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Is Culture a Justiciable Issue?*

Jessica L. Darraby**

Vast cultural terrain describes the contemporary art world. Technological detritus, computer sputum, advertising jingos, battered signage, sketchpad specifications, literary innuendo, and even conduct bring diverse products within the ambit of visual art.¹ Neon-washed hallways² recast from engineering schematics, window niches³ converted from architectural plans, and trade dress appropriated from corporate commerce⁴ all grace the corridors of museums, transformed to high art under the pen of the critic and the presentation of the curator.⁵

Disputes involving creators, collectors and exhibitors bring this compendium of product into the legal forum. Is the jurisprudential frontier broad enough to decipher effectively such art world disputes? Should the legal frontier be recharted to do so?

If the proposition is accepted that the twentieth century has broadened acceptance of what constitutes art beyond painting and sculp-

* Dedicated to my 1989 Law and the Visual Arts students whose inquiries invited this investigation and whose encouragement permitted this exploration.

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1. Some examples include artists David Hockney, Barbara Kruger, John White, Donald Judd and Karen Finley.

2. Dan Flavin. See generally Raynor, *Sculptures That Announce Themselves With a Blaze of Light*, N.Y. Times, June 30, 1991, at 11, col. 1 (N.J. ed.) (discussion of neon in art).

3. James Turrell. See also Feliciano, *Taking the Plunge Into a Batch of "Heavy Water,"* L.A. Times, June 6, 1991, at F4, col. 1; *Carbery Diary: Slugging It Out in a Sky Garden*, The Independent, May 18, 1991, at 37.

4. Andy Warhol.

5. The exchange of commercial symbols, devices and functional objects with "culture" are analyzed in *High & Low: Modern Art, Popular Culture*, CATALOGUE AND EXHIBITION, directed by Kirk Varnedoe and Adam Gopnik, originating at the Museum of Modern Art, New York. See also Nagin, *The Politics of Plunder*, NEW ART EXAMINER, Nov. 1986, at 22.

ture, then like anything else that there is too much of, the result is crowding. Crowding has created a proverbial traffic jam on the cultural roadways. Will those seeking to unlog cultural commerce summon the cultural cops? Who will take that patrol? Will walking the cultural beat expedite the flow of ideas or contribute to cultural gridlock? Court dockets and legislative fora are filled, respectively, with art litigation and regulatory proposals suggesting that some believe safe passage, however limited, is a cultural expedient.⁶

The parties claiming rights-of-way are not necessarily those for whom systematic resolution is necessary. Artists, dealers and museums historically have had a predilection to settle differences in the "back room." The back room is a physical area usually not visible from the gallery exhibition space where deals are brokered and sales are closed. "Back room" is used here as a realm where informal alternative dispute resolution principles are loosely applied without the assistance of counsel. The give-and-take of "you stroke my back and I'll stroke yours," effective in a limited arena of identifiable players, breaks down in the submarkets of a highly elastic market.

Art patronage is no longer limited to an elite.⁷ During the 1980s, the economically endowed — business executives and entertainment moguls, corporations, law firms, savings and loans institutions,⁸ clients of interior designers, and the government itself⁹ — leapt into the art market.

Although many immediately think of the highly publicized National Endowment for the Arts¹⁰ as a major government patron, its budget is but a sliver in the heap of taxpayer dollars used to purchase art. Programs that place art in public places link¹¹ federal, state and

6. See, e.g., *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990), amended, 1991 W.L. 33355 (S.D.N.Y. 1991); Glueck, *The Basquiat Touch Survives the Artist in Shows and Courts*, N.Y. Times, July 22, 1991, at C13, col. 5; 19 C.F.R. §§ 12.104-12.109 (1991) (emergency import ban added in 1991 to protect pre-Columbian art from Peten region of Guatemala pursuant to UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property); 17 U.S.C. §§ 101, 106(A), 113 (1991) (amended to include Visual Artist's Rights Acts). See also *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991); *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990); *Danae Art Int'l, Inc. v. Stallone*, 163 A.D.2d 81, 557 N.Y.S.2d 338 (N.Y. App. Div. 1990); *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130, 280 Cal. Rptr. 535 (1991).

7. Some observers argue that elitism has been "democratized" by money. See *A Survey of The World Art Market*, THE ECONOMIST, Dec. 22, 1990, at lff.

8. The savings and loan debacle modified the art collecting practices of thrifts, savings and loans, and banks. In 1990, CenTrust of Miami was compelled by the Florida Comptroller to divest its art collection, reportedly purchased on the advice of consultants from an auction house. Financial Times, April 7, 1990, at XX. See Michaelis, *As Banks Slim Down, So Do Their Budgets for Artwork*, AMERICAN BANKER, Jan. 24, 1991, at 6.

9. See *infra* notes 11-15 and accompanying text.

10. 20 U.S.C. §§ 951-ff (1990).

11. See Glueck, *Art in Public Places Stirs Widening Debate*, N.Y. Times, May 23,

local agencies as major buyers that use subsidized tax dollars to finance their purchases. The Art in Embassies program,¹² the Art in Federal Buildings program, administered by the General Services Administration,¹³ the Department of Transportation¹⁴ and its local counterparts;¹⁵ various public art programs at the city, county, and state levels; and quasi-public, legislatively-sanctioned development agencies are but a few government sanctioned entities that participate in the art market.¹⁶

Although some of the traditional back room back-strokers — the artists, dealers and *patrones* — have formalized their status as litigants,¹⁷ those pressing for more art patrols appear to be new entrants to the market.¹⁸ Players, qua litigants, who entered the market on the power of the greenback, now claim that the dollar is an inadequate password and provides an insufficient initiation to a market mired in mystique and swathed in secrecy.

Will the cultural market be better served by the warnings, disclosures, offering statements, due diligence investigations, consents and waivers that lawyers and legislators borrow in tone, substance and vocabulary from regulatory schemes wholly unrelated to the elusive and elastic qualities of art? If the codification of cultural commerce is unsatisfactory, the common law web surrounding statutory schemes is more synaptic than interstitial. Cases can be improbable

1982, § 2, at 1, col. 1; Russell, *Gallery View 70's Art in Public Places - From Anchorage to Atlanta*, N.Y. Times, July 6, 1980, § 2, at 19, col. 1.

12. See, e.g., Wash. Times, Oct. 12, 1990, at E2; Gamarekian, *Embassies Turning to Cultural Concerns*, N.Y. Times, Jan. 2, 1991, at C9, col. 3.

13. See, e.g., N.Y. Times, Feb. 19, 1987, at C21, col. 2.

14. See generally L.A. Times, June 30, 1991, at K3, col. 5.

15. See, e.g., Reinhold, *Fantasy to Lure Subway Riders in Los Angeles*, L.A. Times, Aug. 4, 1991, at A20, col. 2. For its new subway system, the Los Angeles County Transportation Commission, for example, "[d]espite pressures to cut costs in tough times, . . . [has] insisted on giving art a top priority. The transportation commission has allocated one-half of one percent of the transportation budget for art, which amounts to more than \$100,000 for each of the five stations." *Id.*

16. It is not yet known how the current economic climate has affected budgeting for these programs. The Community Redevelopment Agency for Los Angeles (CRA/LA), authorized by postwar state enabling legislation, in effect assesses participating developers a percentage of certain costs for its public art projects. This type of art financing seems to survive downturns.

17. Art law cases now regularly appear on state and federal dockets in both civil and criminal courts. Foreign sovereigns, shareholders, and celebrities have all joined the art law fracas. Even as early as the fifteenth century, reports exist of artists defending their oeuvre. See, e.g., Tine, *Artists Outwit Inquisition*, N.Y. Times, Nov. 12, 1990, at A19, col. 1.

18. Some entrants are not only new, but also unwitting. See, e.g., *Sullivan v. Hammar*, Fed. Sec. L. Rep. (CCH), ¶ 95,415 (Aug. 7, 1990).

and opinions can be too ethereal to provide a precedential legal matrix. This is not to ascribe arbitrariness to the bench, but to illustrate the dangers of opining about art in the jurisprudential forum. Art authentication at the judicial level, for example, establishes legal finality to an inconclusive process of fragile dimension fraught with the potential for market manipulation.¹⁹

That some art matters have come before the bench at all is a result of lawyers performing not as barristers in the tribunal but as advisers in their own offices. Deals have been negotiated that cannot on their face be navigated in the cultural tributaries. Lawyers even “buckle up” next to their clients or pack the deal vehicle with interests perilously, but not necessarily patently, hostile.

Ethical considerations may not be evaluated properly if the market is as befuddling to the lawyer as it is to the client. Lacking knowledge of market mechanisms may impair the lawyer’s contemplation of those eventualities and “worst” case scenarios important in considering professional responsibilities and the client’s best interests.

Should aestheticians defer at all to an authority legal in nature and juridical in application?²⁰ Should the practitioners of verbiage — the lawyers — speak for the masters of imagery — the artists?²¹ Should law be the arbiter of art, notwithstanding procedural attributes or legal guarantees? Should art itself, whatever its manifestation, be evaluated according to procedural tests, evidentiary rules and substantive law grounded in public policies and economic realities alien to art production, exchange and presentation? Does the monetarization of the market during the 1980s account for its newly legalized fervor in the 1990s?²²

Are culturemakers following an itinerary they themselves never contemplated, a legal road map regulating not only the flow of ideas from creator to citizen, but also the context of presentation? Tax laws, intellectual property laws, RICO,²³ unfair competition statutes, international conventions, nonprofit codes, constitutional precepts — these are but a few of the roadways lawyers are paving to expedite cultural transport.

But artistic expression has never been satisfactorily positioned in

19. Kimmelman, *Absolutely Real? Absolutely Fake?*, N.Y. Times, Aug. 4, 1991 § 2, at 1, col. 4.

20. Extra-judicial resolution has been discussed by the courts in matters involving “political offenses” as in extradition treaties. *See, e.g.*, *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

21. F. Galuszka, *Legislating Order: Dream or Nightmare*, in CONFERENCE OF SOCIETY OF ENVIRONMENTAL GRAPHIC DESIGNERS, Philadelphia Art Commission (April 1991) (“Art and Law are natural enemies”).

22. *See supra* note 6.

23. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1991).

law, even when tucked under the umbrella of the first amendment²⁴ or protected from its exclusionary spokes like libel²⁵ or obscenity.²⁶ Never before in American history has the long arm of the law stretched so far that its fingers tickle so much of the trafficking of ideas, that ebb and flow of the cultural commute. Never before in American history has the long arm of the law been linked to communication networks and information systems that so extend its reach.

Is there a pool of creators sufficiently confident, a strata of exhibitors sufficiently courageous,²⁷ a free market system sufficiently efficient, and a cultural citizenry sufficiently accommodating to empower a mediation of cultural values outside the legal system? Can the system forego controls, reverse position and return players to the back rooms?

There are, of course, creators who recognize their own sense of entitlement afforded by the new litany of laws and who chart the map to personal advantage.²⁸ Ironically, Robert Mapplethorpe, from whom self-assessment in this regard is no longer possible, may be a singular beneficiary of arbiting the legal process.

Mapplethorpe, perhaps more than any other artist, has had his

24. U.S. CONST. amend. I. See, e.g., *Serra v. GSA*, 947 F.2d 1045 (2d Cir. 1988). Cf. *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), *cert. denied*, 400 U.S. 903 (1970); *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'd*, 401 U.S. 531 (1971). But cf. *U.S. ex rel. Radich v. Criminal Court*, 385 F. Supp. 165 (S.D.N.Y. 1974).

25. See, e.g., *Silberman v. Georges*, 91 A.D.2d 520, 456 N.Y.S.2d 395 (1982).

26. See, e.g., *Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc. 2d 9, 566 N.E.2d 207 (1990); see also *Piarowsky v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985); *United States v. One Unbound Volume of 113 Prints*, 128 F. Supp. 280 (C.D. Md. 1955).

27. A skittishness toward exhibition sensibilities is apparent in the post-CAC world, or at least better publicized now in the media. Director Elizabeth Broun of The National Museum of American Art (a Smithsonian Institution museum) ordered that a three dimensional photographic work by artist Sol LeWitt, titled "Muybridge 1," be removed from the exhibition "Eadweard Muybridge and Contemporary American Photography," which opened there on June 28, 1991 and is scheduled to travel to the Long Beach Museum of Art next year. Parachini, *Photo Show is Back in Focus*, L.A. Times, July 16, 1991, at F1, col. 5. Ms. Broun is reported to have objected to the LeWitt portrayal of the nude female image, which "focusing increasingly on [the model's] pubic region invokes unequivocal references to a degrading pornographic experience." *Id.* This interpretation of the piece is disputed and the director's role in its removal, not surprisingly, is controversial. Curators from the Addison Gallery of Art at Phillips Academy in Andover, the organizers of the Muybridge exhibition, threatened to terminate the exhibition unless the LeWitt piece was returned, which it was. *Id.*

28. This is not to ascribe any judgment to those who do or do not utilize the legal system.

work analyzed in the marketplace of ideas.²⁹ Although the provocative imagery of his oeuvre was produced without regard for laws or jurisprudence, he chose the works and set the conditions of display, in conjunction with a curator, for the exhibition "The Perfect Moment." He thus had the opportunity to mediate his cultural message even if he did not foresee where legal arbiters might take it. As belabored as the national route was for the exhibit,³⁰ the jump was short from the Cincinnati Contemporary Arts Center to the county courthouse where, before a jury of peers, the Contemporary Arts Center (CAC) director and the CAC exhibitors of "The Perfect Moment" were tried for obscenity.³¹

Visual art does not have a monopoly on unpleasant or socially unacceptable imagery. Nor is contemporary America the only situs where cultural values become public and politicized issues. Charles Baudelaire was convicted under French law for offending public morality by publication of his poetry collection *Les Fleurs du Mal*. The court banned six poems — a ban not officially lifted until 1949.³²

In June 1857, *Les Fleurs du Mal* went on sale in Paris. By July, a critic for *Le Figaro* wrote:

Never, in the space of so few pages, have I seen so many breasts bitten — nay, even chewed! — never have I seen such a procession of devils, foetus, of demons, cats and vermin. The whole volume is an asylum . . . of all the putrescence of the human heart. . . . [N]othing can justify a man of more than thirty uttering such monstrous monstrosities in a printed book!³³

Fleurs was seized and confiscated in July.³⁴ By August, Baudelaire was on trial for blasphemy and offending morality.

29. Extensive public commentary appeared in the nation's media. See, e.g., Chicago Tribune, Dec. 31, 1989, at 4; N.Y. Times, Dec. 24, 1989, at 35, col. 1.

30. Shortly before the scheduled opening date, the Corcoran Museum of Art in Washington D.C. cancelled its commitment to provide a venue; instead, the Washington Project for the Arts was substituted.

31. *Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc. 9, 566 N.E.2d 207 (1990). The misdemeanor charges were as follows: Count 1, possession of photographs of minors, male and female, both in a "state of nudity" with "lewd exhibition or graphic focus on genitals" in violation of OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp. 1990) (possession of material that shows minors in a state of nudity); and Count 2, "display[ing] or exhibit[ing]" various photographs depicting "forearm and hand of one person inserted into anus of another, . . . finger inserted into a penis, . . . a cylindrical object inserted into an anus, . . . a man urinating into the mouth of another, . . . and a man with a whip inserted into his anus" in violation of OHIO REV. CODE ANN. § 2907.32(A)(2) (Anderson Supp. 1990) (promotion, display or exhibition of obscene material). Experts apparently convinced the jury that the photos in question had serious artistic value. See Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. Times, Oct. 6, 1990, at P1, col. 1. See also *Curator Photo Defends Exhibit*, N.Y. Times, Oct. 4, 1990, at P19, col. 1.

32. E. STARKIE, BAUDELAIRE 324-25 (1988) [hereinafter STARKIE]. Until *Les Fleurs du Mal* was published in book form in 1857, Baudelaire was primarily known as an art critic. *Id.* at 288.

33. *Id.* at 313 (quoting *Le Figaro*, July 5, 1857).

34. *Id.* at 317.

In the Palais de Justice in Paris on August 20, 1857, Monsieur Pinard, the public prosecutor, curiously opened his argument by suggesting that the state was doing Baudelaire a favor because his works would rise in market value as a result of the notoriety surrounding the trial.³⁵ To obtain a conviction and protect the people from "offen[s]es] against public morality,"³⁶ Pinard (like Prosecutor Prouty who stepped into Pinard's shoes one century later in Cincinnati),³⁷ decided that the work itself would be the best evidence against the artist. He called no witnesses.³⁸ Reading the poems to the court, he reportedly classified them as "lascivious and obscene."³⁹ Emphasizing that the poems threatened religious and moral decency, Pinard summarized with the thought that: "The court must censure the tendency to speak about and describe things at random because . . . outspokenness awakens in those who have no experience of life a curiosity about matters of which they were better ignorant."⁴⁰

The verdict? Baudelaire, ironically the author of the artist-as-hero essay in "The Painter of Modern Life" apparently went too far for Second Empire judgments with "sordid painting"⁴¹ in poems like "Lesbos" and "Les Femmes Damnées." He was convicted of violating public morality but acquitted of blasphemy.⁴² The first edition of *Fleurs* was destroyed.⁴³

Curiously, Baudelaire's name does not appear in recent discussions of another verbal painter, Salman Rushdie. Although Rushdie indubitably would have preferred the court conviction of Baudelaire, he is indefinitely sentenced to isolation imposed not by the rap of the gavel

35. *Id.* at 322. But see *Wojnarowicz v. American Family Assoc.*, 745 F. Supp. 130 (S.D.N.Y. 1990) (contention that an art-related controversy would benefit plaintiff-artist's career was refuted because of the artist's particular market position).

36. STARKIE, *supra* note 32, at 322.

37. *Cincinnati v. Contemporary Arts Center*, 57 Ohio. Misc. 9, 566 N.E.2d 207 (1990). Baudelaire's attorney argued unsuccessfully that *Les Fleurs du Mal* should be judged as a whole, instead of focusing on the six poems which the prosecution had excised. STARKIE, *supra* note 32, at 324. Defense counsel for CAC put forth the same argument, contending that "The Perfect Moment" must be viewed in its entirety under the *Miller v. California* test instead of on selected photographs from the exhibition. See 418 U.S. 915 (1974). The CAC court permitted the jury to review copies of the selected photographs in isolation, but some contend that the decision was not in accord with precedent. Margolick, *Rank-and-File Rebuff Censorship*, N.Y. Times, Oct. 6, 1990, at P6, col. 1.

38. STARKIE, *supra* note 32, at 322-24.

39. STARKIE, *supra* note 32, at 322.

40. *Id.* at 323.

41. *Id.* at 324.

42. *Id.*

43. *Id.*

but by the jeer of the crowd.⁴⁴ This crowd is one clothed in a religious imperative so confining that manipulation of its precepts, even in fiction, is enough to trigger a death sentence. Neither due process nor a jury of peers imbue the *fatwah* with the trappings of jurisprudence.

What Mapplethorpe would have said in his own defense had he been charged and called is speculative. His voice, like Baudelaire's is now stilled; his life, like Baudelaire's, is occluded by posterity's prurience; his message, like Baudelaire's, survives only in his art.

But Rushdie's voice is still here, albeit quieter, and his own defense is one essentially used by Baudelaire. "Description of evil does not entail approval of evil,"⁴⁵ wrote Rushdie.

Baudelaire fled to Belgium for asylum. But for Rushdie such asylum is not possible. Rushdie resides in the contemporary technologically-possible swatch of international suzerainty known as the "global village."⁴⁶ Unnamed and unmapped, perhaps, this isolated international crossroads is home to a citizenry of universal cultural import. Does it too require a world court to mediate aesthetic values? Or have its resident visionaries moved beyond the pale? Where is culture better situated — in the courts — or at such crossroads?

44. Publication of his book, *The Satanic Verses*, culminated in a call for his death. See Scott, *People*, TIME, July 1, 1991, at 63; D. PIPES, THE RUSHDIE AFFAIR 27 (1990); T. BRENNAN, SALMAN RUSHDIE AND THE THIRD WORLD viii-xv (1990). See generally S. RUSHDIE, THE SATANIC VERSES (1989).

45. *An Exclusive Talk With Salman Rushdie*, NEWSWEEK, Feb. 12, 1990, at 46. But some read Baudelaire's own words as "suggest[ing] that pure art is a form of Satanism" and that creative energy ought to be regimented. E. WIND, ART AND ANARCHY 2, 93 n.1 (1985).

46. *Locking the Doors in the Electronic Global Village*, N.Y. Times, July 28, 1991 at P2, col. 1.