

Dear everyone,

I've taken advantage of Tom's invitation to write a paper on religion and copyright that was "informal in format, in keeping with the informal nature of this gathering". What I have had to say on the Jewish law of gleaning is already on record;¹ what you'll read here are more like meditations. Thinking about the connections between art, spirituality and law has touched some very personal issues for me. Further, I know that everything I have to say is partial. I hope what I am about to give you will nevertheless raise some questions of interest.

Incidentally, some of what appears below evolved from an unpublished lecture called "What's Art Got to Do With It?" that I gave at Cardozo some time ago.

Please keep this all confidential between us: please don't recirculate via email, quote, etc., except among ourselves. Thank you.

Wendy

ART AND THE INTRINSIC WORTH OF A HUMAN LIFE

I. INTRODUCTION

This ^{essay} ~~brief~~ essay suggests that art like religion can help foster recognition of individuals' intrinsic importance. It tentatively explores what would change in the law of copyright and so-called moral rights, if somehow we could measure the extent to which an act of creation, recreation, or copying connects with the intrinsic importance of an individual.

Roberta Kwall's fascinating article on moral rights is the first piece I know of that puts forward the question of how the law of intellectual products might respond

¹ Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 *FORDHAM LAW REVIEWS* 2411-35 (2009).

to the needs of the “intrinsic soul.”² Accordingly, much of this small essay of mine centers on Roberta’s work. As she is one of the recipients of this missive, I’m looking forward to her comments, and to all of your reactions.

II. WHAT “INTRINSIC” MEANS

The opposite of “intrinsic” is instrumental. Both religion and art can validate that individuals are important not merely for what the individual can accomplish for other people, but also for their own sake (and God’s). We must not treat others simply as instruments of our will, but must embody in our actions and minds the recognition that the other person has an intrinsic importance in and of herself. Kant is famous for telling us that we should not treat each other as “mere means” but the sentiment does not originate in Kant. The abhorrence of being treated merely as the instrument of another’s will goes deep in western culture,³ and I claim that value as my own.

Tied to the notion of people having intrinsic worth is the recognition that the other person is not merely an object, but is also a subject: not only something to be looked at, but also a person who looks out through her own eyes. In our culture, “being treated like an object” is an insult even if the treatment is luxurious.

Also linked to the notion of intrinsic worth is the issue we know as “commodification”: the question of deciding what aspects of life should be placed

² Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *Notre Dame L. Rev.* 1945, 1947 (2006) (“The intrinsic dimension of creativity ... is one characterized by spiritual or inspirational motivations that are inherent in the creative task itself as opposed to motivation resulting from the possibility of economic reward.”)

³ To choose self-abnegation is a different story.

outside the realm of commerce. To be able to buy something for a set amount of money implies that the thing is interchangeable with everything else that can be purchased for that amount of money. (Transaction costs aside, one object can be transformed into another: if I buy a goat for \$20 and really want a tricycle, and a tricycle costs \$20, I can probably find someone willing to exchange my new goat for a trike.) The role of interchangeability leads us to enunciate one characteristic of “intrinsic”, namely, uniqueness. Uniqueness is one cause of “incommensurability”-- the inability or refusal to measure things in a common metric.⁴

Commodification also raises another characteristic linked to “intrinsic worth”, namely, recognition of the other person’s will. Things on a market are there to be sold. Let me quote a bit of rude dialogue from the movie “The Wild, Wild West.” In the scene I refer to, one of the heroes dresses in drag as a disguise. When he (in trollop’s clothing) rebuffs a cowboy’s proposition, the cowboy exclaims in both anger and puzzlement, “You’re a whore, you can’t say no.”

*They
cannot
keep.*

Respect for persons seems to involve allowing them to express their will even when it diverges from one’s own: all are entitled *not* to sell when they prefer not to⁵

And sometimes it adds the dignity of m. to forbid even willing sellers.

⁴ Michael Walzer in Spheres of Justice argues that an important reason for keeping everything from being measured in money is to keep equality. Some of us excel in profit-making, some in physical sports, some in holiness, some in intelligence, some in political acumen. To “buy” an Olympic medal, a churchly office, a Nobel prize, or a vote is forbidden-- in part, he argues, to keep one set of people from dominating all areas of life.

I think he’s right that incommensurability and limits of commodification aid the cause of equality, but I don’t see equality as the main reason why law or culture forbids the buying and selling of some things.

⁵ Neil Netanel has focused on the related question of how restraints on alienation might

By “intrinsic” I do not mean that an individual is supremely valuable—it is a very separate question whether one can be rightly called upon to sacrifice the self. But each person makes valid claim to have an incommensurable value.

The Bible tells us that the shepherd who has lost a single sheep should go look for it, even if it means putting the rest of the flock temporarily at risk.⁶ From a consequentialist perspective such behavior might well be irrational: if wolves are near, the shepherd may well lose more than one sheep unless he stays with the flock; in consequential terms he should stay with the larger group and sacrifice the lost lamb. But we all are the lost lamb at one time or another, and the danger to the flock is only speculative rather than certain. Something in the command to search for the lost sheep makes sense; it speaks to our sense that everyone has intrinsic worth.

Let me extend the notion of “intrinsic” one step further, and use it to examine how we look at the world. I argue we gain something when we fully attend to things *as they are* without trying to turn them to our own use. I think there’s a link between recognizing/attributing intrinsic value to the world around us, and recognizing intrinsic value in ourselves. Further, I think seeing others’ intrinsic worth (and our own) is linked to spirituality.

or might not serve interests of autonomy.

⁶ The parable appears in Jewish prayer services, but the most well known source is Christian:

From Matthew 18:12–13

12How think ye? if a man have a hundred sheep, and one of them be gone astray, doth he not leave the ninety and nine, and goeth into the mountains, and seeketh that which is gone astray? 13And if so be that he find it, verily I say unto you, he rejoiceth more of that sheep, than of the ninety and nine which went not astray.

You may well balk here, given the number of undefined terms I am advancing. But try to give my discussion the benefit of the doubt..

III. HOW IS THE INTRINSIC VALUE OF HUMANS LINKED TO ART

There may be hundreds of ways in which the (religious) search for intrinsic value is linked to art, but I want to focus on two: First, that as a psychological matter I think that appreciation for the intrinsic value of things makes one want to create. That is, among the many non-economic causes of creating art, I think that one is appreciation for what we have been given, art as gratitude. Second, I think that being trained as an artist, or as a person who understands art, assists the person in appreciating the intrinsic value of things in a way that also helps her appreciate the intrinsic value of herself.⁷

Does this relate to one's person

A. ART AS GRATITUDE

Let me address my first proposition, that appreciation for the intrinsic value of things makes one want to create. As anecdotal ‘proof’, let me offer my own experience:

At fifteen I found myself looking at a tree against the sky and being filled up with something bigger than I could contain. It was a sensation that demanded to be poured into something. The best label I could find for the emotion was “gratitude”: Gratitude for the world I had not made, but had been given.

In the gratitude was a kind of command to make something, to give something back. Or perhaps I shouldn’t say it “commanded” me to create something. Rather, what I sensed was that I was holding *too much* – too much of something wonderful— that demanded release. I can’t say *how* it

⁷ Lest it sound like I am advancing a circular argument, let me stipulate: a person not trained in art can by luck or religious training or disposition, *attend* to what is around her. Attending sometimes makes her want to give back, particularly to give back to the beauty of the world a creation (art) of her own. In practicing art, she can (I argue) come closer to recognizing the intrinsic value of things. Art generates art, but art need not start with art. So I am describing a feedback loop, not a circle.

demanded release—it wasn't like the feeling an overfull child has after gorging on ice cream. The feeling was wonderful, very unlike a stomach ache. Wonderful—but it *needed* something. It felt like it needed *completion*.

All I could think of to complete the feeling was to make some beauty myself. And it seemed to me, “This is how art happens. Art is the expression of gratitude. Art is how this feeling of wonder-too-big-to-contain completes itself.”

I remember where I was standing, though not the particular tree or the particular sky. There was a plot of flat grass in my childhood, to the left of the driveway which divided the flat land from the small artificial hill on which sat my parents' home. In my mind's eye today and perhaps then, the grass was zoysia: a varietal with strong short stubby blades (somewhat like myself, already shorter than my friends).

This remembered image of zoysia grass had it stretching green for hundreds of feet, terminating in the same neat concrete curb edge that bordered the small area of my parents' real yard. Above this obviously man-made horizontal terrain stretched the sky. My adult mind takes note of the sharp contrast between the (limited) manmade flat short zoysia grass on which one walked, and the immense sky (not manmade at all) to which one aspired. My child's mind must have responded to the contrast intuitively.

What of the tree, standing between earth and sky? I'm not even sure today that there *was* a tree. Sure, there was a tree in the actual yard—a crabapple – but the one in my mind's eye was an evergreen. In all healthy pines not struck by lightning, the central pole stretches toward the heavens; and most pines' angled-down-flung branches point to the earth. There are few more potent symbols of connection between heaven and earth, of aspiration (the pointing upward of the central trunk) and care (the sheltering branches).

In this state of being filled up with a sense akin to glory or wonder, it wasn't the sense of glory I was grateful for. The joy was a byproduct; the reason for the joy was the world: The flat zoysia grass, the limited curb, the immense sky, gray-blue with clouds. The reason was seeing how much I'd been *given*.

Words fail, of course. So does memory. I'm not sure that the something really came from beyond me, or whether instead it was welling up from within me. Not being trained in the experience of religious belief, I do not know how to translate the experience. But if I have a spirit, it was *alive* on that occasion, and its imperative was to pour out through a making of my hands.

Lewis Hyde's influential book on gift suggests that gift cultures are naturally fecund: if one receives art (or any beauty) as a gift, one tends to respond in kind.⁸

B. ART AS HELPING US TO SEE AND APPRECIATE THE WORLD IN AN INTRINSIC WAY

Let me offer three quotations here, that point to why I believe art helps us to see and appreciate the world as it is... and to why I think this kind of appreciation is valuable.

The first quotation is from Schopenhauer:

... Art is the abstraction of self from will, which makes possible objective viewing. The artist who goes to the Danube sees at the river a multitude of beautiful vistas; the business traveler sees a horizontal line, bisected with the vertical line of bridges, leading to the traveler's destination.⁹

Not asking of the world, 'how will it help me', but striving to see the world for itself, that is an artistic mode of seeing. I think that kind of seeing is a kind of love.

The second quotation is a poem by William Carlos Williams:

So much depends
Upon

A red wheel
Barrow

Glazed with rain
Water

⁸ Lewis Hyde, *GIFT: THE EROTIC LIFE OF PROPERTY*. If one is *unable* to respond in kind, it may be serve self-respect more to respond with money than with nothing. See, e.g., Annette Weiner, e B. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving* (1992), suggesting ways in which gift cultures can beget subordination.

Beside the white
Chickens.

What is, *matters*.

As for my third quotation, it is Buddhist and addresses the value of attending to the intrinsic worth of an object at every and any particular moment in time. Thich Nhat Hanh tells us: if we wash the dishes instrumentally-- to get them clean-- and do not wash the dishes for the sake of washing the dishes, then 'we are not alive' in that moment.¹⁰ I might add: If we treat things instrumentally, we may forget that we ourselves are not merely instruments.

III. AM I FALLING PREY TO THE MACHINATIONS OF UNSUCCESSFUL POETS?

When I argue that creating and viewing art can function as a crucial way to have access to noninstrumental aspects of life, Martha Woodmansee might argue that that I've simply fallen into the traditional explanation of the elevation of the arts as a substitute for religion, as a refuge for operation of the spiritual faculty. In her well-respected book on the history of aesthetics¹¹ Martha says elevation of the arts "traditionally... has been attributed to secularization: with the erosion of orthodox belief beginning in the Renaissance, art has inherited the task of interpreting human experience."¹² She also suggests that this is

¹⁰ Thich Nhat Hanh, *The Miracle of Mindfulness* at 4-5.

¹¹ Martha Woodmansee, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* New York: Columbia University Press, 1994.

¹² *Id* at 20.

absurdly off point: that the elevation of art occurred in part as a reaction of Germany's best poets to the increasing spread of reading among people who simply didn't like their work.

As the "best" of the German literati failed to please the mass buying public, she argues, those same literati developed an aesthetic in which the true purpose of art wasn't to *please* the audience --because after all the literati were failures by that measure-- but rather where the true purpose of art was to exist for its own sake, a noninstrumental artifact of intrinsic value. By such a measure, the literati can be successes even if they don't sell-- and they can intimidate the haute bourgeoisie in buying more of the "proper" kinds of products.

So have I simply fallen into a trap set for me by the self-interest of certain 18th century rhetoricians? Of course I do not think so. First, even truths can emerge from self-interest-- that's one of the things that it means for a phenomenon to be "overdetermined"-- and I think that while my account doesn't account for all art, ^{I think it accounts} ~~it's true enough~~ for some. (Though of course one can never know one's own illusions at the moment of being deluded.) Second, the artists Martha depicts were elevating their art works ^{themselves} as intrinsically important. I take no position on that. (For example, I don't know a Rembrandt has a claim on us similar to the claim a human being would have.) Rather, my focus is on the role of art in helping people connect to ^{comprehending the} ~~the~~ intrinsic importance of individual humans.

Martha implicitly denigrates the contributions of one aesthete, Mortiz, by arguing that he merely projected onto art the religion of his youth." ¹³ I think that we all do that -- we project our religious and ontological beliefs on to art. If one is religious, then art can embody the expression of divinity in the world. If one is existentialist, then art can call us to recognize authenticity and freedom. I think this process deserves respect rather than

¹³ Id at 18.

derision. Art calls up our basic reactions to life precisely because it fills no immediate utilitarian need, just as a new baby fills no immediate utilitarian need. Art, like the birth of a child, can lift us above the instrumental.

IV. ART AS ~~COMFORT FOOD~~ *Instrumental*

Some art enables us to live fully in the moment, to appreciate the world and each other in non-instrumental terms. But not all art does so. *Some art is ~~self~~ instrumental, a tool. to the contrary encourages turning away from the world.*

Recall Tina Turner's famous song, where the singer pounds the audience repeatedly with the insistent apparent question: "what's love got to do with it!?" We know she's not really asking a question. What she wants to do is deny love's force, and free herself from its disappointment. The singer's seeming repudiation of love is an attempted eradication of something that is definitely still part of her.

Belied by the passion evident in her performance, the singer calls love a routine and unimportant thing: "an everyday emotion." She is trying to attain peace of mind by expressing her anger-- and by denying her reality. I respect her anger, but I suspect she needs to go on to reconsider the nature of what she has called love.

Love is God's greatest gift to humanity; it is his promise and our hope.... Without truth, charity degenerates into sentimentality. Love becomes an empty shell, to be filled in an arbitrary way. In a culture without *truth*, this is the fatal risk facing love. It falls prey to contingent subjective emotions and opinions, the word "love" is abused and distorted, to the point where it comes to mean the opposite.¹⁴

¹⁴ From a 2009 Papal Encyclical (emphasis added);
http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html

While I cannot pretend to understand the Christian dimensions of these words, their plain meaning speaks loudly.

The form and beauty and strength of Turner's song may keep her (and her listeners) from attending to this next task, of seeking to understand where their need to feel and express love should be directed. If so, there is a danger that making art, and even more often attending to other's art, can enable us to attain comfort at the expense of truth, of reality.¹⁵

make the
value
the
song

Happy endings, nay even sad endings, feed the privileged American sense that we are entitled to peace of mind, for they provide *form* for lives that (like most lives) contain an intolerable degree of formlessness. The appearance of form (or balance, or 'right proportion') implies the existence of sense, security, maybe even being cared for. The first storytellers in our lives were our parents; stories today may give us the sense that the narrators are in control and will keep us from undeserved harm. Form (when it triumphs) hides from us the reality that undeserved pain happens¹⁶ and that life doesn't all hang together

to it happens
I don't see
turning
my
that
way
any
as
step.

Marx supposedly said that religion is the opiate of the masses. Perhaps *form* is the Librium of the bourgeoisie. Both art and religion can sometimes provide illusory refuge from necessity.

Does art's sometime role as mild narcotic help explain recent copyright legislation and case decisions that have given primacy to ownership interests over aesthetic interests? Most of us have suspected that these developments are more related to issues of power (RIAA *strategically* suing the little guy) and public-choice (lobbying strength) than to the substantive issues at

¹⁵ Reality, temporarily and tentatively defined: The state of knowing that nothing comes between you and the world. This is a very open definition, given that I leave "world" undefined, and "world" can include spiritual dimensions. But (provisionally) the definition suggests the absence of a personally attentive divine presence.

¹⁶ On the potential evil of novels, see not only a host of nineteenth century moralists, but also Ideology & Fiction: Resisting Novels, by Lennard Davis.

stake. But maybe judges and legislators today have a sense that our culture isn't worth much except as commodity.

Holmes's caution against legal minds judging art seems to forbid us from going down this route. But we can still contemplate the possibility that the most popular movies made and watched, the best-sellers written and most often purchased, indeed mainly serve us as a kind of calorie-free comfort food: something to make us feel good at the expense of more difficult routes to the same end, routes that might exercise our higher selves.

Of course not all art is primarily valuable as candy. Many of us writing in copyright came to that task because of a love of books (or theater, music, painting, movies, dance . . .) that went far beyond a love of comfort. Art helped us give names to our emotions, helped us intuit the truth of things. Let me take the liberty of saying that some art helped in the development of our spiritual side. Because art (making and consuming) became part of us, so studying the law of art promised to tell us something about the law of us.

In our scholarship we hide most of this influence. Part of the reason is that we fear subjectivity, and the imperfect judgment of our fellow humans. This is fear in three senses: fearing self-exposure, fearing that judges and legislators cannot make reliable judgments about aesthetic and spiritual matters, and fearing that law-giving and law-interpreting agents should not even engage in such judgments lest their inquiry into spiritual/psychological issues erode the liberal-state bedrock: separating church and state, and allowing each person to pursue his or her own conception of the good.¹⁷

But it might be worth asking: if we (contrary to fact) had access to a perfect machinery of justice—say, a nonsectarian way to measure spiritual recognition of individuals' intrinsic

¹⁷ *Bleistein v Donaldson Lithog.*, 188 U.S. 239

worth -- and could abandon Holmesian diffidence, would we want the law to distinguish the *making of art* that assists the spiritual and other higher faculties from art-making that did not? ^{Similar} and would we want the law to distinguish *copying* that assists the spiritual and other higher faculties from copying that did not. How different would our law look?

We might have several objectives, including, inter alia:

- We might want to increase the amount of ‘good’ art MADE.
- We might want to increase the amount of ‘good’ art READ and SEEN and LISTENED TO.
- We might want to decrease the amount of “bad” art both made and consumed.
- We might want to increase the spirituality (definition open) of the experience of making art.
- We might want to increase the spirituality (definition open) of the experience of reading/ seeing/ hearing art.
- We might want to increase the well-being of artists in a manner that facilitates their contact with a sense of intrinsic worth.

IV. INCREASING THE RESPECT FOR ARTISTS: THE KWALL PROPOSAL

Roberta Kwall’s article on moral rights implicitly suggests we focus on the last agenda item above: increasing the well-being of artists in a manner that facilitates their contact with a sense of intrinsic worth.. What’s new about this kind of question-- ^{repeatedly novel} which I see in Robert Kwall’s work¹⁸-- is that it allows us to put aside issues of art-and-incentive for a moment.

¹⁸ Roberta Rosenthal Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic

Let us note the exhilarating step this makes possible: it lets us get away from the perennially nagging questions of incentives. ~~It's as if (perhaps contrary to fact) we're temporarily entitled to presume that spiritually motivated art needs no monetary incentive.~~

As I understand her, although Roberta would like to see create more high art created as a result of enacting her moral rights regime, her main goal is something else.¹⁹ She wants to create more respect for the creators of such art. She suggests that the law do so by providing a right of action that would require all makers of derivative works to identify the prior work used and spell out how the new work differs.

Her primary route for doing this is to grant a nonwaivable right of integrity that is good even against derivative works and other reproductions. The right, which lasts only for the life of the author of special works,²⁰ requires inter alia that those who would produce “distorted” versions of a special work must provide a disclaimer and identify the work copied. ~~Apparently there is no defense that the reader or hearer will know the first source, or that the whole point of the parody involves the audience having a moment of~~

Put back
V/ent

lat

Soul, 81 Notre Dame L. Rev. 1945, 1947 (2006) (“The intrinsic dimension of creativity ... is one characterized by spiritual or inspirational motivations that are inherent in the creative task itself as opposed to motivation resulting from the possibility of economic reward.”).

¹⁹ Sometimes her article does seem to aim at “encouraging” more high-quality art, e.g., at Kwall, 81 Notre Dame L. Rev. at 2000, but I take its main focus to be “intrinsic”: vindicating a desire by the artist for recognition as a person, via legal rights to control how others use the artist’s work.

²⁰ Roberta’s works of high originality do not, in my mind, correlate precisely with works that increase the artist or audience’s appreciation for the intrinsic. In Jewish lore, it is said that after all the rhetoric and sincere ornate prayer of a sophisticated congregation, the simple whistle of a peasant-boy can be what opens the gates of heaven.

But let us put aside the issue of identifying qualifying works, and assume we are using our neutral, nonsectarian quality-meter.

recognition where they pair the original and the parody in their mind.²¹ Roberta writes that the creator of the derivative work “should be required to provide a disclaimer adequate to inform the public of the author’s objection to the modification or contextual usage;²²” Her proposal “seeks to insure that the public is informed of the existence of the original author’s message and meaning in situations where the original author would be associated with the covered work.”²³

V. DISCLAIMERS AND RESPECT

what can be said for the creator

inspired by Roberta

The authors of derivative works are authors too, as Roberta recognizes. She also recognizes Jessica Litman’s lesson, that all art involves some recombination of the pre-existing. Is there any reason for privileging works that are not formally derivative works, over works that are formally derivative?

can

A. In the current American moral rights provision, VARA,²⁴ no integrity right extends to reproductions. Only the initial instantiation of the artwork (and a finite sequence of numbered and signed copies) have the protection. Peggy Radin, Annette Weiner, and many others have made clear that some objects have special significance for self-identity. Peggy cites wedding rings; the late anthropologist Weiner cites the ax that a great-grandfather successfully used to defend the tribe.²⁵ It is certainly plausible that an artist

²¹ Her rule would require literal listing of the item parodied, and explicit statement that it is being parodied, even if that ruined the joke.

²² Kwall at 2006.

²³ Id at 2008

²⁴ 17 USC sec. 106A

²⁵ A recent example seen in a shop window: “This skateboard might be the same as all

might have such a connection with an object she has made. Yet Roberta suggests we expand integrity rights to reproductions. Is that justified?

There is some basis for the extension. People whose work is reproduced can also feel the act impugns their intrinsic worth. Robert wants to remedy what one copied friend of mine describes as “the feeling that you’re just invisible. You spend hours writing something, getting rid of what’s extraneous and trying to be clear. Then a stranger comes along and thinks your words are valuable enough to use and doesn’t even mention you. It’s insulting.”²⁶ Roberta wants to remedy the insult.

In a world where we had a perfect meter for ‘connection to the sense of intrinsic worth’, we could employ the meter to distinguish when the maker of the first work or the person who adapted it has the closer connection. In the real world, we make guesses. As to the exact object made by the artist, it seems plausible if not convincing that the artist’s connection is greater than the users. I cannot make such an assumption about reproductions and derivative works.

But perhaps there is one class of original and one class of derivative work for which her assumption is warranted. The type of original is a work made from nature; the type of derivative work is a one that uses the first merely as a symbol, an instrument.

Some observers might well distinguish a special role for painting when done from nature rather than from secondary sources. If one definition of spirituality is ‘being fully present

other skateboards, but it is mine.”

²⁶ This is a paraphrase rather than an exact quote. Conversation with Pam Rogers on Sept. 1, 2009.

and appreciating the world we are given', then painters have a unique ability to touch that world with their eyes:

By the eighteenth century the phrase 'the language of nature' had acquired two separate connotations. The primary meaning was ... the 'Adamic' language-- the original tongue in which the first human, divinely possessed of speech, had named the animals according to his perfect insight into their real qualities.

The metaphor of the 'book of nature' was, as it were, an extension of this belief.

The natural world, though groaning in travail, remains nonetheless after the Fall a visible and concrete reminder to Man of his divine origins-- but now as a 'book' written in a lost language whose meaning could only be puzzled out in fragments with prayer and toil. From this idea we find developing the second meaning whereby the phrase 'the language of nature' is applied metaphorically to the 'message' encoded in Creation for the initiated to perceive...²⁷

The whst of the 'original' is actually to the BL of Nature

By contrast, (it might be said in defense of Roberta's position), the person who makes a derivative work—who like Marcel Duchamp takes a copy of the masterpiece and draws a mustache on it-- ^{might} ~~is~~ merely playing with a symbol. He's more distant from reality. Consider an example deployed by Betty Edwards.

Edwards presents her readers with two drawings:²⁸ one drawing shows a particular chrysanthemum on a particular day, with leaves both clumped and clear, straight and

²⁷ STEPHEN PRICKETT, WORDS AND THE WORD: Language, poetics and Biblical interpretation: Cambridge U Press 1986 at 123 (emphasis added).

Prickett is discussing the decoding of Creation via mysticism and later by physical science; I am adapting his observation to decoding Creation via art.

²⁸ Betty Edwards, DRAWING ON THE ARTIST WITHIN (Simon & Schuster 1987) at 44. To see the two drawings, direct your browser to http://www.amazon.com/gp/reader/067163514X/ref=sib_dp_pt/104-4270882-8547914#reader-link On the left-hand side of the page, choose search "Inside this Book", then type the word 'chrysanthemum' in the box, then hit "Go". If you click on the first reference (it brings you to page 44 of the Edwards book), the drawings will appear.

lopsided, the entire “experience” of a particular chrysanthemum. Edwards says of this drawing, “[G]iven another chrysanthemum, the artist would have to start again from the beginning. The same would be true even with the same chrysanthemum *if the position of the flower were changed even slightly.*”²⁹ The second drawing shows a schematic sketch of a few lines that anyone would recognize as ~~the~~ symbol of ~~a~~ chrysanthemum. Says Edwards of the second drawing: It results from a process of “abstract[ion]”, and is a “symbolic shape, that can be used over and over, *without further thinking*, to ‘stand for’ the general category, ‘chrysanthemum petals.’”³⁰ To the extent that derivative works involve *no further thinking*, Roberta is right to give them second-place status.³¹

(Though even if there’s some reason to prize rendition of nature over re-rendition of artifice, prizing something does not necessarily justify legal protection. But let us get back to the question of whether derivative works are necessarily spiritually bereft.)

Not
The ~~work of Michelangelo~~
Paradise Lost is a derivative work for Genesis!

So is making a derivative work always a second-rate experience? I think not. In some instances the artifice is the reality with which the person is trying to come to terms and the production of the derivative anything but thoughtless.

Romeo + Juliet
of
Pyrom
E
Thebe

²⁹ *Id.* at 45 (emphasis in original).

³⁰ *Id.* at 45 (emphasis in original).

³¹ Roberta quite recognizes that all works are, as Jessica Litman taught us, to some extent derivative works. But original and derivative can be divided by levels of degree .

Admittedly, Marcel Duchamp was probably just playing with a symbol when he painted the mustache on the Mona Lisa. But when the Air Pirates injected an unseemly note into the Disney characters' ordered world, they were addressing those characters on their own terms, creating derivative works that could fight for equality as against a kind of schoolyard bully or teacher's pet.³² When Alice Walker rewrote scenes from *Gone with the Wind*, she was dealing with a set of words and romantic images that had polluted her mind as surely as witnessing violence in person (in the *Book of Nature*) would have.

It's like the finger of the lover limning the features of the beloved's face. Anything to which we really attend, is valuable in the act of attending. I say this out of my experience with the sky, grass and tree. And I argue that sometimes the beloved is an artifact.

So I would not automatically privilege creating from nature over drafting from artifice. Further, the importance of creating from any sources—and being allowed the dignity of being able to publish the result—is so great that the small benefit of Roberta's moral rights scheme do not outweigh it. (Luckily Roberta is part of our discussion and available to explain what I'm missing.)

I think Roberta's proposal inappropriately favors the object of art over the process of making art.³³ I agree (in the abstract hierarchy of likelihoods) that making good art is better than making bad art, and that good and bad can be described not only in purely

³² For further development, see my *Reality as Artifact: From Feist to Fair Use*, 55 *LAW AND CONTEMPORARY PROBLEMS* 93 (1992).

³³ Santilli and Hansmann suggest that one function of 'moral rights' is to preserve masterpieces for the public, thus preserving a process (the public coming into contact with the untouched original). But Roberta's proposal extends also to reproductions. *Kwall*, 81 *Notre Dame L Rev* at 2004. It's rare that the protection of altered reproductions will affect the public's ability to appreciate the original.

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aesthetic terms, but also in terms of engaging the spiritual quality. Let me even tentatively agree, for reasons I explore below, that making derivative works might (in the abstract hierarchy of likelihoods) tend to be less spiritually valuable than making works based more on observed natural phenomena. But I cannot believe that salving the hurt feelings of good-art-makers is more important—or more conducive to appreciating intrinsic worth—than is allowing new art to arise free of bureaucratic constraint.

good case re example in sect 15 or her proposal a harmless compromise

In addition, many people suffering insult will not sue; for example, the friend I quote above had a full remedy available in copyright but did not want to employ it. The sense of insult is personal, and the awkward remedy of a lawsuit (whether copyright or moral right) is a cumbersome and ineffective way to get someone to apologize. Also, some research suggests that subordinated groups are less likely and less psychologically able than high-caste persons to punish wrongdoers³⁴. The insulted and ignored may well belong to those groups-- it's a commonplace that the well-known get cited ahead of the rest. Had the person whose work is quoted without attribution been famous, a factor that might help one to feel unsubordinated, then presumably the copier would have cited her name in the first instance. Even a well-known artist facing a distortion might be disempowered by the very insult. Bringing suit requires confidence. So Roberta's Moral

³⁴ Ernst Fehr's new paper

Right, being unwaivable, stands like a permanent barrier to the spontaneous production of new work, not utilized by those who need it most, but scaring off potential publishers.

Second,

How do we shelter the making of good art?

Roberta Kwall and Lewis Hyde³⁵ both suggest that this sheltering is desirable. But the two of them have very different (implicit) answers about the kind of shelter that is needed. Roberta wants to give the makers of high-originality works a legal right to make anyone who builds on their work include a detailed attribution and disclaimer.³⁶ Lewis wants to increase the domain of gift.³⁷ He is imprecise about how to get there, but the image is clear: where the early and established artists, grateful for the heritage they have received, in turn needing no more repayment for use of their work from later artists than the latter themselves engaging in gift-giving, 'paying forward' to future generations. It is not clear how the domain of gift can be expanded and authors still have the wherewithal to live; nevertheless I share his vision.

³⁵ Lewis Hyde, GIFT: THE EROTIC LIFE OF PROPERTY

³⁶ "[R]equiring a disclaimer when integrity and attribution interests are violated simultaneously facilitates congruence between the purported harm and its remedy. Creators whose authorial dignity is compromised can be made whole through the communication of information designed to educate the public about *the nature of the authentic external embodiment of the author's message*." Kwall at 2006 (emphasis added). The author Roberta Kwall has in mind is the first author; thus the author of the derivative work is made the vessel of the prior author. See __ infra.

³⁷ At least, that seems to be his goal. His GIFT is more descriptive than programmatic.

Gift is not the only form of human interaction that needs shelter. I also want to shelter another kind of informal interchange: the liberty of the subordinated to talk back to the dominant culture with the language (imagery, icons, symbols, poems, songs) of the dominant culture.³⁸ You might say I'm interested in increasing the legitimacy of resentment.³⁹

How did I travel from gratitude to resentment? The answer is that both are part of the same phenomenon: *connection*. I am convinced that the person who has been hurt and writes in self-defense, like Alice Randall, can be as filled with a spirit that demands expression as the most grateful recipient of the muses' favors. ~~You may say I'm mistle-~~
I don't think I'm assuming
that the experience of being full of strong emotion is not generically spiritual: That being in touch with anger has nothing in common with being in touch with gratitude. Yet I am

³⁸ In addition, it must be noted, much current art is about destruction. See Amy Adler, AGAINST MORAL RIGHTS, 97 Cal. L. Rev. 263 (2009). I do not need to venture down that line of thinking. As I have been much affected by Bourdieu's cynicism about the careerism inherent in the 'art as anti-art' movement, I am not sure the artists of creative destruction are among the subordinated for whom I have most concern.

³⁹ Theresa Amabile, the psychologist upon whom Roberta often relies, seems to create a false dichotomy between 'monetary motives' and 'positive nonmonetary motives.' For example, Roberta writes:

"[Amabile] defines intrinsic motivation as "any motivation that arises from the individual's positive reaction to qualities of the task itself; this reaction can be experienced as interest, involvement, curiosity, satisfaction, or positive challenge." Kwall, 81 Notre Dame Law Review at 1964.

My interest embraces one of the elements ignored in Amabile's definition: nonmonetary negatively hued motivations, motivations such as anger or self-defense or even (!) unjustified but inevitable Bloomian resentment. Resentment is an important stage on a spiritual journey, and I think unless aired and expressed can block the journey from continuing. It is, says Bloom persuasively, also an important stage in artistic development.

persuaded that the need to speak in self-defense—the need to speak out of resentment-- is also in part a need to defend *others*, to spread one's branches in care.

Let me return to contrasting the approaches of Lewis Hyde and Roberta Kwall. On a structural level, Lewis seems to want fewer claim-rights⁴⁰ and more liberties, while Roberta seems to want more claim-rights and fewer liberties. One reason I side with Lewis is that I see the harm of a state-imposed duty to be greater (other things being equal) than the harm imposed by fellow-citizens. Even caselaw has suggested that people feel more shame if the state criticizes me than if other citizens do it.⁴¹

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rights/liberties

Some pain is inevitable: allow later comers to do what they want, and some earlier folks will suffer from it. Forbid later comers to do what they want, and some later folks will be frustrated in their inability to express themselves. Perhaps Roberta imagines that her 'disclaimer' system of moral rights provides a painless third way. But there is plenty of pain in a court refusing to let a parodist distribute her work until she writes a disclaimer and satisfies some tribunal that her disclaimer perfectly describes her relationship to the work she's parodying. Imagine the psychological difficulty of doing the latter—or of having a tribunal dictate the detailed disclaimer. Imagine the *practical* difficulty.⁴² As

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⁴⁰ Again a qualification: Lewis's existing book on GIFT is short on programmatic recommendation, and I haven't read more than a brief description of his new book on the COMMONS. So I am intuiting rather than citing with assurance.

⁴¹ Reference needed.

⁴² Roberta's proposal has many dimensions, at least two of which could put the author of the derivative work to a hard choice: the maker of the derivative work must avoid both "(3) modification of an author's work resulting in a substantially similar version to the original

Clarisa Long reminds us, it is almost impossible to describe the “message” of a work of art.⁴³

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In other words, the author of the derivative work must *speak the message of the work criticized*. He is explicitly *not* valued intrinsically; he is made the vehicle of another’s will.

Roberta’s proposed remedy thus causes insult: it tells the law to privilege the first author – long after her creative act is complete—over the creative process of the second, subordinating the parodist to the other artist. The later author is made a mere means of restating the first author’s primacy. This is not respecting the intrinsic dignity of the

without attribution or with false attribution; and, (4) false attribution of authorship of a work to an author.” Kwall at 2004.

This need to be *precise* – to simultaneously describe what has been changed and what has not – resembles the dilemma the Court saw facing users of public-domain work in *DASTAR*, namely, it’s immensely hard to choose between too much and too little when describing the sources of your work. The Court wrote:

“We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.

Another practical difficulty of adopting a special definition of “origin” for communicative products is that it places the manufacturers of those products in a difficult position. On the one hand, they would face Lanham Act liability for failing to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for crediting the creator if that should be regarded as implying the creator’s “sponsorship or approval” of the copy,...

Dastar Corp. v. Twentieth Century Fox Film Corp. 539 U.S. 23, 35-36 (2003).

⁴³ Clarissa Long compares the easily described attributes of inventions with the ineffable attributes of copyright’s subject matter: “The idiosyncrasy of copyrighted goods and the ineffable nature of much original expression make information about copyrighted goods difficult to convey: Two people are unlikely to agree on the meaning of the information, even if it is made public. {Footnote omitted.} The owner may have to spend more time describing the good than creating it. ...” Clarisa Long, *INFORMATION COSTS IN PATENT AND COPYRIGHT*, 90 *Va L Rev* at 469 (2004).

second author. So the theme of Insult recurs. And insult at the hand of the state is greater than equivalent insult at the hand of a private party.

III. Art and Eden

*realm of liberty? lets say fair use for © but moral it
No moral it either*

Lewis Hyde paints an Eden of gift so vivid that the flowers have sweet odors, and his garden draws in so many of us: he provides a picture of artistic reciprocity, generosity, receipt and plenitude, where art stimulates the making of more art the sole corruption is commerce. This Eden of gift speaks particularly strongly for me, for my first strong aesthetic impulse arose as a desire to repay the world for its beauty, an impulse of gratitude for gift.

One needs to pinch oneself to break the trance, to remember the dangers of disdainng commerce too greatly. Consider a case in point: Wagner.

Wagner reportedly had great disdain for the influence of commerce over art. This is dramatized vividly in The Ring Cycle. In the opera cycle's opening, all is peace while the Rhine maidens gaze quietly at the beauty of their underwater gold, but the world ends because the Norse gods seek to put the gold to use. They put the gold in circulation, that is: use it as payment. It's not merely the theft of the gold that makes the gods sin, it's the gold (the glory) escaping the sight of the adoring few to dazzle the greedy, where it causes dissension and death. So commerce is evil, eh? But necessary. And consideration of necessary evils leads us to scapegoats.

Wagner brings us to Nazis and Nazis bring us the scariest of cautionary tales. Why the anti-Semitism, we Jews ask. What was the point, why us? One explanation for the Nazi's ability to sell a program of anti-Semitism to their people lies in a tale of Wagnerian daze.

As some historians tell it⁴⁴, the Hegelian state urged toward unity, self-sacrifice, and mystic gift. Yet someone had to lend the money to build the houses, and so outsiders (we Jews) were delegated to touch the tainted gold. And when the dream faltered, when imperial ambition of the mystic state brought ruin, whom to blame but the outsiders? So Wagner's distaste for commerce, Hyde's distaste for commerce, my distaste for commerce ... can have bloody results. ~~Bloody as in blood: blood of our cousins, blood of our in-laws.~~ And bloody as in nasty brutish and short, the exclamation of dismay. Bloody!

So where are we? Spotting the snakes in Eden.

The anthropologist Annette Weiner suggests another snake: that gift can beget subordination. Clever gift-givers can substitute fungible blankets and such for the few objects of true value to the culture, and by such maneuvering attain possession of what all covet.⁴⁵ Jeanne Schroeder⁴⁶ takes that idea so far as to recommend we shun gift as a

⁴⁴ References to be supplied

⁴⁵ Annette B. Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving* (1992). I am indebted to Weiner for making me understand that the particularity of provenance (the origins of physical object) really can make a difference. This makes me more tolerant of VARA (with its focus on the initial object the artist made) and more unsympathetic to regimes like Roberta

mode of subordination and embrace contract as a mode of equality. I think Jeanne's conclusion is faulty—formal equality breaks down in the face of inequality of means. Nevertheless I'm intrigued by the notion of unwanted or even wanted gifts causing resentment in the recipient. Critic Harold Bloom teaches us the fecundity of resentment.⁴⁷ And if resentment is the inevitable result of gift—of being ever the puniest in the shadow of giants—we need liberty to express that resentment if art isn't to stall altogether.

IV Further thoughts on Roberta Kwall and her focus on the object (and its originator) rather than on the person encountering the created object and wishing to alter it

Where my inquiry really begins is in the sense that the spiritual nature expresses itself sometimes in making art, and sometimes in receiving art. And further, that Roberta Kwall errs in thinking that the first proposition (about making art's spiritual dimension) has implications for extending rights of control. Liberty should be the background assumption. Correlatively, duties (what property imposes on the polity and on one's fellows) should arise only when they meet the burden of proving they better human ends.⁴⁸ I think Roberta's moral rights scheme errs in privileging the integrity of the creation over the integrity of the act of creating.

Really
art

Kwall's that go beyond the initial object.

⁴⁶ Jeanne L. Schroeder, PANDORA'S AMPHORA: THE AMBIGUITY OF GIFTS, 46 UCLA L. Rev. 815 (1999)

⁴⁷ See, e.g., his *Anxiety of Influence*. One friend of mine objects that "Bloom doesn't get much play lately", but that does make what Bloom said less true.

⁴⁸ Greg Alexander, PROPERTY AND PROPRIETY (1997).

Roberta Kwall's stimulating paper on moral rights is immensely right in emphasizing the emotional and spiritual nature of some creativity. And I think the word that Roberta puts front and center-- namely, the word "intrinsic"-- is a word that perfectly captures many of the meanings and dimensions where art and religion connect.

yet I think her proposal expands on art.

III. On Martha Woodmansee and Romantic Imagery

Does the value of the expressive moment as experienced by the Air Pirates (or Marcel Duchamp or Alice Walker) really matter all that much? One way to examine the question is to see how my account squares with some of the literature on the history of aesthetics. Particularly interesting are the writings by Mark Rose (focusing on England) and Martha Woodmansee (focusing on Germany) suggesting that there is great historical interdependence between the notion of authorship and the development of copyright.

Let me focus on Martha Woodmansee's book. How might Martha react to my account? For example, I argue that the immediacy of creation should be privileged even when it involves some copying: that the life as lived is more important than the mere possibility of another class of author receiving monetary incentives or respect to mend hurt feelings.⁵⁰ To this Martha might chuckle at the irony of seeing the elevation of artistry being used to undermine copyright, when such elevation was, in her view, often used as a BASIS for copyright.

More importantly,

The living act of creation should take precedence.