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2-13-2007

## Art As Speech

Edward J. Eberle

*Roger Williams University School of Law*

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### Recommended Citation

Eberle, Edward J., "Art As Speech" (2007). *Roger Williams University School of Law Faculty Papers*. Paper 10.  
[http://lsr.nellco.org/rwu\\_fp/10](http://lsr.nellco.org/rwu_fp/10)

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## Art as Speech

Edward J. Eberle\*

Treatment of artistic expression (what we can call art speech) under the First Amendment Free Speech guarantee<sup>1</sup> has been a problematic enterprise. There is wide agreement that art speech is protected speech.<sup>2</sup> Indeed, art speech can be viewed justifiably as forming one of the

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<sup>1</sup>The First Amendment Free Speech protection provide: “Congress shall make no law . . . abridging the freedom of speech.”

<sup>2</sup>*See, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995)(painting, music and poetry are “unquestionably shielded” by First Amendment); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)(“Music, as a form of expression and communication, is protected under the First Amendment”); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981)(“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment’s guarantee”); *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952)(“[M]otion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”).

essences that comprise the core of protected speech.<sup>3</sup>

Despite these favored formulations of art speech, the expression nevertheless often finds itself at the center of controversies over its content or presentation. For example, paintings displayed publicly at institutions<sup>4</sup> of higher learning can be banned or relocated to less traveled locales if the art was deemed inappropriate. A university<sup>5</sup> or public secondary school<sup>6</sup> might

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<sup>3</sup>*See, e.g.,* *Abood v. Detroit Bd. of Educa.*, 431 U.S. 209, 231 (1977)(“[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection.”).

<sup>4</sup> *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7<sup>th</sup> Cir.), *cert. denied*, 474 U.S. 1007 (1985)(state college moved gallery display from common traveled venue to another location because of its controversy in depicting graphic nude figures); *Close v. Lederle*, 424 F.2d 988 (1<sup>st</sup> Cir.), *cert. denied*, 400 U.S. 903 (1970) (art exhibit initially endorsed by University of Massachusetts, Amherst, was ordered dismantled by university administration upon subsequent determination that it was inappropriate because of display of genitalia; ban upheld by United States Court of Appeals).

<sup>5</sup> *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986)(court overrules University of Nebraska’s ban on scheduled showing of Jean-Luc Godard’s *Hail Mary* because university thought the film sacrilegious).

<sup>6</sup>“Appeal filed to repeal ban on movie,” *Providence Journal*, Nov. 16, 2005, at D 1;“Schools ban ‘Dirty Deeds,’” *Barrington Times*, Nov. 9, 2005, at 1(Barrington Public Schools ban PG-13 rated movie written as part of Barrington Public School senior project graduation requirement because of objecting parents). The appeal succeeded, allowing the film to be shown

choose to ban scheduled showings of movies deemed too controversial. A display of Robert Mapplethorpe's photographs (some of which are homo-erotic) can be banned.<sup>7</sup> Or public funding for the edgy performance art of Karen Finley can be denied.<sup>8</sup> Art speech, for sure, is not always nice.

But a lot of speech is not nice. A publisher of adult magazines can lampoon a leading figure of the religious right as enjoying his first sexual experience with his mother in an outhouse.<sup>9</sup> A young man can exhibit his protest of the Vietnam War by wearing a jacket that says "Fuck the Draft" on its back.<sup>10</sup> Or a group of racist youth can tear apart a chair, form it into a cross, trespass onto a neighbor's lawn, and set it afire during the night to express their outrage that their new neighbors are black.<sup>11</sup> All of these incidents are considered protected expression

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in Barrington schools, with parental consent. "'Dirty Deeds' allowed back in schools, Land will keep volunteering," Barrington Times, Dec. 14, 2005, at 4.

<sup>7</sup>*Cincinnati v. Contemporary Arts Ctr.*, 566 N.E.2d 214 (Ohio Mun.1990)(court rejects Art Center's motion to dismiss obscenity charge); *Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990)(temporary restraining order prohibiting seizure of Mapplethorpe exhibit issued until obscenity issue decided). "A jury later acquitted the defendants on all counts." Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 Cal. L. Rev. 1499, 1535 n.154 (1996).

<sup>8</sup>*NEA v. Finley*, 524 U.S. 569 (1998).

<sup>9</sup>*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>10</sup>*Cohen v. California*, 403 U.S. 15 (1971).

<sup>11</sup>*R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

under the First Amendment.

So, what is it about art speech that leads to the conundrum it regularly faces? How can art speech be protected speech and, even, core speech, but nevertheless be regulated in more substantial ways than other favored speech domains, like political or religious speech? Is art speech different than other favored speech domains? Is judgement of art speech contorted because it is judged not on its own terms but on the terms of conventional justifications for speech that are directed to undergirding political speech? Is art speech simply less valuable or less valued? Is the lesser favor often accorded art speech a function of the general neglect of a person's inner life in American law and society?

No ready answers exist to these questions. However, one observation seems inescapable: there is no satisfactory justification for the status of art speech as protected speech. The Supreme Court has ruled that particular instances of art speech are protected expression, but has not supplied a satisfactory rationale for protecting art.<sup>12</sup> Lower courts have generally followed the lead of the Court.<sup>13</sup> Major First Amendment theorists likewise have not devoted substantial

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<sup>12</sup>*E.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment’s guarantee”).

<sup>13</sup>*Bery v. New York*, 97 F.3d 689, 694 (2d Cir. 1996) (“The First Amendment shields more than political speech and verbal expression,” including entertainment, theater, music and parades)(citations omitted).

attention to art speech.<sup>14</sup>

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<sup>14</sup>For example, consider the famous dialogue between Alexander Meiklejohn and Zechariah Chafee. Reviewing Meiklejohn's important book, *Free Speech and Its Relation to Self-Government* (1948), Chafee critiqued:

The most serious weakness in Mr. Meiklejohn's argument is that it rests on his supposed boundary between public speech and private speech. That line is extremely blurred. [The] truth is that there are public aspects to practically every subject. [If Meiklejohn's public speech excludes scholarship,] art and literature, it is shocking to deprive these vital matters of the protection of [the] First Amendment. [Valuable] as self-government is, it is itself only a small part of our lives. That a philosopher should subordinate all other activities to it is indeed surprising.

Zechariah Chafee, *Book Review*, 62 Harv. L. Rev. 891, 899-900 (1949).

Meiklejohn then responded:

[Self-government] can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express. [Thus,] there are many forms of thought and expression within the range of human communication from which the voter derives the [necessary] knowledge, intelligence, [and] sensitivity to human values. [These], too, must suffer no abridgment of their freedom. [These include:] 1. Education, in all its phases. 2. The achievements of philosophy and the sciences. 3. Literature and the arts. 4. Public discussions of public issues.

The absence of a convincing theory for the status of art speech as protected speech likely leads to its underestimation. Art speech is often not valued for the uniqueness and worth it possesses. For example, art can appeal to sensory, subliminal, emotional or other noncognitive dimensions of human life, instilling inspiration, rapture or disgust. Art can be beautiful or ugly. Or art can be soothing or arresting. But these qualities of art can be missed when no solid rubric exists upon which to evaluate art speech as protected speech because it is art.

Instead, art speech often is evaluated under conventional free speech justifications, such as the pursuit of truth, marketplace of ideas or self-government. But these and most other accepted justifications for speech were developed for and relate especially well to political speech. Viewing art speech through this lens tends to lead to its contortion.<sup>15</sup> While art speech can speak to truth, contribute ideas to the marketplace or be political, those are simply some qualities that art can exhibit. The essence of art is participation in and display of the human creative process.

So, what we need is a justification of why art speech merits value as protected speech because it is art, not because it is political or religious. Only with a satisfactory justification of

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Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. 245, 255-257.

There are exceptions. Some of the best work on art speech is by Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73 (1996); Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment*, 1987 Wis. L. Rev. 221.

<sup>15</sup>*E. g.* Close v. Lederle, 424 F.2d 988, 990 (1<sup>st</sup> Cir.), *cert. denied*, 400 U.S. 903 (1970) (“There is no suggestion, unless in its cheap titles, that plaintiff’s art was seeking to express political or social thought.”).

its worth can art speech takes its rightful place as one of the clusters of highly valued communication that form the core of protected speech.<sup>16</sup>

Part I describes what it is about art that is unique and why that uniqueness merits its estimation as protected speech. Art is unique because it quintessentially involves the creative process; addresses aspects of human life that are difficult to reach or, even, ordinarily beyond comprehension; and constitutes a domain of freedom beyond the normal rules of society. Part II explains why art speech can be justified as protected speech under standard justifications. Art speech furthers the pursuit of truth, constitutes self-realization, checks entrenched power, and acts as a safety valve to diffuse tension, to apply a few conventional justifications. Part III evaluates the consequences of art resting upon its own justification as protected speech. Viewing art speech as art, art speech should be presumptively protected expression, like other core expression, absent exigent circumstance. Art speech, in short, is core speech and should be valued accordingly.

#### I. The Uniqueness of Art.

Art speech is, of course, speech. But before we consider why art speech is special, it makes sense first to explain briefly why speech is special. It is critical to justify the specialness of speech because speech has received extraordinary protection in constitutional democracy. It naturally follows that art speech can be special only if speech is special, since art speech is a subset of the broader category of speech.

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<sup>16</sup>*Southeast Promotions v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”).

Speech is special, first and foremost, because it encompasses the integrity of the thought process that is critical to deliberation and formation of a person's identity and his or her acting within society. Thought and expression lie at the well spring of being that forms the root of humans as free and autonomous beings. We might refer to this well spring as the essence of a person's inner life, giving rise to the inner voice we each possess that drives and motivates us. Within this domain of interiority, we possess the faculties to think as we like, speak or not speak as we like, and listen or not listen as we like, as we determine our fate. These attributes of inner human life are indispensable qualities to a free human being,<sup>17</sup> as conceived in modern society. These elements of Free Speech leads to its critical role in reflecting and constituting human identity.

It is these quintessential human activities that the Free Speech Clause protects. Because Free Speech protects the inner workings of a person, it safeguards a person's ability to control his or her thought process and to engage in expression according to his or her desires. People control their own thought process, and the nature of its constitution, nurture and dissemination, not government.<sup>18</sup> Free Speech is a protected zone for human contemplation, experimentation, deliberation and expression. The First Amendment marks out the communicative process as a special and protected constitutional domain.

Free Speech merits extraordinary privilege as a protected constitutional domain because it captures as much, if not more, the essence of being human, as conceived and situated in

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<sup>17</sup>Edward J. Eberle, *Cross Burning, Hate Speech and Free Speech in America*, 36 Ariz. St.L.J. 953, 959 (2004).

<sup>18</sup>*Id.*

constitutional democracy. Through Free Speech a person develops thought, belief, aspiration, ideas and plans to go about the business of living life. Through exercise of Free Speech, a person reflects the truths and essences of what is important in an individual's life. In these regards, Free speech is crucial to the development and nurturing of human capacity and human personality. Free speech or communication is an indispensable element of who we are as a person, individually, and a people, collectively.

The different categories of speech address different dimensions of human thought. Political speech speaks to our desire to affect the public policies and character of the society we live in. Political speech is fundamentally the silhouette of the public persona we take on or hope to be. Religious speech speaks to the transcendental yearning we experience (or do not experience) to access a world beyond the nitty-gritty of normal existence, the realm normally addressed by political speech. This was the point of the Protestant Reformation: rooting man's conscience as an inviolable medium of communication with God. Academic or scientific speech speaks to our search for pure truth, trying to understand, devise or reformulate the facts or rules that constitute the paradigms that comprise the world we live in.

And then there is art speech. What is it about art that marks it as special and privileged so as to gain entrance to this constitutional domain? We can identify at least three basic reasons why art is special and, accordingly, entitled to protection as Free Speech. First, art is special because it partakes of the creative process central and unique to human existence. Second, art provides an avenue to dimensions of human life less accessible by ordinary rational or cognitive processes. Art is a portal to nonrational, noncognitive, nondiscursive dimensions to human life, offering a fuller conception of the human person. Third, art functions as a private sphere of

freedom not subject or susceptible, on the whole, to the normal rules of society. Within this private sphere of freedom, a person can contemplate and muse over elements of the human condition free from the pressures or sanctions of normal social forces. Let me explain each of these justifications.

#### A. Art as the Human Creative Process

Art speech speaks to our innate desire to create and fashion ideas, symbols, forms or, even, worlds seen only by the inner eye, and then made manifest through use of the creative process. Art speech is, in essence, use of the uniquely human desire to fashion and form things, to communicate through image, color, form or symbol.<sup>19</sup> The essence of art is nondiscursive communication, at least art employing forms other than written. A good description of art can be gleaned from the German Constitutional Court case of *Mephisto*:

The essential characteristic of artistic activity is the artist's free and creative shaping of impressions, experiences and events for direct display through a medium of a specific language of shapes. All artistic activity is a mix of conscious and unconscious events that is not rationally orderable. Intuition, phantasy and artistic understanding all effect artistic creations, such creations are primarily not informational but rather an immediately direct expression of the individual personality of the artist.<sup>20</sup>

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<sup>19</sup>West Virginia State Bd. of Educa. v. Barnette, 319 U.S. 624, 632 (1943) (visual images are “a primitive but effective way of communicating ideas . . . a short cut from mind to mind.”); Bery v. New York, 97 F.3d 869, 696 (2d Cir. 1996) (“Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.”).

<sup>20</sup>*Mephisto*, 30 BVerfGE 173, 188-89 (1973). The German Constitutional Court was construing the express protection of art as expression under article 5(3), which provides “Art and

This creative process is the channel through which artists depict their inner life and create their personal wares: novels, poems, paintings, sculptures, dances and numerous other mediums of artistic activity. Combining these qualities, we can come up with this definition of art speech: art speech is the autonomous use of the artist's creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium. In other words, the purpose of the artist is to depict his/her vision, express his/her personality or convey meaning.

Defining categories of speech (protected and unprotected) is crucial to the architecture of the Free Speech Clause so that differently valued forms of expression may clearly be distinguished from one another and, thereby, maintain the integrity of the amendment by avoiding the dangers of doctrinal dilution, misestimation of expression or other dangers to expression. For example, art speech is not advertising because it is not commercial speech,

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science, research and teaching shall be free.” In *Mephisto*, the Court determined that Klaus Mann's novel, *Mephisto*, defamed its implicit subject, a German actor (and brother-law of Mann) who achieved fame by hitching his star to the Nazi government, which Mann analogized to Mephisto, making a bargain with the devil. For further discussion of *Mephisto*, see Edward J. Eberle, Public Discourse in Contemporary Germany, 47 Case W. Res. L. Rev. 797, 834-41 (1997).

Stated a different way, “the artist imposes her own order upon nature and the universe.” Sheldon H. Nahmod, *supra* note 14, at 223.

which is speech that proposes a commercial transaction.<sup>21</sup> The consequences of assigning speech to a specific category are significant. In the example just provided, consider that estimation of speech as art speech should result in governmental regulations being judged under a strict scrutiny regime,<sup>22</sup> whereas labeling the speech as commercial speech will result in governmental regulations needing to meet the lesser standard of intermediate scrutiny.<sup>23</sup> Valuation of speech makes a difference. Working out and maintaining the architecture of Free Speech is a crucial project, one necessary to safeguard freedom of thought, but one beyond the scope of this article.

Art is also important because possession and use of the creative process is a unique element of the human condition, a trait that fundamentally distinguishes us from other species. We can point to early man's communication of his state through cave drawings discovered in France or such enigmatic structures as Stonehenge in England or the large statues of Easter Island known as moai to evidence the unique human creative activity. Or we could point to more modern manifestations of human creativity such as Da Vinci's the Mona Lisa, Shakespeare's Sonnets, Rodin's *Le Penseur* or Pablo Picasso's *Guernica*. Each of these works is a tangible use of the creative process by which the artist or artists communicate some essential truth, vision,

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<sup>21</sup>*Bd. of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)(commercial speech is "speech which does 'no more than propose a commercial transaction.'")(quotation omitted).

<sup>22</sup>*See infra* text and accompanying notes .

<sup>23</sup>*Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1990). In the more recent case of *44 Liquor Mart v. Rhode Island*, 517, U.S. 484 (1996), a plurality of the Court would apply strict scrutiny to truthful commercial speech.

symbol or form about themselves, their world or the human condition. Man as artist is an indispensable element of man as creator--man as visionary, man as maker, man as vision maker. Artistic creation is autonomous human meaning making. Such use of the creative process can be an immense source of human satisfaction and fulfillment, to both artist and viewer.

The creative process makes art unique not only because it is the tangible manifestation of the artist's personality. The creative process makes art unique also because its products have the special quality to inspire, satisfy, outrage or disgust the viewers/listeners of the art object. There is a unique object (artist)/subject (viewer) relationship by which humans communicate to each other the beauty, sublime, horror and fear of human existence. Creativity and its products are a source of immense satisfaction/dissatisfaction for those viewing art works. In these respects, art is fundamental to the human spirit.

B. Art Addresses Fuller Dimensions of Human Existence, such as Nonrational and Noncognitive Elements.

Art is also special because it offers portals to fuller dimensions of human existence that are not ordinarily accessible by resort to rational cognitive processes. In this respect, art offers unique perspectives on human existence, especially nonrational, noncognitive or nondiscursive elements. We are accustomed to thinking of the human being as a rational actor, and there is much of human life that comports with this ideal. For example, law and economics theory is modeled around the ideal of man as rational actor. In free speech theory, the political speech model is essentially built around this ideal. Art, of course, can speak to this rational aspect of life, as it can to political or religious concerns as well.<sup>24</sup>

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<sup>24</sup>Consider, for example, Andres Serrano's controversial piece "Piss Christ," which

But the human being is complicated. Woman as rational actor accounts for only part of the totality of human existence. Man can also act nonrationally, emotionally or by whim. This is the part of human existence involving our senses, intuition, feelings and vision. It is this more nonrational dimension of human existence that art especially speaks to. Art offers access to the sensory and lyrical in direct ways not readily offered by other speech forms. This element of art speech makes it unique.

The nature of the artistic communicative dialogue occurs on a track parallel to, but different than, more standard forms of communication, such as speaking and listening, writing and reading, or other more cognitive forms of discourse. Communication through art involves the flow of sensory, emotional or intuitional data. The creative process of art facilitates this unique human dialogue by which we gain access to these extra-ordinary dimensions. We think, or learn to think, outside of ourselves, learning new aspects to humanity. We thereby achieve a greater understanding of life.

Capturing this element of human existence is vitally important to the Free Speech project, as we strive to account for more and more of the totality of life. Given the complication of modern life, we need as much information as possible to make sense of our world and achieve satisfaction and fulfillment. Art allows us to participate in and/or experience the rapture, pleasure/displeasure or joy/frustration of the artistic process. In modern society, construction and

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depicts a Jesus figure being urinated upon, and triggered the rage of then Senator Jesse Helms, or of his later work depicting Klansmen in their white robes. Adler, *supra* note 7, at 1523. See also Gia Kourlas, *Messages Written on Flesh as Art Flirts with Political*, N.Y. Times, November 28, 2005, at B5.

realization of self-identity is paramount. We need to form a freely autonomous identity so that we can decide our own fates, as much as we can, outside the control of government, corporate power or other entrenched authority. Art offers added perspectives to facilitate this self-realization.

There are also important reasons relating to Free Speech theory that must be considered. Many of the foundational issues of Free Speech are now largely settled. These central issues include identifying the core of Free Speech; discerning the values furthered by Free Speech; and setting out the architecture of the First Amendment by demonstrating how different types of speech can be ordered under different levels of protection, resulting in a multi-sphered approach to the First Amendment.<sup>25</sup> With these foundational issues now largely resolved, the more profitable direction of Free Speech lies in assessing and sharpening the frontiers of the First Amendment and capturing the more complete meaning of the Amendment.<sup>26</sup> Filling out the justification for art fits within this project because justifying art's status as protected speech captures more of the complete meaning of the Amendment. We can never get enough information or meaning in life. Further, justifying art's status as core speech endows more solidity to the First Amendment.

Justice Harlan spoke to this dimension of the First Amendment when he wrote

much linguistic expression serves a dual communicative function; it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the

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<sup>25</sup>Eberle, *supra* note 17, at 969-70.

<sup>26</sup>*Id.*

Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>27</sup>

The emotive or noncognitive function of expression Harlan speaks to describes the important intuitional, visual or sensory qualities communication can play. These noncognitive dimensions of expression are especially pronounced and significant in art speech. Art, after all, is imagination made manifest. Through art, the artist manifests his or her imaginative construction or reconstruction of life. We sense the artist's intuitions about life, power, reality or death.<sup>28</sup> Seeing the works of the seer allows us to observe dimensions to humanity that are normally beyond our ken.<sup>29</sup> These visions are out of the ordinary and can be enriching, challenging or arresting, but our observation of them broadens our perspectives. Art can shake us up, leading to enlightenment or disillusionment, but we are wiser for the experience.

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<sup>27</sup>Cohen v. California, 403 U.S. 15, 25-26 (1971). *See also Bery*, 97 F.3d at 695 (“written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. . . . Visual artwork is as much an embodiment of the artist’s expression as is a written text, and the two cannot always be readily distinguished.”).

<sup>28</sup>Hamilton, *supra* note 14, at 87-88 (“the imagination takes one beyond one’s preexisting conceptions and intuition about life, power, and reality.”). *Id.* at 87.

<sup>29</sup>Walt Whitman, Preface to *Leaves of Grass*, in *The Complete Poems* 746 (Penguin 1986)(“The greatest poet . . . is a seer . . . only he sees it and they do not. He is not one of the Chorus. . . . What the eyesight does to the rest he does to the rest.”).

In this sense, art speech has much in common with religious speech. Like art speech, much religious speech is not orderable along rational or cognitive grounds. Religion, like art, speaks to nonrational, noncognitive dimensions of human life. Religion is belief, hope and godly vision, whereas art is imagination, creation and inspirational vision. Both speech categories are alike in that they address dimensions to humanity beyond the merely rational and thus provide different and unique perspectives on the human person. Art and religion speak to man's spiritual being. Added to our normal, rational evaluation of human kind, they provide a more complete view of the human being.

Appealing to the nonrational and emotive can be extremely affective, pleasureable/nonpleasureable. Artistic expression can directly appeal to the visceral senses, communicating to the core of a person's being beauty, rapture, fear or horror. Symbolic, form, or color communication appeals to our sensory faculties, triggering our emotions, intuitions or subconscious. Artistic expression, like other expression, fosters our own emotional, intellectual and spiritual development.<sup>30</sup> These can lead to powerful impulses.

So powerful, in fact, that religion and art can be deeply subversive. For religion, we need only think of the revolution of the Protestant Reformation or, today, the Islamic *jihad* to note religion's potential for upsetting the social order. For art, we can take note of thinkers like Plato<sup>31</sup> and regimes like Nazi Germany<sup>32</sup> and Soviet Russia<sup>33</sup> that considered art to have the

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<sup>30</sup>Marci Hamilton, *supra* note 14, at 84. *Bery*, 97 F.3d at 695 (“The ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language group to both the educated and the illiterate.”).

<sup>31</sup>Plato desired to ban artists from the Republic unless they could be controlled by the

potential to be deeply threatening to the social order. So threatening, in fact, that authorities paid attention to and, where necessary, controlled art, lest their regimes be undercut.<sup>34</sup> Or we might

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Philosopher King. Plato, Republic 80-85 (Cornford trans. 1941).

<sup>32</sup>Nazi Germany sought to instill an ideal of Teutonic virtue based on hard work, Aryan racial stock, and basic German bourgeois values, and they expected the same of German artists. Hans Grimm's novel *Volk ohne Raum* (A People without Space) gave the Nazis one of their pet phrases, illustrating art's influence, in this case devious. Ernst Rose, *A History of German Literature* 309 (1960).

Many great German writers would not conform to such Nazi ideology and, wisely, chose to emigrate. The emigres included the Nobel-prize winning author Thomas Mann and his brother, Heinrich, Berthold Brecht, Alfred Döblin and Robert Musil.

The same applied to the great German artistic movements of Expressionism and the Bauhaus. Leading Expressionists like Wassily Kandinsky, Max Beckmann and Paul Klee emigrated, as did key founders of the Bauhaus, like Mies van der Rohe and Walter Gropius. Infamously, the Nazis displayed publicly the products of these movements in Germany as degenerative art (*Entartete Kunst*).

<sup>33</sup>For the Soviets, "art should serve only to reinforce socialist ideals and thereby inculcate appropriate behavior; nonrepresentational art is considered decadent, bourgeois and dangerous." Nahmod, *supra* note 14, at 224.

<sup>34</sup>Nahmod, *supra* note 14, at 227; Hamilton, *supra* note 14, at 87-88, 97-98.

Another example is painters of the Renaissance, who often picked as subjects myths from ancient Greece or Rome so that they could freely display the human body in all its nude glory.

think of Harriet Beecher Stowe's book, *Uncle Tom's Cabin*, which galvanized support in the North to fight slavery or Salman Rushdie's novel, *The Satanic Verses*, that destabilized orthodox views of Islam, leading to calls for his assassination.<sup>35</sup> A recent example is the international furor caused by cartoons depicting the Prophet Mohammad in unflattering ways first published in a Danish newspaper.<sup>36</sup>

With its spawning of various avant garde movements, modernism too constitutes an attack on the traditional value order.<sup>37</sup> Here we can return to our consideration of Robert

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These painters knew that they had a free hand to display the unadulterated human form in so far as they could clothe it in a conventional myth. They knew they had to fly below the radar screen; portraying real life contemporary subjects would invoke the wrath of the authorities. They had to be stealthily subversive.

<sup>35</sup>Hamilton, *supra* note 14, at 97-98.

<sup>36</sup>Michael Slackman & Hassan M. Fattah, *Furor Over Cartoons Pits Muslim Against Muslim*, New York Times, February 22, 2006, at A1.

<sup>37</sup>Nahmod, *supra* note 14, at 250-51. Nahmod observes that Daniel Bell attacks modernism "for undermining the values necessary for the effective functioning of a highly organized and rationally bureaucratized capitalist society." *Id.* at 250. Perhaps Bell is right. For as Jürgen Habermas observes:

Modernity revolts against the normalizing functions of tradition; modernity lives on the experience of rebelling against all that is normative. . . [It] continuously stages a dialectical play between secrecy and public scandal; it is addicted to a

Mapplethorpe's work. Consider Mapplethorpe's frequent use of "nude black men, often pictured in eroticized, classical poses."<sup>38</sup> A viewer might consider these pictures as heroic, like the classical pieces they were modeled on. Or a viewer might consider them political, drawing attention to the AIDS crisis of that time. Still other viewers might view them as pornographic or obscene or pandering to racial stereotype. But an alternative view is also possible. Did Mapplethorpe intend to deconstruct racial stereotype?<sup>39</sup> If so, we could observe an example of the self-cleansing function of free speech. By appropriating the language of racism, Mapplethorpe may have turned racism against itself, uncovering its raw emotion, helping defuse that social ill. Offering perspectives on beauty or the sublime, art provides unique opportunities to perceive alternative worlds and perceptions of truth, reality or life. Art can challenge the status quo. Art can jar our sense of self. This process of questioning reality from the perspective of art allows us to refresh and constitute ourselves, as individuals and as a society. Art is a crucial part of the process of human definition and self-definition so central to any robust concept of Free Speech.

Art has a further great benefit not always associated with other speech forms. The process

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fascination with that horror which accompanies the act of profaning, and yet is

always in flight from the trivial results of profanation.

Jürgen Habermas, *Modernity—An Incomplete Project*, in *The Anti-Aesthetic: Essays on Postmodern Culture* 4 (Foster ed. 1983), *cited* in Nahmod, *supra* note 14, at 249.

<sup>38</sup>Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 Cal. L. Rev. 1499, 1543 (1996).

<sup>39</sup>*Id.*

of creating and viewing art is largely risk-free. Art poses no concrete risk of harm to individuals or society, as other areas of speech considered to be harmful. Speech can be regulated, for example, when it incites violence,<sup>40</sup> threatens<sup>41</sup> or defames with malice.<sup>42</sup> The harm of art, by contrast, is simply observation of its idea or image. Such internal impact on the psyche arising from the dialogue between artist and observer constitutes the very point of Free Speech—communication—and is largely immune from regulation. We can think of art as a risk-free zone,<sup>43</sup> which leads to a further justification for the uniqueness of art.

### C. Art as a Protected Realm of Freedom

Art speech is also special because it forms a protected realm of freedom. The Free Speech Clause prohibits government from intruding into the private sphere of a person's thought process and expression. While other speech areas form protected realms of freedom as well, the nature of freedom protected by art is unique. Art speech protects and fosters a person's

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<sup>40</sup>Brandenburg v. Ohio, 395 U.S. 444 (1969).

<sup>41</sup>Virginia v. Black, 538 U.S. 343 (2003).

<sup>42</sup>N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

<sup>43</sup>Marci Hamilton, *Art Speech*, 49 Vand. L. Rev. 73, 76 (1996). Some art can result in violence. Consider, for example, the film of Theo van Gogh or the artistic creativity of the recent cartoons depicting the Prophet Mohammad in unflattering terms. Van Gogh paid with his life, as did a number of people killed in riots over the Prophet Mohammad cartoons. Under the rules of Free Speech, however, the killings would be conduct and, accordingly, punishable, not speech.

emotional, intellectual, spiritual and sensory independence from government.<sup>44</sup> This freedom opens up access to more complete dimensions to humanity, including the nonrational, emotional elements discussed above. A person is thereby empowered to pursue the artistic muse as he or she fancies, exploring with relative freedom the world of creation and meaning making.

Pursuing art allows one to inhabit a different world, one not subject to the normal rules of cognition and knowledge that largely comprise the paradigms that organize modern society. We can characterize most judgements that make up the world of knowledge as we know it to be judgements of science because they operate within a set of established rules that form a field or pattern in which the judgement takes place. For example, rules of law are established in constitutions, statutes, regulations, cases or the like. These rules serve as a benchmark against which a legal question must be measured to determine resolution of the matter.<sup>45</sup> Judgements of pure science, economics, and much of politics operate similarly: each of these topics must generally conform to established criterion for their acceptance and recognition. These types of judgements involve acts of cognition.

But judgements of art are different. Art involves the free use of imagination and intuition. This free use of judgement is unencumbered by rules. Art must not conform to accepted standards. Art is, in a sense, standard less. In these respects, art is an act of the free reign of the mind. “[T]he person making the judgment feels himself completely free with regard

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<sup>44</sup>Hamilton, *supra* note 14, at 84.

<sup>45</sup>This part is derived from Edward J. Eberle & Bernhard Grossfeld, *Law and Poetry*, 11 Roger Williams Univ. L. Rev. 353 (2006).

to the satisfaction that he devotes to the object. . . .”<sup>46</sup> Art is exercise of our fancy, inspiration or whim.

Immanuel Kant described this difference well. In his *The Critique of the Power of Judgement*, Kant provides an account of aesthetic judgement—judgements of beauty or art. Judgements of beauty involve the faculties of imagination and creation. “[T]here is in our imagination a striving to advance to the infinite.”<sup>47</sup> These judgements are free in the sense that they are not subject to a rule to which they must conform. There is no rule for determining whether something (e.g. a poem, painting, sculpture) is or is not beautiful.<sup>48</sup> That is why judgements of beauty cannot be resolved definitively or “scientifically.” Instead, artistic judgements are free, “disinterested and ruleless, unconstrained by . . . appetite” or the demands “of a master concept to which they must conform.”<sup>49</sup> Aesthetic judgements partake of the exhilaration of freedom, which “is the source of the pleasure to which judgements of beauty refer.”<sup>50</sup> In this way, aesthetic judgements partake of the “pleasure of freedom itself.”<sup>51</sup>

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<sup>46</sup>Immanuel Kant, *Critique of the Power of Judgment* 96-97 (ed. and trans. Paul Geyer 2000, Cambridge Press).

<sup>47</sup>Immanuel Kant, *Critique of the Power of Judgment* 134 (ed. and trans. Paul Geyer 2000, Cambridge Press).

<sup>48</sup>Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 Ga. St. U. L. Rev. 311, 319-24 (1999).

<sup>49</sup>*Id.* at 324.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

According to Kant, this sense of freedom is a person's "feeling of life," "the pleasurable experience of being an active, living being endowed with a freedom that transcends the world." It is a "power of free creativity,"<sup>52</sup> unbound by rules. This is the essence of artistic invention, the heart of the enjoyment of the power itself.<sup>53</sup>

Kant's account of aesthetic judgements is universally communicable to other people, forming a connection between object/artist and subject/viewer. Universal communication of judgements of beauty provides a common ground for all, "a common basis of experience that all human beings share."<sup>54</sup> Aesthetic judgements yield "the pleasurable sensation produced by the

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<sup>52</sup>*Id. citing* Immanuel Kant, *The Critique of Judgment* 38 (J.H. Bernard trans. Hafner 1951).

<sup>53</sup>*Id.* at 324.

<sup>54</sup>*Id.* at 325. Kant describes this universality as follows:

This state of a free play of the faculties of cognition with a representation through which an object is given must be able to be universally communicated, because cognition, as a determination of the object with which given representations . . . should agree, is the only kind of representation that is valid for everyone.

This subjective universal communicability of the kind of representation in a judgment of taste. . . can be nothing other than the state of mind in the free play of the imagination and the understanding. . . .

Immanuel Kant, *Critique of the Power of Judgment* 102-03 (ed. and trans. Paul Geyer 2000, Cambridge Press).

free play of [our] mental faculties . . . the spontaneous creativity of mental life.”<sup>55</sup> It is an aspect of acknowledging “our common humanity.” The common bond we share is “the shared experience of free creativity.”<sup>56</sup> The artist and his or her viewer share the bond of communicating and sensing life feelings, sharing meanings. Each thereby participates in the universal experience of being human. The essence of the artistic dialogue between artist/viewer partakes of this universality.

It is this element of art that allows the artist and the viewer to see and experience new dimensions and perspectives on life and the human spirit. Most importantly, each of us is empowered to see these dimensions as we see fit. No person or government can channel our free play of imagination. We alone possess control of our mind, our inner space. In this regard, art speech is a protected realm of freedom, outside the control of government and the majoritarian forces that form conventions and the normal rules of society.

The freeness of art allows us to test ourselves, moving beyond ourselves and the ordinary conceptions that comprise our lives. We can see things truer and more presciently than normally accessible by other forms of communication. For example, the dissatisfaction that led to outbreaks of violence by dissatisfied immigrant Muslims in France during Fall 2005 was portrayed in film and rap music in the 1990s.<sup>57</sup> The freeness of art allows us to challenge conventional notions of life, positing alternative dimensions to reality that can enrich, ennoble

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<sup>55</sup>Kronman, *supra* note 45, at 325.

<sup>56</sup>*Id.*

<sup>57</sup>Alan Riding, *In France, Artists Have Sounded the Warning Bells for Years*, N.Y. Times, Nov. 24, 2005, at B1.

our enlarge our ken. This part of art can also be threatening or subversive to the status quo, as in the cases of Plato, Nazi Germany and Islamic Iran discussed above.<sup>58</sup>

In the United States, most of these battles over control of reality have centered on pornography or obscenity. Depiction of uncovered or nude human body forms can be upsetting. Depiction of graphic, ultimate sex acts is shocking to convention. Obscenity can destabilize conventional notions of morality.<sup>59</sup> That is perhaps as good an explanation as any as to why obscenity is an unprotected category of speech.

And perhaps the authorities are right. Artists (whether or not using obscenity in their works) can be threatening. After all, artists are prime barometers of culture, voicing its dreams, hopes, aspirations, fears, frustrations or despairs. Seeing with the inner eye, an artist can portray the society in ways out of the ordinary, illuminating new perspectives and, of course, challenging convention in doing so. We can see that artists offer, indeed, a unique silhouette of the human condition in a given genre. We learn perspectives on life, humanity, human spirit and society that might otherwise remain hidden. Artists can be true seers of the spirit of the times (*Zeitgeist*). In these ways, the artist is a prime contributor to the building of culture.

We have become accustomed to think of Free Speech possessing value because it facilitates the public discourse so necessary to the formation of public policy. That is why political speech is so highly valued and initiated the dialogue on why Free Speech is special. But

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<sup>58</sup>See *supra* notes 29-31.

<sup>59</sup>Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment*, 1987 Wis. L. Rev. 221, 250.

the building of culture in a society can be just as valuable as the building of policies.<sup>60</sup> In culture we find an alternative view of a people: its visions, priorities, dreams and whimsies. We find in culture a reflection of our inner essence—of who we are or hope to be. The cultural life of a people is a reflection of their human spirit. Art is instrumental in the building of culture and can offer an antidote to the grittiness, superficiality or blandness of life.

## II. Art as Speech under Conventional Justifications.

We have seen how art is special and that this specialness justifies protection of art as speech. Justifying the specialness of art is critical to treatment of art as core speech. But we could justify the status of art as protected speech under conventional Free Speech rationales as well. Art is protected speech because, first, it advances knowledge and the pursuit of truth; second, is an act of self-realization; third, can check government; and, fourth, can act as a safety valve to diffuse pressure that builds up in individuals or society. Each of these conventional justifications for protecting art speech as Free Speech merits brief discussion.

### A. Art as Advancement of Knowledge and Pursuit of Truth

Advancement of knowledge and pursuit of truth are seminal justifications for the protection of speech. We can trace this theory at least back to John Stuart Mill's seminal work *On Liberty*,<sup>61</sup> and then follow its translation into American law in the formative opinions of

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<sup>60</sup> “[B]eauty has constitutional status too, and . . . the life of the imagination is as important to the human adult as the life of the intellect.” Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Supreme Court Review 1, 16.

<sup>61</sup> John Stuart Mill, *On Liberty* (1859).

Justice Holmes.<sup>62</sup> As expression, art too can convey ideas, knowledge and truth, as other forms of speech.<sup>63</sup> Hegel thought that the purpose of art was to reveal truth.<sup>64</sup> As an example, consider a painting like Picasso's *Guernica*; this painting conveyed the truths of the horrors of war as well, if not better, than any discursive, written description.<sup>65</sup> Or observe the paintings and self-

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<sup>62</sup>*See, e.g.,* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon their wishes safely can be carried out.”). Thomas Emerson elaborated this rationale for protecting speech too in his famous work, *The System of Freedom of Expression* 7 (1970).

<sup>63</sup>*Bery*, 97 F.3d at 696 (“paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”); Roberta Smith, *Even a Little Space Can Hold an Abundance of Ideas*, *N. Y. Times*, Nov. 25, 2005, at B 41 (describing gallery exhibit as “intellectual, spatial and aesthetic”).

<sup>64</sup>Georg Friedrich Hegel, *Philosophy of Fine Art* 15-16 (Osmaston trans. 1920) *cited in* Nahmod, *supra* note 14, at 232.

<sup>65</sup>Or consider the paintings of Winslow Homer. *Bery*, 97 F.3d at 695 (1996) (“One cannot look at Winslow Homer’s paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.”). *See also* Sarah Lyall, *Playwright Takes a Prize and a Jab at U.S.*, *N.Y. Times*, December 8, 2005, at A3 (Upon winning Nobel Prize for literature, Harold Pinter

portraits of Felix Nussbaum, which lie in a museum in Osnabrück, Germany, his hometown. Nussbaum was a German Jew who sought to escape Nazi Germany, leaving home and traveling throughout Europe in a vain journey of escape, ending in the all too-common, tragic fate of his brethren: extermination. Nussbaum's paintings depict the ever growing despair and hopelessness of Jews in Europe during the Nazi period. The poignancy of his work conveys the horror and inhumanity of the Nazi time.

Much art speech advances our knowledge and contributes to the pursuit of truth. Certainly art speech makes weighty contributions to the advancement of knowledge, as other highly ordered speech categories, such as religious, scientific or, even, political speech. For example, could we say that the paintings of Picasso or Nussbaum are less weighty than the political ideas of Lyndon Larouche or David Duke, failed political candidates? Of course, it is hard to value in any definitive way the contribution of any idea. But that is the point: art speech, like other speech, can contribute to the advancement of knowledge, and it is up to each of us to gauge its value within the keen competition of the marketplace of ideas. Art speech, in particular, offers us an alternative perspective.

#### B. Art as Self-Realization

Engagement in art is a tangible use of human capacity and faculties that transforms to a concrete manifestation of human personality. The personality of the artist is revealed in the art. Art speech thus invokes the standard justification of speech described variously as self-

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remarks “drama represents ‘the search for truth’ . . . politics works against truth, surrounding citizens with ‘a vast tapestry of lies’ spun by politicians eager to cling to power.”).

realization,<sup>66</sup> individual self-fulfillment,<sup>67</sup> liberty<sup>68</sup> or autonomy. These theories justify protection of speech on the nonconsequentialist rationale that expression constitutes a core human activity central to self-identity and development of human potential. We might think of this justification of speech as intrinsic to the human dignity we possess as autonomous, free persons in charge of our fate. Furthering human potential leads to a more complete and fulfilled sense of self.

An example of the self-realization justification underlying art speech is the performance art of Karen Finley. We are used to thinking of Karen Finley in the context of her provocative performance art, involving graphic displays of her body, covering her body in chocolate and inviting the audience to lick it off, or stuffing her anus with food.<sup>69</sup> But if we turn to her motivations, to the extent we can, we can observe her art from a different perspective. The suicide of her father affected her deeply, as did the AIDS-related deaths of her friends. Her performance art was a way to come to grips with these traumatic events.<sup>70</sup> She acted out her

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<sup>66</sup>Martin Redish, *Freedom of Expression: A Critical Analysis* 9-40 (1984).

<sup>67</sup>Thomas Emerson, *supra* note 59, at 7.

<sup>68</sup>C. Edwin Baker, *Human Liberty and Freedom of Speech* 47-48 (1989); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. Pa. L. Rev. 646, 658 (1982).

<sup>69</sup>[www.geocities.com/WestHollywood/2399/KAREN.html](http://www.geocities.com/WestHollywood/2399/KAREN.html).

<sup>70</sup>Lindsay Caddel, *Karen Finley to speak at law symposium*, 88 *Hullabaloo News* (Number 20, Online Edition) (“I’ve seen tragedy in human life, and I’m interested in creating art that identifies with that part of life.”).

despair. She also acts out to portray many of society's important and controversial events that can escape wide public notice, such as the AIDs crisis (in its incipient stage), subordination of and violence toward women or emotional despair. Viewed this way, we can see how Finley's art is a form of her self-realization.<sup>71</sup>

Art speech may also constitute self-realization for its impact on the viewer or listener. Viewers may also further their own self-realization by virtue of the new information, ideas, images or perspective learned by observation of the art. Art poses alternative dimensions to reality and new visions of the world that can transform, enlighten, terrify or challenge the viewer. Viewers can obtain access to the artistic world, experiencing joy, rapture, horror or pleasure/displeasure. In this way, viewers may enhance their own self-realization.

### C. Art as Checking Value.

Art speech can also be justified as speech because it serves as a countervailing force to check and challenge government and entrenched power. The checking value that speech can serve is an important constraint on official sources of power, particularly since there is a danger that official control of power can lead to its abuse.<sup>72</sup> Concern over abuse of power lead James Madison to his famous observation:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies

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<sup>71</sup>Vittorio Carli, Karen Finley Story/Interview, at <http://www.artinterviews.com/Karen.html>.

<sup>72</sup>Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 American B. Found. Res. J. 521, 527-42.

in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>73</sup>

After all, government has a monopoly on legalized violence and other forms of coercion.

Authority can use force to direct people to desired behavior. It is unhealthy for society to let such awesome, monopoly power go unchallenged. The main way people can check such entrenched power is through exercise of Free Speech.

Much of the checking value that Free Speech can serve is conceived as exercise of political speech. And this makes sense. The checking value of speech grows out of democratic theory and leads to a contest of views and ideas on public policy issues.<sup>74</sup> For example, in recent time, the comments by Representative John Murtha that it is now time to plan on withdrawing American troops in Iraq changed the debate on the American Iraqi war policy in November 2005.<sup>75</sup> But political speech is not the only form of speech that can check authority.

Art speech is an alternative way to check the power and reach of government and the status quo. Art speech can be very effective in challenging official and majoritarian power. The alternative cognitive and sensory world posed by art speech effectively conveys consideration of views of reality different than official or accepted ones. This quality of art can be subversive and destabilizing to regimes. For example, consider again the effect of Salman Rushdie's *Satanic*

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<sup>73</sup>The Federalist No. 51 (James Madison, 1788).

<sup>74</sup>Blasi, *supra* note 69, at 527.

<sup>75</sup>Eric Schmitt and David E. Sanger, *Fast Withdrawal of GI's Is Urged by Key Democrat*, New York Times, November 17, 2005, at A1.

*Verses* on Islamic Iran. Or consider the photographs of Iraqi prisoner abuse at the Abu Ghraib prison in Iraq. These photographs (depicting American soldiers positioning Iraqi prisoners in various states of humiliation and debasement, like the performance art of Karen Finley) unleashed a surge of emotion against the American war effort that words could not so easily convey. The point here, simply, is that art speech can be justified as speech by the conventional rationale of acting as a check on power.

#### D. Art as a Safety Valve.

A final standard Free Speech justification worth considering is the safety value function. Exercise of speech can be cathartic; a way to release tension that has built up and that otherwise might lead to more dire consequences, sometimes acted out as physical behavior that can be harmful. The value of the safety valve function of Free Speech “is an essential mechanism for maintaining the balance between stability and change,” as famously formulated by Thomas Emerson,<sup>76</sup> reworking Justice Brandeis’s seminal formulation of the values of free speech.<sup>77</sup> Speech as safety valve means that a process exists by which people and society may adjust to the process of change that any society inevitably faces. Through exercise of speech, all people have a role in the process of formation of speech, ideas and public policies. Even if policy decisions go against a person, the person is apt to feel less aggrieved or discouraged by virtue of the input

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<sup>76</sup>Thomas Emerson, *The System of Freedom of Expression* 7 (1970).

<sup>77</sup>*Whitney v. California*, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring)(free speech valuable because it develops human faculties, facilitates pursuit of knowledge and truth and enables people to participate in public decisions).

and participation that the person has had.<sup>78</sup>

Art speech is especially well suited to serve as a safety valve because it, by its very nature, poses an alternative world to the normal process of society. Exercise of art speech is personally cathartic to the artist and may well be also to the viewer. Art is a refuge from the normal course of society. For some people, the interior world of the inner mind reached by art may well be preferable to standard life.

A good example of art as safety valve is the Nineteenth Century German experience. In this era, Germans were inspired by the French Revolution, as other Europeans, and sought to invoke that inspiration to fashion a democratic German society. But most of the efforts of the German democrats were met with repression by Prussian authorities. A famous suppression was the failed 1848 revolution against authority by democrats attempting to refound German society on a constitutional democratic basis, embodied in the aborted Frankfurt (St Paul's Church) Constitution of that date. In response to that suppression, and earlier aborted reform movements, Germans went deeply into the interior of their minds, focusing on development of mental faculties such as the arts, academic research and science. Art speech and other interior directed speech served as the safety valve by which people and the society could yet function. In the mind, a person can always be free. The fruits of these efforts resulted in concepts we can all be grateful for: academic freedom, the model of the research university and protection of art as speech, conceptions all embodied in the present German Basic Law.<sup>79</sup>

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<sup>78</sup>Thomas Emerson, *supra* note 76, at 7.

<sup>79</sup>German Basic Law (GG) art. 5 (3): "Art and science, research and teaching shall be free. Freedom of teaching shall not release anybody from his allegiance to the constitution."

### III. Consequences of Art as Core Speech

We have seen, in Part I, that art speech can be justified as speech for its own intrinsic value because it partakes of the creative process; addresses a more complete view of human personality through accessing noncognitive elements in addition to cognitive ones; and forms a unique protected realm of freedom. These justifications display how art speech exhibits qualities that justify its treatment as Free Speech on its own terms for the reasons unique to this type of speech. The uniqueness of art speech makes for the uniqueness of this category of speech and its position as a form of core speech. We have also seen, in Part II, that art speech can also be justified as speech pursuant to standard speech justifications, such as advancing knowledge and pursuing truth; participating in the process of self-realization; checking authority; and acting as a safety valve. These justifications show that art speech is speech, like other speech, because it can be justified pursuant to conventional methodology. We now need to assess the consequences of justifying the status of art speech as Free Speech.

First, all of these justifications provide a strong rationale to treat art speech as protected speech. The justifications underlying art speech fit within normal Free Speech theory because together they demonstrate specific qualities of specialness exhibited by art speech as a form of speech and, in addition, can also be justified by conventional Free Speech rationales. Further, there is no one foundational justification of art speech. Rather, art speech is justified as being supported by a web of interlocking values that coalesce together to form a strong foundation for art speech.<sup>80</sup>

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<sup>80</sup>The Supreme Court commonly justifies speech as protected on multiple rationales, not one basic value. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

These arguments combine to form a strong and correct case that art speech is core speech. The Supreme Court has recognized as much, albeit indirectly, in observing that for speech to qualify for protection as nonobscene it “must have serious literary, artistic, political, or scientific value . . . .”<sup>81</sup> The Court’s placement of artistic speech, alongside political, religious and scientific speech, is a demonstration of its prioritization of the types of expression that comprise favored categories of Free Speech.

Second, treatment of art speech as core speech means that standard First Amendment methodology applies. Thus, art speech, like political speech and religious speech, is presumptively protected and may not be regulated unless government can prove a serious, imminent, concrete harm independent of the speech. In other words, government is presumptively disabled from regulating the content of speech unless it can prove convincingly a concrete, serious harm associated with or arising from the speech. Stated a different way, the focus of governmental regulation must be the concrete harms independent of the speech.

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Council, Inc, 425 U.S. 748 (1976). In Free Speech theory, there is a major debate between proponents of unidimensional values, *see. e. g.*, Alexander Meiklejohn, *Political Freedom* (2d. ed. 1965)(self-government); Martin Redish, *Freedom of Expression: A Critical Analysis* (1984). (self-realization), and proponents of multidimensional values, *see, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. Rev. 1615 (1987).

<sup>81</sup>Miller v. California, 413 U.S. 15, 26 (1973); *Abod v. Detroit Bd. of Educa.*, 431 U.S. 209. 231 (1977)(“[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection.”)..

Governmental targeting of harm based only on the content of the communication is presumptively unconstitutional.<sup>82</sup> Noncommunicative harm is the proper focus of government.<sup>83</sup> This methodology is framed in the core Free Speech rule of strict scrutiny analysis that provides that speech may not be regulated unless government demonstrates a compelling governmental interest that is narrowly tailored to effectuate that end.<sup>84</sup>

Third, assessing art speech under standard strict scrutiny analysis applicable to core speech, it will be very difficult to regulate art speech. The Supreme Court has recognized very few categories of unprotected speech. The main unprotected categories comprise incitement to violence,<sup>85</sup> threat,<sup>86</sup> fighting words,<sup>87</sup> actual malice defamation,<sup>88</sup> child pornography<sup>89</sup> and

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<sup>82</sup>Jed Rubinfeld, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 777 (2001).

<sup>83</sup>Eberle, *supra* note 17, at 965.

<sup>84</sup>*See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988).

<sup>85</sup>*Brandenburg v. Ohio*, 394 U.S. 444, 447 (1969)(to constitute incitement, the speaker must intend to cause imminent unlawfulness and such unlawfulness must be imminently likely to occur).

<sup>86</sup>*Virginia v. Black*, 538 U.S. 343, 360 (2003)(concern that “threatened violence will occur.”).

<sup>87</sup>*Cohen v. California*, 403 U.S. 15, 20 (1971)(“those personally abusive epithets which, when addressed to the ordinary citizen, are . . . inherently likely to provoke violent reaction.”).

<sup>88</sup>*N.Y. Times, v. Sullivan*, 376 U.S. 254, 280 (1964)(defamation for public people may be proscribed only when communicated “with knowledge that it was false or with reckless disregard of whether it was false or not.”). Defamation is more easily proscribable when it involves

obscenity.<sup>90</sup> Most art speech will not fall into these unprotected categories.

It is hard to imagine art speech constituting incitement, threats or fighting words. Instances of art speech almost never involve violence or threatened violence germane to these categories of unprotected speech. Of course, art speech might sometimes be used in conjunction with troubling behavior to constitute violence or threatened violence. We might imagine negative depictions of the Prophet Mohammad, or Nazi or Ku Klux Klan paraphernalia, used to aid an activity that results in violence. Ordinarily, however, the only threat posed by art speech is the presentation of its idea, form or image. Regulation of such internal threats to the psyche is normally off-limits to government under Free Speech.

It is possible, but not likely, that art speech could constitute defamation. It would seem quite unlikely that art speech could be proscribable as actual malice defamation because art, by definition, involves the creative process that mainly deals with a fancified and imagined world, not statements of facts. Thus, it is extremely unlikely that art speech could satisfy the threshold

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nonpublic or private people. Private people must prove that the communication caused damage to their reputation under standards determined by state law. *Gertz v. Robert Welch, Inc*, 418 U.S. 323 (1974).

<sup>89</sup>*New York v. Ferber*, 458 U.S. 747, 756-65 (1982)(child pornography proscribable only upon showing of sexual abuse of child in production of material that then exists as permanent record to torture child psychologically).

<sup>90</sup>*Miller v. California*, 413 U.S. 15, 26-27 (1973)(to be proscribable, obscenity must appeal to the prurient interest, be an offensive depiction of ultimate sex acts as defined by state law and not have “serious literary, artistic, political or scientific value . . .”).

criterion of being intentionally false or reckless with regard to truth. Perhaps there might be a stronger case to be made by private people that art speech can constitute state law defamation, but this too seems improbable.<sup>91</sup>

Child pornography, by definition, must depict actual children.<sup>92</sup> Because much of art deals with an imagined world—paintings, sculpture, poetry—much art speech cannot constitute child pornography. Some art speech does deal with live people, including children. This would be mediums such as photographs, theater and performance art. These types of mediums could constitute child pornography if they depict children in sexually abusive situations.

And then there is obscenity. Obscenity, of course, is the one area of American Free Speech that can be regulated without concrete proof of its harm. The only harm presented by obscenity is assault to the senses of the viewer. But this harm is no different than any other form of speech. Much speech assaults the senses of viewers by virtue of being offensive, outrageous or disturbing. Emotional reactions to speech by the viewer do not generally form a basis for speech regulation.<sup>93</sup> Obscene speech, however, would appear to be an exception from this rule.

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<sup>91</sup>Continuing the reformulation of defamation law begun in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), decreed that states could define defamation for nonpublic actors insofar as they did not impose liability without fault and damages must be proved.

<sup>92</sup>*Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51, 256 (2002) (virtual depiction of child porn does not constitute child porn, as defined in *New York v. Ferber*, 458 U.S. 747 (1982) and, therefore, cannot be restricted).

<sup>93</sup>*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

The basis for obscenity regulation is essentially morals—protection from internal assault of images of graphic sex—not concrete harm. Obscenity is regulation of what the majority determines to be improper thoughts—the thoughts of sexual arousal.<sup>94</sup> In essence, obscenity regulation is driven by the fear that it can subvert traditional cultural values.<sup>95</sup> Still, considering that obscenity yet remains an unprotected category of speech notwithstanding its lack of concrete harm independent of the speech, art speech that constitutes obscenity can be regulated. The mediums of art speech that can be so regulated are likely to be film, print, visual art and theater. Obscenity is easily the category of unprotected expression most likely to affect regulation of art speech.

With the exception of obscene art speech (that is art speech that lacks serious artistic value and meets the other elements of the Court’s definition of obscenity<sup>96</sup>), and art speech that depicts real children in sexually abusive situations, it should be difficult to regulate art speech pursuant to its justified treatment as core speech. Apart from extremely rare situations where art speech presents threats of imminent violence or defames, most art speech should be firmly protected core speech outside the domain of government. The consequence of such justifiably preferred treatment of art as core speech is that most regulation of art speech should be unconstitutional. For example, to revisit examples discussed earlier, banning of controversial movies, edgy performance art or display or relocation of paintings cannot satisfactorily be

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<sup>94</sup>Harry Kalven, *supra* note 57, at 19.

<sup>95</sup>Nahmod, *supra* note 14, at 249-50.

<sup>96</sup>*Miller*, 413 U.S. at 26-27.

justified on content-based grounds.<sup>97</sup> Stated a different way, unless governmental authorities can demonstrate harm independent of the art speech—the only persuasive reason to justify regulation of the content of any speech—the art speech is constitutional. As demonstrated, it will be difficult for government to make its case in most instances of art speech under prevailing First Amendment standards. In this manner, art speech can take its rightful place as one of the forms of expression meriting justifiably preferred status as core speech.

Solidification of art speech as core speech will inevitably give rise to a host of important questions. For example, precise definition of art speech is necessary to distinguish it from other forms of expression so that the proper level of protection may be applied to relevant categories of speech. I have set out a definition of art speech above,<sup>98</sup> but perhaps someone can do better. A second relevant question is applying the rubric of art speech to a range of instances of communication so that clarity can be brought to the substance of art speech. This will call for case-by-case application employing standard common law methodology to concretize the meaning of art speech. And, lastly, cementing art speech as core speech is likely to have ramifications for other categories of speech, especially those that are unprotected. Most notable here is obscenity, which can involve significant use of the artistic process. There is likely to be a reciprocal effect of art speech on obscenity, and vice-versa. But these are all questions for another day.

#### IV. Conclusion

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<sup>97</sup>See *supra* text accompanying notes 4-9. Art might, of course, be regulated on the basis of captive audience or other time, place manner restrictions.

<sup>98</sup>See *supra* text accompanying notes .

Free Speech achieved special constitutional status in the Twentieth Century through its fashioning and refashioning in heated political and religious controversies. Leading Supreme Court cases (like *Cantwell v. Connecticut*<sup>99</sup> or *New York Times v. Sullivan*<sup>100</sup>) have cemented a central core of the First Amendment that consists, at least, of political and religious speech. Political speech speaks especially to the intellect, as religious speech speaks centrally to the soul. It is high time now that we recognize the indispensability of man's imagination and spirit as well as his intellect. Art speech speaks to this important interior dimension of a human being that addresses imagination, creativity and spirit.

We have seen that art speech is special and justifiably merits protection as Free Speech because it partakes of the creative process; addresses aspects of human life often beyond normal comprehension; and constitutes a unique protected zone of freedom beyond the normal rules of society. Each of these justifications makes art unique and entitles it to recognition as a category of protected expression of a dimension similar to other core categories of speech. Applying standard First Amendment methodology, accordingly, art speech should be presumptively protected expression and generally immune from regulation absent exigent circumstance.

Application of standard Free Speech rules reveals another unique quality of art speech. Art generally poses no concrete risk of harm to individuals or society. The main harm posed by art speech is simply observation of its idea or image. But, of course, communication and/or observation of messages is the essence of Free Speech itself. Thus, we can think of art speech as a largely risk-free zone in which to engage in Free Speech.

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<sup>99</sup>310 U.S. 296 (1940).

<sup>100</sup>376 U.S. 254 (1964).

For these reasons, at least, we should bring art out from under the shadows and into the promised realm of core speech. We should treat art as art and, in so doing, recognize that art is valuable because it is use of our imagination and creativity to portray and capture the inner life of the human spirit. Imagination and creativity is every bit as valuable as reason and intellect in trying to make sense of our complicated world.