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"Recognized Stature" Revisited: Could "Community Standards" Rescue Restrictive "Recognized Stature" Definition in *Castillo v. G&M Realty L.P.*?

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Note

“RECOGNIZED STATURE” REVISITED: COULD “COMMUNITY
STANDARDS” RESCUE RESTRICTIVE “RECOGNIZED
STATURE” DEFINITION IN *CASTILLO v.*
G&M REALTY L.P.?

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“The making of a work of art is one historical process among other acts, events, and structures — it is a series of actions *in* but also *on* history.”¹

I. THE GARDEN OF EARTHLY DELIGHTS:² SHOULD PROTEST ART BE
PROTECTED UNDER THE VISUAL ARTISTS RIGHTS ACT?

On May 25, 2020, the death of George Floyd sparked protests around

* J.D. Candidate, 2022, Villanova University Charles Widger School of Law; B.A. in Art History, 2014, Wellesley College. I want to thank the Villanova Law community, my ever-supportive family, and my beloved dad, who I will always aspire to be like.

1. This Note’s title is derived from EVELYN WAUGH, *BRIDESHEAD REVISITED: THE SACRED & PROFANE MEMORIES OF CAPTAIN CHARLES RYDER* (Chapman and Hall, 1st ed. 1945).

T.J. CLARK, *IMAGE OF THE PEOPLE: GUSTAVE COURBET AND THE SECOND FRENCH REPUBLIC 1848–1851* 13 (Thames & Hudson Ltd. ed., 1st ed. 1973) (emphasis added).

2. Hieronymus Bosch, *THE GARDEN OF EARTHLY DELIGHTS* (Museo Del Prado 1490–1500), <https://www.museodelprado.es/en/the-collection/art-work/the-garden-of-earthly-delights-triptych/02388242-6d6a-4e9e-a992-e1311eab3609> [<https://perma.cc/5ZL7-5LQX>] (last visited July 9, 2021). A three paneled interpretation of Bosch’s imagining of the afterlife, this work’s meticulously detailed, surreal, and sometimes grotesque imagery has captivated scholars and viewers alike for centuries. See Pilar Silva, *El Bosco. Tríptico del Jardín*, in *EL BOSCO. LA EXPLOSIÓN DEL V CENTENARIO* 330 (2016), <https://www.museodelprado.es/en/the-collection/art-work/the-garden-of-earthly-delights-triptych/02388242-6d6a-4e9e-a992-e1311eab3609> [<https://perma.cc/5ZL7-5LQX>] (last visited July 9, 2021) (citation omitted). The theme of this Note was inspired by the Second Circuit’s statement that there may be “rare cases[s] where an artist or work is of such prominence that the issue of recognized stature need not be tried” *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020); see also *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) (“[T]he court can imagine a set of circumstances where an artist’s work is of such recognized stature that any work by that artist would be subject to VARA [Visual Artist Rights Act]’s protection For example, the court would be hard pressed to hold that a newly discovered Picasso is not within the scope of VARA”). The Author of this Note took this maxim to heart in developing a theme of artworks for which the “recognized stature” designation is a foregone conclusion.

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the country.³ In the wake of this nationwide outcry, artists around the country created public protest art with the potential of becoming a “monuments of sorts” that “synthesize a moment” in history.⁴ Protest art takes on the expressive intentions of its creators, imbuing visual media with powerful iconography of resistance.⁵ Recent examples of protest art include mural portraits of George Floyd on city streets and other images advocating for the Black Lives Matter movement.⁶ Protest art is “timeless iconography” that inspires vigorous affinity for opposing the status quo.⁷ Notwithstanding protest art’s significance in the contemporary zeitgeist and its potential historical impact, whether protest art, and public art generally, is legally protected from destruction under the Visual Artists Rights Act (VARA) is an open question.⁸ In answering this question, courts must turn to the “recognized stature” standard as VARA only prohibits destruction of art when it meets this standard.⁹

3. See Mackenzie Crosson et al., *Protest Art Has Covered Boarded Up Businesses—Will It Be Preserved?*, WBEZ (July 11, 2020), <https://www.wbez.org/stories/protest-art-has-covered-boarded-up-businesses-will-it-be-preserved/e3db8017-a6ba-4dde-9bc3-3d17f6ee5392> [<https://perma.cc/J7R4-W2AD>].

4. See *id.* (quoting Dorian Sylvain, artist and originator of Mural Moves, a Chicago community arts campaign that mobilized mural painting in Chicago neighborhoods during the summer of 2020).

5. See Michael Cavna, *George Floyd’s Death Has Inspired Powerful Protest Art: ‘I Needed to Have Another Way of Seeing Him’*, WASH. POST (June 11, 2020), <https://www.washingtonpost.com/arts-entertainment/2020/06/11/protest-art-black-lives-matter/> [<https://perma.cc/X5UD-5Y9U>] (describing creative process of protest art creator). Protest artist Simi Stone converted her despair following the deaths of Ahmaud Arbery, Breonna Taylor, and George Floyd into a rendering of George Floyd’s face after her boyfriend encouraged her to “[p]rotest on the canvas.” *Id.*

6. See Alexandra Schonfeld, *The Art of Protest: Artists Create Images in Support of Black Lives Matter*, NEWSWEEK (June, 25, 2020), <https://www.newsweek.com/art-protest-artists-create-images-support-black-lives-matter-1512810> [<https://perma.cc/2FH2-9AHG>] (describing, with images, protest art around the world, including portraits of George Floyd in Manchester, England, a “gloved fist” in a Toronto alley, and mural reading “Black Lives Matter” in Brooklyn).

7. LIZ MCQUISTON, *PROTEST!: A HISTORY OF SOCIAL AND POLITICAL PROTEST GRAPHICS 6* (Princeton Univ. Press ed., 2019) (describing impact of protest art as it “represent[s] a power struggle; a rebellion against an established order and a call to arms, or a passionate cry of concern for a cause”).

8. See *supra* notes 4–7 and accompanying text for recent examples of protest art and their cultural effect. VARA is codified at 17 U.S.C.A. § 106A (West 2021) and the “recognized stature” provision is described in 17 U.S.C.A. § 106A(a)(3)(B) (West 2021). Commentators speculate on how courts will apply VARA to protest art. See Andrea Arndt & Caleb Green, *Black Lives Matter Murals: Intellectual Property v. Real Property Rights*, JD SUPRA (July 9, 2020), <https://www.jdsupra.com/legalnews/black-lives-matter-murals-intellectual-83384/> [<https://perma.cc/X68B-6P39>] (“Street art, including temporary street murals, may be protected under the Visual Artist Rights Act (VARA).”); Blake Brittain, *Protest Art Fate Tied to Obscure, Rarely Litigated Copyright Law*, BLOOMBERG L., (July 16, 2020), <https://www.bloomberglaw.com/product/blaw/document/X8PVGGA000000> [<https://perma.cc/DJC4-M57P>] (“But how long those works stay visible may depend on interpretations of a rarely tested part of copyright law . . .”).

9. See *infra* Section II.A and accompanying text for a description of the “rec-

The Second Circuit's recent definition of "recognized stature" in *Castillo v. G&M Realty L.P.*¹⁰ highlights the challenges courts face in applying the standard.¹¹ In *Castillo*, the Second Circuit considered whether the destruction of graffiti collective 5Pointz in Queens, New York violated VARA.¹² In affirming the Eastern District of New York's finding of violations of VARA, the Second Circuit refined the definition of "recognized stature" to place more emphasis on the opinion of art experts than may be appropriate based on administrative guidance and the Act's legislative history.¹³ This Note critiques the Second Circuit's definition of "recognized stature" because protest art, and public art generally, may fall outside this definition's limited scope and thus outside the ambit of VARA's protection, with adverse consequences for cultural and historical preservation.¹⁴

Acknowledging the inherent challenges in judicial treatment of "recognized stature," this Note proposes the application of the "community standards" analysis of First Amendment jurisprudence to evaluate recognized stature.¹⁵ Part II provides the history and relevant case law of VARA, offers context for protest art in the visual arts canon, recounts judicial challenges with adjudicating art, and describes the role "community standards" plays in First Amendment analysis. Part III describes the background of *Castillo* with a particular focus on litigation at the district court level. Part IV synthesizes the Second Circuit's affirmation of the VARA

ognized stature" standard; see also Brittain, *supra* note 8 ("The scant law on the topic doesn't settle what recognized stature is . . .").

10. 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

11. See, e.g., *id.* at 166 ("We conclude that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community." (first citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp 303, 324–25 (S.D.N.Y. 1995), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77; then citing *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999)); U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 77–78 (2019) ("[A]bsent statutory text or direct legislative history, courts were left to develop a workable standard on their own, and despite Congress' intentions, such battles have occurred."); Emma G. Stewart, Note, *United States Law's Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold*, 97 WASH. U. L. REV. 1233, 1249 (2020) ("The need to assess recognized stature . . . has resulted in costly litigation for both artists and landowners alike. Because a definition of recognized stature is not included in the statute, deciding whether or not a work is eligible for protection from destruction . . . has been a matter of interpretation for the courts." (footnote omitted)).

12. See *infra* notes 107–18 and accompanying text for a history of 5Pointz, and Section III for a narrative analysis of the Second Circuit's opinion.

13. See *Castillo*, 950 F.3d at 166 (noting "recognized stature" determinations should usually rely on expert opinion) and Section II.A for a description of VARA's legislative history and administrative guidance.

14. For a complete critical analysis of the inadequacies of the Second Circuit's application of "recognized stature," see *infra* Section V.A.

15. See *supra* note 11 and accompanying text for an explanation of how the absence of Congressional guidance on the "recognized stature" standard resulted in an arguably imprecise judicial definition. For an evaluation of the feasibility of applying the "community standards" doctrine for findings of recognized stature, see *infra* Section V.B.

violations and damages award in *Castillo*. Part V dissects the Second Circuit's definition of "recognized stature" and recommends a broader definition of the term that incorporates "community standards" analysis. Finally, the Note concludes in Part VI by contemplating the consequences of losing cultural and historical heritage should protest art fail to gain legal protection.

II. THE BIRTH OF VENUS:¹⁶ WHY WAS VARA ENACTED AND WHY DOESN'T IT ACHIEVE THESE GOALS?

VARA attempted to protect artists and promote cultural preservation, though courts interpreting its provisions have achieved mixed results.¹⁷ "Recognized stature" remains controversial, primarily due to its ambiguity, even close to thirty years after VARA was enacted.¹⁸ In particular, the Second Circuit's recent revision to the judicial definition of "recognized stature" in *Castillo* may undermine the cultural preservation of protest art.¹⁹ Protest art spans the art historical canon from the ancient to the present, offering a unique cohesion of a political moment and an artistic viewpoint that resonates with both modern audiences and their future counterparts.²⁰

In rebuke of the Second Circuit's apparent dismissal of community perspective in evaluating whether art is protected, and in response to anxiety about potential judicial transgressions when applying "recognized stature," this Section explores "community standards" jurisprudence as a potential blueprint to remedy these deficiencies. Subsection A describes the enactment of VARA and subsequent litigation interpreting its provisions. Subsection B illustrates the history of protest art and illuminates its relevance in contemporary life. Subsection C outlines the unsettled precedent of art adjudication. Subsection D presents a brief overview of the ways the Supreme Court has used the "community standards" concept to evaluate whether materials are obscene under the First Amendment and the evolution of "community standards" at the district court level.

16. Sandro Botticelli, *THE BIRTH OF VENUS* (The Uffizi 1485), <https://www.uffizi.it/en/artworks/birth-of-venus> [<https://perma.cc/3LEK-4X9J>] (last visited July 9, 2021). This Botticelli masterpiece portrays the winds ushering the Roman god Venus to land on a seashell. See *Birth of Venus*, LE GALLERIE DEGLI UFFIZI, <https://www.uffizi.it/en/artworks/birth-of-venus> [<https://perma.cc/3LEK-4X9J>] (last visited July 9, 2021). Exemplifying beauty and the bounty of spring, this painting borrows heavily from Classical mythology and art. See *id.*

17. See *infra* notes 36–57 and accompanying text for an overview of judicial interpretation of "recognized stature."

18. See *infra* notes 31–35 and accompanying text for critiques of "recognized stature."

19. See *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (emphasizing importance of expert opinions in "recognized stature" evaluations). See *infra* Section V.A for an analysis of why the Second Circuit's opinion falls short of protecting protest art.

20. See *supra* notes 4–7 and accompanying text for a description of the significance of protest art.

A. *Impression, Sunrise*:²¹ What is VARA?

Enacted in 1990, VARA codifies the moral rights of artists in alignment with international precedent.²² Moral rights stem from the belief that artists hold more than an “economic interest” in their creations and are entitled to protection of the “creative persona” inherent in their artwork.²³ In addition to protecting moral rights, VARA supports cultural preservation.²⁴ VARA represents the United States’ commitment to the Berne Convention for the Protection of Literary and Artistic Works (“the Berne Convention”).²⁵ The United States joined the Berne Convention in 1988, though the Convention’s first signatories date to 1886.²⁶ VARA pro-

21. Claude Monet, *IMPRESSION, SUNRISE* (Musée Marmottan Monet 1872), <https://www.marmottan.fr/en/collections/highlights/> [https://perma.cc/FZD6-CSVB] (last visited July 9, 2021). Depicting the daybreak mists of Monet’s Le Havre hotel, this painting’s title became the moniker of an entire movement. See N. V. BRODSKAIA & N. N. KALITINA, *THE ULTIMATE BOOK ON CLAUDE MONET* 71 (2015).

22. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946 (describing history of VARA). VARA was “tacked on” to the Judicial Improvement Acts of 1990 and was the first moral rights protection enacted at the federal level. See Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1935 (2000). Though the importance of moral rights had been recognized prior to VARA and states had passed moral rights statutes, federal moral rights legislation had failed multiple times. See *id.* at 1941.

23. Robinson, *supra* note 22, at 1939 (describing moral rights protection). Robinson notes that art—especially public art—has the potential to “ha[ve] a lasting effect on the artist’s reputation, with impact on his dignity and career.” *Id.* Robinson notes that visual art is different from other types of art because “a disproportionate percentage of the value of a work of fine art is in the physical object created, rather than the exploitation of derivatives or copies.” *Id.* at 1936 (footnote omitted). Another commentator similarly calls attention to the difference between economic rights and moral rights: “[u]nlike the economic protection provided by copyright law, moral rights were created to protect an artist’s honor and reputation.” Stewart, *supra* note 11, at 1235–36.

24. See Robinson, *supra* note 22, at 1936 (describing twofold aims of VARA). In addition to protecting moral rights, “VARA recognizes a public interest in the encouragement of artists to work and in the preservation of their work once created[,]” embracing a “public duty to preserve the nation’s art and cultural patrimony” *Id.*

25. See Damich, *supra* note 22, at 945–47 (describing history of VARA). VARA’s protections align with article 6*bis* of the Berne Convention, though Damich argues that VARA “does not bring United States law into conformity with article 6*bis*.” *Id.* at 947. Namely, article 6*bis* protects “all literary and artistic works[,]” (not just visual art); provides for additional moral rights outside of those protected by VARA; and extends the moral rights protections past the artist’s lifetime for “as long as economic (copyright) rights.” *Id.* Damich additionally asserts that VARA’s sanctioning of moral rights waivers fails to acknowledge “article 6*bis*’s concern about protecting the artist even ‘against himself.’” *Id.*

26. See Sara Rosano & Birgit Kurtz, *Tear Down This Wall? The Destruction of Sanctioned Street Art Under U.S. and Italian Law*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 767, 771 (2020) (describing history of Berne Convention and remarking on United States’ relative tardiness to the Berne Convention compared to the ten

protects artists' "right of attribution and . . . right of integrity."²⁷ This Note concerns the scope of VARA's protection of the right of integrity, through which artists can either stop or claim damages "for the intentional distortion, mutilation, modification, or destruction of [their] work."²⁸ Under VARA, artists may "prevent any destruction of a work of recognized stature"²⁹ Additionally, VARA provides caveats for protection.³⁰

Both VARA and the "recognized stature" standard have been the subject of significant criticism since VARA's inception.³¹ VARA's most vehement critics argue that its protections impermissibly infringe "basic property and contract rights[.]"³² Another scholar asserts that VARA's definition of visual art is unforgivably narrow and the "recognized stature" requirement should be done away with entirely.³³ A less censorious critic

original signatories). Ten countries signed on to the Berne Convention at its inception. *See id.*

27. Robinson, *supra* note 22, at 1935–36. Likely initiated in nineteenth-century France, moral rights arguably reflect an appreciation of individual artistic brilliance and an acknowledgment of the importance of cultural preservation for future artistic development. *See id.* at 1938–39.

28. *Id.* at 1936 (describing VARA's breadth). VARA protects *all* visual art from forms of damage outside of destruction, such as "distortion, mutilation, and modification . . . prejudicial to an artist's honor and reputation" *Id.* at 1946. One commentator notes that the differing threshold for protection for destruction creates a "loophole" that "incentivizes property owners to destroy artwork that they have damaged or wish to modify. . . . if not of recognized stature, a modified or damaged work may give rise to liability— completely destroy that work, and the liability vanishes." Stewart, *supra* note 11, at 1250.

29. 17 U.S.C.A § 106A(a)(3)(B) (West 2021). Notably, the "recognized stature" requirement only applies to destruction of artworks. *See* Robinson, *supra* note 22 at 1946–47. The prohibition of destruction of artwork of "recognized stature" is not a part of the Berne Convention because destroyed artwork cannot injure an artist's standing. *See id.* at 1940. A scholar analyzing "VARA's threat to traditional property and contract rights" argues that VARA oversteps by providing a remedy for destruction when the Berne Convention itself does not provide this protection. Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 369 (2019). Furthermore, Thornley argues that "recognized stature" provision can be repealed without sacrificing the United States' adherence to the Berne Convention. *See id.*

30. *See* Robinson, *supra* note 22, at 1948 ("Works that are incorporated into buildings with the artist's consent and that may not be removed without mutilating or destroying the work are not protected by VARA."). *See infra* note 56 and accompanying text for a further discussion of the lack of protection for illegally installed artworks.

31. *See* Damich, *supra* note 22, at 962 ("Limiting the right against destruction to works of recognized stature is inconsistent with moral rights theory, the Berne Convention, and the United States copyright law tradition of refraining from judgments as to quality."); *see also* Robinson, *supra* note 22, at 1936 (describing "recognized stature" as a "particularly contentious provision of VARA").

32. Thornley, *supra* note 29, at 364 (criticizing "recognized stature" standard). Thornley argues "[t]he 5Pointz ruling reveals the substantial threat the Visual Artists Rights Act poses to our nation's long-standing commitment to private property and freedom of contract." *Id.* at 370.

33. *See* Stewart, *supra* note 11, at 1257–59 (suggesting that "[i]n order to adequately protect public artists and serve VARA's purposes," VARA's definition of

lamented the disappointing inclusion of the “recognized stature” standard and predicted the potential for judicial misappropriation.³⁴ The *Castillo* defendants joined the chorus critical of the “recognized stature” standard; maintaining that the “recognized stature” standard is “unconstitutionally vague” in their attempt to overturn the Second Circuit’s holding.³⁵

Congress’ lack of specificity, particularly on the function of the “recognized stature” standard, undercuts the implementation of VARA’s aspirational policies and enables judicial instability.³⁶ To this end, one scholar characterized VARA cases as reflecting uncertainty about the provision’s function and evidentiary standards.³⁷ Despite this dearth of legislative guidance, the Southern District of New York in *Carter v. Helmsley-Spear, Inc.*³⁸ deftly supplied the first test for courts to determine recognized stature.³⁹ In *Carter*, the Southern District of New York’s “recognized stature” test required plaintiffs to “make a two-tiered showing: (1) that the visual art in question has ‘stature,’ *i.e.* is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.”⁴⁰ In particular, the

visual art should incorporate more types of art and the “recognized stature” requirement be eliminated (footnote omitted)). The statute’s definition of visual art is limited to a “painting, drawing, print, or sculpture,” and “still photographic image[s] produced for exhibition purposes only” in their original form or “in a limited edition of 200 copies or fewer[.]” 17 U.S.C.A. § 101 (West 2021).

34. See Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 480 n.19 (1989) (arguing the “recognized stature” standard “may be incoherent” due to difficulty of applying the standard potentially leading to incongruous results).

35. Petition for Writ of Certiorari at 22, *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020) (No. 20-66) (“This case concerns an unconstitutional application of an unconstitutionally vague statutory provision at odds with fundamental legal principles and long-standing decisions of this Court.”).

36. See Robinson, *supra* note 22, at 1948 (“While VARA incorporated a personality and preservation rationale, it left many questions of application of these twin goals unanswered, not least the impact of the recognized stature standard.”); see also Stewart, *supra* note 11, at 1249 (“VARA provides no guidance on how the term should be understood.”).

37. See Robinson, *supra* note 22, at 1948 (“The litigation reveals confusion over the purpose of the recognized stature provision—for example, whether the standard is intended merely to filter out nuisance suits or should act as a substantial hurdle for the plaintiff—and what type of proof is required to satisfy the standard.”).

38. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

39. See Robinson, *supra* note 22, at 1948–51 (describing *Carter*’s development of “recognized stature” test, particularly the court’s “plain meaning” interpretation of statute and acknowledgment of VARA’s preservative aims).

40. *Carter*, 861 F. Supp. at 325 (court’s “recognized stature” definition). The Southern District of New York granted the *Carter* plaintiffs a permanent injunction to bar defendants from “distorting, mutilating, or modifying plaintiffs’ art work.” *Id.* at 337. On appeal, the Second Circuit found that the artwork at issue was “‘made for hire;” which is not protected under VARA. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995). Thus, the Second Circuit vacated the perma-

Southern District of New York's clarification that "plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact" to fulfill this definition forecasts the importance of art experts.⁴¹ *Carter's* test remains dominant in contemporary adjudications of "recognized stature."⁴² In particular, the court's emphasis on the need for expert witnesses was particularly persuasive for future adjudicators.⁴³

After *Carter*, courts continued to flesh out VARA's boundaries.⁴⁴ Scholarly analyses of "recognized stature" determinations indicate that courts have taken differing approaches when weighing the necessity of expert testimony in such cases.⁴⁵ Community relevance supported a finding of "recognized stature" in *Hanrahan v. Ramirez*⁴⁶ in the Central District of California.⁴⁷ The *Hanrahan* court noted that the artwork at issue, an anti-drug and alcohol mural created by a local artist and approximately 300 community members, met the "recognized stature" standard.⁴⁸ To support this finding, the court cited to the recognition of the mural in a national mural contest and exhibition at the Canon Building of the United States House of Representatives.⁴⁹ Despite the absence of expert testimony, corresponding evidence of public acclaim was sufficient to find "recognized stature" for the *Hanrahan* court.⁵⁰

ment injunction. *Id.* at 88. The Second Circuit did not discuss the "recognized stature" analysis. *See* Robinson, *supra* note 22, at 1948 n.135. Nevertheless, *Carter's* test is the "prevailing standard" for "recognized stature" determinations. *See* Stewart, *supra* note 11, at n.135.

41. *Carter*, 861 F. Supp at 325 (providing additional detail on application of "recognized stature" test).

42. *See* Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 437 (E.D.N.Y. 2018), *aff'd sub. nom.* Castillo v. G & M Realty L.P., 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) ("[T]he district court's decision in *Carter v. Helmsley-Spear, Inc.* . . . remains the seminal case interpreting the phrase 'recognized stature' . . .").

43. *See* Monika Isia Jasiewicz, "A Dangerous Undertaking": *The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 YALE J.L. & HUMAN. 143, 176 (2014) (noting significance of expert witness testimony in VARA cases); Robinson, *supra* note 22, at 1951 ("The judge's comments on the need for expert testimony, his formulation of a two-pronged test for recognized stature, and his insistence on the preservation rationale for the provision have proved both influential and unfortunate."); *see also* Hunter v. Squirrel Hill Associates, L.P., 413 F. Supp. 2d 517, 520 (2005) ("[Recognized stature] finding generally depends upon the testimony of experts.").

44. *See supra* notes 36–56 for a description of VARA's litigation history.

45. *See* Robinson, *supra* note 22, at 1948–63 (reviewing "recognized stature" jurisprudence and noting lack of consistency in judicial deference to expert opinions).

46. No. 2:97-CV-7470 RAP RC., 1998 WL 34369997 (C.D. Cal. June 3, 1998).

47. *See id.* at *4.

48. *See id.* at *1, *4 (describing creation of mural and finding that work meets "recognized stature" standard).

49. *See id.* at *4 (reasoning that mural met "recognized stature" due to level of recognition).

50. *See* Robinson, *supra* note 22, at 1954 ("[R]ecognized stature was found based on national and local community reaction, with little reference to the world

Similarly, in *Martin v. City of Indianapolis*,⁵¹ the Seventh Circuit applied the *Carter* test and affirmed a violation of VARA when the plaintiff supplied letters, articles, and an award program in support of “recognized stature” but no expert testimony.⁵² Nevertheless, in *Scott v. Dixon*,⁵³ the Eastern District of New York held that a “single article” about the work at issue that does not address “the artistic merit of the [work at issue]” in the absence of other evidence does not support a finding of recognized stature, even if other works by that artist may be of “recognized stature.”⁵⁴ In *English v. BFC & R East 11th Street LLC*,⁵⁵ the Southern District of New York held that VARA also does not protect the destruction of art created on property without the permission of the property owner.⁵⁶ Reviewing “recognized stature” jurisprudence since VARA’s enactment, the United States Copyright Office advocates for a more expansive definition of “recognized stature” that better aligns with Congress’s intentions to eschew a “battle of expert witnesses” in favor of extending protection to art that is meaningful in community contexts.⁵⁷

of professional art criticism.”). The *Hanrahan* court cited *Carter* throughout its opinion but did not explicitly apply the *Carter* “recognized stature” test. *Hanrahan*, 1998 WL 34369997, at *3-5.

51. 192 F.3d 608 (7th Cir. 1999).

52. *Id.* at 612 (“It is true that plaintiff offered no evidence of experts or others . . . [p]laintiff’s evidence of ‘stature’ consisted of certain newspaper and magazine articles, and various letters . . . as well as a program from the show at which a model of the sculpture won ‘Best of Show.’”). In *Cohen*, the Eastern District of New York cited *Martin* in its reasoning for the proposition that “expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature” *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018), *aff’d sub. nom. Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

53. 309 F. Supp. 2d 395 (E.D.N.Y. 2004).

54. *Id.* at 398, 400 (noting that though artwork at issue may be of “artistic merit,” the artwork had not met the “recognized stature” standard). Furthermore, the artwork at issue, a sculpture installed by the plaintiff in defendants’ backyard, “was [n]ever open to view either by the general public or by any art critics” which additionally supported a finding of no “recognized stature.” *Id.* at 398, 400.

55. No. 97 Civ. 7446(HB), 1997 WL 746444 (S.D.N.Y. 1997).

56. *See id.* at *1, *5 (“The Court therefore holds that VARA does not apply to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question.”). However, the *English* court did not address whether VARA applied to illegal artwork that *could* be removed. *See id.* A scholar has pointed to the *Pollara* district court’s reading of the *English* court’s analysis and points to the *Pollara* district court’s conclusion that “*English* is limited to the situation where the artwork cannot be removed without destroying it.” Rosano & Kurtz, *supra* note 26, at 775 (quoting *Pollara v. Seymour*, 150 F. Supp. 2d 393, 396 n.4 (N.D.N.Y. 2001), *aff’d*, 344 F.3d 265 (2d Cir. 2003)). Rosano and Kurtz also point to “dictum” of the *Pollara* court finding “there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner.” *Id.* (quoting *Pollara*, 150 F. Supp. 2d at 396 n.4).

57. *See* U.S. COPYRIGHT OFFICE, *supra* note 11, at 77–80 (quoting H.R. REP. NO. 101-514, at 15 (1990)) (recounting legislative history of VARA’s enactment and comparing to current judicial interpretations of VARA).

B. *Guernica*.⁵⁸ *Why Is Protest Art Deserving of Legal Protection?*

Visual art has provided a medium for protest for centuries.⁵⁹ Protest art can take a variety of forms, though this Note is particularly concerned with public protest art, such as graffiti and murals.⁶⁰ Political graffiti has been recorded as early as ancient Rome and is inescapably entwined with the aesthetics of its historical context.⁶¹ Following artistic progression in the United States in the 1970s, graffiti enjoys broad recognition and appreciation.⁶² As the term “graffiti” can conjure connotations of vandalism and other illegal acts, graffiti may now bear the moniker of relatively uncontroversial names such as “street art or urban art.”⁶³ Nevertheless, these art forms retain an aura of proscribed and spontaneous creativity.⁶⁴ Contemporary graffiti has entered the popular imagination through the works of prominent graffiti artists, such as Banksy.⁶⁵ The popularity of street art

58. Pablo Picasso, GUERNICA (Museo Nacional Centro de Arte Reina Sofia 1937), <https://www.museoreinasofia.es/en/collection/artwork/guernica> [<https://perma.cc/PPW2-WUM7>] (last visited July 9, 2021). An abstract but nevertheless gripping portrayal of the aftermath of a bombing, Picasso’s work became an allegory for the ravages of violence. See Paloma Esteban Leal, *Guernica*, MUSEO NACIONAL CENTRO DE ARTE REINA SOFIA, <https://www.museoreinasofia.es/en/collection/artwork/guernica> [<https://perma.cc/PPW2-WUM7>]. One commentator points to Guernica’s considerable influence as a tool of protest, noting “Guernica so accurately and powerfully conveyed the ravages and despair of war that it became influential rhetoric in multiple anti-war movements.” Brooke Davidson, Note, *A Thousand Words: Pollara v. Seymour and the Trend to Under-Value and Under-Protect Political Art*, 14 DEPAUL J. ART, TECH. & INTELL. PROP. L. 257, 262 (2004).

59. See McQUISTON, *supra* note 7, at 7 (“Social discontent and political protest have been expressed visually as well as verbally throughout the ages.”).

60. See TV REED, PROTEST AS ARTISTIC EXPRESSION, in PROTEST CULTURES, A COMPANION 78–84 (Kathrin Fahlenbrach, Martin Klimke & Joachim Scharloth eds., 2016) (noting protest art has developed in multiple mediums, including theatre, performance art, music, and “[g]raphic arts,” including posters and murals).

61. See Johannes Stahl, *Graffiti*, in PROTEST CULTURES 228 (Kathrin Fahlenbrach, Martin Klimke & Joachim Scharloth eds., 2016) (describing history of graffiti as “a permanent and immortal accompany of cultural history.”). Stahl characterizes graffiti as “a continuous factor in the history of protest.” *Id.* at 229.

62. See *id.* at 228 (“In our contemporary use, the term also can label an art form, which . . . has developed an own pictural grammar and reached worldwide extension after forceful impulses out of New York and Philadelphia since the 1970s.”).

63. *Id.* at 231 (describing change in graffiti vocabulary due to ongoing criminalization and scrutiny).

64. *Id.* at 231 (noting these types of art still reflect “noncommanded and partly nonpermitted public expression . . .”). Stahl notes though graffiti originated from the ancient Greek word for writing (graphein) and was used in Renaissance Italy to refer to a “decorative technique,” it took on its modern meaning in nineteenth century France when “publications focused on graffiti as illegal, scriptural, or pictural use of public walls.” *Id.* at 228.

65. See *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 168 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (“Banksy’s work is nonetheless acknowledged, both by the art community and the general public, as of significant artistic merit and cultural importance.”). The Second Circuit states that “‘street art’ . . . has emerged as

represents the progression of the history of art from traditional canvases on museum walls, to “readymade” art and pop art in the twentieth century that brought artifacts of daily life into the museum space.⁶⁶ Street art pushed this further by eliminating the museum context entirely—art can now be found on street corners, sidewalks, and building walls.⁶⁷

Murals also serve as an important vehicle for protest art.⁶⁸ Due to their large size and placement on local streets, murals have the potential to transform community spaces into enduring memorials to activism.⁶⁹ Throughout the summer of 2020, artists created numerous murals across the United States to “amplify” the current state of societal inequities.⁷⁰ Protest art is not only a visual catalyst deployed in the contemporary moment, but a tool that can coalesce powerful emotions and captivating imagery for use in the present; it will ultimately become testimony of times gone by for future generations.⁷¹

C. *The Thinker*:⁷² How Should Courts Assess Art?

Courts have long struggled with how to adjudicate art due to its inher-

a major category of contemporary art.” *Id.* at 167. The court then quoted with approval Richard Chused’s scholarship describing the cultural impact of street art that has attained the distinction of “high art.” *Id.* at 167–68 (quoting Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 583 (2018)). Chused notes that “graffiti and street art” has developed into a “major, quickly evolving, internationally recognized art form.” Chused, *supra* note 65, at 583.

66. See Emma C. Peplow, Note, *Paint on Any Other Canvas: Closing a Copyright Loophole for Street Art on the Exterior of an Architectural Work*, 70 DUKE L.J. 885, 895–900 (describing progress of history of art from “Monet’s water lilies” to Marcel Duchamp’s “readymades” to Andy Warhol’s Brillo boxes).

67. See *id.* at 898–900 (asserting that street art continues transition of art from being mediated by museums to being integrated into everyday life: “[w]hereas pop art grappled with whether ‘everyday objects’ could be art, street art grappled with whether ‘post-museum art’ could exist. Could art be consumed by the masses where the masses exist?” (footnotes omitted)). Peplow notes that though art has moved outside the museum space, the conventional art establishment still intercedes with auctions and museum exhibitions of street art. *Id.*

68. See REED, *supra* note 60, at 84 (describing acclaimed, “deeply political” works of notable twentieth-century Mexican muralists as prominent examples of the “modernist mural art movement”).

69. See *id.* (Operating “on a grander scale,” “[m]urals can be integrated as permanent parts of neighborhoods, where passersby are confronted with literally larger than life images of protest.”).

70. See Arndt & Green, *supra* note 8 (“Artists . . . have joined the movement and created street art throughout the United States, including Brooklyn, San Francisco, Austin, Cincinnati, and Charlotte.”).

71. See *supra* notes 4–7 and accompanying text for scholarly interpretation about the significance of protest art.

72. Auguste Rodin, *THE THINKER* (Musée Rodin 1903), <http://www.musee-rodin.fr/en/collections/sculptures/thinker-0> [<https://perma.cc/VU5D-BUT8>] (last visited July 9, 2021). One of Rodin’s most enduring and recognizable sculptures, this work captures a man entranced by the workings of his inner mind while simultaneously evoking the latent potential of his powerful physicality. See

ent subjectivity.⁷³ Judicial handwringing about making value judgments about art is commonly traced to Justice Oliver Wendell Holmes' 1903 copyright opinion, *Bleistein v. Donaldson Lithographing Co.*⁷⁴ Justice Holmes famously warned his future counterparts from making "aesthetic judgments" due to their lack of experience evaluating the merits of art.⁷⁵ This long-established approach to adjudicating aesthetics is termed the "doctrine of avoidance" or "aesthetic neutrality."⁷⁶ Today, judges "perform analytical jujitsu" when confronted with aesthetic judgment, giving the perfunctory nod to *Bleistein* before applying an "ad hoc aesthetic theory of the court's own devising."⁷⁷ Justifications for this evasive approach include judges' lack of relevant expertise and their concern about censorship, and the randomness of subjective appraisals.⁷⁸ Nevertheless, government bodies, including courts, frequently make aesthetic judgments in varied aspects of law, including tax, customs, freedom of speech, land use, and intellectual property.⁷⁹ Within the context of this Note, judges confront aesthetic

The Thinker, MUSEÉ RODIN, <http://www.musee-rodin.fr/en/collections/sculptures/thinker-0> [<https://perma.cc/VU5D-BUT8>] (last visited Feb. 27, 2021).

73. See Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 Nw. U. L. REV. 343, 344 (2015) ("[Courts] become utterly flummoxed when confronted with works of art.").

74. 188 U.S. 239 (1903); see also Walker & Depoorter, *supra* note 73, at 345 (noting origin of "doctrine of avoidance" judicial stance).

75. See Walker & Depoorter, *supra* note 90, at 345. Justice Holmes' oft-quoted phrase is as follows: "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." *Id.* (quoting *Bleistein*, 188 U.S. at 251); see also Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 382–83 (2017) (remarking on the ubiquity of Justice Holmes' admonition).

76. Soucek, *supra* note 75, at 382–83 (2017) ("Holmes's so-called aesthetic neutrality or nondiscrimination principle has now become dogma." (footnotes omitted)); Walker & Depoorter, *supra* note 90, at 345 (describing developing of "doctrine of avoidance" approach) (quoting Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 815 (2005)).

77. Walker & Depoorter, *supra* note 73, at 347. Here, the Second Circuit acknowledged the futility of judicial aesthetic judgments by citing *Bleistein* as a justification for deferring the aesthetic judgment to the "relevant community." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020). Despite these protestations of judicial inadequacy, the Second Circuit nevertheless applied a revised standard of "recognized stature" that inevitably forces aesthetic judgment, belying the court's intentions. See *id.* and *infra* Section IV for a discussion of the Second Circuit's reasoning.

78. See Soucek, *supra* note 75, at 446 (describing rationalization of avoidant approaches including the fact that "courts . . . are ill-equipped to engage with aesthetics," the "subjective or unpredictable nature of aesthetic judgment," and the specter of "censorship: worries about government-imposed aesthetic orthodoxy"); Walker & Depoorter, *supra* note 73, at 345–46 (noting the "unpredictability" of art, judicial lack of experience, and potential for "a covert form of censorship" as explanations for avoidant approaches).

79. See Soucek, *supra* note 75, at 384.

"These are the kinds of decisions made by the IRS every time it assesses the value of a donated or inherited artwork; by courts when they decide whether a work has serious enough artistic value to escape an obscenity

judgments when determining whether the art at issue meets the “recognized stature” standard.⁸⁰ Commentators propose varying approaches to reconcile the necessity of aesthetic judgments with its perceived risks.⁸¹ This Note explores the applicability of obscenity jurisprudence, specifically “community standards” analysis, for “recognized stature” determinations.⁸²

D. *American Gothic*:⁸³ What Are “Community Standards,” What Role Do They Play in First Amendment Jurisprudence, and What Do They Have to Do With Art?

Similar to “recognized stature,” courts have struggled with how to determine whether work is obscene and thus unshielded by the First Amendment.⁸⁴ Both obscenity and “recognized stature” require judicial assessment of inherently subjective material.⁸⁵ In that context, the Supreme Court has developed the concept of “community standards” as a method of adjudicating issues of obscenity.⁸⁶

charge; by customs officials when they decide whether a certain piece of metal is a sculpture; by the National Endowment for the Arts when it chooses what projects to fund; and by municipal historical preservation committees when they decide whether proposed renovations will disrupt the character of a neighborhood.”

Id. (footnotes omitted)).

80. *See id.* at 444 (“One place where VARA unavoidably demands aesthetic judgment is in its protection against the destruction of works ‘of recognized stature.’” (citing 17 U.S.C.A. § 106A(a)(3)(B)) (West 2021)).

81. *Compare id.* at 458–66 (describing fitting aesthetic judgments within a “First Amendment spectrum”), *with* Walker & Depoorter, *supra* note 73, at 376–79 (advocating for adoption of “Community of Practice” method).

82. *See infra* Section II.D for an overview of obscenity jurisprudence. This Note considers the applicability of the “community standards” approach as opposed to other theoretical frameworks because the Eastern District of New York referenced “community standards” analysis. *See infra* notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York’s discussion of “community standards.”

83. *See* Grant Wood, *AMERICAN GOTHIC* (The Art Institute of Chicago 1930), <https://www.artic.edu/artworks/6565/american-gothic> [<https://perma.cc/HKB2-CP99>] (last visited July 9, 2021). Instantly recognizable, Grant Wood’s portrait of Midwestern farmers is commonly acknowledged as a critique of provincialism, though Wood’s objective was instead to sentimentalize, and even endorse, the pastoral American lifestyle. *See American Gothic*, THE ART INSTITUTE OF CHICAGO, <https://www.artic.edu/artworks/6565/american-gothic> [<https://perma.cc/HKB2-CP99>] (last visited July 9, 2021).

84. *See* Soucek, *supra* note 75, at 419 (2017) (“Obscene material falls outside the protections of the First Amendment . . . [b]ut not until 1973, in *Miller v. California*, did the Court finally coalesce around a definition.”).

85. *See id.* at 382 (“Aesthetic judgment pervades the law [I]n obscenity cases . . . and throughout intellectual property law, judges and other government officials are constantly deciding what is art, or what counts as artistically or aesthetically valuable.”).

86. *See* Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1841 (1975) (“‘[O]bscenity’ is understood to be a factual inquiry into what is offensively prurient to particular communities . . .”).

In evaluating whether a work is obscene, the Supreme Court first considers “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest”⁸⁷ In *Miller v. California*,⁸⁸ the Supreme Court granted “broad discretion” to judges and juries to determine which community’s standards should be applied.⁸⁹ Additionally, the Supreme Court established that “community standards” should be “statewide standards” as opposed to “national standard[s].”⁹⁰ In subsequent obscenity cases, the Supreme Court continued to sustain judges and juries deciding “the content of whatever community standards they apply.”⁹¹

More recently, in *Brown v. Entertainment Merchants Association*,⁹² the Supreme Court found a California statute that incorporated “community standards” to impose limitations on the sale of “violent video games” to minors unconstitutional.⁹³ In a concurring opinion, Justice Alito took issue with the “community standards” section of the statute.⁹⁴ Justice Alito found that the statute’s reference to “community standards” did not evade constitutional course correction, because he reasoned that there is a lack of community accord about what constitutes inappropriate violence that is not at issue in obscenity determinations.⁹⁵

87. *Miller v. California*, 413 U.S. 15, 24 (1973) (first quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972); then quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)) (describing first prong of three-prong obscenity test).

88. *Id.*

89. Note, *supra* note 86, at 1842 (describing import of *Miller* test in obscenity determinations and Supreme Court’s deference to adjudicators in deciding “the relevant community, and in applying that community’s measure of obscenity.”).

90. *Id.* (“[T]he Court . . . criticiz[ed] at length the national standard requirement”). In *Miller*, the Supreme Court course corrected “national community standards” utilized in prior cases due to their lack of workability. *See id.* at 1841; *see also* Soucek, *supra* note 75, at 419–20 (“[T]he first two prongs of the *Miller* test—both of which are judged against *local* standards” (emphasis added)).

91. Note, *supra* note 86, at 1842 (discussing *Jenkins v. Georgia*, 418 U.S. 153 (1974) and *Hamling v. United States*, 418 U.S. 87 (1974)). Discussing *Jenkins*, the author notes that the Supreme Court does not require identification of the community whose standards are to be applied. *See id.* In its consideration of *Hamling*, the author characterizes the Supreme Court as considering the jury pool the relevant community and giving “jurors free [rein] to apply their own conceptions of community mores.” *See id.* at 1844.

92. 564 U.S. 786 (2011).

93. *Id.* at 788 (“We consider whether a California law imposing restrictions on violent video games comports with the Fourth Amendment.”). The California statute, CAL. CIV. CODE §§ 1746–.5 (2009), defined these video games in part as those “patently offensive to prevailing standards in the community as to what is suitable for minors.” *Id.* at 789 (quoting CAL. CIV. CODE § 1746(d)(1)(A)). The majority found the statute unconstitutional as it did not pass strict scrutiny. *See id.* at 805.

94. *See Brown*, 564 U.S. at 812 (Alito, J., concurring) (describing constitutionally infirm qualities of “community standards” part of statute).

95. *See id.* (describing applicability of “community standards”). Justice Alito characterized the California statute as attempting to skirt “vagueness problems” by couching its “community standards” within the scope of *Miller*. *Id.* at 808, 812. In finding that “community standards” were not applicable, Justice Alito considered

"Community standards" entered the "recognized stature" conversation when the Eastern District of New York considered the advisory jury opinion while determining whether the destruction of 5Pointz violated VARA in *Castillo*.⁹⁶ The Eastern District of New York noted advisory juries are "particularly appropriate in cases involving community-based standards."⁹⁷ The *Castillo* petitioners cited Justice Alito's reasoning in their petition for certiorari to similarly distinguish "community standards" in the obscenity context from "community standards" in the "recognized stature" context.⁹⁸ The *Castillo* defendants dismissed the application of "community standards" in "recognized stature" determinations in their petition for certiorari.⁹⁹

that obscenity implicates "generally accepted norms concerning expression related to sex[]" and there are no equivalent mores regarding violence. *Id.* at 812. Thus, Justice Alito reasoned that these flaws in the statute "fail[] to provide the fair notice that the Constitution requires." *Id.* at 813.

96. See *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 430–31 (E.D.N.Y. 2018), *aff'd sub nom.*, *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) ("Under these principles, the Court will take the jury's verdicts under advisement in making its independent findings of fact and conclusions of law, especially on issues that require judgment of the community." (footnote omitted)). The Eastern District of New York declined to inform the advisory jury that "their findings would only be advisory" in order "[t]o enhance the integrity of their verdicts . . ." *Id.* at 431. After considering the advisory jury's findings that twenty-eight out of a sum forty-nine pieces of art at issue had "achieved recognized stature," the Eastern District of New York judge extended the "recognized stature" designation to another seventeen pieces of art for a total of forty-five pieces of "recognized stature" that had been destroyed. *Id.* at 431, 439–40. The jury also found that that eight works constituted VARA violations as they "had been mutilated, distorted, or otherwise modified to the prejudice of the artists' honor or reputation;" VARA violations that do not require a finding of "recognized stature." *Id.* at 431. See *supra* notes 28–29 and accompanying text for a discussion of these VARA provisions.

97. See *Cohen*, 320 F. Supp. 3d at 430 (quoting *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002)) (justifying use of advisory jury). In *NAACP*, the Eastern District of New York judge noted that "[a]dvisory juries are particularly useful in cases in which 'there are special factors . . . which suggest that a jury composed of members of the community would provide the Court valuable guidance in making its own findings and conclusions.'" *NAACP*, 226 F. Supp. 2d at 398 (quoting *Skoldberg v. Villani*, 601 F. Supp 981, 982 (S.D.N.Y. 1985)). The *NAACP* judge then cited to numerous cases ratifying the use of an advisory jury to support use of an advisory jury in the instant case to "advise the court on the question of whether defendant gun manufacturers and distributors have created a public nuisance and, if so, to provide guidance on the nature of appropriate injunctive relief." *Id.* at 399–400 (citing Note, *supra* note 86, at 1371–76).

98. See Petition for Writ of Certiorari, *supra* note 35, at *29 n.20 ("To the extent the 'recognized stature' provision might be analogized to 'community standards' provisions in other legislation, the 'recognized stature' provision has 'no similar history' remotely comparable to experience with the conduct regulated in those statutes." (citing *Brown*, 564 U.S. at 812) (Alito, J., concurring)).

99. See *id.* The *Castillo* defendants intended to undermine the applicability of "community standards" analysis to advance their argument that the "recognized stature" standard is fatally ambiguous and cannot be saved by "community standards." See *id.*

Though “community standards” are more commonly found in obscenity jurisprudence, the Eastern District of New York introduced “community standards” to assist in gauging “recognized stature.”¹⁰⁰ Additionally, the Eastern District of New York has used advisory juries, particularly for their use in assessing “community standards,” to adjudicate legal issues outside of obscenity.¹⁰¹ The particularized ability of local jurors to apply “community standards” is a factor some judges consider when deciding on motions to transfer.¹⁰²

Public opinion has been a part of “recognized stature” determinations since *Carter*.¹⁰³ “Community standards” analysis operates as a viable, though admittedly imperfect, method for courts to incorporate public opinion in the obscenity environment.¹⁰⁴ The workability of “community standards” in the obscenity context and other cases requiring the opinion

100. See *Brown*, 564 U.S. at 812 (Alito, J., concurring) (noting history of “community standards” evaluation in obscenity context); *Cohen*, 320 F. Supp. 3d at 430–31 (“Because advisory juries permit community participation and may incorporate the public’s views of morality and changing common law, their use is particularly appropriate in cases involving community-based standards” (quoting *NAACP*, 226 F. Supp. 2d at 398)).

101. See *NAACP*, 226 F. Supp. 2d at 400 (E.D.N.Y. 2002) (ordering empanelment of advisory jury in nuisance case because “[i]t is appropriate to take into consideration the values and standards of the community through the use of an advisory jury . . .”). The Eastern District of New York cited to *NAACP* to support the assertion that advisory juries can provide relevant guidance for the court in assessing community standards. See *Cohen*, 320 F. Supp. 3d at 430 (citing *NAACP*, 226 F. Supp. 2d at 398).

102. See 15 ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3854 (4th ed. 2020) (“Courts also have considered whether a jury in the transferor or the transferee district would be better equipped to apply community standards . . .”). Miller cites to numerous cases applying this principle: *Keefe v. Simons*, 2013 WL 3243110, at *6 (noting “where a jury could best apply community standards” is a transfer factor in case with non-obscenity underlying cause of action.); *Grainger v. Reiner*, 2012 WL 386722, at *3 (N.D. Ill. 2012) (same); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 218, 221 (7th Cir. 1986) (same) (first citing *Chance v. E. I. Du Pont De Nemours & Co., Inc.*, 371 F. Supp. 439, 439 (E.D.N.Y. 1974); then citing 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3854 (1986)); *Conseco Life Ins. Co. v. Reliance. Ins. Co.* 2001 WL 1631873, at *5 (N.D. Ill. 2001) (transferring insurance dispute to “permit the application of community standards by the trier of fact” among other reasons); *Chance v. E.I. Du Pont De Nemours & Co., Inc.*, 371 F. Supp. 439, 449 (E.D.N.Y. 1974) (severing and transferring products liability cases when “resolution of these claims is most likely to be achieved by subjecting them to the critical scrutiny of local jurors with knowledge of local practice . . . [c]ommunity standards are a vital element in assessing the actions of the parties in this suit.”).

103. See *supra* notes 38–43 and accompanying text for a description of the *Carter* test and legacy. This Note refers to “community opinion” or “public opinion” to refer to lay opinions about art, often originating in the local community in which the art resides.

104. See Note, *supra* note 86, at 1371–72 (“Issues of community participation in the areas of obscenity . . . portray the possibilities and dangers of advisory jury use. . . . The community participation element of advisory juries makes them especially attractive to judges trying cases under civil obscenity statutes.”). This commentator finds advisory juries invite “greater participation of members of the

of local communities or the broader public suggests “community standards” may be a serviceable adjudicative tool in comparably fraught “recognized stature” valuations.¹⁰⁵

III. THE LAST SUPPER:¹⁰⁶ THE BETRAYAL OF 5POINTZ

Originally a water meter factory, the Neptune Meter’s most famous metamorphosis is arguably its penultimate, “Aerosol Art Centre” “5Pointz: The Institute of Higher Burning[.]”¹⁰⁷ Under the auspices of curator Jonathan Cohen, who selected and cultivated aerosol artists to fill its exterior canvases, 5Pointz engendered a local following.¹⁰⁸ The once derelict building transformed into a “living monument, spawning” worldwide appreciation and visitation from both artists and lay people.¹⁰⁹ Despite the building’s significance as a “cultural institution,” Gerald Wolkoff, the 5Pointz property owner, destroyed 5Pointz in the middle of the night as the latest provocation in his increasingly heated attempts to develop the

nonlegal community,” which has the benefit of “the influence of broader community norms” with the risk of “narrow parochialism” *Id.* at 1371.

105. See *supra* Section II.D for a description of “community standards” analysis in obscenity and other cases, and *infra* Section V.B for the argument in favor of applying “community standards” to “recognized stature” decisions.

106. Leonardo da Vinci, *THE LAST SUPPER* (Santa Maria delle Grazie 1495–1498). This ill-fated and world-famous mural of Christ eating his final meal amongst his treacherous disciples was itself betrayed by Leonardo’s unorthodox painting technique which caused the mural to decline shortly after its completion. See ANNA ABRAHAM, *LEONARDO DA VINCI* 34-35 (2014). The Author of this Note hopes the allegorical similarity of *The Last Supper’s* demise and the perfidy that befell 5Pointz is clear to the reader. See *infra* notes 107–11 and accompanying text for a description of 5Pointz’s destruction.

107. Mekhala Chaubal & Tatum Taylor, *Lessons from 5Pointz: Toward Legal Protection of Collaborative, Evolving Heritage*, 12 *FUTURE ANTERIOR: J. HISTORIC PRES., HIST., THEORY, & CRITICISM* 77, 77–78 (2015) (describing lifespan of the historic Neptune Meter building). The Neptune Meter building in Queens, New York, has undergone many iterations since its construction in 1892. See *id.* at 77 (“The former Neptune Meter building was constructed in 1892 as a factory for the production of water meters, continuing to serve this function until 1972”). Chaubal and Taylor relate Gerald Wolkoff’s purchasing of the property in the early 1970’s before leasing studios within the building to artists and allowing aerosol artists to use the outside of the building. See *id.* Though intended as a prophylactic measure to limit illegal graffiti elsewhere, what was known as the Phun Phactory “attracted criticism from vocal detractors . . . who feared that the project was glorifying vandalism.” *Id.* When the Phun Phactory became “unmanageable” for Mr. Wolkoff, the partnership with Mr. Cohen to oversee the site to “increase [the artworks’] quality and cohesion” seemed a suitable solution. *Id.* at 78.

108. See Chaubal & Taylor, *supra* note 107, at 77. Passengers on the high-volume New York City 7 subway train could view the site, which boosted its popularity. See Chused, *supra* note 65, at 585 (“The notoriety of the site was enhanced by its visibility from the heavily used 7 train as it passed nearby on an above ground portion of the New York City subway system.”).

109. See Chaubal & Taylor, *supra* note 107, at 77 (relating 5Pointz’s impact in both the local and international art communities as “a major destination for international graffiti artists and tourists alike.”).

site into apartment buildings.¹¹⁰

Confronting the complete devastation of 5Pointz, the 5Pointz artists pivoted from their now futile legal maneuvers to preserve the site to a post-mortem attempt to seek retribution for the destruction under a seldom tried and “obscure”¹¹¹ amendment to the Copyright Act, VARA.¹¹² The artists’ successful suit was the first instance where a federal court found a private property owner had infringed artists’ VARA rights.¹¹³

5Pointz began when the defendant property owner, Mr. Wolkoff, recruited one of the plaintiffs, Mr. Cohen, to curate a public art space at Mr. Wolkoff’s run-down properties in Long Island City, New York in 2002.¹¹⁴ This relationship proved fruitful for both Mr. Wolkoff and Mr. Cohen.¹¹⁵ Mr. Cohen engaged aerosol artists and transformed the space into 5Pointz, a “major global center for aerosol art” that enjoyed significant publicity.¹¹⁶ The once symbiotic relationship soured when Mr. Wolkoff began the process of developing the site in 2013.¹¹⁷ Mr. Cohen futilely attempted to save 5Pointz through pleas to the New York City Landmark

110. *See id.* (“[T]he 5Pointz Aerosol Art Centre had received international attention as a ‘mecca for graffiti artists’ and a ‘cultural institution.’” (footnote omitted)). After the artists’ failed attempt for a preliminary injunction, Mr. Wolkoff banned the artists’ from accessing the art and hired workers to “white-wash[]” 5Pointz. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 163 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020); *see also* Chused, *supra* note 65, at 591 (describing Wolkoff’s efforts to prepare the buildings for development and the artists’ attempts to save the site through both preservation and legal avenues). Mr. Wolkoff passed away in July 2020. Dana Chiueh, *Prominent Long Island Developer Jerry Wolkoff Dies*, LONG ISLAND PRESS (July 20, 2020), <https://www.longislandpress.com/2020/07/20/prominent-long-island-developer-jerry-wolkoff-dies/> [<https://perma.cc/94UG-UL9Z>].

111. *See* Brittain, *supra* note 8 (noting “scant law” analyzing the “recognized stature” standard).

112. *See* Robinson, *supra* note 22, at 1948 (describing circumstances of VARA’s enactment as “narrow but profound amendment to the Copyright Act.”).

113. *See* Thornley, *supra* note 29, at 352 (noting that the Eastern District of New York’s holding was “first time [] that a property owner violated visual artists’ moral rights, per VARA . . .”).

114. *Castillo*, 950 F.3d at 162 (explaining historical relationship between parties and origin of dispute). The Second Circuit characterized Mr. Cohen as “a distinguished aerosol artist[.]” *Id.* Prior to 2002, aerosol artists had used the space, known as the “Phun Phactory,” with Mr. Wolkoff’s permission since 1993. *See* Chused, *supra* note 65, at 584–85. Mr. Wolkoff’s arrangement with Mr. Cohen represented a new era for the site, as Mr. Cohen “organize[d], control[led] and curate[d] the creative endeavors of artists from all over the world seeking access to the site.” *Id.*

115. *See Castillo*, 950 F.3d at 162 (recounting longstanding working relationship between the parties).

116. *Id.* (illustrating public exposure of 5Pointz which “attracted thousands of daily visitors, numerous celebrities, and extensive media coverage”).

117. *Id.* at 162–63 (noting Mr. Cohen learned of Mr. Wolkoff’s plans to raze the site to build luxury apartments when Mr. Wolkoff began the development process).

Preservation Commission and fundraising to buy the property outright.¹¹⁸

With other 5Pointz artists, Mr. Cohen began seeking legal remedies under the Visual Artists Rights Act (VARA).¹¹⁹ First, the plaintiffs received a temporary restraining order.¹²⁰ Following the lapsing of the temporary restraining order, the plaintiffs unsuccessfully attempted to receive a preliminary injunction.¹²¹ The Eastern District of New York denied the preliminary injunction on November 12, 2013 and issued an opinion on November 20, 2013.¹²² On the same day, Mr. Wolkoff closed the site to the artists before authorizing workers to “whitewash[]” 5Pointz.¹²³

Subsequently, nine other 5Pointz artists also sought relief under VARA.¹²⁴ Following consolidation of the two suits, the Eastern District of New York held a three week trial.¹²⁵ Though initially a jury trial, the plaintiffs consented to waive the jury resulting in the use of an advisory jury.¹²⁶ The Eastern District of New York considered the jury’s findings in reaching its verdict, particularly when deciding “issues that require judgment of the community.”¹²⁷ Furthermore, the “[c]ourt was keen to learn whether the jurors, as members of the community” believed the art pieces met the “recognized stature” standard.¹²⁸ The court also considered the jury to be

118. *Id.* at 162 (relating Mr. Cohen’s bids to preserve 5Pointz). The New York City Landmark Preservation Committee denied the application. *Id.* A commentator has speculated that the application was unsuccessful because the aerosol art did not meet the thirty-year requirement for preservation. *See Chused, supra* note 65, at 591. Mr. Cohen’s intention to purchase the property became unrealistic when an October 2013 variance significantly enhanced the land’s worth from \$40 million to \$200 million. *See Rosano & Kurtz, supra* note 26, at 779.

119. *Castillo*, 950 F.3d at 163 (describing plaintiffs’ initial legal action).

120. *Id.* (citing *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d. 212, 214 n.1 (E.D.N.Y. 2013)).

121. *Id.* at 163 (citing *Cohen*, 988 F. Supp. 2d at 214) (describing Eastern District of New York’s order denying preliminary injunction with forthcoming opinion).

122. *Id.*; *Cohen*, 988 F. Supp. 2d at 214 (Eastern District of New York’s opinion denying the preliminary injunction). One commentator has described the Eastern District of New York’s opinion denying the preliminary injunction as a “woefully inadequate analysis of the legal issues in the dispute.” *Chused, supra* note 65, at 590. *Chused*’s critique faults the Eastern District of New York’s holding that the artists were effectively on notice of destruction because of both the “impermanent” nature of graffiti and because use of the art space was contingent on the status of the redevelopment plans. *Id.* at 596–97.

123. *Castillo*, 950 F.3d at 163 (describing Mr. Wolkoff’s destruction of 5Pointz).

124. *Id.*

125. *Id.* (describing Eastern District of New York trial).

126. *Id.* When advisory juries are used, judges retain the burden of determining the verdict. *See id.* Judges consider and implement the advisory jury’s findings at their discretion. *See id.*

127. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 430 (E.D.N.Y. 2018), *aff’d sub nom.*, *Castillo*, 950 F.3d 155, *cert. denied*, 141 S. Ct. 363 (2020) (describing reliance on advisory jury).

128. *Id.* at 430 (describing Eastern District of New York appraisal of advisory jury).

a proxy for the opinion of the broader community.¹²⁹

The Eastern District of New York held that Mr. Wolkoff willfully violated VARA, granting the plaintiffs \$6,750,000 in statutory damages.¹³⁰ In its holding, the Eastern District of New York concluded that forty-five of the forty-nine works at issue fit the definition of “recognized stature.”¹³¹ Then, the defendants filed post-trial motions under Federal Rules of Civil Procedure 52(b) and 59(a) to either grant a new trial, find for the defendants, or grant remitter.¹³² In denying the motions, the Eastern District of New York recounted the evidence that led the court to find “recognized stature” had been met.¹³³ In explaining its holding on each work of art, the Eastern District of New York detailed why the works met “recognized stature” by one or more of three groups of “art experts, other members of the artistic community, or by some cross-section of society.”¹³⁴ The Eastern District of New York deliberately delineated that each of these categories are sufficient to establish “recognized stature.”¹³⁵

IV. AUTUMN RHYTHM:¹³⁶ A NARRATIVE ANALYSIS OF THE SECOND CIRCUIT’S RUMBA WITH RECOGNIZED STATURE

In affirming the Eastern District of New York’s finding for the 5Pointz artists, the Second Circuit identified the core issue on appeal as whether

129. *Id.* (“[S]ince 5Pointz had achieved *worldwide community recognition*, the Court was keen to learn whether the jurors, *as members of the community*, would view the works as having achieved recognized stature under VARA.” (emphasis added)).

130. *Castillo*, 950 F.3d at 163.

131. *Id.* (noting Eastern District of New York’s findings).

132. *Cohen v. G&M Realty*, No. 13-CV-05612(FB) (RLM), 2018 WL 2973385, at *1 (E.D.N.Y. June 13, 2018) (citation omitted) (describing post-trial litigation, defendants requested the court “set aside the [c]ourt’s findings of fact and conclusions of law and grant a new trial or, alternatively, to vacate the judgment in plaintiff’s favor and enter judgment for defendants, or alternatively, for remitter.”).

133. *Castillo*, 950 F.3d at 164 (noting Eastern District of New York’s approach in response to post-trial motions: “marshall[ing] the evidence in the record supporting the court’s findings as to the recognized stature of each work in question.”).

134. *Cohen*, 2018 WL 2973385, at *7 (emphasis added) (quoting *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y.), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995)) (advancing format of analysis).

135. *Id.* (“These three categories are conjugated with ‘or’; that is, the artist’s work needs recognition by only one of these three groups.”). For example, in describing the evidence in favor of a finding of “recognized stature” for a plaintiff’s work *7 Angle Time Lapse*, the court noted that the work enjoyed significant public visibility, “was featured in 14 documentaries,” and “the jury found it achieved recognized stature.” *Id.* at *31.

136. See Jackson Pollock, *AUTUMN RHYTHM* (The Metropolitan Museum of Art 1950), <https://www.metmuseum.org/art/collection/search/488978> [<https://perma.cc/ZX39-JNJY>] (last visited July 9, 2021). This larger-than-life painting is characteristic of Pollock and his signature “drip” methodology, invoking the tumult of seasonal change. See *Autumn Rhythm*, THE METROPOLITAN MUSEUM OF ART, <https://www.metmuseum.org/art/collection/search/488978> [<https://perma.cc/ZX39-JNJY>] (last visited July 9, 2021).

the destroyed 5Pointz artworks were of "recognized stature."¹³⁷ After reviewing VARA's statutory provisions and the protections it affords, the Second Circuit found "that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community."¹³⁸ The Second Circuit further clarified that:

[a] work's high quality, status, or caliber is its stature, and the acknowledgement of that stature speaks to the work's recognition. The most important component of stature will generally be artistic quality. The *relevant community will typically be the artistic community*, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.¹³⁹

In justification of this definition of relevant community, the Second Circuit reasoned that the standard safeguards national cultural history.¹⁴⁰ The Second Circuit then conceded the impropriety of courts making value judgments about the quality of art and referenced Justice Holmes' warning that judges are not qualified to evaluate art.¹⁴¹ Nevertheless, the Second Circuit maintained that its mutable interpretation of "recognized stature" does not stray too far afield of Justice Holmes's proscription because "expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature."¹⁴²

After reviewing the Eastern District of New York's determinations of recognized stature, the Second Circuit noted that the district court's holding can only be overturned on the basis of "clear error."¹⁴³ The Second Circuit found no statutory support for the defendants' contentions that VARA does not protect temporary art, such as 5Pointz.¹⁴⁴ Citing examples

137. *Castillo*, 950 F.3d at 166 ("The crux of the parties' dispute on this appeal is whether the works at 5Pointz were works of 'recognized stature,' thereby protected from destruction . . .").

138. *Id.* (first citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994), *aff'd in part, and vacated in part, and rev'd in part*, 71 F.3d 77 (2d Cir. 1995); then citing *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999)) (providing "recognized stature" definition).

139. *Id.* (emphasis added) (providing additional clarification on definition of "recognized stature").

140. *Id.* ("VARA protects 'the public interest in preserving [the] nation's culture (quoting *Carter v. Helmsley-Spear*, 71 F.3d 77, 81 (2d Cir. 1995)).

141. *Id.* ("After all, we are mindful of Justice Holmes's cautionary observation . . ."). The Second Circuit further quotes Justice Holmes that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art]." *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

142. *Id.* ("This approach also ensures that the personal judgment of the court is not the determinative factor in the court's analysis." (citing *Robinson*, *supra* note 22, at 1945 n.84 (2000))).

143. *Id.* at 167 (describing appellate standard of review).

144. *Id.* ("We see nothing in VARA that excludes temporary artwork from attaining recognized stature."). The Second Circuit clarified that a prerequisite of permanence would contravene Congress's intent and overstep judicial boundaries

of “temporary” art that have generated acclaim, the Second Circuit concluded that temporary art is not excluded from “recognized stature.”¹⁴⁵ Agreeing with the Eastern District of New York, the Second Circuit observed that VARA provides for “durational limits” in the statute’s text.¹⁴⁶

The Second Circuit then considered and dismissed the defendants’ additional contentions that the district court misapplied the “recognized stature” standard.¹⁴⁷ The defendants first argued that the Eastern District of New York mistook “recognized stature” for “recognized quality” and that evaluation of “recognized stature” should be backdated to the date of destruction rather than determined at trial.¹⁴⁸ The defendants also argued that the plaintiffs’ expert witness’s testimony received undue credence when the expert witness had not observed all of the works at issue, and that Mr. Cohen’s testimony on both his curatorial work and 5Pointz as a whole was afforded inappropriate influence.¹⁴⁹ The Second Circuit found none of these arguments persuasive and concluded that “the district court applied the correct legal standard and did not commit clear error[.]”¹⁵⁰

On July 20, 2020, defendants filed a petition for a writ of certiorari to the Supreme Court.¹⁵¹ The defendants asserted that the “recognized stat-

because the statute’s text does not distinguish artwork on its temporal status. *Id.* (citing 17 U.S.C. § 101).

145. *Id.* at 168 (describing recent temporary artworks that would meet the definition of “recognized stature”). The Second Circuit proffered *The Gates* as an example of artwork that would meet the “recognized standard” standard even though it “lasted only two weeks but was the subject of significant critical acclaim and attention, not just from the art world but also from the general public.” *Id.* at 167. The Second Circuit also pointed to Banksy’s *Girl with Balloon* that “self-destructed after selling for \$1.4 million at Sotheby’s . . . the temporary quality of this work has only added to its recognition.” *Id.*

146. *Id.* (“[T]he statute provides that ‘[t]he 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 distortion, mutilation, or other modification described in subsection (a)(3)(A).’” (quoting 17 U.S.C. § 106A(c)(1))). The Second Circuit also rejected the defendants’ contention that the 5Pointz artists’ knowledge of the potential destruction of the art precludes a VARA violation. *Id.* at 168. The court again referenced the text of VARA, agreeing with the Eastern District of New York that VARA accommodates those prospective situations by requiring a waiver or providing notice to the artists and notes that there is no evidence that this occurred. *Id.* at 168–69.

147. *Id.* at 169 (“Wolkoff argues that the district court erred in several other respects . . . [n]one of these contentions, considered separately or in the aggregate, convinces us that any of Judge Block’s findings were clearly erroneous.”).

148. *Id.*

149. *Id.*

150. *Id.* at 170 (affirming Eastern District of New York’s holding finding VARA violations).

151. See Petition for Writ of Certiorari, *supra* note 35, at *37; see also Blake Brittain, *N.Y. Developer Seeks SCOTUS Review of 5Pointz Graffiti Art Case*, BLOOMBERG L. (July 20, 2020, 12:01 PM), <https://www.bloomberglaw.com/product/blaw/document/XDTB7IV0000000?bc=W1siQmxvb2liZXJnIEExhdyIsIi9wcm9kdWN0L2JsYXcvbm90aWZpY2F0aW9ucy9pdGVtcy9SRVNFQVJDSF9UUKFJTCljXQ->

ure" standard was unconstitutionally vague.¹⁵² The Supreme Court denied the petition for certiorari on October 5, 2020.¹⁵³

V. THE LAST JUDGEMENT:¹⁵⁴ A CRITICAL ANALYSIS OF THE SECOND CIRCUIT'S "RECOGNIZED STATURE" DEFINITION IN *CASTILLO V. G&M REALTY L.P.*

This Section maintains the Second Circuit's definition of "recognized stature" elevates expert testimony over other types of evidence at the expense of protecting art outside the mainstream. Subsection A asserts that the Second Circuit's "recognized stature" guidelines promote the protection of museum-quality artwork and potentially decrease the likelihood that public art, such as protest art, will be safeguarded by VARA. Understanding the difficult circumstance courts find themselves in when making findings of "recognized stature," this Note argues in Subsection B that the Second Circuit should have considered "community standards" analysis as a method of assessing "recognized stature" and proffers this analysis as a viable tool for future adjudicators.

A. *The Second Circuit's Definition of "Recognized Stature" Leaves Public Art Vulnerable*

The Second Circuit's revised definition of "recognized stature" does not adequately address the role community perception plays in determining recognized stature.¹⁵⁵ Particularly, the Second Circuit's emphasis on the opinion of "the artistic community to determine 'recognized stature' places a higher premium on these 'expert[]' opinions than the opinions

7d97e0814b01f2a467dfe0a55cca64ed76649c62 [https://perma.cc/B3PU-J6DY] ("A New York property owner who was forced to pay \$6.75 million for whitewashing a 'mecca' for graffiti art asked the U.S. Supreme Court on Monday to reverse the ruling.").

152. See Petition for Writ of Certiorari, *supra* note 35, at *5–6 (claiming "recognized stature" violates the Fifth Amendment because "Congress neglected to define this novel phrase, which fails to provide a person of ordinary intelligence fair notice of what is prohibited").

153. Kyle Jahner, *High Court Lets Artists' \$6.75M 5Pointz Graffiti Win Stand*, BLOOMBERG L. (Oct. 5, 2020), <https://news.bloomberglaw.com/ip-law/high-court-lets-artists-6-75m-5pointz-graffiti-win-stand?context=search&index=0> [https://perma.cc/H6T6-6U9L].

154. See Michelangelo, THE LAST JUDGEMENT (Sistine Chapel, Musei Vaticani 1536–1541), <http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/cappella-sistina/giudizio-universale.html> [https://perma.cc/2FYE-Y9LZ] (last visited July 9, 2021). A stirring tableau from Michelangelo's Sistine Chapel masterwork, this particular scene illustrates the instant before Christ issues his final ruling. See *The Last Judgment*, MUSEI VATICANI, <http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/cappella-sistina/giudizio-universale.html> [https://perma.cc/2FYE-Y9LZ] (last visited July 9, 2021).

155. For the Second Circuit's definition of "recognized stature," see *supra* notes 138–39 and accompanying text. For a justification of why community opinion is deserving of weight in the "recognized stature" analysis, see *supra*, note 57 and accompanying text.

of the *Carter* court's "cross-section of society."¹⁵⁶ This definition that is deferential to art experts also discounts the weight the Eastern District of New York gave to both the advisory jury's opinion and public opinion generally.¹⁵⁷ The Second Circuit did acknowledge the relevance of non-professional opinions when the court concluded that "expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature."¹⁵⁸

Nevertheless, when the Second Circuit described the "relevant community" as "typically [] the artistic community," the court undermined what it described as VARA's goal to "protect[] 'the public interest in preserving [the] nation's culture[.]'"¹⁵⁹ This definition fails to protect art, including protest and other forms of public art, that is, arguably, part of the nation's cultural heritage because of its community relevance and impact, but that has not garnered the commendation of the artistic community.¹⁶⁰

Diagnosing this avertible gap in protection, the United States Copyright Office supports an expanded definition of recognized stature.¹⁶¹

156. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1995), *aff'd in part, and vacated in part, and rev'd in part*, 71 F.3d 77 (2d Cir. 1995) (providing "recognized stature" test). For a discussion of the *Carter* test for recognized stature, see *supra* notes 38–43 and accompanying text.

157. See *Castillo*, 950 F.3d at 165, 170 (noting "extensive lay testimony and documentary evidence" but crediting "expert testimony" as the "linchpin of claims of 'recognized stature.'") For a discussion of the Eastern District of New York's use of the advisory jury and analysis of public opinion, see *supra* notes 96–97, 100, 126–29 and accompanying text.

158. *Castillo*, 950 F.3d at 166.

159. *Id.* (emphasis added) (quoting *Carter*, 71 F.3d at 81); see also Rachel Horn, Note, *Highway Art Policy Revisited: Rethinking Transfers of Copyright Ownership in State-Owned Transportation Artwork*, 43 COLUM. J.L. & ARTS 295, 305 (2020) (noting that VARA analysis is particularly significant for public art because "public art is . . . installed in common spaces—often dynamic places where a community's pluralistic interests and evolving needs may entail a greater likelihood of removal or modification . . .").

160. See U.S. COPYRIGHT OFFICE, *supra* note 11, at 79 (describing shortcomings of current "recognized stature" standard and offering commentary on remedial measures). In preparing the Report, the United States Copyright Office solicited feedback from the New York Bar Association. See *id.* A participant maintained "the preservative aims of the recognized stature provision should not be undercut by an inflexible dependence on a scholarly consensus of aesthetic importance" and acknowledged that "[t]he recognized stature of such a localized work may not be primarily aesthetic in nature at all; the work may have become iconic for non-aesthetic reasons, or it may reflect the social concerns of the community in a way that an acknowledged masterpiece may not." *Id.* (citing Art Law Committee of the New York City Bar Association, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry 5 (Mar. 27, 2017)). A participant critiqued the "recognized stature standard" as "too narrow, especially in the context of public art (e.g. murals, large-scale sculptures) where the value of the art is rooted in the community where the art resides." *Id.* (citing Art Law Committee of the New York City Bar Association, *supra* note 160, at 5).

161. See *id.* at 80 (proposing legislative amendment of VARA).

The United States Copyright Office described the Eastern District of New York's opinion as "potentially address[ing] some of these concerns regarding the exclusion of certain types of art."¹⁶² Endorsing the Eastern District of New York's "proposed standard," the United States Copyright Office recognized that "the local community's relationship with the artwork" should be a factor in judicial decision making about "recognized stature."¹⁶³ The Office supports "a broader interpretation . . . that accounts for the opinions of those beyond the academic community," expanding VARA's sanctuary to more types of art in alignment with legislative intent.¹⁶⁴ Additionally, as public art often deliberately subsists outside of the broader art establishment context and can be assessed without the intermediary of the museum or the interpretation of art experts, wholesale reliance on art expert opinion may be misplaced.¹⁶⁵

B. *Can "Community Standards" Jurisprudence Assist Courts in Making "Recognized Stature" Decisions?*

The Second Circuit also did not address the viability of the Eastern District of New York's allusion to "community-based standards" as a method of evaluating "recognized stature."¹⁶⁶ In its opinion, the Second Circuit did not respond to the Eastern District of New York's use of the advisory jury or meaningfully remark on the Eastern District of New York's lengthy findings of community recognition to support its findings of rec-

162. *Id.* (reviewing Eastern District of New York's *Castillo* opinion); *see also* Brittain, *supra* note 8 (describing Second Circuit's "recognized stature" analysis and relating to United States Copyright Office's report). In considering the application of VARA to protest art, Attorney Megan Noh noted the possibility that local art that has attained "huge significance to people in the community[] . . . may not be on the radar of worldwide art critics." *Id.* (internal quotation marks omitted). Another commentator has noted the Eastern District of New York's opinion embraces a broader definition of "recognized stature" because the Eastern District of New York did not require the plaintiffs to prove the market value of the art issue, indicating a "liberalizing shift in judicial understandings of what qualifies as a work of 'recognized stature.'" Horn, *supra* note 159, at 307.

163. U.S. COPYRIGHT OFFICE, *supra* note 11, 79–80.

164. *Id.* The United States Copyright Office summarizes participant feedback on this point as "the less established the artist and less relevant their work is to scholarly research, the more attention should be given to the *community's* opinion and not necessarily the expert's . . ." *Id.* at 79.

165. *See* Peplow, *supra* note 66, at 898. Though certainly art experts are capable of testifying to the significance of art in any context, art outside of museums seems to self-evidently invite analysis of its significance from non-art expert sources.

166. *See* *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 430 (E.D.N.Y. 2018), *aff'd sub. nom. Castillo v. G & M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (quoting *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002)). Additionally, defendants' petition for writ of certiorari also dismissed the application of "'community standards' provisions" without detailed analysis. Petition for Writ of Certiorari, *supra* note 35, at 29 n.20 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 812 (2011) (Alito, J., concurring)).

ognized stature.¹⁶⁷ Instead, the Second Circuit credited the ample “expert testimony, which is often the *linchpin* of claims of ‘recognized stature.’”¹⁶⁸ Notwithstanding the policy reasons supporting a broader definition of “recognized stature” that recognizes community appreciation of art, the use of a “community standards” approach may prove to be a useful tool for courts struggling with the means to address “recognized stature.”¹⁶⁹ Despite Justice Alito’s proscription of the use of “community standards” outside the obscenity context in *Brown*, applying “community standards” for “recognized stature” determinations does not suffer from the same deficiencies that applying “community standards” to violence does.¹⁷⁰ Opinions about art are fundamentally personal and necessarily diverse.¹⁷¹ Even with that understanding, the use of “community standards” to evaluate “recognized stature” would not rely on unanimous opinion to dispositively turn the “recognized stature” classification on and off like a light switch.¹⁷² Instead, “community standards” can be leveraged as a *factor* in determining recognized stature, alongside expert testimony, similar to the methodology the Eastern District of New York employed in *Castillo*.¹⁷³ Notably, the *Miller* use of “community standards” encourages a local standard, aligning with the Eastern District of New York’s use of an advisory jury made up of members of the local community.¹⁷⁴ Furthermore, the case law verifies the jury’s unique ability to apply “community

167. See *Castillo*, 950 F.3d at 166–70 (evaluating Eastern District of New York’s findings of “recognized stature”). The Second Circuit acknowledged the Eastern District of New York’s use of “extensive lay testimony and documentary evidence” but did not go beyond this to explore community recognition, instead favoring expert testimony. *Id.* at 170.

168. See *id.* at 170 (emphasis added) (citing *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

169. See *supra* notes Section II.C for a description of why courts struggle with art adjudication. On the policy front, public art generally is an integral part of community building. See Horn, *supra* note 159, at 320 (“Public art is a well-recognized means of beautifying shared spaces, fostering community identity and strengthening communal values, encouraging economic development, improving civic participation, and generally enhancing a population’s quality of life.”).

170. See *supra* notes 94–95 and accompanying text for a description of Justice Alito’s concerns about “community standards” analysis.

171. See Brian Soucek, *supra* note 75, at 420 (describing Justice Scalia’s perspective on art opinions). Soucek recalls Justice Scalia’s concurrence in *Pope v. Illinois*, when Justice Scalia stated “[j]ust as there is no use about arguing about taste, there is no use litigating about it.” *Id.* (internal quotation marks omitted) (quoting *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring)).

172. See *supra* note 95 and accompanying text for Justice Alito’s reasoning that “community standards” are not appropriate analytical tools outside of obscenity.

173. See *supra* notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York’s use of “community standards” to find “recognized stature.”

174. *Miller v. California*, 413 U.S. 15, 24, 30–34 (1973) (first quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972); then quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). See *supra* notes 88–91 and accompanying text for a description of *Miller*’s definition of what makes up the community in “community standards,”

standards" and provide local perspective in adjudicating sensitive issues of fact.¹⁷⁵

Judicial agita about aesthetic judgments is well-documented.¹⁷⁶ Relying on juries, particularly the rarely used advisory jury, to assess community impact of works of art will greatly assist courts in making these decisions while simultaneously extending the definition of "recognized stature" in accordance with the aims of VARA and the United States Copyright Office's aspiration.¹⁷⁷ At the very least, the Second Circuit should have credited and evaluated the Eastern District of New York's continued emphasis on the role of the advisory jury and community opinion to provide well-defined precedent for future adjudications of this undeniably nebulous copyright statute.¹⁷⁸

VI. THE PERSISTENCE OF MEMORY:¹⁷⁹ THE FATE OF PROTEST ART

The Second Circuit's interpretation of "recognized stature" has significant implications for the preservation of recent protest art and the avenues both artists and art advocates have open to them to preserve protest art.¹⁸⁰ The deficiencies in the Second Circuit's construction of "recognized stature" alleviate none of the concerns with the application of the "recognized stature" standard.¹⁸¹ Instead, this definition permits the possibility of judicial misappropriation and leaves artworks vulnerable to destruction and their creators without a legal remedy.¹⁸² In an interview,

and notes 96–97, 100, 126–29 and accompanying text for the Eastern District of New York's characterization of local jury members.

175. See *supra* notes 96–97, 100–02 and accompanying text for a description of cases where judges either relied on or noted the importance of juries in applying "community standards."

176. See *supra* Section I.C for considerations of judicial disquiet about "judging" art.

177. See *supra* notes 57, 161–64 for a description of the legislative intent behind VARA and the United States Copyright's Office perspective on desired modifications to the definition of "recognized stature."

178. See *supra* notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York's use of the advisory jury and notes 157–58 and accompanying text for a critique of the Second Circuit's failure to adequately address the Eastern District of New York's consideration of the advisory jury and community opinion generally.

179. See Salvador Dalí, *THE PERSISTENCE OF MEMORY* (The Museum of Modern Art 1931), <https://www.moma.org/collection/works/79018> [<https://perma.cc/GY76-5V9T>] (last visited July 9, 2021). Melding Dalí's absurdist imagination with his homeland landscape in its portrayal of everyday objects losing their temporal physicality, this piece embodies Dalí's obsession with time's degenerative effects. See *The Persistence of Memory*, THE MUSEUM OF MODERN ART, <https://www.moma.org/collection/works/79018> [<https://perma.cc/GY76-5V9T>] (last visited July 9, 2021).

180. See Brittain, *supra* note 8 (noting uncertainty of whether VARA applies to protest art).

181. For critiques of VARA, and "recognized stature" in particular, see *supra* notes 31–35 and accompanying text.

182. See Thornley, *supra* note 29, at 364 (noting application of "recognized

Sarah Henry, Chief Curator of the Museum of the City of New York, recounted how “[s]o many movements in U.S. history have taken on a life in a single image . . . George Floyd’s face, as captured by artists, is one of those.”¹⁸³

Nevertheless, recently created protest art is already being destroyed.¹⁸⁴ One activist finds her motivation to preserve protest art because “[t]hese walls speak . . . they’re expression of communities. We want these feelings, hopes, calls to action to live on.”¹⁸⁵ Art historian T.J. Clark notes that art will forever be an amber of the moment “when the painter stands in front of the canvas, the sculptor asks his model to stand still,” or perhaps in today’s cultural landscape, the aerosol artist shakes the spray paint canister, or the muralist wets the tip of their brush.¹⁸⁶ Embracing a broader definition of recognized stature, grounded in “community standards” analysis, will encourage the continued development and appreciation of this art.¹⁸⁷ Artists, preservationists, and other professionals removed protest art for preservation and display in other spaces as recent protest art cannot exist in the public sphere indefinitely.¹⁸⁸ Projects of

stature” risks inconsistent interpretations from judges and juries”); Crosson et al., *supra* note 3 (noting protest art’s exposure to demolition). One commentator explained all public art is at risk, stating, “[i]t is public artists that are perhaps most in need of moral rights, and yet the work of these artists is often ignored by and excluded from the legal definition of art in VARA. And this is despite the rise of public art in cultural importance and popularity.” Stewart, *supra* note 11, at 1234.

183. CBS *This Morning*, *Amid the Racial Justice Movement, Artists Wield Their Art as a Tool for Change*, YouTube (Sep. 3, 2009), <https://www.youtube.com/watch?v=&UorDsxL4> [<https://perma.cc/Y7BB-7XVJ>] (CBS *This Morning*’s Anthony Mason interviews Sarah Henry about museum exhibition “New York Responds”).

184. See Crosson et al., *supra* note 3 (“Ant Ben hoped his painting would have a life in a Chicago public school once the restaurant decided to take the boards down, but the piece disappeared before that was possible.”). Chicago residents expressed concern about the destruction of the art. See *id.* One commentator also pointed to the importance of public art generally that contributes to both “shared cultural identities in communities” and drives economic prosperity and “urban development, as “cit[ies] with public art attract[] young, creative, and educated people; [this] communicates that the city is vibrant, innovative, and diverse; and even appeals to tourists.” Stewart, *supra* note 11, at 1238. Stewart asserted that “not only does public art play a role in building the culture of a community, some community cultures are built around public art.” *Id.*

185. The Associated Press, *Artists, Activists Rush to Save Black Lives Matter Murals*, NBC NEWS (Dec. 14, 2020), <https://www.nbcnews.com/news/nbcblk/artists-activists-rush-save-black-lives-matter-murals-n1251113> [<https://perma.cc/B4KW-6GX9>] (interviewing Kenda Zellner-Smith, co-founder of Save the Boards to Memorialize the Movement, a preservationist effort to save Black Lives Matter protest art).

186. CLARK, *supra* note 1, at 12.

187. See Stewart, *supra* note 11, at 1264 (“Reform [of VARA] is necessary to protect and encourage the continued creation of these artworks”).

188. See Marissa J. Lang, *Protest Art Covered Shuttered Businesses for Months at Black Lives Matter Plaza. Now it Has a New Home*, WASH. POST (Feb. 7, 2021), https://www.washingtonpost.com/local/black-lives-matter-plaza-art/2021/02/06/ad57d9d8-67cb-11eb-8468-21bc48f07fe5_story.html [<https://perma.cc/7ZXQ->

this type would encourage property owners to exercise VARA's notice provision, which bars liability for property owners who give artists the opportunity to remove the art at their own cost as an alternative to outright destruction. This fulfills VARA's preservationist goals while also providing property owners a viable exit option.¹⁸⁹ Nevertheless, should artists need to turn to the courts to remedy destruction of works of "recognized stature," artists should be mindful of VARA's restrictions, particularly courts' historical unwillingness to find VARA protects art installed without permission and the lack of protection for removable works rooted within buildings.¹⁹⁰

Since the Second Circuit's ruling, VARA litigation has risen sharply.¹⁹¹ Several of these cases highlights the relevance of community perspective in making findings of "recognized stature."¹⁹² Following the closure of a queer bar, The Stud, due to COVID-19-related financial distress, the bar's landlords painted over "iconic" murals on the exterior of the building during Pride 2020.¹⁹³ Painted to commemorate The Stud's new cooperative ownership in 2019, one of the mural artists stated the art "convey[ed] that [The Stud] was a space that was safe for everyone. It was the start of a new generation."¹⁹⁴ In November 2020, the artists filed a suit

LXCH] (describing efforts to move Black Lives Matter murals from Washington D.C.'s Black Lives Matter plaza to exhibition space for future display).

189. See 17 U.S.C.A. § 113(d)(2) (West 2021) (describing requirements of liability-less removal for property owners); see also Robinson, *supra* note 22, at 1948 ("When the work can be removed without causing the [] harm, however, moral rights do apply, unless the building owner makes an unsuccessful good-faith attempt to contact the artist who fails to remove the work or pay for its removal.").

190. See *supra* note 200 and accompanying text for a description of case law considering whether VARA protects art placed without permission of the property owner. See *infra* note 200 for further analysis on the likelihood of protection of non-permissive art. See *supra* note 30 and accompanying text for a comment on VARA's limitations.

191. See Blake Brittain, *Activist Artists Cite Novel N.Y. Win to Sue Over Threats to Work*, BLOOMBERG L. (Feb. 1, 2021), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X4O5DOM0000000?bna_news_filter=US-law-week#jcite [<https://perma.cc/N4VX-ZH5D>] (comparing filing of six VARA cases in past three months to only 100 VARA filings post 1997, averaging four a year). Brittain speculated that the recent influx of VARA cases may be due to the publicity surrounding the artist's monumental win in *Castillo*. *Id.* Not only do artists and lawyers now, at the very least, know this avenue of relief exists, but they may be more likely to pursue claims following the potential for lucrative damages awards. See *id.*

192. See *id.* (describing complaint of LGBTQ artists against landlord who destroyed community-cherished murals).

193. See Amanda Bartlett, *Artists of Iconic Mural at the Stud Sue Building Owner for 'Whitewashing' Their Work*, SFGATE, <https://www.sfgate.com/sf-culture/article/artists-sue-building-owner-whitewashing-stud-mural-15732095.php> [<https://perma.cc/25PW-VQKQ>] (last updated Nov. 17, 2020) (describing timeline of mural destruction).

194. Amanda Bartlett, *'We Will Not Be Erased': Graffiti Artist Strikes Back After SF Queer Bar's Mural is Painted Over During Pride*, SFGATE, <https://www.sfgate.com/sf-culture/slideshow/The-mural-on-SF-s-oldest-queer-bar-was-painted-204388.php> [<https://perma.cc/5QS4-DBAK>] (last updated Nov. 16, 2020, 5:13 PM) (interview-

alleging VARA violations in the Northern District of California against the landlord of the building; the suit is in mediation before a jury trial in September 2022.¹⁹⁵ The artists' complaint asserts that the murals meet the "recognized stature" standard, highlighting the murals' community resonance and subsequent ire following the murals' destruction.¹⁹⁶

This pending litigation stresses how public art is integral to community building: it memorializes triumphs, acknowledges hardships, and signals community identity and kinship.¹⁹⁷ Nevertheless, a "recognized stature" definition contingent on art expert testimony may find these murals unworthy of inclusion under VARA despite their cultural merit.¹⁹⁸

A particularly poignant example of this predicament is the Museum of Modern Art (MoMA)'s alleged removal of Black Lives Matter protest art placed on the boarded-up storefront of MoMA's design store in SoHo.¹⁹⁹ MoMA's potential legal liability for destroying the art is an open question, as the works were placed without permission.²⁰⁰ Nevertheless, the artist behind the protest art, Amir Diop, compellingly distills why leaving the definition of art up to art institutions is problematic:

It just seems as though MoMa [sic] determined what's art, and what's not art . . . If I'm not a dead Black artist, they don't want to

ing Xara Thustra, co-artist of *Queer Trans Spaces* mural created during 2017 Pride week).

195. See Complaint at 1, 7, *Canilao v. City Commercial Inv. LLC*, No. 3:20-cv-03030 (N.D. Cal. Nov. 13, 2020); Civil Minutes of Initial Case Management Conference, *Canilao*, No. 320-cv-03030, ECF No. 23 (recording parties' consent to court-sponsored mediation and scheduling of jury trial).

196. See Complaint, *supra* note 115, at 5–7 (describing how "[t]he community venerated the [m]urals" and the "outpouring of emotions and stories" chronicled by local news).

197. See *supra* notes 193–96 and accompanying text for the community impact of the works at issue in the ongoing suit. Likewise, Soho artist Amir Diop described his intentions for his art created during Black Lives Matter protests in summer 2020: "My hope is that [my art] is a part of history . . . [w]e can teach kids in the future that this is what happened in 2020 . . ." Justine Calma, *Protest Art Leaves The Streets*, VERGE (Oct. 21, 2021), <https://www.theverge.com/21509952/street-art-murals-black-lives-matter-blm-protests-new-york-city-artists> [<https://perma.cc/ABQ3-THRG>].

198. For a description of the risk inherent in depending predominantly on expert opinion in "recognized stature" determinations, see *supra* Section IV.A and accompanying text.

199. See Calma, *supra* note 197 (describing "shredd[ing]" of mural just days after it was placed).

200. See *id.* (noting artist did not have MoMA's consent to paint the mural). Courts have interpreted lack of consent to bar VARA claims. See *supra* note 56 and accompanying text. Dicta in *Castillo* may open the door to reconsideration of this principle as the Second Circuit named Banksy as an example of artists befitting the "recognized stature" designation even though Banksy's trademark is "unauthorized art," leading to the conclusion that "other unauthorized works could receive VARA moral rights protections." *Intellectual Property—Copyright—Second Circuit Finds Temporary Art Protected Under the Visual Artists Rights Act.—Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), 134 HARV. L. REV. 1881, 1887–88 (2021).

hear from me They destroyed a piece from this movement. When I am dead, they'll be looking for the works that I've made.²⁰¹

The relevance of community opinion poses interesting questions about art that does not reflect the values of a community.²⁰² Vermont Law School recently confronted this issue following student criticism of a mural that depicted the Underground Railroad in a racially insensitive manner.²⁰³ Originally intending to remove the mural, Vermont Law School instead decided to shield the mural from view after the artist pursued VARA litigation.²⁰⁴ The District of Vermont denied the artist's preliminary injunction to bar Vermont Law School from inserting panels to hide the mural on the basis that concealing the murals does not violate VARA's proscription of either destruction or modification.²⁰⁵ Nevertheless, the District of Vermont anticipated the murals would likely meet the "recognized stature" standard due to favorable press coverage at the time of the mural's installation, approbative statements from "two witnesses with experience in selecting and exhibiting visual art," and the absence of conflicting evidence from Vermont Law School.²⁰⁶

These types of divergent opinions from experts and the community raise new uncertainties about future VARA litigation: does VARA, and the "recognized stature" designation specifically, distinguish between the

201. Calma, *supra* note 197 (interviewing Amir Diop).

202. See Daniel Grant, *Vermont Law School Can Hide a Mural that Offended Students Behind a Wall, Court Rules*, ART NEWSPAPER (Mar. 17, 2021), <https://www.theartnewspaper.com/news/vermont-law-school-can-hide-a-mural-that-offended-students-behind-a-wall-court-rules> [https://perma.cc/YC2R-A8AT] (describing student reproach of mural). The Vermont Law School dean's statement following censure of the mural states "the mural is not consistent with our School's commitment to fairness, inclusion, diversity, and social justice." See *id.* (internal quotation marks omitted) (quoting *Vermont Law School Plans to Paint Over Mural Deemed Racist*, ASSOCIATED PRESS (July 9, 2020), <https://apnews.com/article/293513059e1c2e244a0f53b8318b7606> [https://perma.cc/DA3C-5UBA]).

203. See *id.* (describing mixed community opinion of mural, particularly admonishment of both content of mural and "cartoonish" depictions of people of color).

204. See Margaret Grayson, *Judge Says Vermont Law School Can Cover Controversial Murals*, SEVEN DAYS (Mar. 17, 2021), <https://www.sevendaysvt.com/LiveCulture/archives/2021/03/17/judge-says-vermont-law-school-can-cover-controversial-murals> [https://perma.cc/AHE3-C483] (describing Vermont Law School's initial strategy to "paint over" or detach the mural before deciding to place the mural behind panels).

205. See Complaint at 9–11, *Kerson v. Vt. Law Sch., Inc.*, No. 5:20-cv-00202-gwc (D. Vt. March 10, 2021) ("[T]he language of the VARA does not include a protection against concealment or removal from display of artworks by the owner."). Due to the dubious possibility of the artists' success on the VARA claim for these reasons, the court denied the preliminary injunction. *Id.* at 11.

206. *Id.* at 7–8 (finding works at issue would likely meet "recognized stature" standard).

“problematic nature” of art and “aesthetics?”²⁰⁷ If so, can a work’s “recognized stature” designation change over time?²⁰⁸ The answers to these questions, and how courts should decide them, is beyond the scope of this Note. Nevertheless, the very existence of these thorny questions illuminates precisely why it is so critical that courts take judicial notice of community perspective in “recognized stature” determinations.

207. See Brittain, *supra* note 191 (quoting interview with art lawyer Kate Lucas).

208. See *id.* (art attorney Kate Lucas raises possibility that work’s “recognized stature” status is impermanent); see also Keshawn M. Harry, Note, *A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990*, 9 J. INTEL. PROP. L. 193, 201–03 (2001) (noting possibility of “recognized stature” status “fluctuat[ing] over time” and resulting challenges for courts to serve VARA’s “preservative purpose”).