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# Artists' Moral Rights and the Psychology of Ownership

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## I. INTRODUCTION

What do we own when we own something? Law students long ago learned to understand property as a “bundle of rights” and not as a thing,<sup>1</sup> and thus it is now well-known that ownership not only confers privileges, but in fact consists of privileges. When we own something—a car, a boat, a sack of potatoes—we have the right to use it or use it up; show it or hide it; bend, fold, or mutilate it; or destroy it forever. Or do we? Certainly not if the “something” is animate, like a pet.<sup>2</sup> Usually not if the “something” is a historic building with a landmark designation.<sup>3</sup> In these and countless other instances, the bundle may turn out to contain fewer sticks than people formerly believed and fewer than many people believe now.

Most of us do know now that the bundle of rights surrounding ownership of a pet or a historic building is more limited than the bundle surrounding a sack of potatoes, but what if what is owned is a

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1. See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. 1987, 2001 (2008); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001).

2. See *Davis v. Commonwealth*, 30 Pa. 421, 424 (1858).

3. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 142 (1978).

work of art? May I treat my Picasso with as much impunity as I treat my potatoes? If I use my set of Rembrandt etchings as place mats, have I done something wrong? If I bought these works of art, isn't it solely my business what I do with what I now own? Or, rather, does ownership of a Picasso or a Rembrandt come with restrictions better analogized to those associated with owning a pet or a historic landmark?

The motivation for this Article arises out of recurring questions about the nature of ownership rights in art. Is a work of art like a sack of potatoes, such that what we do with *our* potatoes is, largely, our own concern? With few exceptions, the law is singularly unconcerned with whether we eat the potatoes, give them away, save them for a rainy day, or paint them to resemble cartoon characters. Or is a work of art like a historic building, where the rights of ownership are severely constricted by laws regulating, for example, whether (if at all) I may destroy it, how (if at all) I may modify it, and even which uses are permitted and which are prohibited?<sup>4</sup>

In many civil law countries, ownership of works of art has traditionally been restricted by what are known as the *moral rights* of artists.<sup>5</sup> When moral rights laws are in place, an artist may sell me a painting, but even after the sale, it remains part of the artist's patrimony, and I am not free to destroy, mutilate, or modify it. It may be my painting, but in important ways, it remains the artist's painting as well.<sup>6</sup>

Artists' moral rights have not traditionally been part of the legal landscape in the United States and other common law jurisdictions.<sup>7</sup> So although in many civil law countries the artist's moral rights include

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4. See, e.g., National Historic Preservation Act, 16 U.S.C. § 470 (2006). See generally GAIL I. WINSON, *HISTORIC PRESERVATION LAW: AN ANNOTATED SURVEY OF SOURCES AND LITERATURE* (1999); Daniel T. Cavarelo, Comment, *From Penn Central to United Artists' I & II: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593 (1995). On the tensions between historic preservation and traditional conceptions of the rights of a property owner, see Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 FLA. L. REV. 709 (1996).

5. See Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 205 (1995); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67-68 (2007).

6. See generally Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431 (1994).

7. See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS* (2006); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1029 (1976). See generally John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

the so-called right to integrity—the right of artists to prohibit even purchasers of a work of art from materially modifying the artist's artistic creation—historically no such right existed in the United States.<sup>8</sup> An example of the traditional American approach, and the traditional American rejection of artists' rights, occurred in 1958, when Alexander Calder created, under a commission from a private collector, a black and white mobile that was to be hung from the ceiling of the Allegheny County airport in Pittsburgh, Pennsylvania. Shortly after taking possession of the mobile, the Airport Authority came to the conclusion that it could improve on Calder's artistic vision. The Airport Authority then immobilized the moving parts of the mobile and also installed a motor so that the now immobile mobile could move in one piece. Finally, they repainted the mobile in green and gold, so as to match the new color scheme of the airport. Not surprisingly, Calder was incensed, and he seriously investigated the possibility of bringing a lawsuit to preserve his original artistic conception. But under American law at the time, an owner could do what he wanted with what he had purchased. Calder eventually and grudgingly followed the advice of his lawyers and refrained from bringing what would plainly have been at the time a futile lawsuit.<sup>9</sup>

A similar outcome was seen in the well-known *contretemps* regarding the sculptor Richard Serra,<sup>10</sup> but here the issue did wind up in court. Under a U.S. federal program to fund and commission public art on federal property, Serra in 1981 created a 120-foot-long and 12-foot-high metal sculpture entitled "Tilted Arc" for Federal Plaza in New York City. In the years after the sculpture was erected, many workers at Federal Plaza complained that the work interfered with their passage across the Plaza and detracted from their use and enjoyment of the Plaza in general. Moreover, the sculpture had over time developed what Serra described as a "golden amber patina" but what others called "rust." After a public hearing, the General Services Administration decided to remove the work. Serra brought suit, but the federal courts determined that because Serra sold the work to the

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8. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 100 (1997).

9. See *id.*; Diana Rose, *Calder's Pittsburgh: A Violated and Immobile Mobile*, ART NEWS, Jan. 1978, at 39. Calder remained angry for his entire life at what had been done, but two years after he died, the mobile was returned to its original state.

10. See Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1114 (1995); Eric M. Brooks, Comment, "Tilted" Justice: *Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CAL. L. REV. 1431, 1431-33 (1989).

United States General Services Administration, he retained no enforceable rights under American law.<sup>11</sup> Shortly thereafter, the sculpture was dismantled and sold as scrap metal.

Things began to change in 1988, however, when the United States signed the 1971 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),<sup>12</sup> and even more in 1990, when Congress passed the Visual Artists Rights Act (VARA),<sup>13</sup> which moved the United States closer to Western Europe in its recognition that a work of art may be more like a historic building than a sack of potatoes.<sup>14</sup> Now, when we buy a painting by Jasper Johns, we are in part the owner, but in part we are also the steward of Johns's artistic reputation and the country's (and the world's) artistic heritage. Now, under VARA, visual artists retain certain residual rights in their art after they sell it. For any "work of visual art," defined as "a painting, drawing, print, or sculpture, existing in a single copy[, or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered" by the artist,<sup>15</sup> the artist has the right to "claim authorship," to "prevent [the] use of his or her name" on a work of visual that the artist did not create, and to "prevent any intentional distortion, mutilation, or other modification of that work."<sup>16</sup> In addition, VARA provides that for works of "recognized stature," artists have the right not only to prevent the aforesaid "distortion," "mutilation," or

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11. *Serra v. U.S. Gen. Servs. Admin.*, 664 F. Supp. 798, 807 (S.D.N.Y.), *dismissed in part*, 667 F. Supp. 1042 (S.D.N.Y. 1987), *aff'd*, 847 F.2d 1045 (2d Cir. 1988).

12. *See generally* William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373 (1995); Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 GEO. J.L. & TECH. 1 (1988); Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363 (1990). For a relatively recent update on the effect of United States accession, see Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111 (2005).

13. Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A(a)(3)(B) (2006)).

14. Among the more comprehensive of the numerous commentaries are Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741; Elizabeth Dillinger, Note, *Mutilating Picasso: The Case for Amending the Visual Artists Rights Act To Provide Protection of Moral Rights After Death*, 75 UMKC L. REV. 897 (2007); Richard J. Hawkins, Comment, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437 (2008); and Rebecca Stuart, Comment, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 To Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645 (2007).

15. 17 U.S.C. § 101 (2006).

16. *Id.* § 106A(a).

“modification”<sup>17</sup> of the work, but also its “intentional or grossly negligent destruction,” even by a purchaser of the work.<sup>18</sup>

The protections offered by VARA are comparatively new as property rights go, and their strength and scope remain contested.<sup>19</sup> This degree of uncertainty and controversy should come as little surprise, however, because fundamental contestation characterizes many contemporary property law issues. As scientific advances have created potential new forms of property, for example, and as technological changes have made online copying and distribution easier, creators of online content and newly valuable goods have insisted that the content is their property, just as their vociferous opponents have argued that thinking of that content and many of those scientific advances as property is a misplaced metaphor.<sup>20</sup> And controversial Supreme Court cases such as *Kelo v. City of New London*<sup>21</sup> have heightened the attention to the extent to which property ownership is consistent with extensive regulation and with the susceptibility of that property to an involuntary taking.

It is hardly inevitable or universally desirable that law be designed to match people’s prelegal preferences; if that were the case, we might have no tax laws at all. Yet such a correlation between legal regulation and prelegal behavior is often important if we expect new forms of legal regulation to garner a substantial degree of public acceptance. As

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17. Cases interpreting these protections include *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003); *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999); *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004); *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89 (D. Mass. 2003); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in part, vacated in part, and rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

18. 17 U.S.C. § 106A(a).

19. See cases cited *supra* note 17.

20. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL STUD. 321 (1995); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 (2000); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007); Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123 (2006); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

21. 545 U.S. 469 (2005).

with Karl Llewellyn's attempt to conform much of the Uniform Commercial Code to existing merchant practices,<sup>22</sup> laws that reinforce existing understandings have a much greater likelihood of taking root. Given the comparative newness in the United States of any conception of artists' moral rights, therefore, we hypothesize that enforcement and interpretation of artists' rights in general, and VARA in particular, will be more effective insofar as such enforcement and interpretation remain in the vicinity of the existing beliefs of citizens who may now know little of the relevant law. Additionally, we hypothesize that the degree of initial acceptance of VARA, and the degree of initial effectiveness in its enforcement, may be influential in the long run in securing more widespread acceptance in the United States of rights that have long been taken for granted elsewhere.

With these hypotheses in mind, we performed two experiments designed to examine people's beliefs about the types of issues encompassed by VARA. In the remainder of this Article, we describe our experiments and findings and then conclude by exploring the possible implications of our results.

## II. OVERVIEW AND RATIONALE OF THE RESEARCH

We aimed our empirical research at investigating how lay people would resolve the conflict between the belief that once someone owns something she has the right to do with it as she wants, on the one hand, and the feeling that there is something not quite right about destroying another's creative artwork, on the other. Inspired by the issues presented by VARA, we examined whether people would find different kinds of alterations to artwork differentially offensive and whether mutilation and destruction were perceived to be on equal footing. Drawing on psychology research showing that people place a higher value on art that takes more effort,<sup>23</sup> we set out to examine which attributes of a work of art—effort, beauty, message, fame, artist's intent, etc.—might lead people to believe that the ownership rights of a purchaser of art should be subject to limits, whether legal or otherwise. We conducted two different experiments.

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22. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 270-340 (1985); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt To Achieve the Good, the True, the Beautiful in Commercial Law*, 73 *GEO. L.J.* 1141 (1985); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 *HARV. L. REV.* 465 (1987); Imad D. Abyad, Note, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 *VA. L. REV.* 429 (1997).

23. Justin Kruger et al., *The Effort Heuristic*, 40 *J. EXPERIMENTAL SOC. PSYCHOL.* 91, 92 (2004).

## III. EXPERIMENT 1: THERE'S SOMETHING ABOUT ART

Altering something we have purchased is a ubiquitous phenomenon, and in the ordinary course of events it would be surprising to discover that people had any concerns about a purchaser's postpurchase modification or even destruction of a car, clothes, a house, or furniture. But do people feel that it is worse to alter art than a nonart object? And do people have these feelings about such alterations even when they believe that the owner has the legal right to do so?

Participants in Experiment 1<sup>24</sup> read one of three scenarios about a fictional person named Mike. In the first scenario (car condition), Mike buys a new car from a dealer and then proceeds to put NASCAR decals all over the exterior of the car. The dealer is upset when she sees Mike driving around town in the "ruined" car. In the other two scenarios, Mike buys not a car, but a painting, and he buys it from the original artist. In one of the scenarios (dunes condition), the painting is of people and cars on sand dunes at sunset. In the other (meaning condition), the painting depicts an antidiscrimination protest march, and again the painting contains images of both cars and people. In each of these two scenarios, Mike puts the painting he has purchased in his living room and then proceeds to put NASCAR decals on the cars in the painting. The artist, not surprisingly, believes that Mike has ruined her painting.

After reading a scenario, participants were asked to rate whether they felt that Mike did something wrong. The ratings were on a five-point scale (where 1 = no, he definitely did nothing wrong, and 5 = yes, he definitely did something wrong). The participants were then asked whether the seller should have rights after the sale in what Mike does to the object. They could circle either: "No, none" or "Yes, some."<sup>25</sup> Finally, the participants were asked whether their answers to these two questions conflicted.

The results were clear: As Figure 1 shows, participants rated it worst to alter the painting of the protest march, wrong but not as

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24. Participants were 145 undergraduates at the University of Virginia who participated as an option in fulfilling a course requirement. They did this study along with several other short paper-and-pencil studies and were given as much time as they needed to complete the tasks.

25. Because the participants had no legal training, the nature of the rights was not specified. For legally astute participants, it might be valuable to see whether their views differed depending on whether the artist's remedy was for money damages, an injunction, or something else.

wrong to alter the painting of the sand dunes at sunset, and not at all wrong to alter an actual car.<sup>26</sup>

Although the participants believed it wrong to alter the paintings, in all three conditions, few participants agreed that the seller should have actual legal rights after the object was sold (0% in the car condition; 12% in both painting conditions). But nearly all of the participants who said the seller should have no rights, even in the painting conditions, and also said that it felt like Mike did something wrong acknowledged that those answers conflicted.

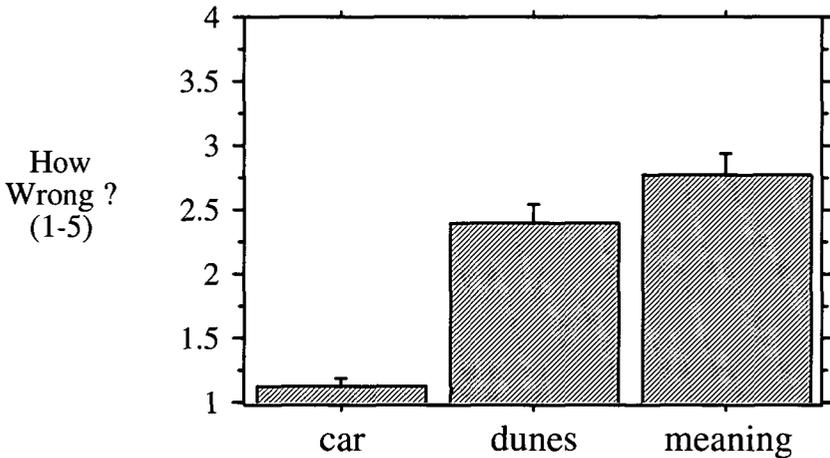


Figure 1. Means for the three conditions of Experiment 1 (with standard error bars).

Thus, these results support the conclusion that there is something about art that makes people feel that altering it is wrong, and it is clear that they feel this way even though they believe that the purchaser has the legal right to do so.

#### IV. EXPERIMENT 2: ART, ARTISTS, AND AGREEMENT

As Figure 1 shows, participants in Experiment 1 felt it was more wrong to deface the artwork when it expressed a social opinion (the painting of the antidiscrimination protest march) than when it portrayed natural beauty (the sand dunes at sunset). Experiment 2 was consequently designed to investigate the extent to which (if it all)

26. An omnibus F-test showed that the conditions significantly differed:  $F(2, 142) = 40.34, p < .001$ ; a Fisher's PLSD showed that they were each different from each other, all  $p$ 's  $< .05$ .

participants' feelings depended on whether they agreed or disagreed with the social opinion that the work of art expressed. In Experiment 2, therefore, all of the participants<sup>27</sup> read about Mike, who again bought a painting depicting a protest march, but in this case the protest march related to abortion. Some participants read a scenario in which the peaceful marchers held pro-life signs; others read a scenario in which they held pro-choice signs. The content of the artwork thus expresses a controversial social opinion. In each scenario, Mike brings the painting home and eventually tires of it. He either throws it in the trash, defaces it by adding bright colors, or modifies the substance of the artist's expression either by changing the pro-life signs to pro-choice signs (or vice versa), or by adding devil's horns and tails to the marchers. After answering the same questions as in Experiment 1, participants were then asked about their political affiliation, their views on abortion, and whether they or anyone close to them was a visual artist.

Overall, as shown in Figure 2, participants thought it was worse to add devil's horns and tails than to take any of the other actions; however, the differences were not statistically significant.<sup>28</sup> In this experiment, a greater percentage of participants agreed that the painter should "have some rights—after the painting is sold—in what Mike does to it" than in Experiment 1 (15% in the trash condition, 31% in the colors condition, 44% in the signs condition, and 33% in the devil condition compared to 12% for the two painting conditions in Experiment 1).

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27. Participants were 265 undergraduates from the University of Virginia. The data from nine participants were incomplete; thus these nine were dropped from the analysis.

28.  $F(3, 252) = 1.54, ns$ . The post hoc tests showed the devil condition to be only marginally significantly greater than the other conditions.

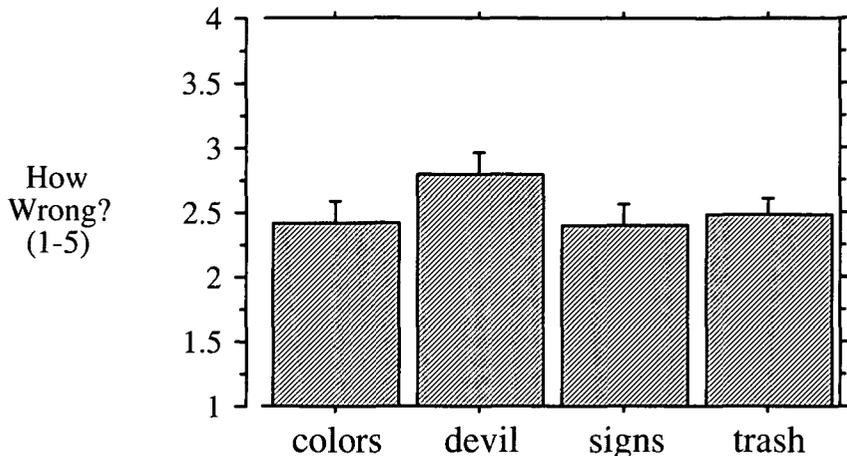


Figure 2. Means for the four conditions of Experiment 2 (with standard error bars).

*A. Effect of Agreement with the Expressed Opinion*

The results also reveal that participants' political opinions and involvement in art affected their judgments. In the experiment, participants were asked to characterize their views of abortion on a scale from 1 = strongly pro-life through 3 = middle/moderate to 5 = strongly pro-choice. Sixty-three participants rated themselves as middle/moderate and were excluded from the opinion analyses. Of the remaining 193 participants, 37% rated themselves as pro-life (1 or 2 on the scale) and 63% rated themselves as pro-choice (4 or 5 on the scale).

Figure 3 shows the overall effect of opinion, showing the content of the sign but collapsing across the four destructive actions (although each action alone shows the same pattern of results). Both pro-choice and pro-life participants thought it worse to deface artwork that agreed with their opinion about abortion than artwork that disagreed with their opinion.<sup>29</sup>

29. There were no main effects and a significant interaction,  $F(1, 189) = 8.23, p < .01$ .

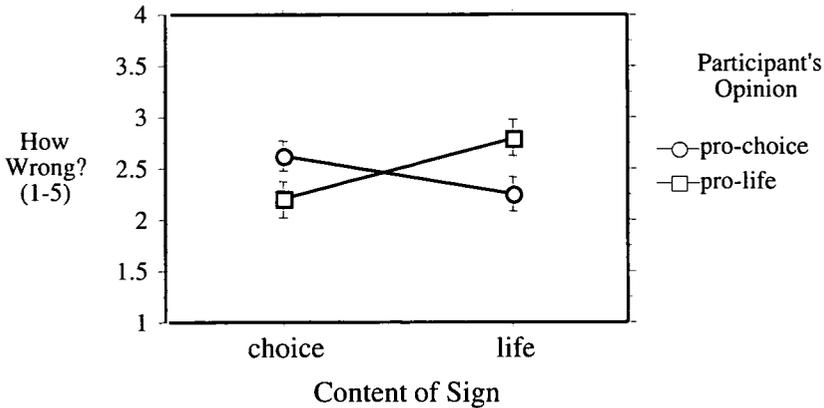


Figure 3. Means for the participants who had a nonneutral opinion about abortion in Experiment 2 (with standard error bars).

### B. *Effect of Involvement in Art*

Participants' involvement with art was also related to their beliefs in how wrong it was to deface the art—but not in any simple way. We asked the participants whether they were involved in visual art, whether they had a close relation (e.g., parent, sibling, friend) who was involved in visual art, and then to explain what kind of art the close relation did and how long they had been doing it. A research assistant who was blind to condition<sup>30</sup> coded each of the two answers on a scale of 0 = no involvement, 1 = casual involvement, 2 = serious involvement, and then summed them up for an involvement-in-art score. As Table 1 shows, the modal involvement score was 0. Participants who had some involvement in art (score > 0) did not differ significantly from those with no involvement in art (score = 0) in how wrong they rated Mike's actions (some-art group = 2.6 vs. no-art group = 2.4).<sup>31</sup>

30. We thank Kelly Gould for that assistance.

31.  $F(1, 254) = 1.46$ , *ns*. Note that it is inappropriate to correlate involvement in art and wrongness rating because of the former variable's J-shaped distribution.

	Involvement in Art Score (0-4)					
	Total	0	1	2	3	4
Overall	256	111	87	37	17	4
With Nonneutral Abortion Opinion	193	88	64	29	9	3

Table 1. Number of participants with each level of involvement in art.

But what of the relation between involvement in art and political opinions? For the 193 participants who had a nonneutral opinion about abortion we separately analyzed the no-art and some-art groups.

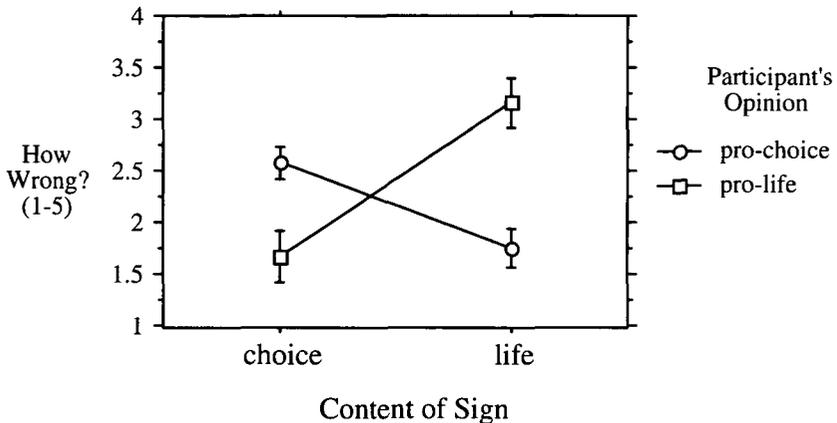


Figure 4. Means for participants with a nonneutral opinion about abortion and no involvement in visual art (with standard error bars).

As shown in Figure 4, for the 88 participants who were not involved in visual art the content of the art mattered: they thought it was more wrong to deface art that agreed with their position than to deface art depicting a view with which they disagreed.<sup>32</sup> However, as shown in Figure 5, the 105 participants who had some involvement in

32. Again, there were no significant main effects but there is an interaction,  $F(1, 84) = 28.63, p < .001$ .

visual art showed an entirely different pattern of results<sup>33</sup>: for those involved in art the relation between their own belief and the message of the art did not affect their ratings of Mike's actions.<sup>34</sup>

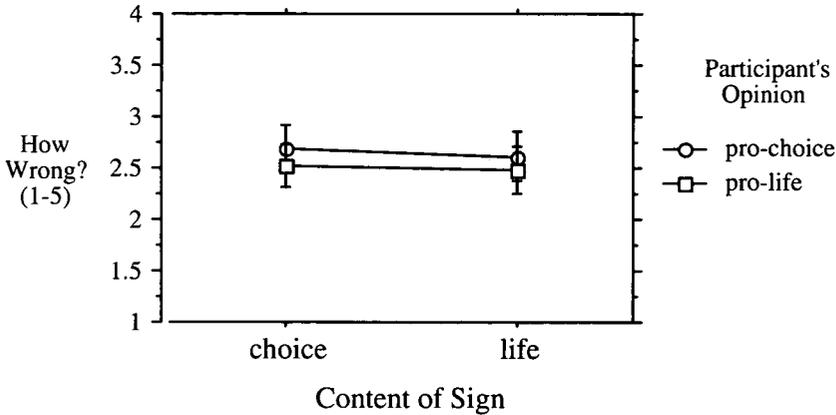


Figure 5. Means for participants with a nonneutral opinion about abortion and some involvement in visual art (with standard error bars).

Thus, even though our participants had never heard of VARA, the Berne Convention, or the legal principle of artists' moral rights, and even though most believed that purchasers could legally do as they liked to the artwork, most also admitted to having "feelings" (or, perhaps, "moral intuitions") about what seems right that are consistent with VARA and the legal protection of artistic integrity. That is, the participants felt that changing an artist's message was wrong and that changing an artist's aesthetic vision was wrong. Although their views about aesthetics were influenced by their connection with the world of art, and their views about message were influenced by their own point of view, the participants nevertheless expressed sympathy with the

33. These participants show neither main effects nor an interaction, all  $F(1, 101) < 1$ ,  $p > .5$ . The three-way interaction was significant,  $F(1, 185) = 11.79$ ,  $p < .001$ .

34. We believe this result is explained by the extent to which people believe that the purpose of art is to "send a message." The results support the conclusion that message effects are greater for those outside the art world and, conversely, that a concern with aesthetics or with the artist's intentions, independent of point of view, is greater for those who know and understand artists and the world of art.

wrongness, even by a purchaser, of altering what an artist had set out to do.<sup>35</sup>

## V. CONCLUSIONS

Our research shows that people actually are concerned about artistic integrity and believe that it is wrong to interfere with an artist's intentions or an artist's conception of the point of her creation. As we noted in the Introduction, it is not obvious that we should care about what people think about the protection of artistic integrity, as opposed to caring about what the law is or about what the law should be. And of course we acknowledge that what people think the law ought to be is not always important even to what the law actually ought to be, to say nothing of what the law simply is.

Thus, there are numerous areas of law—taxation, securities, and many aspects of contract, for example—that are so technical that it would be absurd to think that popular feelings about them should make any difference. People have few beliefs about the registration provisions of the Securities Exchange Act of 1934,<sup>36</sup> and it is hardly clear that lawmakers or regulators should care about the beliefs that people might actually have about such matters. So too when law is designed to serve a collective good by regulating the pursuit of individual self-interest, where tax laws are again a good example, as are many motor vehicle regulations. And when law is designed to protect minority rights against majorities, it would be counterproductive, to say the least, to be particularly concerned with the majority's opinions on the matter.<sup>37</sup>

With respect to the putative rights of artists to artistic integrity, however, we believe the issue is different. As the public protests against *Kelo* showed, Americans, especially, have deep-seated views about the sanctity of property—you buy it, you can do anything you want with it. Recognizing and enforcing an artist's right to artistic integrity by limiting the ownership rights of a purchaser goes against this widespread American ethos, and is, moreover, a new addition to the American legal landscape. As a result, the willingness of Americans to support such rights and comply with laws protecting them may be unusually dependent on the extent to which such laws

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35. In light of these results, it would be interesting to give participants the exact scenario of *Calder* and the Allegheny County Airport; on the basis of our results, we would predict considerable sympathy with *Calder's* position.

36. 15 U.S.C. § 78p (2006).

37. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191-95 (1977).

stay moderately close to existing lay opinion.<sup>38</sup> Indeed, the growing body of important literature on social norms and the law implicitly adopts the view that laws largely consistent with existing social norms are likely to be more effective than laws that are not.<sup>39</sup> It is true that much of this literature is focused on the role of law in creating rather than adopting social norms,<sup>40</sup> but even if law can sometimes serve this function,<sup>41</sup> it seems apparent that it is least likely to do so in areas of law that are less well-known and destined to remain that way. The general subject of the rights of artists as against purchasers of their work seems a prime example. To the extent that this is true, therefore, we would expect that laws like VARA can be most effective when they operate incrementally against existing social norms and when they are concerned with protecting those norms against outliers rather than seeking to achieve large-scale changes in the norms themselves.

If our suppositions in the previous paragraph are sound, then it may be that in the drafting or amendment of statutes like VARA, or in drafting of state law counterparts, or in the judicial enforcement and interpretation of such laws, it will be important for courts and law-makers to understand which aspects of artists' rights are potentially acceptable to the population.<sup>42</sup> Our experiments, which we view as a suggestive beginning and hardly the last (empirical) word on the subject, were aimed at trying to assess this particular dimension of public opinion about an area regulated by the law. Thus we believe that the results of the experiments we have conducted can assist courts and legislators in gaining this understanding of public views about the intersection of artists' rights and property rights. Similarly, the results

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38. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

39. See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497 (1993); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000); Symposium, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996).

40. See, e.g., Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 345 (2001).

41. That sometimes it cannot is the basic message of GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

42. And thus the issues involved in the application of the Berne Convention may well be very different for civil law countries with a history of domestic moral rights enforcement than for common law countries with a quite different history.

can assist scholars who are trying to understand what courts and legislators are doing, why they are doing it, and whether and how they might do it more effectively.

## APPENDIX: THE EXPERIMENTAL MATERIALS

## Experiment 1 Materials

*The Car Story:*

Mike was interested in buying a cool-looking car. He shopped around and finally found a model he liked—and the one he bought had lots of interesting detailing. When he got it home he decided it wasn't flashy enough. He bought some NASCAR-like logos and decals, put them all over his car, and drove around town. When the car dealer who sold Mike the car saw what Mike had done, she was angry that Mike had ruined the beautiful look of her car.

*The Painting-Dunes Story:*

Mike was interested in buying a cool-looking painting for his living room. He shopped around and finally found something he liked—a large picture of people and cars on a sand dune overlooking the Pacific Ocean. He bought it from the artist in her gallery. When he got it home he decided it wasn't flashy enough to fit his decor. He bought some NASCAR-like logos and decals and put them all over the cars in the painting. When the artist who sold Mike the painting heard what Mike had done, she was angry that Mike had ruined her beautiful painting.

*The Painting-Meaning Story:*

Mike was interested in buying a cool-looking painting for his living room. He shopped around and finally found something he liked—a large picture of people marching down the middle of a street in Washington, DC to protest against racial discrimination. He bought it from the artist in her gallery. When he got it home he decided it made too serious a statement for him. He bought some NASCAR-like logos and decals and put them all over the cars in the painting. When the artist who sold Mike the painting heard what Mike had done, she was angry that Mike had ruined the message of her painting.

## Experiment 2 Materials

*All the stories in Experiment 2 began as follows  
(with alternative phrasing in brackets):*

Mike was interested in buying an interesting painting for his living room. He went to an art gallery showing of a well-known artist and found something he liked. It was a large (eight feet long by four feet high) painting depicting a pro-life [pro-choice] march in Washington, DC on the 25<sup>th</sup> anniversary of Roe vs Wade (the 1973 Supreme Court ruling that made abortion legal).

In the painting, the pro-life [pro-choice] marchers were depicted as dedicated and righteous. Some were holding up pro-life/anti-abortion [pro-choice] signs. They were surrounded by a radiant glow. They were marching in an orderly manner despite obvious taunting from unruly crowds behind barricades.

Mike took the painting home but tired of it after a few years (and after his attitudes changed).

*Trash Condition:*

One day he took the painting off the wall, broke the frame, rolled up the painting, and threw it all in the trash.

*Colors Condition:*

One day he took some paint, added brighter colors to some of the buildings in the background and some fluffy clouds to the sky. He kept the painting in his living room.

*Signs Condition:*

One day he took some paint and changed all the pro-life/anti-abortion [pro-choice] signs to pro-choice [pro-life/anti-abortion] signs and kept the painting in his living room.

*Devil Condition:*

One day he took some paint and added horns, mustaches, and devil's tails to the marchers and kept the painting in his living room.