law is "an artistic venture, and the lawyers' craft embodies the aesthetic principles that define beauty in art."[10] Beyond rhetoric, there

[7] See, e.g., Gary Bagnall, *Law as Art* (Aldershot: Dartmouth Publishing, 1996); David Kennedy, "Critical Legal Theory" in *Law and the Arts* 124, Susan Tiefenbrun, ed. (Westport: Greenwood Press, 1999).

[8] James Boyd White, *The Legal Imagination*, xxv (Chicago, University of Chicago Press 1985). See also Alfred C. Aman, Jr., "Celebrating Law and the Arts," 2 *Green Bag* 2d 129, 130 (1999). Apparently, Holmes disagreed stating, "Law is not the place for the artist or the poet." Daniel J. Kornstein, "The Double Life of Wallace Stevens: Is Law Ever the, 'Necessary Angel,' of Creative Art?," 41 *New York Law School Law Review* 1187, 1193 (1997) (as quoted in Oliver Wendell Holmes, Jr., The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University, February 17, 1886, in *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes Jr.*, 218, 218, Richard A. Posner, ed. (1992)).

[9] Nathaniel Berman, "Modernism, Nationalism, and the Rhetoric of Reconstruction," 4 *Yale Journal of Law and Humanities* 351, 358–60 (1992).

[10] Kara Abramson, "'Art for a Better Life': A New Image of American Legal Education," 2006 *Brigham Young University Educucation and Law Journal* 227, 252 (2006). Those who have written about the distinctions between law and art tend to reinforce conventional and dichotomous images of both. For instance, Wendy Nicole Duong argues that art is creative and therefore not as concerned with arriving at a theory or conceptualization as law is. Art is prompted by emotion, whereas law is prompted by knowledge. Artistic creation is a subconscious, often spontaneous, impulse, whereas lawyers are

is metaphor, form, imagery, and symbolism,[11] as well as simplicity, elegance, and coherence.[12]

Perhaps more significant in pushing the argument that law itself is an aesthetic creation is the scholarship that investigates the aesthetic attributes of law. Here scholars discern aesthetic arrangements in law. Pierre Schlag, for example, reveals recurring forms in law that shape its understanding and practice.[13] Related is the work that explores the structural similarities between art and law in projecting their own systems of ordering. These scholars also push the analogy in likening law to art in the way both bring a sense of order to human experience.[14]

Other aspects of law have been considered as an art form such as the performance of law as art.[15] Here scholars have looked at the physical space, décor, and other visual cues that contribute to the symbol and ritual of the public practice of law.[16] The architecture of legal institutions, especially the stylized – usually neoclassical – buildings that house law courts, is examined as nonneutral space through which the law simultaneously derives its power, distance, and authority. Thus, these scholars analyze the court house as a ceremonial monument dedicated to an ideological function. The totality of art and architecture organizes the visitor's experience into an activity comparable to a religious ritual.[17] Its decorative language can be seen as functioning as an iconographic program. The significance of these programs lies in their ability to evoke a mythic or historical past that informs and justifies the values celebrated in the ceremonial space. In this light, it is difficult to imagine how such an actively constructed environment can be seen as neutral space.

For example, David Evans analyzes the architecture of the Inns of Court by using concepts of bodily disunity derived from psychoanalysis, and Linda Mulcahy looks at

trained to be deliberative, logical, and rational. Wendy Nicole Duong, "Law is Law and Art is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Processes," 15 *Southern California Interdisciplinary Law Journal* 20–4 (2005). This theme of art as law's opposite will be taken up later.

11 Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice*, ix (Berkeley: University of California Press, 2000).

12 Janice Toran, "'Tis a Gift to be Simple: Aesthetics and Procedural Reform," 89 *Michigan Law Review* 352 (1990).

13 Pierre Schlag, "The Aesthetics of American Law," 115 *Harvard Law Review* 1047 (2002). See also Brian E. Butler, "Aesthetics and American Law," 27 *Legal Studies Forum* 203 (2083).

14 Hilde Hein, "Law and Order in Art and Law," *Law and Literature Perspectives*, Bruce L. Rockwood ed. (New York: Peter Lang Publishing, 1996) at 113; Kornstein, supra note 8, at 1240.

15 See, e.g., Costas Douzinas, "The Legality of the Image," 63 *Modern Law Review* 813 (2000); Costas Douzinas, "Law's Fear of the Image: Whistler v. Ruskin," 19 *Art History* 353 (1996).

16 See Peter Goodrich, "The Iconography of Nothing: Blank Spaces and the Representation of Law in Edward VI and the Pope," *Law and the Image: The Authority of Law and the Aesthetics of Law*, Costas Douzinas and Lynda Neal, eds., 89–114, at 206 (Chicago: University of Chicago Press, 1999); Peter Winn "Legal Ritual," *Law and Aesthetics*, Roberta Kevelson, ed., 401–42 (New York: Peter Lang Publishing, 1992).

17 The word basilica was first used to denote a courthouse, as in the basilica in Pompeii.

the design of modern courtrooms and its effect on the notion of participatory justice.[18] Piyel Haldar describes how the ornamental aspects of the courtroom represent the rhetorical category of the English common law.[19] Katherine Fischer Taylor's analysis of France's 1849 Festival of Justice postulates that it was necessary for the republic to define visually postrevolutionary justice.[20] Jonathan Rosenbloom analyzes trends in courtroom and courthouse architecture in the United States as a reflection of American legal ideology, finding that its continuity demonstrates a durability in American legal culture but that recent changes to a more corporate architecture show that public perceptions of the legal system are changing.[21]

Another aspect of the visual ceremony of law that has been studied is judicial portraiture. The conventions used within the genre of the judicial portrait include large-scale depictions, ascending perspective, ceremonial dark robes, and large, folded hands. Robert Ferguson's reading of the portrait of Justice Holmes reveals how these common images can be built up like a legal argument, and yet appear completely noncontroversial.[22]

A related, and perhaps broader, scholarly concern is how law is depicted in art. Here, the visible symbols of the authority of law are analyzed as the iconography of law.[23] As with the previous scholarship, some scholars are interested in examining the works of art used in legal spaces to illuminate the ways in which legal systems have relied on images to consolidate their power and project their authority within concrete legal spaces, whereas others explore what pictures of law reveal about perceptions of law at the time the picture was produced.[24]

18 See, e.g., David Evans, "Theatre of Deferral: The Image of the Law and the Architecture of the Inns of Court," 10 *Law Critique* 1 (1999); Linda Mulcahy, "Architects of Justice: The Politics of Courtroom Design," 16 *Social and Legal Studies* 383 (2007).

19 See e.g., Piyel Haldar, "The Function of the Ornament in Quintilian, Alberti, and Court Architecture," *Law and the Image: The Authority of Art and the Aesthetics of Law*, Costas Douzinas and Lynda Nead eds., 117–36 (Chicago: University of Chicago Press, 1999).

20 Katherine Fischer Taylor, "The Festival of Justice: Paris, 1849," *Law and the Image: The Authority of Art and the Aesthetics of Law*, Costas Douzinas and Lynda Nead, eds., 137–77 (Chicago: University of Chicago Press, 1999).

21 Jonathan D. Rosenbloom, "Social Ideology as Seen Through Courtroom and Courthouse Architecture," 22 *Columbia-VLA Journal of Law and the Arts* 463 (1998).

22 Robert A. Ferguson, "Holmes and the Judicial Figure," 55 *University of Chicago Law Review* 506 (1988); Mitchel de S.-O.-l'E. Lasser, "Judicial (Self-) Portraits: Judicial Discourse in the French Legal System," 104 *Yale Law Journal* 1325 (1995).

23 See, e.g., R. J. Schoeck, "The Aesthetics of the Law," 28 *Am. J. Juris.* 46 (1983); Bernard S. Jackson, "Envisaging Law," 7 *International Journal for the Semiotics of Law* 311 (1994).

24 Ana Laurel Nettel, "The Power of Image and the Image of Power: The Case of Law," 21 *Word and Image* 136 (2005). Nancy Illman Meyers also looks at artistic representations of justice and the history of law that can be found in art. Nancy Illman Meyers, "A Painting and Accompanying Essay: Painting the Law," 14 *Cardozo Arts and Entertainment Law Journal* 397 (1996). Ultimately the author concludes that law and art have long been linked together because art draws on law for inspiration but the author proposes that, by drawing on art, law could have an even stronger voice.

Foremost is the ubiquitous, large, female form of Justice, draped in white robes, eyes blindfolded and armed with a sword in one hand and scales in the other, who has been the subject of much scholarly attention. Cathleen Burnett, for instance, explores how the deliberate use of the figure of the Greek goddess relates to the generalized notion of justice.[25] Dennis Curtis and Judith Resnik trace the strategic deployment and didactic power of the imagery of Justice from a wide-eyed Goddess to today's blindfolded protector of impartiality before the law.[26] After assessing the virtues and vices of the blindness of justice – that it works toward partiality but eliminates particularity – Martin Jay suggests a creative tension between a seeing and a blind Justice.[27]

The interplay between law and art is more complicated than the use of art as an instrument of law's force. If the law has recognized the potential for art, it has also recognized its danger. No one better expresses the law's long-standing ambiguous relationship with imagery than Costas Douzinas:

> Law's deep ambiguity to images remains intact. The power of spiritual, edifying icons is celebrated and put into effect in every courtroom, in the wigs, the robes, and the other theatrical paraphernalia of legal performance and in the images of sovereignty and justice that adorn our public buildings. The fear of idols is encountered in the renunciation of rhetoric and imagery in legal doctrine and theory, in the claim that reason alone without the contamination of eloquence and passion, oratorical excess and casuistry can deliver justice, in the disassociation between law and aesthetics symbolized by the defeat of images. Finally, fear of idolatry is seen in the denunciation of those figures of seduction and corruption: women, jesters, children – those who do not think like others.[28]

Thus, according to Douzinas, the law possesses a conflicting view of the image as both something to restrict, but also something that can be used to maintain the "social bond."

Protecting Culture

If there is any dominant legal policy that accounts for the myriad interactions between law and art, it is that the law generally promotes the production and preservation of art. The logic is that the more art that exists in a society, the better, and so

[25] Cathleen Burnett, "Justice: Myth and Symbol," 11 *Legal Studies Forum* (1987).

[26] Dennis E. Curtis and Judith Resnik, "Images of Justice," 96 *Yale Law Journal* 1727 (1987).

[27] Martin Jay, "Must Justice Be Blind? The Challenge of Images to the Law," *Law and the Image: The Authority of Art and the Aesthetics of Law*, Costas Douzinas and Lynda Nead, eds., 19 (Chicago: University of Chicago Press, 1999).

[28] Costas Douzinas, "The Legality of the Image," 63 *Modern Law Review* 813–31 (2000); Costas Douzinas, "Law's Fear of the Image: Whistler v. Ruskin," 19 *Art History* 353, 387 (1996).

its creation should be promoted and its integrity protected, rather than impeded by law.[29]

Although the law may seek to promote creativity overall, each branch of law that addresses art has its own distinct objectives, which are usually not articulated but implied and may involve a diverse set of concerns such as public morality, commercial morality, stabilizing meaning, or quieting title.[30] These objectives may be unique to art disputes or they may be more generally applicable to disputes in that area of law. If the latter, the presence of art will invariably add significance to the law's objective.

In recent years, the interest in cultural property, artifacts, and ancient art has increased dramatically. "Cultural property" refers to any items that have "artistic, archaeological, ethnological, or historical interest."[31] With this newfound appreciation for cultural property and ancient art have also come a variety of problems: black markets rooted in the looting, theft, and illegal trade of antiquities. In response, legal academics have formulated various approaches and theories in their attempt to affect policy, which would curb and eventually terminate the illicit trade of cultural property. The world of legal academia is largely split, however, on how cultural property should be treated, and the scholarship in this field often yields opposing or contradictory approaches in how to deal with cultural property and the issues surrounding it.

The world of cultural property law was largely defined first by John Henry Merryman, one of the founding fathers of art law.[32] In principally dealing with the restitution of cultural objects, he etched out the two schools of thought in this area: cultural internationalism and cultural nationalism. Cultural nationalism is premised in the notion that cultural property belongs "at the place, or among the descendants of the culture of its origin."[33] Conversely, the cultural internationalist school subscribes to the notion that the trade of cultural property should emulate that of any other goods, and in turn, should be freely traded.[34] Further, cultural

[29] See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'").

[30] See, e.g., Paul Kearns, *The Legal Concept of Art* 58 (Oxford: Hart Publications, 1998) (discussing the interplay of art and the objectives of law, where an artist's objective is to create freely, the objectives of the law are to protect and promote public morality).

[31] John Henry Merryman, "Two Ways of Thinking About Cultural Property," 80 *American Journal of International Law* 831, 831 (1986).

[32] See, e.g., John Henry Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art, and Law* (Boston: Kluwer Law International, 2000).

[33] John Henry Merryman, *Law, Ethics, and the Visual Arts* 5th ed., 342–3 (Alphen aan den Rijn: Kluwer Law International, 2007).

[34] John Henry Merryman, "Two Ways of Thinking About Cultural Property," 80 *American Journal of International Law* (1986).

property should be enjoyed and viewed by all cultures, as art belongs to all people as a common heritage.

Today, Patty Gerstenblith's scholarship dominates this field.[35] Arguing from what Merryman describes as a cultural nationalist perspective, Gerstenblith suggests that there is a public interest in restitution because theft and looting of antiquities results in the loss of context of the object, which results in a loss of valuable information archaeologists use to study the characteristics of a society, and undocumented antiquities allow for fakes and forgeries to inhabit archival spaces.[36] Gerstenblith argues for the restitution of antiquities to the original owners and for export restrictions for cultural property to curb looting. Conversely, Gerstenblith's critics claim that restitution is not in the public interest because encouraging cultural objects to remain in the country of origin is anti-internationalist.

To delve deeper into the competing claims of the cultural internationalist and nationalist theories, Derek Gillman looks at the philosophical underpinnings of cultural heritage by considering the place and value of culture in both ancient and modern societies.[37] Looking at ways in which the idea of heritage has been constructed, he notes the importance of cultural roles and narratives, which often exclude as much as they include. This leads to a consideration of how value is assigned to cultural activities and objects. Arguments for the preservation of heritage now provide the grounds for controlling both the export of works of art and what may be done to historic buildings. In democratic nations, periodic clashes between "heritage" and private rights reflect an ongoing tension within public policy about the respective importance of communities and individuals.[38]

Law and Creativity

One area of law that has frequent interactions with artworks is intellectual property law. Here the law is more explicit about its objective. Copyright law in particular seeks to promote the creation of new artworks by incentivizing that activity through the offer of legal protections that promise economic rewards.

The interactions between art and law here therefore elucidate how law understands and defines creativity. Even as the law seeks to promote creativity, however,

[35] See, e.g., Patty Gerstenblith, "The Public Interest in the Restitution of Cultural Objects," 16 *Connecticut Journal of International Law* 197 (2001).

[36] Patty Gerstenblith, "The Public Interest in the Restitution of Cultural Objects," 16 *Connecticut Journal of International Law* 197, 198–200 (2001).

[37] Derek Gillman, *The Idea of Cultural Heritage* (Leicester: Institute of Art and Law, 2006).

[38] The issue of cultural property, the debates, and conflicting perspectives that it has incited continue to produce scholarship in the field of art law. For a condensed spectrum of the literature and thought in this area, Kate Fitz Gibbon describes the expansion of cultural property law and case law with regard to ownership of foreign art by museums and private collectors in her book *Who Owns the Past? Cultural Policy, Cultural Property, and the Law* (New Brunswick: Rutgers University Press, 2005).

numerous scholars have noted that law's relationship with this concept is ambiguous. For example, Roberta Rosenthal Kwall, who is primarily concerned with artists' moral rights, argues that artistic creativity and innovation are intrinsically motivated, but that the law fails to recognize this intrinsic dimension and only recognizes the resulting creation.[39] Kwall maintains that artists create out of inspirational (even spiritual) motivation. The law, however, based as it is on the concept of natural law and utilitarianism, deemphasizes the intrinsic process of creation and instead emphasizes the idea of economic reward.[40]

For others, the problem is less that the law is ineffective at promoting creativity, but that it demands a particular conception of creativity, one in which creativity is presented as a constant and stable subject[41] and thus suffers from "a certain dullness of meaning."[42] This is in contrast to what modern and postmodern artists have done in challenging and reconstructing the concept of creativity.

Additional critiques of law's concept of creativity are aimed at what its standard requires. The critique, in short, is that law sets the creativity bar too high. Although copyright law demands only a "modicum of creativity"[43] and explicitly refuses to distinguish between high and low authorship, at base in demanding originality, it requires independent creation. As a result, copying becomes an activity denigrated by law, whereas in art, copying is ever present and can clearly be detected in chains of acknowledged masterpieces. Thus for artists, copying is a means connecting the present with a past and then with the future, and "[t]o deny artists the right to copy is to deny their right to be creative."[44]

For many, the restrictions that the law imposes by way of its creativity threshold are unjustifiable as they constrain creative, cultural practices. These scholars argue that intellectual property law fails to take account of the development of contemporary art practices. These practices then serve to remind us that copyright law is unable to accommodate new forms of cultural expression.[45] For instance, in conceptual art, where the idea itself constitutes the work, and the work may be the result of a simple

[39] Roberta Rosenthal Kwall, "Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul," 81 *Notre Dame Law Review* 1945 (2006). See also Jane C. Ginsburg, "The Right to Claim Authorship in U.S. Copyright and Trademark Law," 41 *Houston Law Review* 263 (2004).

[40] Roberta Rosenthal Kwall, "Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul," 81 *Notre Dame Law Review* 1945, 1983 (2006).

[41] *The Construction of Authorship: Textual Appropriation in Law and Literature*, Martha Woodmansee and Peter Jaszi, eds. (Durham: Duke University Press, 1994).

[42] Kathy Bowrey, "Who's Painting Copyright's History?," *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 272.

[43] *Feist Publications, Inc., v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991).

[44] Karsten Schubert, "Raphael's Shadow: On Copying and Creativity," *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 372.

[45] Johnson Okpaluba, "Appropriation Art: Fair Use or Foul?," *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 200.

choice, law's creativity standard is unaccommodating.[46] Another contemporary art practice that is often used by scholars to bring law's creativity standard into focus is appropriation art. Appropriation artists explicitly challenge conventional notions of authenticity and originality. These moments in art history announce the obsolescence of the legal conception of creativity. Rather than incentivizing this art, in some instances the law forbids it. Thus critics here urge that the law needs to better understand the creative process and adopt a more nuanced understanding of the nature of cultural transformation. Otherwise, the law's mode of resolving disputes involving art such as appropriation art amounts to "objectifying and reifying cultural forms – freezing the connotations of signs and symbols and fencing off fields of cultural meaning with 'no trespassing' signs."[47] Obviously law's ability to stabilize the meaning of cultural forms in this way may be seen as a boon for certain owners, but it creates a tension with its objective to promote cultural production.

Some scholars suggest that the law ought to be able to sort out creative copying from noncreative copying.[48] Paul Edward Geller proposes that rather than a total ban on copying, the law consider "a spectrum of copying: starting with mechanical or rote copying, graduating to knowledgeable reworking and culminating in innovative recasting." This proposal, however, assumes that a simple tweaking of doctrine is all that is necessary to open law to the more nuanced and variable understanding of creation that art requires.

These critiques demonstrate the apparent limits to the legal protection of contemporary art forms. For critics such as John Carlin, copyright law constrains the impulse of modern artists to use, refer, quote, challenge, and praise the imagery that pervades the visual environment, thus placing unacceptable limitations upon artistic activity and free expression.[49] These constraints frustrate the law's apparent purpose. According to Susan Scafidi, "The unregulated freedom to engage in cultural appropriation may be as powerful a stimulus to creativity as the promise of protected economic rewards."[50]

So rather than fulfilling its objective of promoting creativity, law assumes a restrictive relationship with artistic practices. For Daniel McClean, this constraint amounts

[46] Nadia Walravens, "The Concept of Originality and Contemporary Art," *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 175.

[47] Johnson Okpaluba, "Appropriation Art: Fair Use or Foul?," *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 217.

[48] Paul Edward Geller, in *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 27 ("courts apply tests which are far too rigid, failing to distinguish between 'creative' copies that build on the original and literal or 'close' copies which do not").

[49] John Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law," 13 *Columbia-VLA Journal of Law and Arts* 13, 103 (1988).

[50] Susan Scafidi, *Who Owns Culture: Appropriation and Authenticity in American Law* (New Brunswick: Rutgers University Press, 2005).

to an "'intrusion' of law into the hallowed sphere of artistic production" and the concomitant fear of "state restrictions on artistic freedom and individual creativity."[51] He notes the pervading view that "law is perilously out of step with" contemporary art practices in which "the readymade imagery and materials of our culture" are used and recontextualized "thereby calling into question the values of originality and authorship upon which both modernist aesthetics and copyright law are seemingly built."[52] The law's restrictions on creativity are also "realistically unsustainable, as the proliferation of reproduction in the digital environment renders legal mechanisms for controlling information redundant."[53] The law's "apparent miscasting of the diverse impulses and purposes that motivate artistic copying" are therefore an opportunity lost in promoting the arts.[54]

My own research has suggested that the law has a restrictive view of creativity and innovation. My investigations of the interactions between law and cultural practices in which the cultural practice has been either sanctioned, or not, as legally acceptable creativity, reveals the law's action in these contexts of evaluations. For instance, in considering whether or not traditional Aboriginal art presented the requisite authorship for copyright protection, the law had an opportunity to elevate *the selection* of the presentation of particular traditional motifs among numerous others as a creative contribution.[55] Again when considering whether photographs evidenced the presence of the author, the law had an opportunity to declare *the selection* of particular scenes among many others captured by the camera a creative act.[56] And when considering whether appropriationist art revealed the authorship of the appropriator, the law had the opportunity to regard *the selection* of particular preexisting cultural materials to recontextualize among a nearly infinite inventory as a creative choice.[57] The law, however, resists these invitations to place a greater value on selectivity; instead continuing to demand greater innovation. This causes judges to strain legal doctrines to argue why authorship is present in cases where it had not been previously perceived, as was the case in each of the preceding examples. Thus these case studies highlight the law's intuitive tendency to employ a restrictive model of authorship. For instance, the examples discussed demonstrate that judges often demand authorial contributions to be innovative, aesthetically pleasing, and manually produced even when there is no legal authority for the imposition of these

[51] Daniel McClean, *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 11.

[52] Ibid., 12.

[53] Ibid., 15.

[54] Ibid., 22.

[55] Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?," 30 *Connecticut Law Review* 1 (1997).

[56] Christine Haight Farley, "Copyright Law's Response to the Invention of Photography," 65 *University of Pittsburgh Law Review* 385 (2004).

[57] Christine Haight Farley, "Judging Art," 79 *Tulane Law Review* 805 (2006).

restrictions. These instances present the law with challenges to perceive authorship more broadly. In each, however, the law rejects the opportunity to accept the author's act of selection as an original, creative contribution.

There is more work to be done here. It would be interesting to compare the different understandings of the nature of cultural transformation that law and art maintain. To better understand each conception of "transformation," it may be useful to investigate the ways both art and law draw from their respective disciplinary histories, the particular cultural moment in which the articulation occurs, as well as the way those expressions (the specific art object or legal enactment, for example) contribute to the creation and, finally, transformation of that cultural sensibility. For example, law maintains an idea of art that depends on the equation of creativity with originality. Perhaps in stating a requirement that art be transformative, an important, but implicit, corollary is also being articulated. That is, although art transforms, law maintains. If so, then the examples of selectivity and appropriation as modes of artistic creativity are interesting. After all, these modes are not recognized by law as artistic acts. Perhaps these modes are understood by law within its own practices particularly in regard to law's use of precedent. Perhaps law understands its own use of precedent as compared with its rulings on the degree of originality required for something to be considered art and to be owned.

If intellectual property law seems ineffective at incentivizing cultural production, it is quite superb at maintaining control of the meaning of particular cultural forms. After all, the selection and representation of works in new contexts can significantly undermine any stabilized meaning. Thus in the intellectual property regime, the property that can be owned are ideas. As law is predicated on categories of private property and originality that artists and theories of art are bound to challenge, law does not so much protect freedom of artistic expression as property interests in art.[58] For example, Kembrew McLeod analyzes the way the law has allowed for the private ownership of a vast array of things including hip-hop music and third-world culture.[59] Related research on commercial appropriation of traditional cultural expressions highlights communities' desire to take back their cultures and use the tools of intellectual property to prevent outsiders from poaching and altering their cultural symbols. These scenarios, however, demonstrate the limits of intellectual property protection. In numerous cases, what is desired is the protection and containment of ideas. As I have explored elsewhere, in the case of traditional cultural expressions, what is often desired by the local communities is the prohibition on any derivation in the presentation of traditional designs. My research has also shown how often what photographers want to own is the scene before the camera, rather than the particular

[58] Anthony Julius, "Art Crimes," in *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 495.

[59] Kembrew McLeod, *Owning Culture: Authorship, Ownership & Intellectual Property* (New York: Peter Lang Publishing, 2001).

expression of that scene that they have captured. Similarly in contemporary art, the artists of works appropriated into new works seek to use the law to prevent their work from being recontextualized. None of these protections should be possible under legal doctrines that aim to leave ideas in the public domain. Nevertheless, these cultural moments teach that a stronger set of intellectual property rights attach more readily when culture is presented as self-contained and fragile. The harm in strengthening these protections is made clear only when we see culture as robust and fluid.

There has been much scholarly attention devoted to both law's insistence on creativity, and the particular conception of creativity upon which it insists. Thus, artists, as both the creators and the users of protected works, may benefit or be burdened by the law. As Michael Spence has suggested, "It all depends upon the ways in which she creates and appropriates."[60] In the end, "there may be little to gain, and a lot to lose," for artists from the operation of law in these areas.[61] Therefore, in addition to presenting a conflicting relationship between law and creativity, this body of research also raises a larger point about a potential conflict between law and art that is more general in nature.

The Art–Law Collision

Much scholarship in this area is concerned with a perceived collision between the practices of art and law. An unexamined storyline pervades this perception: "Over the centuries, the art world has developed its customs and practices for the most part without any regard for possibly relevant legal principles."[62] Similarly, it is thought, as the preceding section demonstrates, that the legal world has developed its rules and standards without any input from artists, but then something occurs that causes these two separate worlds to collide. What is discovered in this interaction is that the two worlds are incompatible.[63] Moreover, some conclude that "when the two collide, [art] is the invariable loser."[64]

Just as aesthetics is often criticized for lagging behind art, many observe that law lags behind both art and aesthetics.[65] This means that when law attempts to utilize aesthetics, the conflict is extreme. Outmoded theories of art that never adequately

60 Michael Spence, "Justifying Copyright" in *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002).

61 Ibid., 392.

62 Susan Scafidi, *Who Owns Culture: Appropriation and Authenticity in American Law* (New Brunswick: Rutgers University Press, 2005).

63 Apparently not everyone agrees. Paul Edward Geller asserts, "It is a misunderstanding to assume that copyright, and art are necessarily in tension." Paul Edward Geller, in *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 30.

64 Anthony Julius, "Art Crimes," in *Dear Images: Art, Copyright, and Culture* (Daniel McClean and Karsten Schubert, eds., 2002) at 495.

65 Anthony Julius, "Art Crimes," in *Dear Images: Art, Copyright, and Culture* (Daniel McClean and Karsten Schubert, eds., 2002) at 495.

explained contemporary art practices even in their prime may be employed by law. The effect then is a crystallization of law's proscriptions and a concomitant disavowal of their relevance by artists.

Although never fully unpacked, these views are usually premised on the following conventional understandings of both art and law. First, art and law belong in separate cognitive and intellectual spheres. Second, art and law exist in polarity where law is objective and art is subjective. Third, law is about precedent whereas art is about the evolution of ideas. Finally, law is about uniformity, whereas art is unique.[66]

For many scholars, this potential conflict is absolutely fundamental. Some see the conflict as occurring because the legal culture "demands solution," whereas art "defies definition."

> The artist's vocation calls him to creation, not regulation. In art he expresses and is free until a legal mind, allocated to protect potential viewers of his art, directs the need of society to clamp him down, relying on its own judgment within the bounds of a given legal framework.[67]

Paul Kearns sees law as "coercion to bring about conformity," whereas art is unique "by its nature" and is fundamentally unable to conform to law's dictates.[68] Similarly, McClean finds "fundamental and insurmountable differences" in the manner in which legal and aesthetic judgments are made.[69] The law requires certainty, whereas art is comfortable with instability. Likewise, Scafidi worries that even the most "well-intentioned legal protections may [unwittingly] provoke ossification" because "culture is naturally fluid and evolving."[70]

Art creates conflict for law because it has the tendency to expose law's certainty as masking necessary ambiguities, as the case that began this chapter illustrates. It disrupts law's dominion over complexities by demonstrating its elastic discourses and definitions. Law struggles to reduce these complex ideas to neat and finite categories with practical effects. Law, for its part, is the powerful oppressor of art's uncategorical distinctiveness.[71] Law imposes its multi-pronged and multi-factored tests, and ignores nonlegal assistance for fear of appearing to need other aid. At its best, law searches in vain for the ideal legal criteria that will delineate the conceptual complexities involved in disputes over art, when instead it requires an altogether more flexible structure that avoids any set criteria.

In contrast, Douzinas reminds us that sometimes art is as, if not more, rule-bound than law. The conflict between art and law is only visible when the "the law of the art"

66 Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publications, 1998) at 7.
67 Ibid., 58.
68 Ibid., xv.
69 Daniel McClean, *Dear Images: Art, Copyright, and Culture*, Daniel McClean and Karsten Schubert, eds. (London: Ridinghouse, 2002) at 18.
70 Susan Scafidi, *Who Owns Culture: Appropriation and Authenticity in American Law* (New Brunswick: Rutgers University Press, 2005).
71 Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publications, 1998) at xv.

is forgotten. In exposing how law uses its dichotomous relationship with art, Douzinas challenges the conventional acceptance of art as frivolous and radically subjective, and law as its opposite. Furthermore, in this relationship, law achieves power by presenting itself as a discourse with dominion over other discourses, interpretive at base, and self-sufficient. When we take into account their disciplinary history, however, art and art theory can be seen as being equally interested in demarcating categories such as genre and form and delineating boundaries between art and nonart. Instead of finding commonalities, art and law are set off against each other in ways that produce suspicion, envy, and contempt between the two.

What is Art?

Because of society's special relationship with art and underlying belief that law should treat art differently, whether or not a disputed object is a proper inhabitant of the category of art becomes critical to the legal resolution. Whether or not special approaches should be taken hinges on the answer to this question. These disputes then routinely involve resolutions of the definition of art, although rarely is this definitional question addressed explicitly. Thus, in these instances, the "What is art?" question – so contentious in other disciplines – emerges in the context of law.

One avenue of scholarly inquiry has looked at how, when, and why these definitional questions are addressed in the law and whether legal definitions of art are being produced. As the preceeding section demonstrates, many scholars conclude that legal and artistic determinations should not be merged and that judges should refrain from indulging in subjective aesthetic determinations.[72] These scholars are in step with most of the judiciary. Judges repeatedly declare their neutrality and

[72] The following commentators, although not expressing a unified view, have each made statements to the effect that law and aesthetics should not be joined. See, e.g., Amy M. Adler, "Post-Modern Art and the Death of Obscenity Law," 99 *Yale Law Journal* 1359, 1377–8 (1990) ("Because many contemporary artists are so estranged from lay notions of what constitutes 'art' courts might refuse to recognize them as artists"); Keith Aoki, "Contradiction and Context in American Copyright Law," 9 *Cardozo Arts and Entertainment Law Journal* 303, 303–4 (1991) (suggesting that aesthetic determinations made by judges in copyright law have led to "confusing, inconsistent, and erratic decisions"); Robert C. Denicola, "Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles," 67 *Minnesota Law Review* 707, 708 n. 10 (1983) (agreeing with the wisdom of the *Bleistein rule* and arguing for legal tests that avoid the subjectivity of aesthetics); Leonard D. DuBoff, "What Is Art? Toward a Legal Definition," 12 *Hastings Communications and Entertainment Law Journal* 303, 350–1 (1990) (stating that "the legal definition of art greatly depends upon who is doing the defining" and that precise definitions of what constitutes a work of art "would not do justice to the diverse interests involved"); Lindsay Harrison, "The Problem with Posner as Art Critic: Linnemeir v. Board of Trustees of Purdue University Fort Wayne," 37 *Harvard Civil Rights Civil Liberties Law Review* 185, 203 (2002) ("The consequences of judges playing art critic in the context of First Amendment law are . . . grave"); J. H. Reichman, "Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976," 1983 *Duke Law Journal* 1143, 1165 (arguing that copyright decisions should be made independently of any judgment as to the aesthetic merits of the work at issue).

restraint in the face of an opportunity to engage in such activity.[73] Many scholars use Justice Holmes' famous quote from *Bleistein v. Donaldson* regarding the dangers of law delving into the analysis of art as a starting point in assessing the rationales advanced as to why courts should not make aesthetic determinations.[74]

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius 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. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value – it would be bold to say that they have not an aesthetic and educational value – and the taste of any public is not to be treated with contempt.[75]

[73] See, e.g., Smith v. Goguen, 415 U.S. 566, 573 (1974) ("What is contemptuous to one . . . may be a work of art to another"); Cohen v. California, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric"); Mazer v. Stein, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."); Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 924 (7th Cir. 2004) ("This approach necessarily involves judges in a qualitative evaluation of artistic endeavors – a function for which judicial office is hardly a qualifier"); Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003) ("Any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make"); Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999) ("We are not art critics, do not pretend to be and do not need to be to decide this case"); Finley v. NEA, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("'Artistic excellence' and 'artistic merit' are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program"), rev'd, 524 U.S. 569 (1998); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 n.3 (2d Cir. 1987) ("We judges should not let our own view of styles of art interfere with the decision-making process in this area"); Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.) ("Judges can make fools of themselves pronouncing on aesthetic matters"); Hoepker v. Kruger, 200 F. Supp. 2d 340, 352 (S.D.N.Y 2002) ("Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection"); Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980) ("Courts are ill equipped to determine such illusory and imponderable questions"); Esquire, Inc. v. Ringer, 414 F. Supp. 939, 941 (D.D.C. 1976) ("There cannot be and there should not be any national standard of what constitutes art"), rev'd, 591 F.2d 796 (D.C. Cir. 1978); United States v. Ehrich, 22 C.C.P.A. 1, 13 (1934) ("I freely admit, and I think my very sincere associates would do the same, that I know no more about artistic merit than does the average layman, and what might appeal to me as being an artistic creation of great merit, if appearance alone controlled, might not meet the test at all, and vice versa"); Parkersburg Builders Material Co. v. Barrack, 192 S.E. 291, 293 (W. Va. 1937) (describing aesthetics as an "essentially speculative" discipline that offers little guidance except "the infinite variations of taste and preference").

[74] See, e.g., Costas Douzinas, "The Aesthetics of the Common Law," 17 *Studies in Law Politics and Society* 3 (1997); Christine Haight Farley, "Judging Art," 79 *Tulane Law Review* 805 (2006); Alfred C. Yen, "Copyright Opinions and Aesthetic Theory," 71 *Southern California Review* 247, 301 (1998).

[75] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–2 (1903).

Aesthetic judgments are considered subjective and therefore jurisprudentially undesirable; however, decisions about what is and is not art are mandated by the law in a wide range of areas. Some commentators have therefore concluded that some areas of law require courts to make aesthetic choices.[76] Despite the ubiquitous axioms to the contrary, aesthetic judgments are often implicit and, sometimes even explicit, in the law in areas as diverse as obscenity, copyright, customs, and tax. In other areas, legal determinations are inevitably and necessarily entangled with aesthetic judgments. In these instances, the law needs to determine whether the disputed object is art. My own work examines the extent to which the law inescapably must take on these questions.[77]

The resistance on the part of courts and legislatures to devise a definition of art is somewhat understandable considering the difficulty philosophers, scholars, and artists have had in pinning down this phenomenon. The "What is art?" debate has raged for centuries without a definitive resolution. If the law has conceded the impossibility of defining hard core pornography, it is logical also to acknowledge the impossibility of devising a definition of art. Nevertheless, the discussion engendered by the debate about line drawing in the case of pornography has been rich and not fruitless. Moreover, because our cultural policies want to put art in a privileged position, the legal category of art is unavoidable.

In determining art status, courts have found an easy proxy: the status of the artist. Whereas the art status of the object in question is fraught, determining the status of the artist in question is relatively straightforward. Thus, the status of the artist plays into the analysis even where it has no role. The successful claimants in indigenous art disputes resemble the successful claimants in historical photography disputes, which resemble the successful claimants in postmodern art disputes: they best mimic the Romantic author. They are individuals who act like individuals; they suppress the collaborative or group nature of their artistic production. Thus in my own research, the Aboriginal artist Milpururu shares these critical characteristics with the nineteenth-century photographer Napoleon Sarony. They are both the first practitioners of their craft to be designated as authors by the law even if that meant denying the corporate nature of their production. Although judges might be criticized for relying too heavily on an artist's status, what this reliance reveals is the necessity to rely on something objective. At least an artist's status can be confirmed in litigation. In this way, the law influences the understanding of art outside

[76] See, e.g., Raymond M. Polakovic, "Should the Bauhaus Be in the Copyright Doghouse? Rethinking Conceptual Separability," 64 *University of Colorado Law Review* 871, 873 (1993) (asserting that the Copyright Act requires courts to separate aesthetic and useful elements of a useful article); Alfred C. Yen, "Copyright Opinions and Aesthetic Theory," 71 *Southern California Law Review* 247, 301 (1998) ("The existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary").

[77] Christine Haight Farley, "Judging Art," 79 *Tulane Law Review* 805 (2006).

the legal context. Artists must translate their story into law's image of the artist to succeed.

Although work here demonstrates that courts are forced to decide the "What is art?" question on a regular basis, significantly, courts try hard not to do so. They may avoid an explicit discussion of this question and decide the case by methodically analyzing another issue, or they may simply mask this determination, hoping to obscure it in the course of their denials. These conflicts raise questions about law's effectiveness in avoiding subjective determinations.

Courts' explicit resistance to engage in aesthetic analysis only masks that they do so nonetheless. Sometimes the law requires courts to decide definitively what art is, and other times, courts are not required to reach this determination, but allow themselves to be guided by their aesthetic judgments. As a result of this concealed approach, courts employ a variety of problematic techniques to avoid addressing these determinations head on. Thus when courts do make decisions regarding art, they often engage in deflection, denial, and disguise. Ultimately, in several cases courts' responses track various aesthetic theories. Courts seem to assume and enforce particular conceptions of art that they neither commit to paper nor stoop to justify, perhaps because they themselves fail to recognize what is happening. I contend that courts adopt aesthetic theory intuitively, even as they remain seemingly ignorant of that body of scholarship. Ironically, the lure of objectivity may have drawn courts further inward into the subjective realm.

My work argues that law should explicitly look to aesthetics for assistance in resolving cases in which the determination of an object's art status is necessary. Aesthetics offers the law a rich and vibrant debate about both the nature of art and definitional approaches. This engagement does not require that one particular definition of art should be privileged in all cases. Such an approach would reify this definition through the practice of precedent. Instead, courts should import the discourse as a whole to facilitate their analysis of what may or may not be art in particular cases. Rather than selecting just one strain of aesthetic theory, that is, courts should recognize the contested nature of various views on aesthetics. The result would be more open and thoughtful resolutions of these cases. Instead of denying that a difficult question confronts them, courts could take comfort in the rich discourse on the subject that precedes them. Although the aesthetic determinations in these cases may still be extremely controversial, participants and observers would at least be clear on the approach adopted by the court.

Writing about *Whistler v. Ruskin*, Douzinas describes how aesthetic considerations took center stage in the case. Even though each litigant had a very different view of how aesthetics considerations should be used to make an ultimate judgment, both agreed that law was "the proper forum for deciding the truth in art." As one who has investigated the supposed art-law conflict, Douzinas argues "the modern order

of images is always accompanied by laws and regulations" and by a "code that tells us how to . . . understand the image, how to link the sign, visual or graphic, with its signatum and stop its endless drifting."[78] The case, however anomolous in its explicit embrace of an aesthic debate, demonstrates that a court can open itself to this nonlegal aid without being mired in subjectivity.

Conclusion

This brief introduction to the scholarly intersection of art and law suggests the kind of work that has been done at the various points where law and art meet and the themes and subjects that dominate art-law. The opportunities for further scholarship on this relationship are most exciting where the disciplines meet. For instance, there is a growing body of scholarship directed at artistic portrayals of law, and this is the place where the two disciplines can usefully collaborate. Legal scholars can borrow art historical interpretive theories, whereas art historians can adopt a critical and theoretical engagement with the law.

Although some have written about the mutual influences that art and law have had on each other, in my mind, what is most critically missing from this scholarship is an investigation of the correspondence between law and culture. In particular, almost completely absent is an account of the impact of law on artistic practices. As has been shown, some critiques of law suggest that certain artistic practices challenge legal concepts or that the law is in conflict with understandings in the art world. Conversely, some scholars have investigated how a cultural practice finds its way into law's embrace. The next step, however, is to consider the cultural consequence, if any, of the law's rejection or embrace of an art form.

Some scholars explore the mutual influences of law and art. Examining a variety of instances in which law interacts with art reveals how the interactions leave both institutions changed. For example, in the work on intellectual property law and folklore, scholars demonstrate that the accommodation of indigenous art within the intellectual property regime has an effect on copyright law. Notions of group rights and originality, for instance, are challenged. Likewise, the application of copyright law to indigenous art has an effect on our understanding of that art. To be successful in this arena, the art needs to be translated in terms we understand and value. Thus, the individuality and ingenuity of the artist is more apparent. My work on copyright and photography makes a similar contribution. There we see that copyright law's response to the invention of photography left a lasting impression both on the reading of photography and on our concept of the author in copyright law.

[78] Costas Douzinas, "The Legality of the Image," 63 *Modern Law Review* 813, 830 (2000).

There has been some work toward an analysis of how the law has been affected by specific points of contact between art and law. Less work, however, has focused on the affects, if any, on artistic practices when legal concepts rigidly undermine them. Perhaps work of this kind may reveal that art is solidly resistant to perceived conflicts with law, or perhaps it may reveal that these conflicts provide artists with a galvanizing oppositional force.