

# Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression

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*What is a work of art? A word made flesh.<sup>1</sup>*

In 1990, a woman named Annie Sprinkle, formerly a career actress in pornographic films, appeared onstage in New York to perform in a "Smut Fest."<sup>2</sup> During the show, Sprinkle, legs spread, invited audience members onstage to view her cervix by means of a speculum. A number of men and women accepted her invitation.<sup>3</sup> More recently, former Pentecostal minister Ron Athey carved designs into the back of an HIV-positive "drag queen," soaked up the blood with paper towels, and hung the towels over the viewing audience.<sup>4</sup> On other occasions, Athey's on-stage activities have included the folding and stapling of another performer's penis.<sup>5</sup> The activities of both Athey and Sprinkle are part of the often controversial genre of artistic expression that has been identified with the term "performance art."

Performance art, through its confrontational use of the live body, is often interpreted as a danger to the public morals. In addition to being perceived as a moral threat, the performers' conduct might be viewed as physically hazardous to others. As a result, performance artists have faced both legal and extralegal controls through obscenity or lewdness

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<sup>1</sup> ERIC GILL, *THE PRIESTHOOD OF CRAFTSMANSHIP* (1942), reprinted in ROBERT JOHN GOLDWATER, *ARTISTS ON ART 457* (Robert Goldwater & Marco Treves eds., 1945).

<sup>2</sup> See Thomas Mygatt, *Performance Artists Fly Into Storm and Lawsuits and Controversy*, BACK STAGE, Oct. 5, 1990, at 38.

<sup>3</sup> See *id.* C. Carr, reporter and chronicler of the art world, while watching Sprinkle's show, recalled the "old days of the women's movement, when looking at another woman's cervix . . . was a political act." C. CARR, *ON EDGE: PERFORMANCE AT THE END OF THE TWENTIETH CENTURY* 176 (1993). Sprinkle intended to save sex from the "backlash triggered by AIDS hysteria and the new conservatism." *Id.* at 174.

<sup>4</sup> See Beth Barber, *NEA: Patron of Artifice: Public Standards Cannot be Dictated by a Few from the Snob Mob*, PLAIN DEALER, July 27, 1997, at E1; *The Performance that Bombed*, WASH. TIMES, July 22, 1996, at A18.

<sup>5</sup> See Denise Hamilton, *Suffering for Their Art: Pain is the Motivation for S&M Artists*, NEW TIMES L.A., Oct. 9, 1997.

prosecutions;<sup>6</sup> the forced editing of performances;<sup>7</sup> denial of public funding;<sup>8</sup> and regulation based on the public welfare, health, or safety.<sup>9</sup> Even when performance art does not pose any physical danger to others, it has faced resistance from a public that resents the assertion that such "trash" is art. In the wake of such events and attitudes, the tensions between the freedom of artistic expression and asserted public interests have come under increasing scrutiny.

These tensions are exacerbated by the fact that while the Supreme Court has assumed that artistic expression is entitled to some measure of First Amendment protection, it has never thoroughly articulated its reasoning behind this assumption.<sup>10</sup> On effectively a medium-by-medium basis, the Court has determined that a variety of artistic expressive conduct<sup>11</sup> falls within the scope of the First Amendment.<sup>12</sup> In so doing, the Court has observed that "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," but that the "basic principles of freedom of speech" remain consistent.<sup>13</sup> The application of these principles, however, may depend on whether one approaches a particular artistic medium or legal standard from an audience-centered<sup>14</sup> or speaker-centered<sup>15</sup> interpretation of the First Amendment.

Determining the perspective from which the First Amendment should be approached is crucial in light of the broad range of benefits

<sup>6</sup> See, e.g., Janet Wells, *3 Face Trial for Nudity in Berkeley Performance Defended as Artistic Expression*, S.F. CHRON., Sept. 23, 1993, at A22 (reporting that performers engaging in nude onstage "tour of touch" and "sensual celebration" were charged with lewd behavior).

<sup>7</sup> For example, Ron Athey has edited his performances, omitting elements of piercing and tattooing, in order to avoid prosecution. See Robin Stringer, *Piercing Show Stuck by Law*, EVENING STANDARD, June 15, 1994, at 15.

<sup>8</sup> See generally Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression?*, 45 AM. U. L. REV. 353, 360-70 (1995) (discussing National Endowment for the Arts ("NEA") funding controversies).

<sup>9</sup> For example, performance artist Stelarc, during a 1984 piece entitled "Street Suspension," suspended himself from hooks inserted into his skin that were attached to pulleys, which caused his naked body to travel high in the air between two buildings on East 11th Street in New York City. After his journey over a shocked crowd, he was arrested and charged with disorderly conduct. See CARR, *supra* note 3, at 15.

<sup>10</sup> See, e.g., *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2186 (1998) (Souter, J. dissenting).

<sup>11</sup> This Article's definition of "artistic expressive conduct" excludes conduct that the actor herself does not consider artistic. Regulation of such conduct presents another host of difficulties that is beyond the scope of this Article.

<sup>12</sup> See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (recognizing that nude dancing is "marginally" protected speech).

<sup>13</sup> *Southeastern Promotions*, 420 U.S. at 558.

<sup>14</sup> This Article uses the term "audience" to refer to any person external to the speaker.

<sup>15</sup> This Article uses the term "speaker" to identify the creator of artistic expression, although the expression might not involve the physical act of speaking or vocalizing words or sounds. I have avoided the term "artist" because use of that label begs the question: "what is art?"

that both the creative process and its end product represent, not only to larger society, but also to the individual speaker or creator.<sup>16</sup> In some indefinable, visceral sense, we know that artistic expression is of special significance to humankind. We know that art can have an intense effect on its audience—as a vehicle for the communication of images of profound beauty or horror, as a force for potent political commentary, and as a means of provoking unconventional ideas about social or cultural topics. As such, it is well accepted that art is instrumental in questioning, celebrating, and defining the aesthetics, values, and overall tenor of a culture. Art acts as an invaluable contributor to the marketplace of ideas. As a society, therefore, we advocate and encourage the exercise of creativity, despite the difficulties inherent in formulating a comprehensive explanation of our reasons for doing so.

Just as we recognize that encouraging artistic production supports certain cultural values, we tend to acknowledge that an individual may derive some unquantifiable and profound benefit from indulging her own compulsion or urge to create. Consider a prisoner in a World War II concentration camp who secretly makes a drawing, in the face of impending death and with little or no expectation of an eventual audience. Rather than solely an attempt at communication, the drawing represents the prisoner's effort to maintain sanity by confirming and recalling the existence of a world beyond one of extreme suffering and degradation.<sup>17</sup> As illustrated by this example, the reasons for and effects of engaging in the creative process, as well as the impact of the end product, are deeply personal.<sup>18</sup> They involve profound questions of individual fulfillment, exploration, definition, and development. Creative activities have vitalizing and healing properties.<sup>19</sup> Moreover, creation may be seen as, inherently, an act of confronting oneself and one's surroundings.<sup>20</sup> In this way, the creative urge strikes at the very essence of what it means to be human.<sup>21</sup> By its nature, the intimate value of the creative experience is in no way undermined or altered when it is combined with a desire to communicate

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<sup>16</sup> See RONALD DWORKIN, *FREEDOM'S LAW* 199 (1996).

<sup>17</sup> Clearly, a drawing's effect on the audience might be determined by the audience's knowledge or circumstances. An expressive element can be characterized as "art," however, whether or not the creator intended or foresaw an audience and whether or not the audience perceives its "value." Regardless of the audience's reaction, the circumstances under which the drawing was created render the image replete with significance to the artist.

<sup>18</sup> In this way, artistic conduct may be seen as more akin to prayer or other religious activity than to activities traditionally recognized as expressive, such as speaking or writing. Cf. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 67 (1989).

<sup>19</sup> See generally JOAN M. ERIKSON, *WISDOM AND THE SENSES* 46–73 (1988) (discussing ways in which creative activities heal the psyche and make humans feel alive).

<sup>20</sup> See JEAN CASSOU, *ART AND CONFRONTATION* 21 (Nigel Foxell trans., 1968).

<sup>21</sup> Cf. FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 8–9 (1993) (noting that "the most defining characteristic of what it means to be human is [the] symbol-creating and symbol-transmitting capability").

or lack thereof. Although not necessarily of a tangible, easily ascertainable, or objectively fathomable nature, the value of all phases of artistic expression to the individual creator is surely of sufficient worth to warrant a careful consideration of its First Amendment status, and to implicate some degree of constitutional protection.<sup>22</sup>

Courts and scholars have approached the issue of free speech from two vantage points: "audience-oriented" or "speaker-oriented." An audience-oriented First Amendment theory, such as that most commonly identified with the marketplace of ideas, determines the constitutional protection given to certain expression by evaluating the character of the speech and its value to public debate. Freedom of speech is viewed as a means to a larger social end, such as the search for truth.<sup>23</sup> This audience-focused theory may be termed "collectivist," insofar as its locus is the role of speech in collective processes of public deliberation.<sup>24</sup> It is also "instrumentalist" in that it justifies freedom of speech based on the positive effects of that speech, rather than on any intrinsic right to speak.<sup>25</sup>

Often, an audience-focused theory is seen as anchored to a specific external value, such as a notion of democratic self-government.<sup>26</sup> In such a case, the worth of an allegedly artistic expression, and the consequent degree of First Amendment protection applied, is derivative of and dependent on that external value. Finally, in an arguably extreme formulation of an audience-oriented theory, the larger effect of the speech is the only relevant factor; the needs and rights of the individual creator do not matter.<sup>27</sup> In all its variants, an audience-focused theory concerns itself with the exposition of ideas and a concentration on the communicative properties of speech.

In contrast to the audience-focused justifications for First Amendment coverage or protection, a speaker-focused theory places its primary emphasis on the worth of speaking, and the liberty to do so, for the individual engaged in that expression. Such a focus recognizes that a key purpose of the First Amendment is to protect and encourage these individual values, rather than solely to foster public debate and the exposi-

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<sup>22</sup> See *infra* text accompanying notes 255-259, comparing the personal and indescribable nature of the creative process with the same qualities recognized as inherent in religious belief.

<sup>23</sup> The classic marketplace of ideas formulation, first developed by John Stuart Mill, posits that the First Amendment is designed to create a free and open debate, in which truth will ultimately prevail. See *infra* notes 109-118 and accompanying text.

<sup>24</sup> See Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1110 (1993).

<sup>25</sup> See DWORKIN, *supra* note 16, at 200.

<sup>26</sup> Judge Bork has been one of the most visible proponents of a politics-centered view of free speech. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-27 (1971) (discussing relationship between literature and self-government).

<sup>27</sup> See Post, *supra* note 24, at 1111-12.

tion of ideas. Whether embodied in notions of self-realization,<sup>28</sup> individual liberty,<sup>29</sup> or self-fulfillment,<sup>30</sup> these concepts endorse the values of individual choice and development as ends in themselves.<sup>31</sup> In addition, such theories presumably recognize the potential difference between expression and communication.<sup>32</sup> A speaker-focused theory would recognize that expression has intrinsic value unrelated to its communicative nature or overall value to society.<sup>33</sup>

Although members of the Supreme Court have perceived that the Constitution recognizes the intangible value of speech to the individual,<sup>34</sup> the Court's approach toward freedom of expression has been dominated by audience-oriented terminology and justifications.<sup>35</sup> This approach is

<sup>28</sup> See generally MARTIN H. REDISH, *FREEDOM OF EXPRESSION* 9–29 (1984) [hereinafter REDISH, *FREEDOM*]. Although Redish has been labeled a speaker-oriented theorist, his theory contains substantial listener-oriented components. For example, he posits that “performance of the function of self-rule is fostered by the receipt of information that enables the individual to make life-affecting decisions in a more informed fashion.” Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 682 (1982) [hereinafter Redish, *Reply*]. Professor Baker has critiqued Redish's theory by noting that it renders the source of speech legally irrelevant. See C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 652 (1982).

<sup>29</sup> See generally BAKER, *supra* note 18, at 47–69 (setting forth his liberty theory of the First Amendment).

<sup>30</sup> See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–9 (1970) (identifying four values that may be used as a foundation for protecting the freedom of speech, including individual self-fulfillment); see also HAIMAN, *supra* note 21, at 7 (characterizing Emerson's “self-fulfillment” value as “self-expression,” and identifying the value with Baker's notion of individual liberty and Redish's notions of self-realization).

<sup>31</sup> These formulations are different in many respects and inconsistent with each other at various points. See, e.g., REDISH, *FREEDOM*, *supra* note 28, at 30–36, 49–50 (discussing Baker's criticisms of Redish's self-realization theory). Still, each of these theories recognize the value of speech to the individual.

<sup>32</sup> The latter connotes the conveyance of an idea, while the former would also embrace a manifestation of an idea and is not limited to notions of communication. But see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 50–52 (1982) (equating “expression” and “communication”).

<sup>33</sup> This concept is consistent with the recognized right “to refrain from speaking at all,” commonly known as the right not to associate, embraced by the First Amendment. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713–14 (1977). In *Wooley*, the Court observed that the right to refrain from speaking (in that case, to refrain from displaying the New Hampshire state motto on a license plate) is one component of the broad concept of “individual freedom of mind.” *Id.* The Court further noted that requiring such a display “invades the sphere of intellect and spirit which it is the purpose of the First Amendment [to] reserve from all official control.” *Id.* at 715. As Professor Emerson has observed, the freedom of belief is a precursor to the freedom of expression, because “it is the first stage in the process of expression, and tends to progress into expression.” See EMERSON, *supra* note 30, at 21.

<sup>34</sup> See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 85–86 n.9 (1973) (Brennan, J., dissenting) (“Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity.”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (stating that the Bill of Rights “guards the individual's right to speak his own mind”).

<sup>35</sup> See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (stating that society's interest in protecting erotic materials with “arguably artistic value” is of a

most visible, and most troublesome, in the Court's treatment of expression with sexual content. For example, the Court has determined that obscenity falls outside the scope of the First Amendment, since it is neither "part of any exposition of ideas," nor of more than "slight social value as a step to truth."<sup>36</sup> In order to avoid being deemed obscene, a work must have "serious artistic value"<sup>37</sup> from the perspective of a reasonable person.<sup>38</sup> Similarly, the state can regulate non-obscene but still offensive or indecent expression, if the expression is deemed to have only minimal value to society.<sup>39</sup> Under these standards, artistic expression will be evaluated based on its social value, as embodied in the perceived substance of its contribution to the public debate.<sup>40</sup>

An audience orientation, while undoubtedly recognizing important First Amendment values, is likely to raise thorny conceptual and practical issues in the context of artistic expression.<sup>41</sup> The elusive qualities of "art" and "artistic" value are incapable of objective definition or assessment in any fair, comprehensive, and workable fashion.<sup>42</sup> Moreover, it is difficult to determine who among us is the appropriate judge of the status or value of an allegedly artistic expression, because personal and subjective qualities inhere in the creative process and its result.<sup>43</sup> In addition, we must determine the degree of influence to assign the intent and perspective of the speaker, whether to convey a message or not, or to create art or not.<sup>44</sup>

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lesser magnitude than "the interest in untrammelled political debate"); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (stating that obscene materials play no role in the "free and robust exchange of ideas and political debate" envisioned by the First Amendment); see also DWORKIN, *supra* note 16, at 201-03 (discussing "instrumental" justification for free speech in Supreme Court opinions).

<sup>36</sup> *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>37</sup> *Miller*, 413 U.S. at 24.

<sup>38</sup> See *Pope v. Illinois*, 481 U.S. 497, 501 (1987) (considering sale of allegedly obscene magazines under *Miller* obscenity standard). The Court rejected the idea of appraising artistic value by "community standards," instead adopting a "reasonable person" standard. See *id.*

<sup>39</sup> See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (upholding regulation of nude dancing); *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978) (upholding regulation of the radio broadcast of comedian George Carlin's non-obscene *Filthy Words* monologue); *Young*, 427 U.S. at 70-73 (upholding Detroit ordinance limiting the display of sexually explicit but not necessarily obscene films to certain areas of the city).

<sup>40</sup> See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and The First Amendment*, 1987 Wis. L. Rev. 221, 236-38 (discussing the marketplace theory as not specifically protective of art, but as treating art in a hierarchical fashion).

<sup>41</sup> Professor Nahmod criticizes the marketplace theory as failing to take into account the non-cognitive aspects of art. See *id.* at 241-42.

<sup>42</sup> See *infra* text accompanying notes 175-180 (discussing difficulty of defining "art").

<sup>43</sup> See *infra* text accompanying notes 181-195 (evaluating potential "judges" of artistic value).

<sup>44</sup> See *infra* text accompanying notes 211-223 (discussing role of speaker's intent in obscenity context).

Several questions arise in light of these concerns. Do standards that focus on the external values of speech take into account and adequately protect the many-faceted effects of artistic expression on the individual creator? More specifically, are audience-focused standards adequately equipped to deal with the changing face of art, in all its newly emerging forms and incarnations?

These inquiries are complicated not only by an American culture in aesthetic and moral flux, but also by the inherently confrontational form of live art itself. The public distaste for such work is compounded by the perceived snobbery and duplicity of the art community, and the perception that modern performance art is nothing more than "titillation masquerading as sophisticated culture."<sup>45</sup> Particularly at a time when assessing the meaning and viability of "art" has become increasingly difficult, and the label itself is largely devoid of meaningful connotation to the general public, the possibility of any objective evaluation of a work's status as art is called into question. Further, in light of art's "chronic habit of displeasing, provoking, or frustrating its audience,"<sup>46</sup> this problem is unlikely to resolve itself with time.

With these complexities in mind, it appears that while artistic expression serves the various interests considered by audience-oriented theories, these theories do not account for the value of artistic expression to the individual speaker. It has been persuasively and correctly argued that art is of substantial value to a representative democracy; contributes to the political and cultural debate of the marketplace; and provides other tangible and intangible social and cultural benefits. Theories that focus on these attributes, however, are incomplete in that they potentially exclude from First Amendment coverage a variety of expression that possesses significant value other than to the larger social order. In contrast, a First Amendment that finds its bearings in a recognition of the value of expression to the individual points toward a more satisfactory and conscientious resolution of many of the problems that inhere in the application of an audience-oriented approach to artistic expression.

The speaker-focused theory does not require limitless First Amendment protection or disregard for interests external to the speaker. For example, a fictional character in a recently published novel commits murders that he conceptualizes and executes as performance art.<sup>47</sup> The murders might have serious artistic value, and one might conceive of the performances both as expressive and as contributing to the killer's self-fulfillment. In spite of these attributes, it is unlikely and undesirable under any theory of freedom that his artistic endeavors go unregulated. It is

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<sup>45</sup> Laura Collins, *Weekend Nights Out*, SCOTSMAN, Apr. 5, 1997, at 21.

<sup>46</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 7 (1969).

<sup>47</sup> See Adam Woog, *Scene of the Crime*, SEATTLE TIMES, Aug. 10, 1997, at M2 (discussing Lowell Cauffiel's novel *Marker*).

inevitable that deference to the individual speaker will eventually conflict with interests external to the speaker.

The key to discerning when interests external to the speaker justify intrusion on the speaker's liberty is to address physical actions that threaten direct and concrete harm to those interests.<sup>48</sup> Once such a harm is identified, the law must prevent or ameliorate that harm, but in a manner that imposes the least possible restriction on the speaker's expression. Such an approach to limiting government intrusion makes sense conceptually, as it protects both individual liberty and the rights of others.<sup>49</sup> Further, such a solution is practical, as it minimizes the need to rely on the nebulous and unquantifiable interests often invoked to defend the regulation of artistic expression. Ideally, it would create a more clearly defined standard for the appropriate regulation of expression, producing a more predictable legal environment.

This Article will examine whether audience-focused analogues to the "marketplace" theory bear practical and theoretical application to artistic expressive conduct in general, and live art in particular. I suggest two reasons why these audience-focused theories do not represent a comprehensive or workable approach to artistic expression under the First Amendment. First, these theories do not sufficiently recognize the intangible worth of the creative process and its end product to the individual speaker. Second, audience-focused theories do not adequately deal with the difficulties inherent in objectively evaluating the artistic merit or status of allegedly artistic expression. In contrast, a theory focused on the interests of the speaker better protects the important interests of both speaker and audience. Moreover, a speaker-focused theory minimizes the difficulties inherent in judging artistic value, permitting the realization of a more consistent and predictable constitutional system.

In developing an understanding of the nature of the expressive conduct at stake in the analysis, Part I sets forth a brief account of live art. Against this background, Part II evaluates selected audience-based justifications for protecting art specifically and for protecting speech generally under the First Amendment. Each of these justifications will be examined in light of whether, and how, they provide for the key values identified by speaker-focused theories. Part III will use the same perspective to provide a general review of how the Supreme Court has dealt with the notion of conduct as "speech," and against that backdrop will look specifically at the legal treatment of obscene and offensive expression. In comparison, Part IV will analyze speaker-oriented justifications as applied to artistic expression and live art. In addition, this section will also discuss the cir-

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<sup>48</sup> See *infra* notes 283-305 and accompanying text (discussing elements of potential solution for problems presented by audience-oriented standards).

<sup>49</sup> This solution is also viable under a liberal reading of an audience-focused theory, because it maximizes the information dispensed to the public.



cumstances under which artistic expressive conduct might be regulated in a manner consistent with a speaker-oriented foundation and with current doctrine relating to the regulation of conduct. The Article proposes that under certain circumstances, a speaker's assertion that her expression constitutes artistic conduct should be taken at face value, and the expression should be protected by the First Amendment regulated only if the collaboration between expression causes a type of harm that justifies regulation.

### I. A Brief Account of Live Art

*[A]n art form defined is an art form half way to castration.*<sup>50</sup>

Performance art, which American culture recognized as an art form in its own right in the 1970s, "by its very nature . . . defies precise or easy definition beyond the simple declaration that it is live performance by artists."<sup>51</sup> The term "performance art" embraces any combination of dance, song, the spoken word, movement, music, film, drama, video, painting, or any other artistic medium. "No other artistic form of expression has such a boundless manifesto, since each performer makes his or her own definition in the very process and manner of execution."<sup>52</sup> Given its boundless manifesto, performance art might not be easily distinguished from its components, such as dance or theatre, or less-expected art forms, such as the circus performance or the street mime. As a result, the identifying attribute of a work of performance art might simply be the fact that someone calls it "performance art."<sup>53</sup> In other words, "[t]here can be no definition of art, because art is just whatever people say it is."<sup>54</sup>

Performance art is not limited in style and scope to the ideas and methods represented by the "NEA Four," as one might suspect from recent and well-deserved scrutiny foisted on those artists.<sup>55</sup> Instead, the use

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<sup>50</sup> 1 JEFF NUTTALL, *PERFORMANCE ART: MEMOIRS* 24 (1979). Despite the validity of this assertion in many contexts, applying the law to any art form requires the application of language and the assessment of the art form in verbal or written terms.

<sup>51</sup> ROSELEE GOLDBERG, *PERFORMANCE ART FROM FUTURISM TO THE PRESENT* 7, 9 (2d ed. 1988).

<sup>52</sup> *Id.*

<sup>53</sup> See H.W. ARNASON, *HISTORY OF MODERN ART* 563 (3d ed. 1986) (quoting critic Donald Judd as stating, "[i]f someone says it's art, it's art," to describe the post-modern conceptualist movement that sought to broaden the scope of "art").

<sup>54</sup> Louis Menand, *What is Art?*, *NEW YORKER*, Feb. 9, 1998, at 39. Much of the analysis set forth in this Article applies to expressive conduct in general. There are, however, certain attributes of artistic expressive conduct that potentially distinguish it from expressive conduct in general, which will be discussed throughout this Article.

<sup>55</sup> The so-called "NEA Four," Holly Hughes, Tim Miller, Karen Finley, and John Fleck, became embroiled in controversy in 1989 when the NEA reversed a decision to fund their work. See generally Pamela Weinstock, *The National Endowment for the Arts Funding Controversy and the Miller Test: A Plea for the Reunification of Art and Society*, 72

of performance and live gestures by artists can be traced throughout the history of art, though under the auspices of names other than "performance art." Notably, live art has always been practiced by members of the avant-garde of certain art movements, as a means of pushing past aesthetic impasse.<sup>56</sup> As such, when examining the use of live art, one notes an overwhelming variety of purpose for engaging in expressive conduct, method of expression, and message the expression might contain. Despite these varieties, however, conduct that may be designated "performance art" shares certain commonalities: to some extent, it involves conduct, and it always involves an audience, whether willing or unwilling.

In America, the genre came into prominence in the 1970s, during what has been termed the Post-Modernist, or Post-Minimal, phase of art history.<sup>57</sup> During that time, art began to reflect a backlash against 1960s Minimalism, which centered on "machinelike purity and logic" in expression.<sup>58</sup> The Post-Modernists revolted against the "emphatic object qualities of Minimal art," and the perception that the Modernists "had managed to burden an already cluttered world with more objects" and had catered to the "media-stimulated appetite of an uncritical consumer society."<sup>59</sup> Performance art, with its temporal, physically intimate nature, was a natural outgrowth of such a revolution. It liberated the artist from the external object and allowed her to explore any medium, subject, and material that would be appropriate for her purpose.<sup>60</sup> In both theoretical and practical respects, the use of live performance became a powerful method of extending and testing the boundaries of artistic expression, as well as offering a potent and immediate commentary on personal, political, and social questions. In addition, it turned life itself into art, in a way that static object arts like painting or sculpture could not.

Although it came into prominence in America relatively late, performance art has its roots in the turn of the century, in political and social revolution.<sup>61</sup> In Italy in the early 1900s, the Futurists utilized performance as the most direct means of coercing an audience to recognize their ideas. Futurism began as a literary concept developed by Filippo Tom-

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B.U. L. REV. 803, 805-16 (1992) (discussing the details of the controversy). Part of the controversy ultimately reached the Supreme Court. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998) (reversing Ninth Circuit holding that NEA "decency and respect" consideration for funding award was unconstitutional).

<sup>56</sup> *See* GOLDBERG, *supra* note 51, at 7.

<sup>57</sup> *See* ARNASON, *supra* note 53, at 560.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 560-61.

<sup>60</sup> *See id.* at 566.

<sup>61</sup> Obviously, political art is not a phenomenon of the late 20th century. In 1929, Mexican artist Diego Rivera expressed the opinion that "[a]rt has always been employed by the different social classes who hold the balance of power as one instrument of domination—hence, as a political instrument . . . . For that reason, whenever a people have revolted in search of their fundamental rights, they have always produced revolutionary artists." GOLDWATER, *supra* note 1, at 476.

maso Marinetti in 1908,<sup>62</sup> as a movement intent on destroying what it perceived as manifestations of the cultural and political decline of Italy. Along these lines, it praised the "speed and dynamism" of modern technology,<sup>63</sup> and attacked the "establishment values of painting and literary academies."<sup>64</sup> Painters such as Umberto Boccioni later translated Futurist ideas into paintings depicting images filled with speed and violent action.<sup>65</sup> With its foundation in notions of anarchism, Futurism sought to assail all things that its supporters deemed aristocratic and bourgeois.<sup>66</sup>

Perhaps inevitably, the Futurists turned to live performance, which they termed "variety theatre," as "the surest means of disrupting a complacent public."<sup>67</sup> The Futurist performances consisted of flag burning, quarreling, and other actions intended to galvanize the audience and embody the artists' mandate to create "dynamic sensation made eternal."<sup>68</sup> As a result of their performances, the artists suffered arrests, convictions, and public outrage.<sup>69</sup> Like the Futurists, other early art movements have used the medium of live performance as a vehicle for social and political change.<sup>70</sup>

Others, however, have used performance art for personal, rather than political reasons. Jeff Nuttall recorded a fascinating and thorough account of his involvement with the British performance group The People Show, which rose to relative prominence in the mid-1960s. Nuttall, a sculptor, first became involved in performance art when he became excited about the idea of "sculpture with people in it."<sup>71</sup> By use of the human body, Nuttall wished to break away from the traditional conventions of theatre, even those represented by the less traditional Theatre of the Absurd.

Nuttall distinguished his art form from theatre, which involves communication, entertainment, character, message, plot and presenta-

<sup>62</sup> See ARNASON, *supra* note 53, at 181.

<sup>63</sup> Umberto Boccioni's *Manifestoes*, written in 1910, are reprinted in GOLDWATER, *supra* note 1, at 434–37.

<sup>64</sup> GOLDBERG, *supra* note 51, at 11.

<sup>65</sup> See ARNASON, *supra* note 53, at 182 (discussing Boccioni's painting *The City Rises*).

<sup>66</sup> Futurism, eventually co-opted by Mussolini for his own purposes, became a "pillar of Fascism." ARNASON, *supra* note 53, at 181.

<sup>67</sup> GOLDBERG, *supra* note 51, at 14.

<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> For example, followers of Dada used performance as a vehicle for expression and provocation. Some members, such as Frank Wedekind, were subject to censorship trials as a result of sexual performances. *See generally id.* at 50–52 (discussing performance in Dada). The Bauhaus school, which urged the unification of the arts under a "cathedral of socialism," *id.* at 97, wanted to emphasize that "work on the stage is a work of art," *id.* at 98. Both groups were active in the early 1900s in Europe.

<sup>71</sup> *Id.* at 18.

tion.<sup>72</sup> Nuttall explained the goals that he desired to achieve through performance and why he wished to avoid the orthodox theatre:

I . . . wanted to avoid it because *I was not concerned to entertain or communicate*. I was concerned to compose with behaviour, with objects, and with space. . . . It's one thing to watch a riot from the fifth floor of a building. It's another to find yourself caught up in it. I wanted to conduct exactly this sort of excitement, to involve the public in the riot, not give them a safe viewpoint. I was suffering deeply from a massive sense of moral and creative impotence. . . . I was livid with rage and unspent energy and wanted to inflict it in order to energeise the world at large. Most of all I wanted to nauseate. I was not interested in any theatre that gave people the immunity of darkness and anonymity. I was not concerned to perform to voyeurs.<sup>73</sup>

In order to achieve these goals, The People Show engaged in a wide variety of unscripted and scripted performances. For example, on a shopping street in Cardiff, each took action in response to a drawing spontaneously made by another member of the group. In response to a troupe member's drawing of an ejaculating penis, Nuttall filled his mouth with milk and, walking stiffly along the curb, spurted milk every few yards.<sup>74</sup> In 1966, the group performed a loosely scripted piece involving select body parts of certain group members showing through screens, while two members, oddly attired (one wore pink BVDs with a stocking mask and was chained to the ceiling, and the other wore a fencing helmet and an evening dress), stood in the performance area.<sup>75</sup> So arranged, the artists engaged in an unstructured dialogue, which included insulting comments about members of the audience. Toward the middle of the performance, the actors appeared to remove items from their bodies, such as a skinned rabbit (accompanied by the spoken words, "[t]hat's the stringy wish that none of you stupid sods ever let fly with"); and a piece of old, wet fur,

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<sup>72</sup> At least in terms of superficial appearance, theatre is performance art's closest kin. However, performance art differs from theatrical arts in a number of respects. Unlike theatre, much of performance art eliminates the collaboration among writers, composers, designers, dancers, musicians, and visual artists. Rather, live art is usually created and performed under the control of a few individuals. See JESSICA PRINZ, *ART DISCOURSE/DISCOURSE IN ART* 129 (1991). In addition, performance art often does not follow a narrative or plot, and the performer rarely takes on a specific character. Instead, the performer is the artist himself, rather than another person. *Id.* at 8.

<sup>73</sup> See NUTTALL, *supra* note 50, at 28–29 (emphasis added). Nuttall observed that Roland Miller, a member of The People Show, had a different aim in mind: "he was almost completely obsessed with freedom . . . he was, in all his moments, demonstrating freedom." *Id.* at 40.

<sup>74</sup> See *id.* at 50.

<sup>75</sup> The script appears in 2 JEFF NUTTALL, *PERFORMANCE ART: SCRIPTS 9–15* (1979), and is described in NUTTALL, *supra* note 50, at 30–31.

thrown at the audience (accompanied by the spoken words, "[t]hat's the nightmare crotch that only opens to your hands when night comes down on your head like warm blood").<sup>76</sup> According to Nuttall, the show was "an angry last ditch attempt to rub people's noses in their own meat to such an extent that they would come to embrace their condition without cosmetic, deodorant, without modification or rationalisation."<sup>77</sup>

A decade after *The People Show* began its activities, American performance artist Laurie Anderson created work that was more "high tech" than that of *The People Show* and less visceral in many respects, but no less expressive. Anderson's work was intended to "engage and entertain," rather than "antagonize [and] provoke" her audience.<sup>78</sup> Her art focused on language and the spoken word and incorporated sound, as well as visual images. Initially a sculptor, Anderson eventually turned to performance, because she felt it enhanced the communicative qualities of language:

When you get a letter from somebody, you get a feeling of what's going on with them. But if you get a phone call and they say the same things, you get so much more information from the voice and the way they pause. So in looking at my [sculpture] pieces, I thought, why flatten them out like this. Just say them.<sup>79</sup>

One of Anderson's performances, entitled "O-Superman," began with the sound of a digital pulse, over which Anderson began to speak "in a cadenced rhythm halfway between speech and song." As she spoke, Anderson appeared wearing a short, spiky hairstyle and a black leather jacket, while a light emitted a red glow from her mouth. She moved her hands and arms rhythmically, producing huge shadows that hovered over her body. These "uncanny, strange, and bizarre" visual images were accompanied by "perfectly familiar" phrases, such as "[h]ello, this is your mother, are you coming home?" and "[s]moking or non-smoking?"<sup>80</sup> As she spoke the phrases, some were accompanied by familiar corollary gestures. For example, the spoken words "[c]ome as you are, but pay as you go" were accompanied by a pointing hand. Throughout the performance, Anderson altered her voice by electronic means, adding to the eerie effect.<sup>81</sup>

Through performance, Anderson provides her audiences with critical commentary on the values and forms of life embodied in different types

<sup>76</sup> NUTTALL, *supra* note 75, at 11–12.

<sup>77</sup> NUTTALL, *MEMOIRS*, *supra* note 50, at 31.

<sup>78</sup> PRINZ, *supra* note 72, at 130; *see also* ARNASON, *supra* note 53, at 570–71 (discussing Anderson's work).

<sup>79</sup> PRINZ, *supra* note 72, at 129 (quoting Philip Smith, *A Laurie Anderson Story*, *ARTS MAG.*, Jan. 1983, at 60–61 (quoting Anderson in an interview)).

<sup>80</sup> *Id.* at 132, 133.

<sup>81</sup> *See id.* at 131–33.

of language, such as slang, clichés, and slogans.<sup>82</sup> As viewers of Anderson's work, "we witness . . . ideology as process."<sup>83</sup> In other words, we witness the physical voice as artistic medium in a different way than we have previously. Her work represents a breakdown of the barriers between art and media.<sup>84</sup>

In the late 1980s, a performer known as Stelarc staged a variety of self-mutilating activities as his art. For example, he traveled high in the air across a New York City street, suspended by eighteen fish hooks connected to cables that were inserted into his flesh. An observer on the street yelled to pursuing police, "Officer, this man is a world-famous artist."<sup>85</sup> The police officer, who ultimately cited Stelarc for disorderly conduct, replied, "Gimme a break!"<sup>86</sup> Other surprised observers wondered out loud what this world was coming to or commented loudly on the suspended man's questionable mental stability. Stelarc's "stretched skin" performances show "a manifestation of the gravitational pull . . . [they are] proof of the body's unnatural position in space."<sup>87</sup> Stelarc uses performance primarily to explore the experience occasioned when the human body is no longer in control. Despite the confusion his conduct engenders in the audience, one of its apparent strengths is that he "[makes that] confusion interesting."<sup>88</sup>

The Futurists, Nuttall, Anderson, and Stelarc illustrate the variety of methods and motivations for creating artistic expression through live performance. The Futurists performed out of a desire to confront audiences with their message of political and social change; Nuttall acted out of a personal rage and a desire to energize his audience in a more intimate fashion than that afforded by other art forms. In contrast, Anderson performed out of an obsession with communication and a desire to integrate notions of art with emerging electronic media.<sup>89</sup> Somewhat differently, Stelarc uses the live body to explore his own theories and ideas and appears to be essentially unconcerned about how his explorations might be interpreted by others. Each of these artists and groups have engaged in deeply expressive activities, which had some intended or unintended communicative impact on their audiences.

In light of (or despite) the variety of methods and ideas represented in the arena of live art, performance art remains an art form that stubbornly defies precise definition. To some extent, however, one can point to certain deceptively basic commonalities shared by this genre of live

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<sup>82</sup> See *id.* at 142-43.

<sup>83</sup> *Id.* at 146.

<sup>84</sup> See GOLDBERG, *supra* note 51, at 190.

<sup>85</sup> CARR, *supra* note 3, at 14.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 10.

<sup>88</sup> Nick Carter, *Stelarc Hooks Audience at UWM on Body Art*, MILWAUKEE J. SENTINEL, Sept. 30, 1995, at 8.

<sup>89</sup> See GOLDBERG, *supra* note 51, at 190-91.

art. First, all performance art necessarily makes use of the live human body and, therefore, involves conduct.<sup>90</sup> Second, all performance art represents a direct, "real time" presentation of the body. Therefore, a performance piece lasts only as long as the performance itself and cannot be duplicated. Finally, all performance art represents the communication of some idea to another live human being, whether or not the idea or communication is intended by the artist.<sup>91</sup> In other words, by its very nature, performance art requires the presence of at least one viewer, willing or unwilling, comprehending or uncomprehending.

From these characteristics, we can glean certain elements that might make performance art unique from a legal perspective. First, the regulation of performance art constitutes the direct regulation of the person, rather than of "materials," which are one step removed from the artist himself.<sup>92</sup> The censored painter can continue to engage in his chosen expressive activity, but must conceal the product in his studio and refrain from its publication; in contrast, the censored performance artist is more often stripped of the ability to engage in his chosen expressive activity at all. As a result, the regulation of performance art is particularly intrusive to the individual speaker. It involves the state directly dictating the permissible boundaries of the content and form of his actions. Although this factor is unlikely to be decisive in determining how to apply a constitutional legal standard,<sup>93</sup> the profound effect of suppression on the live performer should not be discounted.

Second, performance art, as a live medium, depends for its full effect on immediacy and live connection with an audience. A videotape, sound recording, or written transcription of a performance does not constitute the art piece, which expires with the closure of the original performance. Such a replication would lack the power of live, contemporaneous action. For example, as a psychiatrist noted in regard to Ron Athey's work, the "most sadistic screen violence is not as horrifying as on-stage mutilation," particularly in a culture immunized to violence by television and movies.<sup>94</sup> The work of Athey & Co. is powerful precisely

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<sup>90</sup> I refer here to the original performance and not to videotapes or recordings of the performance.

<sup>91</sup> A performance without an audience is not performance art for the purposes of this Article.

<sup>92</sup> Although criminal prosecutions of the artist have a direct effect on the artist himself, other forms of regulation, such as preventing a gallery from exhibiting certain works, have a less direct impact on the creator of static art work than on the live performer. That is not to say that the censorship of a painting does not act to censor the artist as well, but the effect on the artist's person is less tangible than in the context of performance art.

<sup>93</sup> This factor might, however, function to "place a thumb on the scale" when legal balancing is to occur or merely to raise consciousness about the effects of regulation on the artist. This factor might also be considered in the context of a least restrictive means analysis or an examination of whether a restriction leaves open alternative means of expression. See *infra* text accompanying notes 304-307.

<sup>94</sup> Hamilton, *supra* note 5.

bécause it is "not distant."<sup>95</sup> A videotape or verbal description of Athéy's performance would minimize this aspect of the allegedly artistic value of the performance. Accordingly, the unlikelihood of faithfully reproducing a live art piece should be taken into account when considering whether the usually applicable First Amendment standards are proper or workable in this context.<sup>96</sup>

The difficulty of faithfully replicating a live art piece raises serious practical questions regarding whether an audience-orientation, as part of a regulatory system, is properly suited to address a live artistic medium. In other words, if the art piece cannot accurately be reproduced for consideration by a second audience, will the second audience be capable of fairly assessing whether the piece has merit?

In sum, the unique attributes of performance art should be kept in mind when considering the discussions that follow. Live art has a long and illustrious history as an effective vehicle for social challenge, the communication of ideas, and personal expression. It cannot be characterized and dismissed either as mere "shock art" or because of the consequent distaste for the medium itself and the ideas that it tends to embody. Instead, performance is an ever-evolving form of expression worthy of serious contemplation and respect.

## II. Audience-Oriented Theories and Artistic Expressive Conduct

*To contend is fine; but to contend against what? And to contend with what gain in mind?*<sup>97</sup>

As discussed above, extending First Amendment protection to the arts feels right to many of us;<sup>98</sup> in a visceral sense, it fits in with our generally shared notion of the values that the First Amendment should protect, as well as the values that are commonly viewed as important to our culture and society.<sup>99</sup> Although the Supreme Court has accordingly assumed that artistic expression and conduct are covered by the First Amendment and, therefore, are entitled to some measure of constitutional

<sup>95</sup> See *id.*

<sup>96</sup> In the obscenity context, Justice Brennan recognized that "the obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination . . . . I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on a 'case-by-case, sight-by-sight' basis." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84-85 (1973) (Brennan, J., dissenting).

<sup>97</sup> CASSOU, *supra* note 20, at 30.

<sup>98</sup> But see Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *supra* note 26, at 26-27.

<sup>99</sup> As Justice Burger stated, there is a "well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character." *Paris Adult Theatre*, 413 U.S. at 63.



protection, most critics agree that the Court has not sufficiently addressed the reasons why this is or should be so. The failure to construct a foundation that explains the justifications for protecting art might be due to the difficulty of defining "art" and identifying artistic merit. Alternatively, it might be the result of a larger, fundamental devaluation of artistic expression as an important means of individual expression and contribution to social and political discourse.<sup>100</sup> Whatever its genesis, this failure results in significant uncertainty in our constitutional jurisprudence and, correspondingly, for the potential speaker.

Defining the legal and social goals in protecting a particular form of speech or expression dictates the manner in which a society attempts to realize those goals. To some extent, the Supreme Court has defined the scope and purpose of First Amendment protections. For example, a category of speech called "art" falls under the ambit of protected First Amendment expression.<sup>101</sup> Moreover, expressive conduct and symbolic speech also constitute expression covered by the First Amendment,<sup>102</sup> although the government generally has greater latitude in restricting expressive conduct than it has in regulating the written or spoken word.<sup>103</sup> Further, it has been suggested that non-verbal "speech" might be protected based on, or even regardless of, its purpose or effect, whether that purpose or effect be political,<sup>104</sup> emotive,<sup>105</sup> or entertaining.<sup>106</sup> Performance art, then, should fall squarely within the scope of the First Amendment's protection. In practical terms, however, it is not clear under what circumstances such artwork would be covered. In order to faithfully and consistently apply the First Amendment, it is essential that the goals and interests served by the freedom of expression be delineated with some clarity.

Most of the commonly offered justifications for the First Amendment freedom of speech, including the "marketplace of ideas," can be characterized as audience-oriented.<sup>107</sup> As observed by the Supreme Court, "it is the purpose of the First Amendment to preserve an uninhibited

<sup>100</sup> See, e.g., Marci A. Hamilton, *Art Speech*, 49 *VAND. L. REV.* 73, 75 (1996); Nahmod, *supra* note 40, at 223.

<sup>101</sup> See *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2186 (1998) (Souter, J., dissenting) ("It goes without saying that artistic expression lies within [the] First Amendment protection." (citing examples of dicta where the Court has recognized this proposition)).

<sup>102</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (discussing flag burning):

<sup>103</sup> See *id.* at 406.

<sup>104</sup> See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510 (1969).

<sup>105</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971).

<sup>106</sup> See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996).

<sup>107</sup> See HARRY M. BRACKEN, *FREEDOM OF SPEECH* 11 (1994) (discussing marketplace of ideas theory, particularly John Stuart Mill's version of the theory which was concerned that government control over opinions might suppress truth). Ronald Dworkin observed that Mill endorsed both the instrumental and constitutive views of free speech. See DWORKIN, *supra* note 16, at 201.

marketplace of ideas in which the truth will ultimately prevail."<sup>108</sup> This theory is embodied in the inspirational images that permeate First Amendment case law: those encouraging "uninhibited, robust, and wide-open" debate<sup>109</sup> and the "unfettered interchange of ideas."<sup>110</sup>

A common variant of the marketplace theory posits that speech is protected primarily because it is a necessary element of democratic self-government. In fact, the Court has stated that there is "practically universal agreement that a major purpose of [the First Amendment freedom of speech] was to protect the discussion of governmental affairs."<sup>111</sup> Under a narrow application of the political speech theory, performance art would receive substantial First Amendment protection only when a particular performance conveys a message reasonably identifiable by a judge or jury as "political" or as contributing to the process of self-government. Under more liberal applications of this theory, however, any expression, including the arts, that marginally aids in self-governance, is deserving of stringent First Amendment protection.<sup>112</sup> Presumably, such an application would include performances that comment on social matters tangentially connected with government.<sup>113</sup>

The marketplace theory has been criticized on a number of grounds. One major criticism relates to the theory's presupposition that there exists a discernible "truth" that would be provable and discoverable in the marketplace. However, as Professor C. Edwin Baker has observed, "[t]ruth is not objective."<sup>114</sup> Truth is created, not discovered. Corollary to the notion of truth, the marketplace theory presumes that people are rational and are therefore able to discover or discern objective truth, while rejecting falsity. In this way, the marketplace notions of truth and rationality are intertwined; in the absence of a discoverable truth, the relevance of rational discovery is undermined. Further, even if one were to accept the existence of an objective truth, rationality of the type presupposed is un-

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<sup>108</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding FCC regulations relating to "fairness doctrine" in radio broadcasting).

<sup>109</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (considering freedom of the press in context of defamation of public figures).

<sup>110</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 309 (1984) (Marshall, J., dissenting).

<sup>111</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (striking down state statute punishing publication of newspaper editorial on election day that urged a certain vote).

<sup>112</sup> See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 262; cf. Hamilton, *supra* note 100, at 111 (describing a less rigid version of the marketplace that would take into account art's communicative qualities).

<sup>113</sup> The political quality attributed to a work of art by its creator might not be communicated to the audience. For example, Pablo Picasso's well-known *Guernica* was intended as a commentary on the ravages of the Spanish Civil War. It would seem inconsistent with many justifications for the protection of speech to expect an observer to be aware of the history of an artist or of the art form itself; nevertheless, under a political speech theory of the First Amendment, such an awareness might be a prerequisite for constitutional protection.

<sup>114</sup> BAKER, *supra* note 18, at 12.

likely, as individual perspective is influenced more by interests and life experience than by rational discussion.<sup>115</sup> The artistic process is “too subtle and intimate an experience” for more than generic description; “only the artist himself can observe it fully, but he is so absorbed by it that he has great difficulty explaining it.”<sup>116</sup> These criticisms resonate with particular force in the arena of artistic expression, which involves the speaker’s search for a highly personal truth and interpretation of the self and its view of the surrounding world—a truth that is not subject to any verification, much less of a rational sort.

In addition, the marketplace theory does not account for non-rational aspects of art, such as its emotional impact on an audience or speaker.<sup>117</sup> Pablo Picasso has observed that “from the point of view of art . . . [there are] only forms which are more or less convincing lies. That those lies are necessary to our mental selves is beyond any doubt, as it is through them that we form our aesthetic point of view of life.”<sup>118</sup> The necessity of lies to the individual who tells them infuses them with expressive value, although they might remain “untrue” by the standards of the marketplace. In this context, truth is not necessarily concomitant with value. Accordingly, the marketplace model of free speech is unlikely to provide a wholly satisfactory means of dealing with the non-rational untruths or the highly rational but deeply personal truths promulgated and explored by the artistic speaker.

Even related justifications tailored to the non-discursive, non-rational communicative elements of artistic expression do not necessarily account for the value of the speech to the speaker. For example, Professor Marci Hamilton has proposed that First Amendment theory must reflect art’s “integral role in preserving the constitutional balance between the governed and the governing.”<sup>119</sup> In urging this interpretation, Hamilton posits that all art provides an “effective and unique means” to achieve the goal of reinforcing the subversive quality of the Constitution by enriching the public’s capacity to challenge the ideological hegemony of government.<sup>120</sup> Although her theory does not view the value of artistic expression as solely derivative of its political value, Hamilton urges a recognition of art as protected speech based on its broad function in a representative democracy. She also locates value in art’s “capacity to be a future, potent, immanent tool of critique.”<sup>121</sup> She contends that art cannot be protected solely for the sake of the ideas it may express, because art

<sup>115</sup> See *id.* at 14–15.

<sup>116</sup> H.W. JANSON, HISTORY OF ART 11 (3d ed. 1986).

<sup>117</sup> See Nahmod, *supra* note 40, at 241–42; cf. Hamilton, *supra* note 100, at 75 (observing that current First Amendment doctrine “largely ignores the liberty value of art”).

<sup>118</sup> See GOLDWATER, *supra* note 1, at 417.

<sup>119</sup> Hamilton, *supra* note 100, at 78.

<sup>120</sup> *Id.* at 85.

<sup>121</sup> *Id.* at 96.

does not necessarily encompass rationally comprehensible ideas.<sup>122</sup> Instead, Hamilton seeks recognition of the indirect, non-rational, and subtle communicative attributes of artistic expression with regard to the "democratic enterprise."<sup>123</sup> In sum, Hamilton's theory relies on the ability of art to contribute to the collective good, as an integral part of a representative democracy. This ability encompasses, if not hinges on, art's "capacity to communicate nondiscursively," and the experience that it provides for its audience.<sup>124</sup>

While making a convincing case for the protection of some (even most) artwork, this approach practically disregards other functions of art and the creative process, whereby the advantages of artistic freedom inure to the individual creator.<sup>125</sup> Aside from the benefits that inure to the audience of art, there is no doubt that the creative process is of unquantifiable and significant value to the individual who is thus engaged. Art can be a means of exploring deeply personal issues, rather than as a means of communication. The founder of the group Traumatic Stress Discipline ("TSD"), a performance collectively concerned with the "temporary and sometimes dangerous deformation of the human form,"<sup>126</sup> offered his opinion that "art is created by an internal need of the artist to create something and nothing more."<sup>127</sup> Body suspensions, he said, are an extreme result of the notion that stimuli—whether physical or emotional—are necessary to make a human being feel alive.<sup>128</sup> A more commonplace example of the value of art to the individual can be found in the use of art as therapy. Versions of artistic therapy abound—the personal diary, the letter never intended for mailing, and the sketchbook never intended for viewing by others. Even for the musician, the audience is not necessarily a key factor: "playing with other musicians, and even playing for oneself is still the foundation of musical life."<sup>129</sup> These examples illustrate the intrinsic value of artistic expression to the individual, even where the conveyance of any message, idea, or any other "socially valuable" element is unintended and, essentially, unimportant from the speaker's perspective. The fact that a person might create with

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<sup>122</sup> See *id.* at 105–07.

<sup>123</sup> *Id.* at 108–09.

<sup>124</sup> *Id.* at 109.

<sup>125</sup> Cf. Daniel Mach, Note, *The Bold and The Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 391 n.35 (1997).

<sup>126</sup> TSD Homepage, (visited Mar. 22, 1999) <<http://www.obscurities.com>>. TSD engages in body suspensions similar to those of Stelarc, and images of the group's suspensions (accompanied by detailed warnings regarding the adverse physical effects of the suspensions) appear on the TSD homepage.

<sup>127</sup> Letter from Allen Falkner, Founder of TSD, to author (Nov. 29, 1997).

<sup>128</sup> See *id.* Falkner also related that certain offshoots of TSD around the country are exclusively geared toward spiritual growth of the individual participant. He recounted that in Texas, a group member suspended from a tree was visited by the spirit of his dead grandmother. As Falkner said, "this is pretty heavy stuff." *Id.*

<sup>129</sup> Charles Rosen, *Classical Music in Twilight*, HARPER'S MAG., Mar. 1998, at 52.

an audience in mind, or in an effort to communicate with another, in no way undermines the value of the creative process to the individual.<sup>130</sup> Any theory of free speech that fails to take this profound and unquantifiable interest into account is fatally incomplete.<sup>131</sup>

### III. First Amendment Doctrine and the Audience Focus

#### A. *When Conduct Is Protected "Speech"*

*[I]n many cases, the medium may well be the message.*<sup>132</sup>

As we have seen, performance art is a form of expression that necessarily involves conduct, but does not necessarily involve the physical act of speaking. Certainly, conduct or action is not traditional verbal speech. The Supreme Court has, however, devised distinct approaches to determining when conduct falls within the First Amendment's guarantee of free speech. In large part, these approaches lean on audience-oriented notions of "ideas" and the communication of those ideas. To provide a backdrop for the present discussion in the context of performance art, it is important to review the circumstances under which physical action, which does not necessarily involve verbal conduct, fits within the First Amendment's guarantee.<sup>133</sup>

The Supreme Court has long recognized that the First Amendment's guarantee of "free speech" is not limited in scope to the results of the physical act of speaking. Instead, the Court has acknowledged that conduct, even conduct that does not involve speaking, falls within the ambit of the First Amendment. For example, in opinions that flesh out a powerful First Amendment guarantee, the Court has recognized that the guarantee applies to conduct such as a sit-in to protest against segregation,<sup>134</sup> the wearing of armbands in protest of war,<sup>135</sup> marching in a parade,<sup>136</sup> and a student's refusal to salute the American flag at school.<sup>137</sup> It has been

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<sup>130</sup> Conversely, as one court noted when evaluating obscene materials in the copyright context, "creative activity does not, in itself, result in effective expression." *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858 (5th Cir. 1979).

<sup>131</sup> See Nahmod, *supra* note 40, at 235.

<sup>132</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 774-75 (1978) (Brennan, J., dissenting) (critiquing the majority's statement that persons who wish to hear the "tabooed" words in comedian George Carlin's monologue can "purchase tapes and records or go to the theatres and nightclubs" instead of hearing them on the radio).

<sup>133</sup> See generally Peter Meijer Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 Wisc. L. Rev. 1525, 1531-89.

<sup>134</sup> See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

<sup>135</sup> See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

<sup>136</sup> See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995).

<sup>137</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

recognized that conduct involving the "expression of opinion" can be "akin to 'pure speech.'"<sup>138</sup> The Court has even conceded that nude dancing is expressive conduct that is "marginally" within the "outer perimeters of the First Amendment."<sup>139</sup>

When considering whether conduct qualifies as protected "speech," the Court has employed an audience-oriented analysis. It has treated the communicative nature of the conduct at issue as material to the presence and extent of the First Amendment protection afforded.<sup>140</sup> For example, symbolic speech is protected because "[s]ymbolism is a primitive but effective way of communicating ideas."<sup>141</sup> Because the Court has refused to accept that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"<sup>142</sup> consequent line-drawing has necessitated an inquiry into whether the conduct at issue is "sufficiently imbued with elements of communication"<sup>143</sup> and the effectiveness of those communicative elements.

Concomitantly, the focus on the communicative nature of the speech necessarily takes into account the presence and importance of an audience: "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."<sup>144</sup> In that respect, the context in which the conduct occurs is steeped with import.<sup>145</sup> As Justice Marshall has stated, "one should look first to the intent of the speaker—whether there was an 'intent to convey a particularized message'—and second to the perception of the audience—whether 'the likelihood was great that the message would be understood by those who viewed it.'"<sup>146</sup> The Court

<sup>138</sup> *Tinker*, 393 U.S. at 508. In his concurring opinion, Justice White advised that "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct." *Id.* at 515 (White, J., concurring).

<sup>139</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (upholding regulation on nude dancing). Nonetheless, it has been observed that the Court has never articulated a satisfactory method of dealing with conduct versus speech. *See Tiersma, supra* note 133, at 1531.

<sup>140</sup> Even in the case of nude dancing, the Court observed the "erotic message" that the dancing might convey. *See Barnes*, 501 U.S. at 570.

<sup>141</sup> *Barnette*, 319 U.S. at 632.

<sup>142</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

<sup>143</sup> *Spence v. Washington*, 418 U.S. 405, 409 (1974).

<sup>144</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *see also id.* at 313 (Marshall, J., dissenting).

<sup>145</sup> For example, in *Spence*, 418 U.S. at 410, the Court observed that appellant's display of an upside-down flag with a peace symbol attached was triggered by, and occurred almost contemporaneously with, the invasion of Cambodia and the killings at Kent State. Accordingly, under the circumstances, there was a likelihood that viewers would have understood the message.

<sup>146</sup> *Clark*, 468 U.S. at 305 (Marshall, J., dissenting). The majority's formulation suggests that the viewer must perceive that conduct was driven by an intent to communicate, but needn't recognize the message, while the dissent suggests that the pertinent inquiry relates to the audience understanding of the message intended to be conveyed.

has, however, rejected the proposition that the expression of a "narrow, succinctly articulable message" is a condition of constitutional protection, because such a condition would "never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll."<sup>147</sup> A speaker is not required to "isolate an exact message as the exclusive subject matter" of his speech.<sup>148</sup>

Even if a narrow, succinctly articulable message is not a prerequisite for conduct to qualify as "speech," the exclusive focus on the communicative nature of speech and whether it is "effective" as to the audience does not bode well for the speaker's interests or live art as a genre. As illustrated by the examples of performance art discussed in this Article, the likelihood is not great that a majority of viewers, even highly educated or open-minded viewers or those willingly paying an admission fee, would understand the message intended by the dialogue of The People Show, Anderson's "O-Superman," or Stelarc's body suspensions. Similarly, unlike flag burning or a public political demonstration, a performance piece might communicate a highly personal idea or emotion that is not readily, if at all, referable to a well-known event that would "give meaning to the symbol"<sup>149</sup> used. Moreover, the speaker may not necessarily intend to communicate a "message" at all, or even to communicate a particular idea. Instead, she might use conduct as a vehicle for self-exploration, with the effects on an audience as interesting but incidental results of the experiment. It would seem inappropriate to strip the conduct of First Amendment protection because it might be labeled as "insufficiently communicative," irrespective of other non-communicative value that it might hold for the speaker.<sup>150</sup>

### *B. Regulation of Obscene Conduct*

*In art, immorality cannot exist. Art is always sacred even when it takes for a subject the worst excesses of desire.*<sup>151</sup>

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<sup>147</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995). The Court did not expound on why the enumerated expressions are "unquestionably protected."

<sup>148</sup> *Id.* at 569-70.

<sup>149</sup> *Spence*, 418 U.S. at 410.

<sup>150</sup> This concern applies in the context of other conduct that is unlikely to cause widespread controversy, such as the playing of music without lyrics. The difficulty with the analysis of the communicative nature of conduct parallels the discussion of analyzing the speaker's intent in the obscenity context. *See infra* Part IV.B.2.

<sup>151</sup> *See* 1 JOHN HENRY MERRYMAN & ALBERT E. ELSER, LAW, ETHICS, AND THE VISUAL ARTS 41 (1987) (quoting sculptor Auguste Rodin).

The problems discussed above become most troublesome in the audience-oriented standards that regulate expression with sexual content, as in the areas of obscenity and offensiveness. The Supreme Court has held that obscenity is not "speech," and is not within the ambit of the First Amendment, because it is utterly without redeeming social value. Expression is not obscene, however, and therefore qualifies as protected speech, if it has "serious artistic value"<sup>152</sup> according to the "reasonable person."<sup>153</sup> "Serious artistic value" remains ill-defined by the courts.<sup>154</sup> Each of the problems with the audience-oriented approach, as discussed above, are commuted into the obscenity standard. In the obscenity context, those problems pose the dangers of misapplication, inconsistency, and undesirable majoritarian results that marginalize unpopular expression.

The regulation of obscenity provides a paradigmatic example of the audience-focus at work. Serious problems in this regulatory regime suggest that it is unworkable in the context of live art.<sup>155</sup> In 1957, the Court determined that the category of speech called "obscenity" was without redeeming social value, and therefore undeserving of First Amendment protection.<sup>156</sup> In 1973, the Court set forth the current test to determine what constitutes obscenity. *Miller v. California*<sup>157</sup> represents the Court's tenuous resolution of the legal chaos resulting from its decision in *Roth v. United States*.<sup>158</sup> The *Miller* Court established a three-prong test for determining whether particular speech falls into the unprotected category.

First, *Miller* requires an inquiry into whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest.<sup>159</sup> Second, the trier of

<sup>152</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>153</sup> *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

<sup>154</sup> See generally Edward John Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U. L.J. 1159, 1162-74 (1987).

<sup>155</sup> In addition, because the most current and visible legal controversies surrounding performance art focus on the sexual aspects of certain performances, and because performance art's incorporation of the live body renders it particularly susceptible to regulation based on obscenity or offensiveness, the legal standards for determining when expression with sexual content is protected by the First Amendment are particularly important in this context.

<sup>156</sup> See *Roth v. United States*, 354 U.S. 476 (1957).

<sup>157</sup> 413 U.S. 15 (1973).

<sup>158</sup> I characterize the *Miller* opinion as "tenuous" because four justices dissented, including Justice Brennan, author of the majority opinion in *Roth*. Dissenting in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), a companion case to *Miller*, Justice Brennan specifically observed that "our efforts to implement [*Roth*] demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term." *Id.* at 79 (Brennan, J., dissenting).

<sup>159</sup> *Miller*, 413 U.S. at 24. In many respects, the "contemporary community standards" consideration encourages balkanization. Consider the activities surrounding the 1994 case of comic artist Mike Diana, whose graphic cartoon images of rape, murder, and incest caused him to become the first comic artist ever to be convicted on obscenity charges.



fact must inquire into "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."<sup>160</sup> Finally, the court must consider "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>161</sup> This final requirement places a heavy burden upon the defense, as it would permit a finding of obscenity even as to works that have a recognized social value, if that value is not sufficiently "serious."<sup>162</sup> The Court refined *Miller's* third prong in *Pope v. Illinois*,<sup>163</sup> adding that the determination of artistic value is to be decided with reference to the opinion of the average, reasonable person.<sup>164</sup> Although mere nudity is not sufficient to support a finding of obscenity, certain depictions of proscribed sexual acts are likely to be considered obscene.<sup>165</sup> The contours of the *Miller* test remain defeatingly nebulous.

As indicated by its use of objective standards, the *Miller* Court was concerned primarily with protecting the interests of the audience. The Court's opinions reveal an attempt to limit the category of obscenity to "hard core" sexual conduct" and the crass commercialization of sex.<sup>166</sup> The Court's justification for restricting these categories of speech is based on the protection of "the sensibilities" of unwilling viewers, and the interest in maintaining a decent society.<sup>167</sup> In *Paris Adult Theatre*, the Court claimed that its decision was vindicating "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."<sup>168</sup> Clearly, the Court has not limited the category of obscenity to speech that encounters unwilling viewers. Further, it has assumed a connection between obscenity and undesirable social behavior.<sup>169</sup>

Current obscenity law, then, offers protection for material with sexual content that would be seen by a reasonable person as possessing, on

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Comic book artist Peter Kuper publicized Diana's case with a rendition of the trial that depicted the assistant D.A. telling the jury, "Pinellas County doesn't have to accept what is acceptable in the bath houses of San Francisco, or the Crack Alleys of New York!" Carolina A. Miranda & Ed Tahaney, *Indecent Exposure*, SWING, Nov. 1997, at 100-03.

<sup>160</sup> *Miller*, 413 U.S. at 24.

<sup>161</sup> *Id.* at 24.

<sup>162</sup> See *Paris Adult Theatre*, 413 U.S. at 97 (Brennan, J., dissenting).

<sup>163</sup> 481 U.S. 497 (1987).

<sup>164</sup> See *id.* at 500-01. Community standards, however, continue to apply to the "prurient interest" and "patently offensive" inquiries. See *id.* at 500. Further, materials directed toward a specific "deviant" group (i.e., sadomasochists) are to be judged by whether they appeal to the prurient interest of members of that group. See, e.g., *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

<sup>165</sup> See *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974).

<sup>166</sup> *Miller*, 413 U.S. at 27, 34-35.

<sup>167</sup> See *id.* at 18-19. Notably, in *Paris Adult Theatre*, the Court did not require an unwilling viewer. *Paris Adult Theatre*, 413 U.S. at 57-70.

<sup>168</sup> *Paris Adult Theatre*, 413 U.S. at 58.

<sup>169</sup> The Court later recognized a "secondary effects" exception, which permits the regulation of speech based on its harmful effects. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986).

the whole, "serious artistic value," even if those materials meet the other elements of the *Miller* test. Notably, however, skeptical courts have refused to allow defendants to present evidence of the artistic or communicative value of their work.<sup>170</sup> If a defendant, proceeding under the *Miller* standard per se,<sup>171</sup> is permitted to present such evidence, however, one might wonder what proof of "serious artistic value" he might offer. Although the necessary proof is not well-established by the caselaw, a number of possibilities have been proposed. For example, a defendant might establish the requisite value by demonstrating that the material makes an original and important contribution to art, or that the material reflects the "sanctity and solemnity of high art."<sup>172</sup> Alternatively, a speaker might avoid a conviction under *Miller* by showing that he was sincere in his attempt to make art;<sup>173</sup> or that he intended to convey an artistic, political, or other message or position, rather than "dress up" otherwise obscene matter that was sold or distributed for its obscene appeal, rather than the ideas expressed.<sup>174</sup> Each of these possibilities for avoiding suppression of artistic expression—those focusing on attributes of the materials themselves, and those focusing on the artist's intent in regard to the materials—will be discussed in turn.

### 1. *Evaluating Allegedly Obscene Materials under Miller*

In evaluating allegedly obscene materials, intractable problems arise relating to the meaning of "serious artistic value" and who is qualified to make that determination. The question of what constitutes "art," much less an "important contribution to art," is highly troubling. Much like truth, the artistic value of a particular work, or the status of a work as art or non-art, is incapable of objective evaluation or embodiment in standards capable of consistent application. As recently recognized by one judge in the arts funding context, "[p]hilosophers have no way to distin-

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<sup>170</sup> For example, appellants in *Curtis v. City of Seattle*, 639 P.2d 1370 (Wash. 1982), were convicted of lewd conduct based on activities associated with the Venusian Church, which centered on an individual's acceptance of his sexuality, and discarding sexual repression. See *id.* at 1371. Inside the church, one could pay to see appellants in the "performance area," engaged in sexual activity. See *id.* at 1372. At trial, the appellants were prevented from presenting evidence of the communicative and artistic nature of their activity.

<sup>171</sup> I am aware that, instead of evaluating a set of facts under *Miller*'s standard per se, it is more likely that a court would evaluate a challenge to a particular statute that is alleged to censor further than *Miller*, or a criminal prosecution under a statute that is similar to but not the same as the Supreme Court standard.

<sup>172</sup> Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1365 (1990). Adler concludes that each of these potential methods for "proving" serious artistic value is inadequate in the face of post-modernist art. See *id.* at 1365-69.

<sup>173</sup> See *id.* at 1365.

<sup>174</sup> See FREDERICK SCHAUER, *THE LAW OF OBSCENITY* 140 (1976); cf. Ginzburg v. United States, 383 U.S. 463 (1966) (holding that the marketing of materials as sexual or erotic can be considered when determining whether materials are obscene).

guish art from non-art, or good art from bad art."<sup>175</sup> Notably, when seventeen members of the "art world" were asked, "What is art?", each of them thought that the question had no answer. Their responses ranged from "[b]y now the idea of defining art is so remote, I don't think anyone would dare to do it," to "[i]t seems pretty clear by now that more or less anything can be designated as art."<sup>176</sup>

An evaluation of the value of art is difficult because the answers are inextricably intertwined with matters of personal taste and aesthetics; one man's vulgarity might be another man's lyric.<sup>177</sup> Justice Scalia has explicitly criticized the "reasonable person" standard because it effectively imposes the standard of a "man of tolerably good taste," and "[j]ust as there is no use arguing about taste, there is no use litigating about it."<sup>178</sup> As a result, the "serious artistic value" inquiry could be answered differently by different, but still "reasonable," persons.<sup>179</sup> Precisely because of the difficulty of making decisions in this area, the Court has recognized that "the Constitution leaves matters of taste and style . . . largely to the individual."<sup>180</sup> Therefore, a distinction between art and non-art, or good art and bad art, cannot provide a principled basis for the suppression or regulation of speech.

Further, these criticisms anticipate difficulties inherent in the task of identifying the appropriate judge of artistic value.<sup>181</sup> In the legal context, members of the general public should not be relied upon to make this judgment.<sup>182</sup> Today's cultural climate is dominated by the opinion that modern art is morally and aesthetically bankrupt—a "brothel of the intellect."<sup>183</sup> Even artwork no longer on the fringe, which has received the

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<sup>175</sup> *Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting). In holding the "decency and respect" prong of funding consideration void for vagueness, the court observed that the standard is not susceptible to objective evaluation and therefore gives rise to the danger of arbitrary and discriminatory application. *See id.* at 680. The Supreme Court, however, reversed, determining that the "decency and respect" consideration was not void. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998). Judge Kleinfeld also expressed concern over the majority's implication that "artistic excellence" and "artistic merit" are also vague standards, but are constitutionally permissible because the people making that determination are experts. *See Finley*, 100 F.3d at 689 (Kleinfeld, J., dissenting).

<sup>176</sup> Menand, *supra* note 54, at 39.

<sup>177</sup> *See Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>178</sup> *Pope v. Illinois*, 481 U.S. 497, 505 (Scalia, J., concurring). Recall the Monty Python bit in which the players rate the quality of an artistic masterpiece by how it tastes.

<sup>179</sup> *See id.* at 506 (Blackmun, J., dissenting).

<sup>180</sup> *Cohen*, 403 U.S. at 25.

<sup>181</sup> *See generally* Adler, *supra* note 172, at 1377–78 (denying that a trier of fact will "know art when [he] sees it," because contemporary artists are "estranged from lay notions of what constitutes 'art'").

<sup>182</sup> Where the propriety of a state regulation of artistic expression is at stake, the considerations and interests are vastly different than the interests implicated in the private sphere. When the state places its official imprimatur on suppression, it not only raises the possibility of constitutional violations, but carries the weight of the state's authority. *See Hamilton, supra* note 100, at 112.

<sup>183</sup> ARNASON, *supra* note 53, at 568. In 1967, a New York judge who sentenced per-

once-decisive imprimatur of the museum or gallery, might be viewed with skepticism by those who have not been steeped in the niceties of color, composition, or art's rebellious history. When judging art, the majority of the public is likely to be bound to traditional notions of art and aesthetics.<sup>184</sup>

Moreover, such views are encouraged by the "anything goes" manifesto adhered to in the modern world of avant-garde art, which purposely and effectively rejects traditional confines of high art and notions of artistic quality and sincerity, and often is aimed at producing shock or offense. Throughout history, live art in particular has been used by the avant-garde to push aesthetic boundaries.<sup>185</sup> Like its predecessors, post-modern performance art has raised the public hackles with remarkable consistency. To take one example, the *Washington Times* reported that "much of what is praised as 'performance art' belong[s] on the ash heap of art history."<sup>186</sup> As a result of the progressive functional elimination of social and artistic boundaries, the public tends to view the mechanism, along with its purveyors and supporters, with unbridled suspicion.

Furthermore, those identified as art experts are just as unlikely to offer a satisfactory evaluation of art for legal purposes.<sup>187</sup> On a number of occasions, members of the art community have united against "trash" that later came to be respected and even revered artwork.<sup>188</sup> Peer review has been criticized for its tendency to cause artists to "fall[ ] victim to the passions, and the fashion, of the moment."<sup>189</sup> Sculptor Pierre Jean David D'Angers wrote that "[i]t is easy to foresee the abuses such a system would engender, with judges simply the natural and unwitting victims of their own human weaknesses."<sup>190</sup> In other words, although its members might be more apt to identify as "art" materials that flout various tradi-

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formance artist Charlotte Moorman for "an art which openly outrage[d] public decency," adopted this term as a description of the state of modern art.

<sup>184</sup> After interviewing 1001 Americans about their taste in painting, two Russian artists determined that the most favored painting in America would be "a bluish landscape painting, populated by George Washington, a family of tourists and a pair of frolicking deer. The canvas is the size of a dishwasher and looks like something that might adorn the walls of a third-rate motel. It is the apotheosis of art created by consensus." Michiko Kakutani, *Portrait of the Artist as a Focus Group*, N.Y. TIMES, Mar. 1, 1998, (Mag.), at 26.

<sup>185</sup> See GOLDBERG, *supra* note 51, at 7.

<sup>186</sup> *The Performance that Bombed*, *supra* note 4, at A18.

<sup>187</sup> See generally Adler, *supra* note 172, at 1376-77 (rejecting notion that art world acceptance can define "art").

<sup>188</sup> See *Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("It took a century and a half for most critics to agree that photography could be art. Some have not yet admitted jazz to the pantheon, many, rock and roll. Some disagree on whether Bernstein's *West Side Story* is art or mere entertainment, let alone excellent art.") Such phenomena are visible throughout the history of art. Picasso's painting *Demoiselles D'Avignon*, initially reviled by many critics, was later recognized as a breakthrough into a new arts movement. See ARIANNA STASSINOPULOS HUFFINGTON, *PICASSO, CREATOR AND DESTROYER* 93 (1988).

<sup>189</sup> GOLDWATER, *supra* note 1, at 222.

<sup>190</sup> *Id.* (quoting an 1840 letter from D'Angers to magazine editor Adolphe Chambolle).

tions, the art community is subject to the same influences that work on the judgment of the larger public.<sup>191</sup>

Moreover, the public view of the arts community affects the propriety of designating the expert as judge. In the public eye, art experts, critics, and other members of the arts community are not trusted as skillful and knowledgeable judges, but instead are seen as a "snob mob" that condescendingly views the public as a mass of unsophisticated low-brows.<sup>192</sup> In addition, peer review is commonly seen as incapable of separating good from bad art, because to finger the avant-garde as trash would be "gauche, even traitorous."<sup>193</sup> An expert with a narrow, traditional view of art is bound by majority views, and might sway the jury accordingly; an expert who would recognize a near-limitless version of art is likely to be viewed with suspicion, and as less than reasonable. Reliance on experts to locate and identify artistic value involves the blind leading the blind, where the follower does not trust or respect the leader.

Further, the prospect of a decisive inquiry into whether the materials at issue reflect the sanctity and solemnity of high art is disturbing. At first blush, the inquiry might seem manageable in a courtroom (i.e., a purely visual assessment of the materials on trial, without any testimony, would allow the audience to discern any similarities to the works of Rembrandt, da Vinci, or the like). The problem remains, however, to determine whose vision of "high art," and which of its qualities, are to be reflected in the materials at issue.<sup>194</sup> It is safe to surmise that most would associate the term "high art" with paintings or sculptures (most likely representational in nature), well-entrenched artists who have received critical acclaim, and works that have achieved museum status. In other words, today's perceptions of the qualities of high art have been shaped by the styles, tastes, and aesthetic trends of earlier times and other cultures. Performance art, as a relatively new, controversial, and little-understood genre, is unlikely to achieve favorable comparison to "high art" in the near future. Laurie Anderson's work does not apparently reflect any sort of sanctity or solemnity, and has little in common with the products or practices of Renaissance painters and sculptors. It is, instead, a challenge to notions

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<sup>191</sup> Among the general public and the art community alike, unpredictable factors might bear on the question of artistic value. For example, a creation by a person who has previously achieved "legitimate" artistic success, whether commercially or critically, might be more readily considered "art" than the creation of an unknown or non-artist.

<sup>192</sup> See Barber, *supra* note 4; Don Feder, *Defense of NEA: A Vicious Whine by Show-off Snobs*, BOSTON HERALD, Aug. 7, 1995, at 19.

<sup>193</sup> Barber, *supra* note 4.

<sup>194</sup> One letter to the editor drew a sharp distinction between high art and low performance art: "I guess Michelangelo didn't really need to spend 12 years . . . painting the Sistine Chapel . . . He should have just shoved a yam up his ass and/or hammered a nail through his dick and called it a day." Adam Mendelsohn, *Letters*, NEW TIMES L.A., Nov. 13, 1997, available in 1997 WL 6607424.

of sanctity and solemnity, which makes use of emerging technological media that the populace does not readily associate with "high art."<sup>195</sup>

Notably, even if the artistic value prong could be applied fairly to the static art forms, there is no fair, practical method for permitting a judge or jury to evaluate the artistic value of performance art. A trier of fact can view original "materials," such as paintings or a sculpture, under circumstances similar to those in which outside audiences would view them. In contrast, a piece of performance art is concluded when the performance ends, and cannot be viewed again in its original form. If the objective "artistic value" of Ron Athey's work, for example, depends on the visceral, emotional reaction imparted by watching a live person, in physical proximity, insert staples into his genitals, then a jury won't be in a position to appreciate that value. Therefore, short of restaging a performance in the courtroom,<sup>196</sup> there is no faithful method for either of the litigants to provide evidence of the artwork's value or lack thereof. Even in the case of a restaging, there is no guarantee that the courtroom forum would be as effective as the forum chosen by the artist, or that the production would be as emotionally charged as the initial showing.<sup>197</sup> Watching a recording of a person yelling at you in anger would undoubtedly evoke a different and less intense reaction than the same anger being acted out in your immediate physical space. Because the live nature of a performance is an essential element of performance art, this attribute is worthy of legal consideration. The complications cited above are undesirable for many reasons. The probable failure of necessarily ambiguous bases for determining artistic value, as well as of appointing a satisfactory entity for applying those bases, lends an air of uncertainty to the dealings between art and the Constitution.<sup>198</sup> The possibility of inconsistent outcomes results in a standard that provides a potential speaker with little guidance: "[i]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual ju-

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<sup>195</sup> Cf. Adler, *supra* note 172, at 1367-68 (rejecting standard that would rely on "sanctity and solemnity of high art" because much of contemporary art intentionally challenges such notions). I accept Adler's conclusion. The analysis in this Article, however, further applies to work that does not intentionally challenge notions of high art, but might otherwise fail to "measure up."

<sup>196</sup> The restaging of a performance may raise additional issues. For example, perhaps members of Ron Athey's troupe are unwilling to self-mutilate on command—it seems untenable that a court should order them to do so, merely to enable the jury's evaluation.

<sup>197</sup> Although this discussion conflates notions of preserving context with notions of preserving the art form itself, the two are separable. A live performance depends on live action as well as the context in which that action is presented. Indeed, *Miller's* "as a whole" inquiry recognized the significance of a contextual inquiry. See *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>198</sup> Indeed, this failure to inform people with "fair notice" of what is proscribed is one of the reasons that Justice Brennan concluded "after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today [in *Miller*], can reduce the vagueness to a tolerable level." *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).

rors' subjective reactions to the materials in question rather than by the predictable application of rules of law."<sup>199</sup> Further, reliance on personal perspectives of morality, taste, and style to determine the presence or absence of artistic value leads toward a winnowing of the body of available art to conform with a majoritarian aesthetic, and toward the speaker's self-censorship and constrained liberty. Similarly, majoritarian laws may have a "chilling" effect on the proffering of artistic expression.<sup>200</sup> This filtering process conflicts in particular with expression—like much of performance art—that is intended to act as an unsettling, disruptive, novel, or otherwise anti-majoritarian force.

On this issue, the deference to "artistic merit" found in copyright law is instructive.<sup>201</sup> The purpose of copyright protection is to "promote the Progress of . . . useful Arts."<sup>202</sup> Accordingly, in *Mitchell Bros. Film Group v. Cinema Adult Theater*,<sup>203</sup> alleged copyright infringers argued, essentially, that because the copyright at issue was attached to an obscene film, the film's copyright could not be infringed.<sup>204</sup> In other words, work that lacked social value could not achieve copyright's purpose of promoting progress. In response, the court observed that the purpose of copyright "is best served by allowing all creative works . . . to be accorded copyright protection regardless of subject matter or content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward."<sup>205</sup> Noting that the concept of obscenity is an "awkward, barely acceptable" one that "continues to dog our judicial system and society at large," the court found that denying copyright to "works judged obscene by the standards of an era" would result in a lack of copyright for, and incentive to create, "works that later generations might consider to be not only non-obscene but even of great literary merit."<sup>206</sup> The court further noted that "their very novelty would make them repulsive until the public learned the new language in which their author spoke."<sup>207</sup> The decision was justified by the "strong possibility" that judges and state officials will "err in separating useful from non-

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<sup>199</sup> *Pope v. Illinois*, 481 U.S. 497, 514 (1987) (Stevens, J., dissenting).

<sup>200</sup> The "chilling effect" was acknowledged by both majority and dissent in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2185–86 (1998), with differing emphases. See also *Paris Adult Theatre*, 413 U.S. at 88–91 (Brennan, J., dissenting).

<sup>201</sup> For a discussion of the overlap of copyright law and the First Amendment, see generally Robert C. Summers, Comment, *Constitutional Protection of Obscene Material Against Censorship as Correlated with Copyright Protection of Obscene Material Against Infringement*, 31 S. CAL. L. REV. 301 (1958) (written immediately post-*Roth* and prior to enactment of current Copyright Act).

<sup>202</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>203</sup> 604 F.2d 852 (5th Cir. 1979).

<sup>204</sup> See *id.* at 854.

<sup>205</sup> *Id.* at 855.

<sup>206</sup> *Id.* at 857.

<sup>207</sup> *Id.* at 856.

useful," and the chilling effect of governmental judgments on the arts.<sup>208</sup> This is a danger indeed, because "[t]he pursuit of creativity requires freedom to explore into the gray areas, to the cutting edge, and even beyond."<sup>209</sup>

## 2. *Evaluating the Speaker's Intent under Miller*

As noted above, it has been suggested that a speaker might avoid a conviction under *Miller* by showing that his work has "serious artistic value" because he intended to produce art, rather than obscenity;<sup>210</sup> or he intended to convey an acceptable message, rather than mask material actually sold or distributed for its obscene content.<sup>211</sup> Because of the variety of intentions and purposes, the difficulties of proving these elements at trial, and the "chilling" effect of imposing on an artist the requirement that she act with a certain pre-defined sort of intention, the intent inquiry is an undesirable legal element in the context of live art.

As with art in general, the purposes for creating and "staging" a modern performance vary wildly. Some performers intend to communicate a message of social or political change;<sup>212</sup> some perform out of a desire to experiment with life and experience;<sup>213</sup> some perform as a method of personal catharsis, emotional or otherwise;<sup>214</sup> some as a means of communicating deeply personal messages; some out of a desire to entertain. Should an art piece be "saved" from censorship or an artist escape an obscenity conviction because of what the speaker intended to accomplish via his creative act?

Quite troublesome is the proposition that an artist must prove that he intended to convey a message of the type generally protected by the First Amendment in order to legally legitimize his expression.<sup>215</sup> Assume that an artist, by engaging in expressive activity, intends to convey a particular message or feeling. Clearly, there is no guarantee that a viewer of a particular piece of live art, or other artistic expression, will understand the art to convey the intended message. The viewer might understand the

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<sup>208</sup> *Id.* at 860.

<sup>209</sup> *Id.* at 856.

<sup>210</sup> See Adler, *supra* note 172, at 1369.

<sup>211</sup> See SCHAUER, *supra* note 174, at 140.

<sup>212</sup> For example, Annie Sprinkle intended to "save" sex in an era characterized by fear of AIDS. See CARR, *supra* note 3, at 174.

<sup>213</sup> For example, artists Linda Montano and Tehching Hsieh tied themselves together for one year as a performance piece. See *id.* at 3. Montano was interested in exploring issues such as "claustrophobia, and ego, and power relationships—Life issues." Hsieh viewed the piece as going beyond issues about himself and Montano; instead, the piece was about all people. See *id.* at 5.

<sup>214</sup> Karen Finley began performing in 1979 after her father's suicide, as a means of venting her rage and emotional reaction to his death. See *id.* at 121–22.

<sup>215</sup> The Supreme Court has rejected a similar type of requirement. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 566 (1995).



work to speak about a wholly different topic than that intended. Conversely, a viewer may walk away from an art piece having received a particular message when the creator intended none.<sup>216</sup> A theory that depends on an assessment of the meaning or value of speech to its audience raises serious questions about whether the artist must intend to convey a specific message or idea, and whether the audience must receive the intended message, or any message at all.<sup>217</sup>

In addition, by focusing on audience assessment and interpretation of the work, the notion that speech must convey an idea threatens the speaker's individual liberty in the creative process. "Creativity is a series of autonomous decisions . . . [t]hese are the privileges of creativity, and their loss would surely mean impotence."<sup>218</sup> Annie Sprinkle's savior must arrive in the form of a judge or jury that is capable of viewing her performances as something other than a former porn star offering audiences a thinly disguised peep show, utterly meaningless except for its sexually titillating effect. In order to avoid prosecution or conviction, then, she would be well-advised to gear her creative energies toward an art that conveys an easily understood message. If she does not convey such a message, she must create art that encompasses an aesthetic with majority appeal, which would be more easily understood as a sincere attempt to make "art." By implicitly imposing such requirements, audience-focused theories place the burden on the artist to demonstrate, with objectively understandable evidence, that his art contributes in a recognizable way to some valuable political or social discussion. Or, taking a step back, the artist should imbue his work with a certain type of message—the burden is on the artist to ensure that the "reasonable person" would understand that the work contributes something of value to the public debate. In other words, he must intend to accomplish something specific and "legitimate"—and that intent must be deliberately made manifest to others.

Perhaps art is not made to be understood, but instead to be reacted to on an abstract, non-rational level. Consider the following observation made by Pablo Picasso:

Everyone wants to understand art. Why not try to understand the song of a bird? Why does one love the night, flowers, everything around one, without trying to understand them? But in the case of a painting people have to understand. If only they would realize above all that an artist works of necessity, that he himself is only a trifling bit of the world, and that no more importance

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<sup>216</sup> "Intent", as used in this section, means a purpose to convey a specific message, such as Annie Sprinkle's desire to promote sexuality.

<sup>217</sup> This also raises interesting questions in the context of an alleged artwork on trial. Once the purpose or meaning of an art piece is explained by the artist or an expert, the audience might discern the message more readily than if it had viewed the piece unaided.

<sup>218</sup> BARROWS DUNHAM, *THE ARTIST IN SOCIETY* 74 (1960).

should be attached to him than to plenty of other things which please us in the world, though we can't explain them. People who try to explain pictures are usually barking up the wrong tree.<sup>219</sup>

Now consider the suggestion that an artist can escape an obscenity conviction if he sincerely intended "to create art."<sup>220</sup> This makes no sense. Would it be sufficient for Stelarc to testify, simply, "I suspend my naked body from hooks in order to create art"? This assertion relies on an artificial, semantic characterization of the alleged art piece, and is unlikely to convince a jury. What if instead Stelarc were to expand his testimony as follows: "I suspend my naked body from hooks in order to create art that experiments with the relationship of the physical body with space, and to create a human landscape." With this statement, it would be clear that Stelarc creates work that has some meaning to him personally, but the social value of this meaning remains rather obscure. Therefore, the expressive nature of Stelarc's work might not function to convert it into a vessel of "artistic value" in the eyes of the audience.

Even if he were able to convince a trier of fact that he sincerely intended to make art, a speaker's sincerity might not save the work from condemnation under the *Miller* test. For example, what of the man who performs a piece consisting of nude, nonsensical ravings in an unintelligible language, and later testifies that he sincerely intended to create a piece of art to express the inner rage caused by events in his personal life? One disgusted viewer thinks, "this is garbage, he's nothing but an exhibitionist"; one is frightened, and thinks the performer is merely mad; one is amused, and jeers at the performer's antics; one understands the performance as a commentary on humankind's desire but inability to communicate; none of the viewers perceive the intended expression of pure rage or its genesis. Perhaps one of the viewers perceives some significant value in the performance, perhaps not. Even if an audience fully accepts the artist's testimony concerning his intent and the subjective value of the performance to him as an individual, the majority of that audience might not judge the performance to be of objective artistic merit.<sup>221</sup> Indeed, despite unquestioned sincerity on the part of the artist, the work might be found to satisfy the test for legal obscenity.

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<sup>219</sup> GOLDWATER, *supra* note 1, at 421.

<sup>220</sup> Adler rejects such a standard because evaluating post-modern artwork to determine the artist's sincerity is nearly impossible. See Adler, *supra* note 172, at 1368-69. Her analysis, however, focuses on an audience's evaluation of the materials in order to evaluate the artist's sincerity. In this Article, I refer to the artist's intent as demonstrated by evidence other than the materials on trial.

<sup>221</sup> While this reaction would be valid and certainly valuable in many social, cultural, and individual respects, it is not an appropriate basis for the state to abridge a constitutional right.

Interestingly, it might be noted that in this respect, the censorship of obscene and offensive expression subverts certain goals of audience-oriented ideals. Censorship not only prohibits the artist from showing his work to an audience, but also prevents the audience from seeing the work. *Miller's* censorship test has no effect on what the artist may paint, photograph, or draw in the privacy of his studio.<sup>222</sup> A painting that is never viewed by anyone other than the artist continues to exist. The speaker's version of his ideas or emotions remain placed on the canvas, and still may fulfill certain of the interests sought to be protected by a speaker-based theory. The artist's thoughts and ideas are preserved in their original form; he might harbor an inkling of hope or desire that the painting may be seen by an audience some time in the future. Although preventing a painting from display infringes on the artist's individual liberty interests,<sup>223</sup> the infringement is more potent and direct in the case of performance. Due to its very nature, a performance, unlike a painting or sculpture, must have an audience in order to exist. Removing the possibility of a viewer destroys the essence of the art form itself, thereby precluding any potential benefit to both the audience and the speaker.

### *C. Regulation of Offensive or Indecent Conduct*

*For in a culture where it's increasingly difficult to find the margin, they had found it.*<sup>224</sup>

The regulation of offensive or indecent conduct raises many of the same problems as obscenity, its apparently more depraved counterpart.<sup>225</sup> It also, however, implicates certain unique issues, and therefore is worth brief mention as a separate category of speech.<sup>226</sup> In a sense, the regula-

<sup>222</sup> Mike Diana's sentence for obscenity included a prohibition on his drawing of any more obscene materials, as well as a provision that probation officers would be permitted to search his residence at any time, without a warrant, to determine whether he was in possession of or creating obscene materials. The Supreme Court ultimately denied Diana's petition for certiorari. See generally *Miranda & Tahaney*, *supra* note 159. It is not clear that Diana's sentence, or the terms of his probation, were consistent with *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that a state cannot constitutionally criminalize private possession of obscene materials.

<sup>223</sup> As a general matter, the painter's interests, according to a speaker-focus, would include the right to communicate (i.e., to display his paintings) to a potentially or otherwise willing audience. See *Schneider v. State*, 308 U.S. 147, 164 (1939) (finding that ordinance prohibiting door-to-door canvassing without a permit violated speaker's "liberty to communicate with" others).

<sup>224</sup> CARR, *supra* note 3, at 111 (referring to performance artists).

<sup>225</sup> Offensive speech, by its nature, requires an audience response to determine that it is offensive. In contrast, indecent speech tends to be characterized by erotic content alone. But see *FCC v. Pacifica Found.*, 438 U.S. 726, 739 (1978) (defining "indecent," in part, as "not conforming to generally acceptable standards of morality").

<sup>226</sup> This Article's treatment of offensive and indecent speech draws from the general

tion of offensive conduct is more troubling than the regulation of obscenity. Coincident with the Court's approach to obscenity, speech that is offensive but not obscene may still be subject to restriction if it is deemed of minimal value to society.<sup>227</sup> While obscene materials are governed by an attempt at a relatively specific standard, however, allegedly offensive or indecent conduct is evaluated in an ad hoc manner from the outset. Aside from the notion that offensive or indecent speech is protected, but less valuable than other types of speech, no clear or consistent rules emerge from the caselaw. This lower-value speech tends to be measured against its similarities to other types of speech on the continuum, with political speech at the top and obscenity at the bottom. In that respect, the treatment of offensive or indecent speech tends to parallel the general "rules" of the First Amendment, although not necessarily explicitly so.

In *Cohen v. California*,<sup>228</sup> the Court set forth a relatively strong case for the protection of "offensive" speech. Cohen was convicted for willfully disturbing the peace by offensive conduct as defined by state statute for wearing a jacket that displayed the words "Fuck the Draft" in the county courthouse.<sup>229</sup> The Court viewed the case as presenting an issue of speech, rather than separately identifiable conduct, and therefore not implicating *United States v. O'Brien*.<sup>230</sup> In overturning the conviction, the Court expressed concern that the government, in suppressing offensive speech, would suppress ideas in the process, and that doing so would provide a "convenient guise" for "banning unpopular views."<sup>231</sup> Further, it noted that the freedom of speech itself had developed "in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."<sup>232</sup> Despite the crude language involved in the case, perhaps Cohen's political, non-erotic expression was of a type easier for the Court to stomach than the erotic or indecent.<sup>233</sup>

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discussion set forth in Anne Salzman, Comment, *On the Offensive: Protecting Visual Art with Sexual Content Under the First Amendment and the "Less Valuable Speech" Label*, 55 U. PITT. L. REV. 1215, 1235-43 (1994).

<sup>227</sup> See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-68 (1991).

<sup>228</sup> 403 U.S. 15 (1971).

<sup>229</sup> *Id.* at 16.

<sup>230</sup> See *id.* at 18. See also *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>231</sup> *Cohen* at 26.

<sup>232</sup> *Id.* at 24 (citing *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring)).

<sup>233</sup> Although not specifically characterizing Cohen's speech as political, the Court alluded to his "right to criticize public men and measures." *Cohen*, 403 U.S. at 26 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)). In addition, it specifically noted that Cohen's speech was not erotic in nature. See *id.* at 20.

Indeed, the law has proved less protective for cases involving the erotic or indecent.<sup>234</sup> The Court has stated that nudity or sexual content alone will not place speech outside of the First Amendment's protections.<sup>235</sup> It also has stated, however, that although "the First Amendment will not tolerate suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate."<sup>236</sup> The Court has characterized erotic expressive conduct as "within the outer perimeters of the First Amendment, though . . . only marginally so."<sup>237</sup> Therefore, the Court has upheld restrictions on expression such as erotic films<sup>238</sup> and nude dancing.<sup>239</sup> The restrictions have been found to be justified by state interests, including the protection of social order and morality.<sup>240</sup>

Occasionally, the Court has justified restrictions on lower-value speech by reference to its confrontational quality.<sup>241</sup> For example, in a case dealing directly with offensive speech, *FCC v. Pacifica Foundation*,<sup>242</sup> the Court considered the regulation of a radio broadcast of George Carlin's *Filthy Words* monologue, in which Carlin used seven dirty words selected precisely because they were the ones that could never be said over the airwaves.<sup>243</sup> The Court observed that "the constitutional protection accorded to a communication containing . . . patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that its capacity to offend and its 'social value' . . . vary with the circumstances."<sup>244</sup> Accordingly, expression with "'vulgar,' 'offensive,' and 'shocking'" content is "not entitled to absolute constitutional protection under all circumstances."<sup>245</sup> Significantly, the Court observed that Carlin's monologue might have been entitled to protection if its offensive character had been traceable to

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<sup>234</sup> See generally Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1235-57 (1993).

<sup>235</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Roth v. United States*, 354 U.S. 476, 487 (1957).

<sup>236</sup> *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976).

<sup>237</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

<sup>238</sup> See *Repton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Young*, 427 U.S. at 70-72.

<sup>239</sup> See *Barnes*, 501 U.S. at 572.

<sup>240</sup> See *id.* at 569-70.

<sup>241</sup> The Court has done this despite *Cohen*'s hedged rejection of the "unwilling viewer" factor as determinative. *Cohen v. California*, 403 U.S. 15, 21 (1971). Again, I do not intend here wholly to dismiss the interests of an unwilling viewer. I believe, however, that if those interests are to be protected by the government, this must be accomplished in a manner that is least restrictive to the speaker's interests.

<sup>242</sup> 438 U.S. 726 (1978).

<sup>243</sup> See *id.* at 729, 751.

<sup>244</sup> *Id.* at 747.

<sup>245</sup> *Id.*

political content.<sup>246</sup> The Court ultimately concluded that because of the unique aspects of a radio broadcast—the way in which it confronts the listener and is accessible to children—the FCC could properly regulate the broadcast.<sup>247</sup>

The problems discussed in the obscenity context—the difficulties of evaluating artistic merit, locating the appropriate judge, and defining the permissible scope of activity that is offensive or indecent to the point of being constitutionally unacceptable—arise in the case of non-obscene materials as well. For example, the work of both Stelarc and Nuttall might not meet *Miller's* obscenity test, as they do not seem directed toward “prurient interests.” They are, however, potentially shocking, vulgar, and offensive—aspects that are deeply ingrained in the conduct and expression itself. Particularly for a subject as chameleon-like and elusive as “art,” the current law provides little guidance for the potential speaker, and poses the danger of suppressing or chilling speech that is, intentionally or otherwise, anti-majoritarian in nature.

#### IV. Toward a Speaker-Oriented First Amendment

*Profound statements must be drawn by the artist from the most secret recesses of his being . . . What I hear is valueless; only what I see is living, and when I close my eyes my vision is even more powerful.*<sup>248</sup>

In contrast to the perspectives embodied in obscenity standards, protecting speech has been justified on speaker-oriented grounds. First, speech and expression are seen as necessary for individual self-fulfillment. Under some views, the goal of individual development is the single most important reason for protecting free speech. As scholars and members of the Supreme Court have recognized, free speech is an end in itself, and is intrinsic to individual dignity and autonomy.<sup>249</sup> Accordingly, the First Amendment serves the needs of the human spirit, and not only the needs of the polity.<sup>250</sup> Speaker-focused justifications do not, as general matter, require a radical alteration in First Amendment “rules” that have been developed by the caselaw. Instead, they require a shift in emphasis, and heightened recognition of the speaker’s interests. As demonstrated by this Article’s discussion of obscenity, standards that embody a rigid marketplace theory, to the exclusion of any consideration for individual liberty and self-expression, do not sufficiently protect the impor-

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<sup>246</sup> See *id.* at 746.

<sup>247</sup> See *id.* at 748.

<sup>248</sup> GOLDWATER, *supra* note 1, at 439 (quoting painter and writer Giorgio De Chirico).

<sup>249</sup> See *Herbert v. Lando*, 441 U.S. 153, 186 n.1 (1979) (Brennan, J., dissenting).

<sup>250</sup> See *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

tant interests held by either the speaker or his potential or actual audience.

Considering the audience and speaker theories in isolation, which is by no means a universally accepted approach,<sup>251</sup> protecting speech on grounds of individual liberty presents the most compelling justification for protecting art in general, and live art in particular.<sup>252</sup> Notably, protecting speech based on individual liberty has been closely tied to the political speech theory.<sup>253</sup> Although advocating a speaker-focus in the context of an audience-dependent art form may present a certain irony, it is the only premise that will minimize the possibility of undesirable and inconsistent value judgments, and the burdens placed on an individual artist, posed by audience-oriented justifications. Given the nebulous nature of audience understanding of "artistic merit," as well as the impossibility of predicting audience interpretation or reaction and the immediate, live nature of performance art, the speaker remains the sole fixed and determinate element in the live art equation.

### A. A Presumption of First Amendment Coverage

It is difficult, for many reasons previously discussed, to demonstrate that a work of live art is "sufficiently imbued with elements of communication" to qualify as "speech."<sup>254</sup> Under the auspices of a speaker-focused First Amendment, however, an initial and sincere, claim of artistic expression should suffice to bring expressive conduct within the ambit of the First Amendment's protection. Such a presumption is not alien to First Amendment jurisprudence.<sup>255</sup> Interpreting the mandate that Congress shall not interfere with the "free exercise of religion," the Supreme Court does not question whether a claimant's religious beliefs or practices are valid; instead, sincerity in one's belief is sufficient to sustain a claim of a First Amendment violation, or a request from an exemption from a generally applicable law. For example, the Court accepted a claim

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<sup>251</sup> Some scholars, such as Thomas Emerson and Rodney Smolla, advocate a "multiple justifications" approach to the First Amendment, which posits that marketplace and human dignity theories provide mutually supportive rationales for the protection of speech. See RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2.01[2] (1994); EMERSON, *supra* note 30, at 3-6.

<sup>252</sup> John Frohnmeier, who was head of the NEA during the "NEA Four" conflict, described the First Amendment as conferring a "freedom of conscience," JOHN FROHNMEIER, *OUT OF TUNE: LISTENING TO THE FIRST AMENDMENT* at viii (1995), and the "exhilarating, compelling, and fulfilling belief that we are in charge of our lives, that we are free to make our own choices." *Id.* at 34.

<sup>253</sup> See, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (recognizing the right to make thoughts public as contributing to an open society).

<sup>254</sup> *Spence v. Washington*, 418 U.S. 405, 409 (1974).

<sup>255</sup> See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 306-07 (1984) (Marshall, J., dissenting) (discussing free exercise and military service exemptions).

that mandatory school attendance laws infringed on the protected religious beliefs of Amish parents;<sup>256</sup> similarly, the California Supreme Court accepted a claim that a landlord's religious beliefs prevented her from renting her property to unmarried couples, despite the fact that no organized religious authority required her to refrain from such activity.<sup>257</sup> In the free exercise context, merely accepting the claimant's sincerity in her belief boosts the claimant over threshold legal hurdles, and might result in the award of an individual exemption from laws applicable to the rest of us.<sup>258</sup> Although the ability to protect artistic expression does not depend on such similarities, the creative process is, in many ways, analogous to religious belief. Like religious belief, the creative process is basic to humanity but defies accurate description—it is, in many respects, a matter of faith. Like religion, the desire to follow the bidding of the creative urge is powerfully and deeply rooted in the individual. Mikhail Baryshnikov stated that through his dancing, he has found “what people seek in religion: ‘some approximation to exaltation, inner purification, self-discovery.’”<sup>259</sup> Just as our courts have recognized that there is something different about religion—something that renders it deserving of a special deference and protection—so it is with creativity.

For that reason, the creative urge, process, and its end product should be afforded a presumption that they are protected “speech” in their own right.<sup>260</sup> As discussed above, placing the burden on a speaker to demonstrate that he has created something deserving of the elusive title of “art,” or something of “artistic merit,” is fraught with difficulty. When a painting is denounced by critics, audiences, or juries, the speaker's prior creative and decisionmaking processes are not retroactively stripped of value to its creator.

Once a claimant asserts that he was engaged in expressive activity, and the court accepts that the claimant has testified in good faith and without fraud, a presumption should be established that First Amendment “speech” is at stake.<sup>261</sup> At that point, a court should then examine whether there are other, independently viable reasons for regulating the speaker's conduct that are unrelated to the content of the speech. In addition, any

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<sup>256</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>257</sup> See *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996).

<sup>258</sup> See generally HAIMAN, *supra* note 21, at 79–80 (discussing applicability of approach to free exercise in free speech context). *But cf.* *Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (denying Native Americans a religious exemption from drug laws for ritual smoking of peyote). This decision has severely limited the availability of religious exemptions, such as that afforded in *Yoder*.

<sup>259</sup> Joan Acocella, *The Soloist*, NEW YORKER, Feb. 25, 1998, at 46.

<sup>260</sup> *But see* Adler, *supra* note 172, at 1376 (rejecting a standard that would exempt anything the artist designates as art from finding of obscenity, in part because a hard-core pornographer could assert that his productions are “art”).

<sup>261</sup> See HAIMAN, *supra* note 21, at 79–80 (discussing the potential for abuse of this proposal).



such regulation should be considered, and accomplished, in a manner that is the least restrictive to the speaker's expressive interests.

### *B. When Regulation of Expression Might Be Proper*

Because performance art involves action, it pertains to audience interests that go beyond the nebulous moral and aesthetic interests most often implicated by obscenity and offensiveness law,<sup>262</sup> and directly into the immediate physical realm. Clearly, the First Amendment does not "give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."<sup>263</sup> Physical action, unlike static or two-dimensional visual images, might implicate the public interest in physical health and safety.<sup>264</sup> Ron Athey, whose performances involve potential contact between members of the audience and human blood, raising concerns about infectious disease, provides another example. At some point, the artist's interest in freely creating his art will collide with the public interest in health and safety, and some regulation of his conduct becomes appropriate.<sup>265</sup> According to Professor Emerson, "a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action.' 'Expression' must be freely allowed and encouraged. 'Action' can be controlled . . . but not by controlling expression. A system of freedom of expression cannot exist effectively on any other foundation."<sup>266</sup> Current standards for evaluating restrictions on protected conduct attempt, in many respects, to embody this principle.

#### *1. Current Approaches to Analyzing Regulation of a Claimant's Conduct*

In analyzing government regulation of expressive conduct, the Court has devised a distinction that, by its terms, applies to circumstances in which "'speech' and 'nonspeech' elements are combined in the same course of conduct."<sup>267</sup> In *United States v. O'Brien*, the defendant was convicted of burning his draft card on the front steps of a Boston courthouse, in protest against the war and the draft, before a "sizable" crowd that included several FBI agents.<sup>268</sup> During his criminal trial in federal

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<sup>262</sup> See *infra* note 306 and accompanying text.

<sup>263</sup> *Cohen v. California*, 403 U.S. 15, 19 (1971).

<sup>264</sup> Words, also, can implicate such interests. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

<sup>265</sup> Indeed, many of the Court's opinions in this area have taken pains to point out the passive nature of the conduct at issue. See, e.g., *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>266</sup> EMERSON, *supra* note 30, at 17.

<sup>267</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

<sup>268</sup> See *id.* at 369.

court, O'Brien testified that he burned the card publicly "to influence others to adopt his antiwar [sic] beliefs," and so that others would "re-evaluate their place in the culture of today."<sup>269</sup> On appeal to the Supreme Court, O'Brien argued that his act was symbolic speech, and protected by the First Amendment.<sup>270</sup>

In response, however, the Court held that when speech and non-speech elements are combined in one action, the nonspeech elements may be regulated if the regulation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>271</sup> The Court assumed that even if the "alleged communicative element" in O'Brien's card-burning conduct was "sufficient to bring into play the First Amendment,"<sup>272</sup> he was and could be convicted only for the "noncommunicative aspect" of that conduct.<sup>273</sup> Instead of being aimed at the message conveyed, the law criminalizing the destruction of draft cards was necessary to achieve the state's substantial interest in ensuring the efficient functioning of the system of raising armies.<sup>274</sup> In a concurring opinion, Justice Harlan interpreted the *O'Brien* test as allowing First Amendment claims when a regulation that satisfies the majority's test wholly prevents a speaker from "reaching a significant audience with whom he could not otherwise lawfully communicate."<sup>275</sup>

Further, the *O'Brien* test does not differ substantially from the analysis used to assess "time, place, and manner" restrictions on speech-related activities.<sup>276</sup> This lack of distinction between the *O'Brien* and the time, place, manner analyses is somewhat troubling, because a "least restrictive" requirement does not apply in the time, place, and manner context.<sup>277</sup> The traditional formulation of that analysis permits the government to impose reasonable restrictions on the time, place, or manner of protected speech, "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."<sup>278</sup> The for-

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<sup>269</sup> *Id.* at 370.

<sup>270</sup> *See id.* at 376.

<sup>271</sup> *Id.* at 377.

<sup>272</sup> *Id.* at 376.

<sup>273</sup> *Id.* at 382. For alternative views on the separability of action and expression, compare EMERSON, *supra* note 30, at 80, with John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

<sup>274</sup> *See O'Brien*, 391 U.S. at 382.

<sup>275</sup> *Id.* at 389 (Harlan, J., concurring).

<sup>276</sup> *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

<sup>277</sup> *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

<sup>278</sup> *Clark*, 468 U.S. at 293.

mulation, however, has been subject to some subtle rewording with potentially far-reaching effects. For example, the requirement that a regulation be "justified without reference to the content" has been read to require appropriate "predominate concerns" justifying the regulation, rather than requiring that a "motivating factor" be unrelated to content.<sup>279</sup> In addition, it has been stated that under this analysis, the regulation must "allow[ ] for reasonable alternative avenues of communication,"<sup>280</sup> which is narrower than requiring ample alternatives. The Court's method of applying the time, place, and manner analysis has been criticized, in that it has "seemingly overlooked" the fact that restrictions on speech that are deemed content-neutral under that analysis remain capable of "unnecessarily restricting protected expressive activity."<sup>281</sup>

In any case, *O'Brien's* supposed distinction between the regulation of speech and the regulation of "nonspeech" has been subject to critique. "Since both verbal and non-verbal conduct advances First Amendment values, the purpose of the distinction is unclear."<sup>282</sup> However, the central theory underlying both *O'Brien* and the time, place, and manner analysis is valuable: the state cannot regulate speech if the interest that it seeks to serve is related to the suppression of expression. Application of this underlying theory to artistic expression does not necessarily depend on a dissection of expression into separable elements of "speech" and "action." Instead, as discussed in the following Section, the analysis should focus on the interest that the regulation attempts to serve, and the harms that it seeks to prevent.

## 2. A Speaker-Oriented Proposal for Addressing Harms

Even though the presence of conduct in conjunction with protected speech may result in a legal justification for regulating the expression in its entirety, the appropriate question is not whether particular speech causes harm, but how it causes harm.<sup>283</sup> This echoes the words of Professor Haiman:

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<sup>279</sup> *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). See generally Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1262 (1995) (discussing the difference between looking to justification behind a regulation and looking to its motivation).

<sup>280</sup> *Renton*, 475 U.S. at 50.

<sup>281</sup> *Clark*, 468 U.S. at 313 (Marshall, J., dissenting) (critiquing the creation of a two-tiered approach to the First Amendment, whereby regulations that are not aimed at content are subject to minimal scrutiny); see also *Renton*, 475 U.S. at 57–58 (Brennan, J., dissenting).

<sup>282</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA. L. REV. 964, 1010 (1978).

<sup>283</sup> See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997).

[a] free society will always draw the line between what it considers immoral and what it makes illegal as close as possible to the more serious, direct, immediate, and physical of the harms, and will leave to the operations of social pressure, education, and self-restraint the control of behaviors whose harm to others is less serious, less direct, less immediate, and less physical.<sup>284</sup>

When speech and conduct are so enmeshed that they may be reasonably characterized as one and the same, the question is not whether the expression constitutes speech or conduct, but instead whether the expression causes any harm that the state can legitimately seek to prevent.

This Section outlines some criticism and suggestions regarding the intractable problem of identifying the precise types of harm that might justify regulating expressive conduct. First, however, it is important to recognize the foundational proposition that preventing solely "moral harms," and promulgating or enforcing selected moral beliefs or social norms, should be deemed unacceptable as a sole basis for suppressing protected speech.<sup>285</sup> This proposition is consistent with the time, place, manner and *O'Brien* analyses, and merits further explication.

Taken at their most basic, moral judgments are "nothing but expressions of preference, expressions of attitude or feeling . . . [and] being expressions of attitude or feeling, are neither true nor false; and agreement in moral judgment is not to be secured by any rational methods, for there are none."<sup>286</sup> As such, "[t]he choice among competing values is . . . arbitrary . . . a matter of purely personal subjectivity."<sup>287</sup> Given such definitions of morality, "[a] free society simply cannot function as such if moral premises that are not almost universally agreed to are written into the law."<sup>288</sup>

Because purely "moral harms" are non-regulable, the risk that speech might lead to "undesirable" change in social attitudes does not justify its restriction. In other words, "there can be no interference with free expression on the general ground that it will lead to social change," or social change in the wrong direction.<sup>289</sup> Indeed, the power of speech to

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<sup>284</sup> HAIMAN, *supra* note 21, at 85. Of course, as Haiman observes, "serious" harm can be psychological as well as physical. The question is how psychological or indirect harms should be addressed, and to what degree an intrusion into First Amendment interests is justified.

<sup>285</sup> See EMERSON, *supra* note 30, at 45-46. But see *Miller v. California*, 413 U.S. 15, 21 (1973); *Paris Adult Theatre v. Slaton I*, 413 U.S. 49, 60-63 (1973).

<sup>286</sup> MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 10 (1988) (quoting ALASDAIR C. MCINTYRE, *AFTER VIRTUE* 11-12 & n.4 (1981)). These arguments are premised on a fundamental skepticism about the determinacy of morality, a view that is clearly not universal. See *infra* note 294 and accompanying text.

<sup>287</sup> *Id.* at 10 (quoting JAMES S. FISHKIN, *BEYOND SUBJECTIVE MORALITY* 1 (1984)).

<sup>288</sup> HAIMAN, *supra* note 21, at 85.

<sup>289</sup> EMERSON, *supra* note 30, at 47. But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Paris Adult Theatre*, 413 U.S. at 63.

influence social change is precisely a reason to guard it assiduously. In *American Booksellers Ass'n. v. Hudnut*,<sup>290</sup> Judge Easterbrook characterized the government's position in defense of its anti-pornography law as positing that "pornography affects thoughts," with undesirable results.<sup>291</sup> Judge Easterbrook observed, however, that "[i]f the fact that speech plays a role in a process of conditioning were enough to permit government regulation, that would be the end of freedom of speech."<sup>292</sup> Even accepting the premise that "depictions of subordination tend to perpetuate subordination," and that this in turn leads to the harms of "affront and lower pay at work, insult and injury at home, battery and rape on the streets," the court found the government's argument countervailing, because these effects "simply demonstrate[ ] the power of pornography as speech."<sup>293</sup>

Moral codes infuse our laws on many levels,<sup>294</sup> and it could be argued that they often embody a "correct" result. However, the crucial question in the context of free speech is whether the law is seeking to regulate speech solely because of a perceived objectionable idea or message it carries, because it will "affect thoughts," or whether there are independent, constitutionally legitimate interests that justify regulating the conduct.<sup>295</sup> This concept is embodied in the First Amendment's prohibition on content-based regulation of speech: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>296</sup> Similarly, the government is not permitted to "impose special prohibitions on those speakers who express views on disfavored subjects,"<sup>297</sup> and cannot "rove around imposing general standards of decency."<sup>298</sup> Often, the harms that are alleged to result from offensive or disagreeable speech are too intertwined with the speech itself and the ideas it expresses to be effectively separated out.

<sup>290</sup> 771 F.2d 323 (7th Cir. 1985).

<sup>291</sup> *Id.* at 328.

<sup>292</sup> *Id.* at 330.

<sup>293</sup> *Id.* at 329. Similarly, in response to the government's assertion that pornography was "low value speech," similar to obscenity and therefore regulable, the court noted that the argument that pornography influences social relations and controls attitudes "precludes a characterization of the speech as low value." *Id.* at 331.

<sup>294</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (recognizing that laws are often rooted in morality). However, the decision in *Hardwick* rested on the Court's refusal to find a fundamental right to engage in the conduct, or to invalidate a law against it.

<sup>295</sup> It has been suggested that although the freedom of expression resembles freedom of speech, it does not share the same absolute protection the latter enjoys, because it is not necessary for "completely unfettered . . . discussion of the public business." GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION* 54 (1995). Under that view, freedom of expression can be "legitimately regulated by the law for the sake of common morality." *Id.* at 55.

<sup>296</sup> *Texas v. Johnson*, 491 U.S. 397, 415 (1989).

<sup>297</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

<sup>298</sup> *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2187 (1998) (Souter, J., dissenting) (citing *Reno v. ACLU*, 521 U.S. 844 (1997)).

We can thus narrow our discussion by isolating the notion that it is improper to suppress speech solely because the ideas it expresses conflict with a particular moral code. It has been suggested that "victimless communicative actions," which do not pose any direct threat to the public health or safety, should not be subject to regulation.<sup>299</sup> If one accepts the premise that the absence or presence of communicative nature or intent is not determinative of the value of "speech," then this analysis should also be extended to "victimless expressive actions," which are not in fact, nor intended to be, communicative. Such victimless actions might include those that could have some tangential effect on the mindset of an actor or audience. In such cases, expressions that cause offense, indignation, or repulsion, or might influence a person's sexual behavior or views on sex,<sup>300</sup> but cause no other "harms," might properly be considered victimless. Accordingly, the state should not be permitted to regulate that expression based on its expressive content. For this reason, in addition to those set forth in the previous section, most regulation of obscene and offensive or indecent expression is likely an affront to the First Amendment.

If one accepts that the law cannot properly seek to prevent merely moral or "thought-affecting" harms<sup>301</sup> based on the ideas contained in a particular type or piece of expression, it follows that "expressive conduct that advances the actor's values should be protected, unless it is 'coercive,' physically injurious, or intended to be improperly obstructivist."<sup>302</sup> The types of harm that should be prevented by the law are those that are defined by statute, and, in accordance with the principles set forth in the *O'Brien* and time, place, and manner tests, the purpose for preventing the harm must be unrelated to suppressing expression, or to suppressing any "offensive" aspects that imbue the speech with expressive (and not just communicative) significance.<sup>303</sup>

Once the harm sought to be prevented is identified, the speech should be regulated in the least restrictive manner possible, in accordance with *O'Brien's* requirement that the regulation's effect on protected expression be no greater than necessary to further the government's interest. This prong of *O'Brien* has not, however, been applied as a "least re-

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<sup>299</sup> HAIMAN, *supra* note 21, at 70-80.

<sup>300</sup> Indeed, some (even the "victim") would consider these types of reactions to be favorable progress, rather than "harms."

<sup>301</sup> I am not suggesting that non-physical harms are unworthy of legal recognition, and do not intend to minimize the possible severity of such harms. Indeed, our laws routinely compensate for emotional distress and emotional harms. Instead, I am suggesting that the nature of the harm must be examined relative to the interest that would be infringed in the name of preventing that harm.

<sup>302</sup> BAKER, *supra* note 18, at 73.

<sup>303</sup> Of course, this raises the question of viewer consent. In *Hudnut*, the court observed that "[t]he 'captive audience' problem does not permit a government to discriminate on account of the speaker's message." *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985).

strictive means" requirement.<sup>304</sup> Instead, the *O'Brien* "no greater than necessary" test has been construed as being roughly equivalent to the narrow tailoring requirement of time, place, and manner regulations, thus eviscerating much of *O'Brien's* speech-protecting potential.<sup>305</sup> An analysis of the least restrictive means, however, is necessary to avoid impinging upon important expressive interests of the speaker. Furthermore, because such an analysis does not preclude the use of *any* means to prevent a particular harm, it would sanction a regulation that adequately respects the audience as well. For example, if Ron Athey's performance raises concerns about the transmission of AIDS or other communicable disease, perhaps he would be required to use blood that has been tested for HIV, or carve into the body of a person who is not HIV-positive. Perhaps, as has been done with other performances, the audience could be shielded by sheets of clear plastic. Whatever the resolution, it is clear that there are a number of feasible options that would prevent or minimize any dangers posed by Athey's performances, rather than preventing the production altogether.<sup>306</sup> Similarly, preventing the harms of viewer offense might be better effected by the actions of the audience itself in avoiding the offensive expression,<sup>307</sup> or by seeking affirmative private, rather than governmental, action. In order to preserve a robust First Amendment, its protections must be applied in the most scrupulous manner, and with the utmost respect for the interests of both speaker and audience, to the exclusion of neither.

## V. Conclusion

Audience-oriented standards, such as those that reflect a "marketplace of ideas" theory of the First Amendment, focus on the interests of the audience to the exclusion of those of the speaker. Such standards, like the ones devised to deal with the obscene and offensive or indecent, locate the value of artistic expression solely in its worth to the audience, and do not adequately recognize or protect the speaker's profound interests in

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<sup>304</sup> For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court rejected the proposition that the regulation was invalid because less-restrictive regulatory alternatives existed, such as reducing the size or duration of demonstrations at issue. *See id.* at 295.

<sup>305</sup> Indeed, Professor Emerson has taken issue with the notion that *O'Brien's* formulation provides any significant protection to speech. *See* EMERSON, *supra* note 30, at 84; *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (rejecting an interpretation of *O'Brien* that would require an analysis of the least-intrusive means of regulation).

<sup>306</sup> Previously, I have suggested the use of a "least restrictive means" standard for regulating "static" artwork, such as paintings or sculpture. In that article, I suggested that it would be preferable to require "warning signs" before an allegedly offensive art exhibit, rather than closing the exhibit altogether. *See* Salzman, *supra* note 226, at 1248-56. In the case of performance art, however, which might involve conduct, sound, and the like, such precautions might be inappropriate. *Cf.* *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>307</sup> *See* *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Cohen*, 403 U.S. at 21.

self-expression and self-development. Artistic expression is different from other forms of "speech," although the differences are elusive. The value of the creative process to the creator is undeniable—but it is also unquantifiable and not easy to describe. Further, it is similarly difficult to ascribe a value to the results of that process, which can give rise to varying audience interpretations and reactions. A desire to communicate to others, or the lack of such a desire, does not affect the worth that expression has for the speaker. Even when communication to others is a secondary purpose, the artistic speaker enriches and illuminates his own inner life through his work. That process and its benefits deserve legal recognition and protection from government interference. Unfortunately, while assuming that artistic expression is protected by the First Amendment, our legal system has failed to define the justifications for or parameters of that protection.

Further, audience-oriented standards also raise difficult practical questions about whose sense of taste, style, or morality should act as the filter between good art and bad art, or art and non-art. In the context of the unique qualities of live art, these questions become even more complicated. Performance art, an ever-changing and boundless form of expressive activity, has been the recent subject of unfavorable media attention and scathing criticism due to some of its more shocking and vulgar attributes. Live art is inherently confrontational, and therein lies its power as a vehicle for communication and self-expression. As conventional notions of art and aesthetics erode, members of the arts community and the general public alike face increasing difficulty defining "art" or "artistic merit." Moreover, the fact that it is difficult to reproduce a live art piece faithfully for a second audience affects the ability of the judge or jury to effectively evaluate the piece. Accordingly, audience-focused standards, which call on judges and juries to discern some larger value in the strikingly novel or vulgar, ask unfair and impossibly complex practical and philosophical questions. As a result, such standards pose the dangers of chilling both social progress and individual creative development, and of suppressing anti-majoritarian speech.

In order to treat live art in a manner that respects its status as artistic expression, and recognizes the indeterminate value of the creative process to the individual creator, the law must, at the very least, incorporate a newer, more expansive understanding of the variety of conduct potentially encompassed by the term "art." First, a claimant must be permitted to consider his art on its own terms, and his sincerity in declaring his expression to be artistic, or self-expressive in a profound sense, should bring it under the First Amendment's umbrella, no matter what titles the rest of us would rather impose upon his expression. Second, a court should permit restriction of artistic expression only where it poses the danger of a legitimately preventable harm that is unrelated to the idea, received message, or expressive nature of the artistic speech. Third, re-



strictions should be permitted only if the court determines that it is necessary to prevent the harm, and represents the least restrictive means of doing so. By adopting such a standard, courts can minimize the nebulous value judgments inherent in any attempt to assess the social or artistic value of artistic expression. In addition, focusing on the speaker rather than the audience would eliminate the difficulties inherent in the need to define "art" or "artistic value," and leave the clarification of those terms with the creators themselves.

