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Cover Page Footnote

J.D., Fordham University School of Law, 2007; B.A. Art History, Barnard College, 2004. The author wishes to thank Professor Sonia Katyal for her encouragement and invaluable assistance in writing this Comment, as well as the entire editorial board and staff of the Journal.

EXPRESSIVE MERCHANDISE AND THE FIRST AMENDMENT IN PUBLIC FORA

*Genevieve Blake**

INTRODUCTION

People create expressive materials all the time, in endless variety. These materials may express political or ideological affiliation, aspirations, attempts at persuasion, social or cultural commentary, religious devotion or righteousness, or even private assertions of identity, passion, and dread. “Expression,” commonly defined as “an act, process, or instance of representing in a medium,”¹ is broad enough to include both a boisterous parade of thousands² and an individual’s secret diary.³ Some expressions are and always remain private, but those that enter the public sphere may come into contact with—and conflict with—the expressions of others, and the rules and regulations of social intercourse.⁴ The desire to make public expressions is not limited to individuals or groups with a persuasive or proselytizing purpose; expressions may be aired in public simply as an assertion of self or to create awareness or confrontation.⁵ Public expressions can take many forms, such as parading, rallying, distributing leaflets,⁶ hanging posters,⁷ giving soapbox speeches,⁸ public musical performance,⁹ and selling ex-

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1. Merriam-Webster Online Dictionary, <http://www.merriamwebster.com/dictionary/expression> (search for “expression”) (last visited Feb. 22, 2007).

2. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 558 (1995).

3. See, e.g., *Baumgartner v. United States*, 322 U.S. 665, 667 (1944).

4. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 126 (1989).

5. See, e.g., Francis X. Clines, *To Be Irish, Gay and on the Outside, Once Again*, N.Y. TIMES, Mar. 13, 1993, at 1 (detailing the St. Patrick’s Day parade); John Kifner, *Unmasked Klan is Besieged at Manhattan Rally*, N.Y. TIMES, Oct. 24, 1999, at § 1 (detailing the Ku Klux Klan parade); Robert D. McFadden, *A Parade with Pride and Police*, N.Y. TIMES, June 11, 2001, at B1 (detailing the Puerto Rican Day parade).

6. *Hill v. Colorado*, 530 U.S. 703, 781 (2000).

7. See *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

8. See generally *Marsh v. Alabama*, 326 U.S. 501 (1946).

9. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

pressive materials,¹⁰ some of which have found protection under the “free speech” clause of the First Amendment of the United States Constitution.¹¹

Cities, municipalities, and other kinds of local governments have the responsibility for allocating and maintaining public space so that it can be used by the citizenry that pays for it, without trampling the individual rights of the citizens who want to make such use.¹² Since two parades may not occur at the same time in the same place, cities must necessarily regulate the use of public space in such a way that at times inconveniences, delays, or mutes some public expression.¹³ From this fact of civic responsibility, a judicial doctrine has developed to permit regulations on the time, place, and manner of public speech protected by the First Amendment.¹⁴ The test, which will be discussed in greater detail below, generally permits cities to create reasonable restrictions on the time, place, and manner of public expression, so long as the restrictions do not touch the content of the expression, and are “reasonable.”¹⁵ What is reasonable depends in part on the forum at issue;¹⁶ this Comment will focus on contentions over what are known as “traditional public fora” such as streets and sidewalks.¹⁷ Time, place, and manner restrictions on the use of traditional public fora are subject to intermediate scrutiny¹⁸ by the courts, which requires a determina-

10. *Gaudiya Vaishnava Soc’y v. City of San Francisco*, 952 F.2d 1059, 1061 (9th Cir. 1990).

11. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech or of the press.”).

12. See Amnon Lehari, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 41 (2004).

13. See Randall J. Cude, Note, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations*, 6 J.L. & POL’Y 853, 859 (1998) (“Municipal aesthetic regulations often partially abridge the right of a citizen or group to engage in free expression, by reducing a citizen’s available means of communicating.”).

14. See Shelley Ross Saxer, *Sidewalk Distribution of Protected Speech and Other Expressive Activities*, in PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 211, 222-27 (Daniel Mandelker & Rebecca Rubin eds., 2001).

15. See BAKER, *supra* note 4, at 126.

16. Saxer, *supra* note 14, at 222.

17. See *Hague v. CIO*, 307 U.S. 496, 515 (1939) (commenting, in dictum by Justice Roberts, that public parks and streets “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”).

18. In comparison, strict scrutiny applies to regulations of expression based expressly on content. Content-based restrictions on speech in traditional public fora are presumptively invalid, and the proponent of any such regulation must demonstrate (i) that a compelling state interest is at stake, and (ii) that the regulation is narrowly

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tion as to whether the regulation is narrowly tailored to promote a city's legitimate interests, and whether there are adequate alternatives for people affected by the regulation to conduct their expressive activity.¹⁹ Cities have an interest in limiting the number of people expressing themselves in public areas because unrestrained expressive activity could lead to uncontrollable conflict between individuals or groups over space, volume, aesthetics, equal access, viewpoint, and other points of contention.²⁰ Thus, there is conflict between those who want access to public spaces in which to conduct expressive activities, like sidewalks, and the cities in charge of maintaining those sidewalks that wish to exercise control and restraint on that expressive activity—not necessarily because of the substance of the expression, but merely because the expression exists.

Courts have struggled to strike a balance between the interests of individuals and cities with the application of intermediate scrutiny to content-neutral time, place, and manner restrictions, and several variations have emerged.²¹ This Comment will examine the breadth of those approaches as they affect the determination of what expression triggers First Amendment protection. This issue is timely in light of a recent decision handed down from the Second Circuit Court of Appeals, *Mastrovincenzo v. City of New York*.²² The public expression at issue in that case was the plaintiffs' creation and sale of hats, which the plaintiffs individually adorned by painting them in a graffiti style.²³ The City had barred the plaintiffs from displaying and selling their hats on the sidewalks within the framework of a larger scheme to regulate street vending, which it claimed "impedes the flow of pedestrian traffic . . . and . . . creates the potential for tragedy."²⁴

tailored to serve that interest. See *McEntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 380 (1995). On the other hand, speech in places other than traditional public fora may be limited and regulated subject only to a test of "reasonableness." *United States v. Kokinda*, 497 U.S. 720, 726 (1990).

19. *Cude*, *supra* note 13 at 863 n.38 (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)).

20. See generally *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

21. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) ("[A]ny general rule of first amendment [sic] interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing.").

22. 435 F.3d 78 (2d Cir. 2006).

23. *Id.* at 86.

24. *Id.* at 82-83, 84.

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Part I of this Comment will discuss the statutory framework for the regulation of sidewalk vending in New York City, and offer background information on the intersection of urban arts and First Amendment theory. Part II will examine in detail the interests on both sides of the *Mastrovincenzo* case, and the balance struck by the Second Circuit's ruling. Parts III and IV will compare how the Second Circuit's approach to delineating the scope of First Amendment protection differs from those of other federal courts on the more limited issue of public expression that does not fit into traditional models. The term "traditional models" indicates written or spoken language of a persuasive, discursive, or journalistic nature that has historically enjoyed the strongest form of judicial protection. In making this comparison, this Comment will specifically examine whether the definition of protected expression has widened to include works of visual art, and give special attention to those works that push the boundaries of historically favored media and genre.

In deciding what kinds of expressive materials may fall within the category of protected speech, the Ninth Circuit has developed a test that requires the protection of things bearing a "religious, ideological, philosophical or political message," as identified by court examination.²⁵ This differs from the new two-step test adopted by the Second Circuit, which requires a judge—in the case of works that are not paintings, photographs, sculptures, or prints—to first balance a work's expressive qualities against any utilitarian function the work might have, and then, if expression outweighs utility, to decide if the work has enough overall expressivity to qualify for First Amendment protection. In the Second Circuit, paintings, photographs, prints, and sculptures are thought to be always inherently expressive, and thus do not require analysis by a court.²⁶ While the Ninth Circuit test either ascribes protection or does not, the Second Circuit test carves out a newly available classification for works that are not full "expression," but which have a "predominantly expressive purpose," entitling them to a thinner layer of protection.²⁷ Both approaches are to some extent grounded by a wish to articulate a particular, protectable mes-

25. *Gaudiya Vaishnava Soc'y v. City of San Francisco*, 952 F.2d 1059, 1063-64 (9th Cir. 1990).

26. *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.").

27. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82 (2d Cir. 2006).

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sage.²⁸ In practice, this means that a mass-produced print—of a landmark building for example—is automatically entitled to full constitutional protection in New York City, and the City may not enforce its vending-licensing regulations against any seller of such print. In San Francisco, however, an artist’s work is only entitled to protection if the work she wishes to display and sell expresses one of the above mentioned messages. The categories are, however, very broadly interpreted. Back in New York, an artwork that does not fit into the above mentioned four media categories is subject to an amorphous judicial test of expressiveness. Any artwork with an element of functionality is presumptively inert, and unless its expressive qualities are found to outweigh its utility, it will not be constitutionally protected. Even if it is found predominantly expressive, it is only due a subordinated level of protection.²⁹

Ultimately, Part V will argue for a re-thinking of how courts evaluate the scope of First Amendment protection and municipal regulation of expressive activity. In light of the *Mastrovincenzo* case, a re-evaluation of what should and should not be protected under the banner of “free speech” is necessary, because, as argued below, some judges have strayed far from the issue of expression in the course of pursuing judicial and administrative expediency. Part of the problem with this shift of judicial attention lies with faulty assumptions grounded in a muddled “marketplace of ideas” theory of the First Amendment that both undervalues certain contemporary expressive activity and threatens the validity of existing First Amendment protections for visual expressive works. Finally, this Comment will offer a new way of examining regulations of public expressive activities that draws from a “self-realization” theory of the First Amendment.

I. REGULATION OF EXPRESSIVE ACTIVITIES IN NEW YORK CITY’S PUBLIC FORA

The ennobling of public space is part of democratic culture, ancient and modern.³⁰ The Greek *agora* has been described as “the place of citizenship, an open space where public affairs and legal

28. See *infra* notes 226–33 and accompanying text.

29. Marcel Duchamp would presumably have been unable to display his *Fountain* (1917) on the sidewalks of New York. For an unpacking of *Fountain*, the San Francisco Museum of Modern Art has created an interactive program. See SFMOMA, <http://www.sfmoma.org/msoma/artworks/1466.html> (last visited Feb. 28, 2007).

30. See Don Mitchell, *The End of Public Space? People’s Park, Definitions of the Public, and Democracy*, 85 *ANNALS OF THE ASS’N OF AM. GEOGRAPHERS* 108, 116 (1995).

disputes were conducted” as well as “a marketplace, a place of pleasurable jostling, where citizens’ bodies, words, actions and produce were all literally on mutual display.”³¹ Yet the Greek *agora*, like many American public spaces today, were never really free; only citizens with access to private property and power were able to participate without mediation.³² While today’s urban sidewalks are “largely open to all comers,”³³ the owners of private property abutting the sidewalks may have substantial influence over what kind of expressive activity takes place there.³⁴

Sidewalk vending, for example, has been regulated and sometimes prohibited in the United States since the nineteenth century.³⁵ New York City Mayor Rudolph Giuliani “declared war” on street vending in the mid-nineties, as part of his larger “quality of life” campaign for urban renewal.³⁶ The New York City Council has taken the position that unregulated sidewalk vending has “a pernicious effect on both the tax base and economic viability of the City,” in part because unlicensed vendors “siphon business from reputable, tax-paying commercial establishments” and “impede[] the flow of pedestrian traffic.”³⁷

Why do people sell wares on sidewalks, without the benefit or protection of municipal approval? Some sidewalk vendors do so because they have minimal job skills, are seeking to avoid exploitation, or are taking the first step towards owning more formal busi-

31. See J. HARTLEY, *THE POLITICS OF PICTURES: THE CREATION OF THE PUBLIC IN THE AGE OF POPULAR MEDIA* 29-30 (1992).

32. Mitchell, *supra* note 30, at 116 (“Notions of ‘the public’ and public democracy played off and developed dialectically with notions of private property and public spheres.”).

33. Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 *TEMPLE L. REV.* 1, 3 (2004).

34. *Id.* at 12; Thomas J. Lueck, *Times Sq. Gridlock . . . on Sidewalk; Lapse in Law Puts Hawkers in Way and Pedestrians in a Jam*, *N.Y. Times*, Dec. 2, 2003, at B1; see also Mitchell, *supra* note 30, at 119-20.

35. Kettles, *supra* note 33, at 7 (citing *City of Denver v. Girard*, 42 P. 662, 664 (Colo. 1895) (upholding an ordinance banning sidewalk-stand vending)).

36. *Id.* at 7-8. Street vending was not the only form of expressive activity Mayor Giuliani sought to curtail, in tandem with private corporate interests. “[A]dult establishments” were almost completely eliminated from the Times Square tourism district. See Herald Price Fahringer, *Zoning Out Free Expression: An Analysis of New York City’s Adult Zoning Resolution*, 46 *BUFF. L. REV.* 403, 414 (1998) (“[Michael Eisner] expressed his reservations about bringing Disney’s family-style entertainment to a street dotted with pornography parlors. Mr. Giuliani fixed him with a stolid gaze, Mr. Eisner said, and stated more than once: ‘Michael, they’ll be gone.’”).

37. *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 283 (S.D.N.Y. 2004) (citing *N.Y.C. Local Law 40/1988*, § 1).

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nesses—in other words, economic necessity.³⁸ Cultural factors may also be at work; in Latin America, sidewalk vending is much more common and tolerated.³⁹ A large number of vendors operating on the streets of New York City sell “regular merchandise,” meaning wares of no particular expressive importance.⁴⁰ Vendors of expressive materials may have additional impetus for street vending beyond economic necessity, namely interaction with a broad audience.⁴¹ The situs of the expression in the public forum may also be part of a speaker’s expression of alienation or non-representation in traditional creative venues.⁴² Artists who work with and in public space may do so expressly to re-invent what Michel de Certeau calls “the practice of everyday life”—the use and deconstruction of space dominated by the rich and powerful by those excluded from it.⁴³ The public forum doctrine confronts this reality, at least facially, in requiring speech restrictions to survive greater scrutiny in cases of public fora, because “parks, streets and sidewalks often provide the economically disadvantaged with their only access to communicative expression.”⁴⁴ Yet in New York City such expressions have been—and to some extent still are—criminalized, regardless of their content.⁴⁵

Who can sell what on a New York City sidewalk is governed by the General Vendors Law (“GVL”). The Administrative Code of the City of New York defines a general vendor as one who “hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services . . . in a public space.”⁴⁶ GVL § 20-453 requires all general vendors seeking to sell non-food goods and services to obtain a

38. Kettles, *supra* note 33, at 24 (describing how some vendors “sell on the streets because, as a means of survival, it is the best option among the few available”).

39. *Id.* at 24-26.

40. *See, e.g.,* Al-Amin v. City of New York, 979 F. Supp. 168, 173 (E.D.N.Y. 1997) (holding that sales of oils and perfumes associated with Islamic worship not sufficiently expressive to warrant First Amendment protection); *People v. Saul*, 776 N.Y.S.2d 189, 193 (N.Y. Crim. Ct. 2004) (holding that playing cards picturing deposed Iraqi regime figures did not constitute expressive merchandise).

41. *Mastrovincenzo*, 313 F. Supp. 2d at 291.

42. *Id.*

43. *See* ROSALYN DEUTSCHE, *EVICCTIONS: ART AND SPATIAL POLITICS* 76-77 (1996) (referring to MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984)).

44. Cude, *supra* note 13, at 874.

45. *See generally* Christina Mathes, Casenote, *Bery v. [City] of New York: Do Artists Have a First Amendment Right to Sell and Display Art in Public Places?*, 5 *VILL. SPORTS & ENT. L.J.* 103 (1998).

46. N.Y.C. Code § 20-452(b) (2005).

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license.⁴⁷ Licenses cost two hundred dollars and are valid for one year, but may be renewed indefinitely.⁴⁸ The waiting list for licenses is effectively closed.⁴⁹ Violators of the licensing requirement are guilty of a misdemeanor punishable by fine, incarceration, and civil penalties.⁵⁰ The total number of licenses in effect at any given time is statutorily capped at the number of licenses in effect on September 1, 1979: 853.⁵¹ That limitation, however, is subject to a number of caveats. Any honorably discharged member of the United States armed forces who is a veteran of any war, or who served overseas, and who qualifies for a vending license must be issued one.⁵² As of 1996, 340 such licenses had been issued to veterans, bringing the total number of licenses in effect at that time to 1,193.⁵³ So, while the City Council's maximum for licenses is somewhat permeable, it has limited the official number of vendors to one for every 8,584 New Yorkers in 1990,⁵⁴ and one vendor for every 9,629 New Yorkers in 2005.⁵⁵ Compared with cities like San Francisco, New York is extremely stingy with permission to vend in public.⁵⁶

Beyond the GVL's licensing requirement, general vendors are subject to another kind of time, place, and manner restriction on their physical operations. GVL § 20-465 places a wide variety of

47. *Id.* § 20-453.

48. *See id.* § 20-454; *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 282 (S.D.N.Y. 2004) (explaining that renewal is dependant on the licensee paying all applicable taxes and fees, and good conduct).

49. *See* Jonathan Hicks, *Street Vendors Wary of Council Effort to Create More Licenses*, N.Y. TIMES, Feb. 7, 1993, at § 1 (explaining that getting a vending license is practically impossible, in part because vendors may pass their licenses amongst family); Bruce Lambert, *Neighborhood Report: Lower Manhattan; Fighting for the Freedom to Sell Art on the Streets*, N.Y. TIMES, Oct. 24, 1993, at § 13.

50. N.Y.C. Code § 20-472(a) and (c)(1). Police officers are authorized to seize the items being sold, and the seized items are subject to forfeiture. *Id.* §§ 20-468, 20-472(a).

51. N.Y.C. Local Law 50/1979; *see also* N.Y.C. Code § 20-459(a); *Bery v. City of New York*, 97 F.3d 689, 692 (2d Cir. 1996).

52. N.Y.S. GEN. BUS. LAW § 32(1) (McKinney 2007); *see* Mathes, *supra* note 45, at 105 n.17 (1998) (explaining legislative rationale for the veteran exception).

53. *Bery*, 97 F.3d at 692.

54. *See* <http://www.census.gov/population/documentation/twps0027/tab22.txt> for 1990 population of New York City (7,322,564 divided by 853) (last visited Feb. 16, 2007).

55. *See* Population – New York City Department of Planning, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> for 2004 population of New York City (8,213,839 divided by 853) (last visited Apr. 17, 2007).

56. *See* Adine Y. Kernberg, Note, *The Right to Bear Art: The Impact of Municipal Anti-Peddling Ordinances on the First Amendment Rights of Artists*, 18 COLUM.-VLA J.L. & ARTS 155, 160 (1993).

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restrictions on vendors, e.g., setting the amount of space any general vendor may occupy, setting the minimum width of sidewalks open to general vendors, establishing the minimum space permitted between any general vendor and a bus shelter or subway entrance, barring general vendors from parts of Midtown and Ground Zero, and prohibiting vending from blankets or boxes, or on top of steam grates.⁵⁷

In 1982, the City Council amended GVL § 20-453 to exempt vendors of newspapers, books, and other written materials from the licensing requirement.⁵⁸ The amendment was a reaction in part to criticism from the courts that the regulation was chilling to free expression.⁵⁹ So, on top of the 853 vendors licensed under the statutory scheme, and the veterans, an unlimited number of book, magazine, or newspaper sellers may occupy New York City sidewalks. The *New York Times* has called this last category “First Amendment vendors,” because they claim a constitutional right to sell.⁶⁰ In 1993, the City agreed to consider making a similar exception for vendors of visual art,⁶¹ or to alter its licensing system to address the concerns of artists, but ultimately decided against any change.⁶²

It is unsurprising that New York City felt less than compelled to offer protection to visual art commensurate to that given to books and newspapers. The state of the law on the protectability of visual “speech” is far from clear. In 1991, Professor Barbara Hoffman wrote that “it is doubtful that anyone seriously contests the proposition that an artist’s work (of almost any medium) is sufficiently imbued with elements of communication to fall within the scope of the First Amendment.”⁶³ Yet she concluded that, to the courts, artistic expression qualified for full First Amendment protection only when the artist was expressing a clear political message, or was

57. N.Y.C. Code § 20-465 (2005).

58. N.Y.C. Local Law 33/1982; N.Y.C. Code § 20-453 (“[I]t shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefore.”)

59. See Kernberg, *supra* note 56, at 165 (arguing, pre-*Bery*, for an extension of unlicensed vending rights to visual artists).

60. Lueck, *supra* note 34, at B1.

61. *Id.*

62. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006)

63. Barbara Hoffman, *Law for Art's Sake in the Public Realm*, 16 COLUM.-VLA J.L. & ARTS 39, 60 (1991).

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touching on a matter of “public concern.”⁶⁴ In 1970, the First Circuit permitted a state university to censor exhibition of work by artist Chuck Close, because it found Close’s First Amendment rights “minimal” in light of the work’s lack of political expression.⁶⁵

Artwork has often been analogized to or categorized with conduct, rather than speech, for First Amendment purposes. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court united the idea of protecting parades with the protection of visual art, music, and literature under the rubric of “symbolism.”⁶⁶

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that symbolism is a primitive but effective way of communicating ideas, our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg [sic], or Jabberwocky verse of Lewis Carroll.⁶⁷

This statement by the Court suggests a clear, indeed “unquestionable” protection for apolitical artworks, but offers no further guidance. Some courts have understood *Hurley* to eliminate any requirement of a “particularized message” to make a finding of expressiveness, but the Second Circuit is not one of them.⁶⁸ *Hurley* also raises theoretical questions about the rationale for protection, which have yet to be fully answered.

64. *Id.* at 61-62 (synthesizing an analysis of *Spence v. Washington*, 418 U.S. 405 (1974), and *Miller v. California*, 413 U.S. 15 (1973)). Such constrained protection for visual art is in accordance with the troubled “political speech” doctrine of the First Amendment, favored by former judge Robert Bork. See generally Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)

65. *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir. 1970).

66. 515 U.S. 557, 569 (1995).

67. *Id.* (internal citations and quotations omitted).

68. *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 287 (S.D.N.Y. 2004) (citing *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158-61 (3d Cir. 2002)).

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The Supreme Court often discusses questions on the freedom of speech in terms of protecting a “marketplace of ideas.”⁶⁹ This “marketplace” model posits that speakers should be free from government control or censorship, so that truth and falsehood may battle it out in public discourse.⁷⁰ The value of literature in the marketplace stems from its persuasive or analytic capabilities with respect to a particular idea or point of view.⁷¹ The protection of expression is limited to an audience’s ability to understand or assimilate the underlying idea.⁷² The marketplace of ideas doctrine is more or less compatible with protection of visual expression that privileges political art, but *Hurley* suggests that no particularized message, let alone a political one, is required for protection.⁷³ Even Professor Alexander Meiklejohn, an original exponent of the marketplace theory, said, “the people do need novels and dramas and paintings and poems, because they will be called upon to vote.”⁷⁴ Furthermore, as Professor Hoffman points out, “categorizing artistic expression as non-political or political is itself the product of political and ideological choices.”⁷⁵

An alternative to the marketplace model is “liberty” theory, which holds that free speech should protect an “arena of individual liberty” from state interference, not to foster or enrich public debate, but because the protected speech or conduct fosters individual self-determination.⁷⁶ In this model, no delineation between “speech” and “conduct” is necessary, because either could serve

69. See BAKER, *supra* note 4, at 7; see also *Abrams v. United States*, 250 U.S. 616, 630 (1917) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

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70. See BAKER, *supra* note 4, at 4 (referring to John Stuart Mill’s defense of the model in his classic work *On Liberty*).

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71. *Id.* at 9.

72. Hoffman, *supra* note 63, at 65.

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73. See *Mastrovincenzo*, 313 F. Supp. 2d at 287 (“[I]f Pollock’s ‘Lavender Mist’ conveys a particularized message that is likely to be understood by the viewer, it is difficult to conceive of many works of art that would fail that test. To this extent, the expressiveness test for conduct is perhaps somewhat ill-suited to determine the expressive quality of art.”).

74. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263.

75. Hoffman, *supra* note 63, at 66; see also Redish, *supra* note 21, at 606-07.

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76. BAKER, *supra* note 4, at 5.

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the same value to the individual making the expression.⁷⁷ Broadly speaking, liberty theory would afford greater protection to works of visual expression because it would eliminate the need for a particularized analysis of the artist's message, focusing instead on the function of the expression with regard to the artist's assertion of self in cultural space or other "extrarational value[s]."⁷⁸ As Professor Redish has theorized, free expression fosters the instrumental values of democracy directly by allowing individuals to develop their intellectual and emotive faculties, and facilitates individual self-rule.⁷⁹

Beyond questions of First Amendment theory, an additional barrier to affording art protection from regulations like the GVL is judicial reticence to deal with questions of aesthetics.⁸⁰ A common rationale is that law is all about objectivity and stability, while art is hopelessly subjective and pliable.⁸¹ Yet, many areas of American law require the law to make visual aesthetic determinations, such as the doctrine of useful articles,⁸² moral rights in copyright,⁸³ cus-

77. *Id.*

78. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 110 (1996) (arguing that protecting art with a liberty-reinforcing First Amendment theory is a boon to democracy).

79. Redish, *supra* note 21, at 604.

80. See generally Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) (contrasting the judicial "doctrine of avoidance" in questions of artistic merit with numerous examples of judges making those very determinations). The "doctrine of avoidance" can be traced back to Justice Holmes's opinion in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-51 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the work of pictorial illustrations, outside the narrowest and most obvious limits."). This discomfort is not limited to the highest echelons of legal scholarship; the city leaders responsible for crafting and enforcing vending regulations do not want to implicate themselves in aesthetic decision-making. In Los Angeles, one assistant city attorney has said that because of the impracticability of the law defining "art" or "creativity," the legislature is better "staying away." See Kernberg, *supra* note 56, at 163.

81. See Farley, *supra* note 80, at 811-814; see also *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 352 (S.D.N.Y. 2002) ("Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection."); Richard Posner, *Art for Law's Sake*, 58 AM. SCHOLAR 513, 514 (1989) ("[W]hile it is possible to make objective measurements of physical properties such as weight and speed, it is not possible to make such measurements of artistic value, because people having different values and preferences do not agree and cannot be brought to agree on how to determine the presence of that attribute and even how to define it.").

82. See *Brandir Int'l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987).

83. See Visual Artists Rights Act (VARA), 17 U.S.C. § 106A (2000).

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toms,⁸⁴ arts funding,⁸⁵ and urban planning,⁸⁶ as well as First Amendment jurisprudence.⁸⁷ While many laws seek to promote the arts, assuming they are “intrinsically valuable,” there is no substantial judicial discourse on *why* art ought to be protected.⁸⁸ Because courts are loathe to engage in aesthetic scholarship,⁸⁹ the issue is often objectified.⁹⁰

For these reasons, the question of whether or not people should be arrested for selling their art on the sidewalk in New York City is important, beyond the effect the answer has on any given individual. It may affect whether the marketplace model becomes more entrenched and self-referential, or whether the ability and liberty of individuals to participate in the creation of culture—and expand the scope of their citizenship—are reinforced. An answer to the question could serve as precedent for delineating the scope of protected expression wherever it arises, not just on sidewalks. And it gives us some idea of the willingness of courts to confront intellectual matters on their own terms, rather than homogenizing everything for the convenience of legal reasoning.

In the following section, this Comment will describe how the federal courts of the Second Circuit have dealt with the First Amendment issues raised by the street vending of artistically expressive merchandise in three specific cases: *Bery v. City of New York* in the Second Circuit Court of Appeals, *Mastrovincenzo v. City of New York* in the Southern District of New York, and the *Mastrovincenzo* case on appeal to the Court of Appeals.

II. THE SECOND CIRCUIT’S APPROACH

A. *Bery v. City of New York*

In July of 1993, artist Robert Bery was arrested by an undercover police officer for violating the GVL by selling his “forest se-

84. See *Brancusi v. United States*, 54 Treas. Dec. 428, 428-29 (Cust. Ct. 1928)

85. See The National Foundation on the Arts and Humanities Act, 20 U.S.C.A. § 952(b) (West 2007).

86. See The Public Health and Welfare, Neighborhood and City Reinvestment, Self-Help and Revitalization Act, 42 U.S.C.A. § 8143(1) (West 2007).

87. See *Miller v. California*, 413 U.S. 15, 36-37 (1973) (establishing the standard for obscenity as work without serious artistic value).

88. Farley, *supra* note 80, at 810.

89. *Id.* at 839; see *Parkersburg Builders Material Co. v. Barrack*, 192 S.E. 291, 293 (W. Va. 1937) (referring to aesthetics as “entirely speculative”).

90. See *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 292 (S.D.N.Y. 2004) (analyzing object for “elements of expression or communication that objectively could be so understood”).

ries” paintings on the street.⁹¹ The pictures were confiscated.⁹² A year later, Bery was joined by a number of painters, photographers, sculptors, and an artists’ advocacy organization, Artists for Creative Expression on the Sidewalks of New York, in filing suit against New York City to enjoin enforcement of the GVL against them.⁹³ The artists had been arrested or threatened with arrest for displaying and selling their artistic wares in the City’s public spaces without licenses.⁹⁴ The district court denied the plaintiffs’ motion, and ruled that the GVL was a valid, content-neutral ordinance of general application that did not violate the First Amendment, even though it had the incidental effect of restricting the sale of art.⁹⁵ The district court also concluded that words communicating “political or religious views are much closer to the heartland of First Amendment protection of ‘speech’ than the apolitical paintings in these cases.”⁹⁶

On *de novo* review, the Second Circuit reversed.⁹⁷ First, the court held that the appellant’s artwork was entitled to full First Amendment protection.⁹⁸ Noting that “[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing,” the court went on to praise the superlative communicative powers of imagery over words, which “have the power to transcend . . . and reach beyond a particular language group to both the educated and the illiterate.”⁹⁹ The court further noted that the artists’ street sales were part of their expressive purpose, allowing any member of the public to consume their work.¹⁰⁰ The court found that unlike “the crafts of the jeweler, the potter and the silversmith,” whose work “may at times

91. Kernberg, *supra* note 56, at 158 (summarizing the facts of Mr. Bery’s arrest).

92. *Id.* The seventeen paintings confiscated by the police were generally reflective of the artist’s “ecological concerns”; two of these also included quotations from the Bible, while another included part of a letter by the artist Michelangelo. *Id.*, citing Memorandum of Law in Support of Motion to Dismiss at 1-2, *People v. Bery*, No. 93N061526 (N.Y. Crim. Ct. Sept. 15, 1993). The inclusion of words or text in a work of visual art has been a matter of some First Amendment significance in other jurisdictions. See *infra* note 205 and accompanying text.

93. *Bery v. City of New York (Bery II)*, 97 F.3d 689, 691-92 (2d Cir. 1996).

94. *Id.* at 691.

95. *Bery v. City of New York (Bery I)*, 906 F. Supp. 163, 167-68 (S.D.N.Y. 1995) (citing *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968)).

96. *Bery I*, 906 F. Supp. at 169; see also *supra* notes 64-65 and accompanying text.

97. *Bery II*, 97 F.3d at 693.

98. *Id.* at 696.

99. *Id.* at 695; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (describing visual images as a “short cut from mind to mind”).

100. *Bery II*, 97 F.3d at 696.

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have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to First Amendment protection.”¹⁰¹

Second, the court applied the appropriate constitutional test to the GVL.¹⁰² The court expressed doubt as to whether the GVL was truly content-neutral, because it distinguished between written and visual materials in a way that “effectively bans one while subjecting the other to a more limited form of regulation.”¹⁰³ The court reached no conclusions on that issue because it found that the ordinance was insufficient even when measured against the less restrictive yardstick used for content-neutral regulations: requiring time, place, and manner regulations to be narrowly tailored to serve a significant governmental interest, and leaving open ample alternative channels for communication.¹⁰⁴ The court noted that New York City already had time, place, and manner restrictions on vendors that more directly addressed concerns of crowd management, congestion, and clear passage for the public on city thoroughfares, without implicating free speech.¹⁰⁵ Additionally, the court found the City’s exceptions for veterans and vendors of written materials made the City’s argument for narrow tailoring appear dubious.¹⁰⁶

The City asserted that the vendors had any number of alternative channels for their expression, such as selling their work from their homes, displaying it in restaurants and street fairs, or exhibiting in galleries.¹⁰⁷ The court disagreed, finding no adequate alternate channels existed, because “[d]isplaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people . . . who might feel excluded or alienated from these forums.”¹⁰⁸ Emphatically stating that the sidewalks must be available for the artists to reach their audience, the court held that the

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 697.

105. *Id.* at 698; see N.Y.C. Code § 20-465 (2005); see also *supra* note 57 and accompanying text.

106. *Bery II*, 97 F.3d at 698.

107. *Id.*

108. *Id.*

GVL was an unconstitutional infringement of the appellants' First Amendment rights.¹⁰⁹

Instead of contesting this ruling at a trial on the merits or revising the substance of the GVL, the City of New York consented to a permanent injunction prohibiting the enforcement of § 20-453 against any person who “hawks, peddles, sells, leases or offers to sell or lease, at retail, any paintings, photographs, prints and/or sculpture, either exclusively or in conjunction with newspapers, periodicals, books, pamphlets or other similar written matter, in a public space.”¹¹⁰

B. *Mastrovincenzo v. City of New York*

In 2004, two freelance artists brought a challenge to New York City under *Bery* and the *Bery* injunction.¹¹¹ Christopher Mastrovincenzo and Kevin Santos were at the time of the litigation working in a graffiti style, which they described as “a highly stylized form of typography.”¹¹² The plaintiffs worked on the streets painting articles of clothing, offering both original designs and custom-painted pieces, with the price varying in accordance with the complexity of the design.¹¹³ Some works contained text, logos, designs, or images of public figures, such as President Bush.¹¹⁴ Neither plaintiff had a vending license, and both were denied permission from the City to sell their works without one.¹¹⁵ Mastrovincenzo was arrested twice for selling without a license; Santos was not arrested, but was ordered by police to close up his display.¹¹⁶

Mastrovincenzo and Santos sued the City in federal court, alleging *inter alia* that enforcement of the licensing requirement violated the *Bery* injunction and the First Amendment.¹¹⁷ The City

109. *Id.*

110. Permanent Injunction on Consent dated Oct. 21, 1997, *Bery v. City of New York*, No. 94 Civ. 4253 (MGC) (S.D.N.Y. Oct. 30, 1997) [hereinafter *Bery* Injunction].

111. See *Mastrovincenzo v. City of New York (Mastrovincenzo I)*, 313 F. Supp. 2d 280 (S.D.N.Y. 2004).

112. *Id.* at 284.

113. *Id.*

114. *Id.* Both the Southern District of New York and the Second Circuit Court of Appeals noted that the plaintiffs' work contained depictions of President Bush, but neither opinion assigned any political significance to the imagery. A more detailed description of the presidential motif might have shed much needed light on, or raised additional questions about, the courts' First Amendment analysis. *Id.* at 291-94.

115. *Id.* at 284.

116. *Id.*

117. *Id.*

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responded that the artists' work was not sufficiently expressive or communicative to distinguish it from any other decorative, "regular" wares.¹¹⁸ The Southern District framed the issue as "whether the items Plaintiffs offer for sale are expressive merchandise."¹¹⁹ "The case at bar requires the Court to explore the frontiers of *Bery* to delineate a border between protected, expressive art and unprotected, non-expressive merchandise."¹²⁰

The district court mused at length on the right way to determine the expressiveness of the plaintiffs' work.¹²¹ The court quickly dismissed any notion that the protection should be restricted to works embodied by traditional means:

[T]he I-know-it-when-I-see-it test . . . may be easily dispatched. Should it be a prerequisite for art to be art, that the artist express his thoughts through traditional, perceptually accessible means? The long history of ideas, which records infamous instances of persecution of creative expression, would answer compellingly, for any society that values free speech as much as ours, with an emphatic "No."¹²²

Unlike paintings, photographs, prints, and sculptures, which would receive "blanket protection" from the courts, items like those offered by Mastrovincenzo and Santos would necessitate an individuated evaluation of their expressive qualities.¹²³ In the end, content should trump form, because "[w]hat Plaintiffs paint, not what they paint on, determines whether their work is sufficiently expressive to merit First Amendment protection."¹²⁴ The applicable factors were "myriad," including the artists' given reason for creating the item, the individual creation of the item by the artist, the artist's "bona fides" as such, whether or not the artist was conveying his own message through the item, and whether the item appeared to contain elements of expression that "objectively could be so understood."¹²⁵ After examining the plaintiffs' work, the

118. *Id.* at 285.

119. *Id.*

120. *Id.* at 286.

121. *Id.* at 292.

122. *Id.* at 289.

123. *Id.*

124. *Id.* at 292 (citing *Ayres v. City of Chicago*, 125 F.3d 1010, 1017 (7th Cir. 1997) (noting that the message-bearing t-shirt was to its peddler "what the *New York Times* is to the Sulzbergers and the Oschses—the vehicle of her ideas and opinions.")).

125. *See id.* The court here was grappling with what I will call the problem of craftsmanship: there is a desire to privilege works that are individually or "hand" made, both as reward for the artist's "sweat of the brow" and because of the credence many people give to the artist's signature mark as signifier of quality or aesthetic

court found that the items were “as expressive as any sidewalk calligrapher or Chinese-character painter, apparently neither of whom needs a license from the [City] to produce and sell their wares.”¹²⁶ The court determined that the artists’ wares were sufficiently expressive to trigger First Amendment protection, but went on to hold that the work would be covered by the *Bery* injunction even if it had no expressive function.¹²⁷ Noting that the *Bery* injunction made no mention of expressiveness, nor provided any definition of “painting, photograph, print, or sculpture,” the court blamed the City for the philosophical and practical difficulties *Bery* presented.¹²⁸ The court was satisfied that with time, case law would accumulate to instruct the City as to what types of merchandise were and were not suitable for licensing, and that the burden of litigating such cases would not become unmanageable.¹²⁹

New York City appealed the grant of a preliminary injunction barring it from enforcing GVL § 20-453 against Mastrovincenzo and Santos, arguing that the artists’ merchandise did not constitute “paintings” within the meaning of the *Bery* injunction, or protected expression under the First Amendment.¹³⁰ Whereas the district court examined the expressive capacity of the works before determining whether or not they fit within the scope of the *Bery* injunction,¹³¹ the Second Circuit began its analysis with the opposite conclusion: “[w]here, as in the instant case, items do not fall within one of these four categories [paintings, photographs, prints or sculpture], their sale must be classified as *potentially* expressive.”¹³² The Second Circuit applauded the district court’s focus on examining the contested items themselves for expressive content, as opposed to consulting the creator, but ultimately dispensed with its multi-pronged test.¹³³ Specifically, the consideration of whether the work might have “any expressive or communicative elements”

value. Individuated manufacture is one way to distinguish “art” from, say, the decoration on the back of playing cards. See *People v. Saul*, 776 N.Y.S.2d 189, 191-93 (N.Y. Crim. Ct. 2004). On the other hand, the court doesn’t want to accidentally protect non-expressive craft-items that are mere “regular merchandise.” *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

126. *Mastrovincenzo I*, 313 F. Supp. 2d at 291.

127. *Id.* at 293-94.

128. *Id.* at 293.

129. *Id.* at 294.

130. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 88 (2d Cir. 2006).

131. See *Mastrovincenzo I*, 313 F. Supp. 2d at 290-93.

132. *Mastrovincenzo II*, 435 F.3d at 93.

133. *Id.* at 94.

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would permit over-inclusive protection and “interesting and creative, but ultimately absurd intellectual exercises.”¹³⁴

Instead, the court laid out a new methodology. First, a court should look for evidence that a work contains any expressive elements.¹³⁵ If so, the court should then determine whether the item also has a common non-expressive purpose, and if this is also true, then it is likely to possess “only marginally expressive content.”¹³⁶ If the court finds both expressive content and utility, it must balance the two and conclude whether or not the item is a mere commercial good outside the scope of the First Amendment.¹³⁷ Applying this framework to the plaintiffs’ graffiti-decorated items, the court held them to be “predominantly expressive.”¹³⁸ This finding was, in turn, only one strong indication that the plaintiffs were engaged in protected speech; the court also considered the artists’ stated motivations for selling their work, and whether the sale of goods was “an act of self expression.”¹³⁹ The Second Circuit expressly rejected the district court’s consideration of the artists’ “bona fides,” because of the “potentially undesirable effects of such an inquiry.”¹⁴⁰

Having found Santos’s and Mastrovincenzo’s work within the aegis of the First Amendment, the Second Circuit examined the GVL. The court found the GVL to be content-neutral: “[t]he mere fact that New York City differentiates between *categories* of vendors—that is, vendors of written materials, paintings, photographs, prints and sculptures are exempt from its licensing requirement while other vendors are not—does not suggest that the City’s regulation targets particular messages and favors others.”¹⁴¹

That said, the Second Circuit held that § 20-453 survived intermediate scrutiny because it is a valid time-place-manner restriction, narrowly tailored and leaving ample alternative channels for regulated communications, even though it does not serve as the least speech-restrictive regulation possible.¹⁴² Narrow tailoring was sat-

134. *Id.* at 94-95.

135. *Id.*

136. *Id.* at 95. *But see* *Gaudiya Vaishnava Soc’y v. City of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990) (holding unconstitutional an ordinance protecting only goods with no intrinsic value other than expression).

137. *Mastrovincenzo II*, 435 F.3d at 95.

138. *Id.* at 96.

139. *Id.* at 97.

140. *Id.*

141. *Id.* at 99 (finding that the City’s licensing requirement “applies across the board to all non-exempt vendors”).

142. *Id.* at 102.

ified by the New York City Council's determination that a fixed license scheme, like the GVL, alleviated congestion of city sidewalks.¹⁴³ The court found no evidence that the fixed-licensing was surplus in relation to the other time-place-manner restrictions aimed at reducing congestion by governing the square footage vendors could occupy, or which sidewalks would be available to vending.¹⁴⁴ As for the availability of alternative channels, the court opined that the plaintiffs were free to put their name on the waiting list for a general vendors license, or to lobby the City Council to change the regulatory scheme, even though either course, in light of past experience, would almost certainly fail.¹⁴⁵ The plaintiffs were also told they were at liberty to give their work away for free.¹⁴⁶ The court distinguished *Bery's* holding in terms of tailoring, finding that the artistic wares for sale in that case were of an altogether different form.¹⁴⁷ Reversing the district court's First Amendment determination, the Second Circuit used the listing of media from the *Bery* injunction to circumscribe the scope of constitutional protection:

[t]he types of wares at issue here, whose dominant purpose is not clearly expressive, present line-drawing questions markedly distinct from the more-easily-classified "paintings, photographs, prints and/or sculpture" at issue in *Bery*, and we are therefore persuaded that the least restrictive or 'least intrusive means of achieving the stated governmental interest' . . . in *this* context is likely to be more burdensome than it would be with respect to the traditional art forms at issue in *Bery*.¹⁴⁸

The Second Circuit also overturned the district court's determination on independent and adequate grounds that the plaintiffs' painted hats were "paintings" within the meaning of the *Bery* in-

143. *Id.* at 100 (citing N.Y.C. Local Law 50/1979 § 1).

144. *Id.*; *contra* *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996).

145. *See Mastrovincenzo II*, 435 F.3d at 100. The court suggested that the City Council was not beyond persuasion to raise the number of permits, because it had discussed alternative licensing schemes at a hearing in 1993. *See id.* *But see* Hicks, *supra* note 49 ("The waiting list has been closed for several years," said Patricia B. Cohen, a spokeswoman for the Department of Consumer Affairs. "And there is really very little turnover.").

146. *Mastrovincenzo II*, 435 F.3d at 101 ("Notwithstanding New York City's licensing requirement, plaintiffs may personally distribute their art to the public free of charge . . . [a]t most, therefore, § 20-453 prohibits plaintiffs, as unlicensed vendors, from *personally* selling their wares *for a profit* and *at a venue of their choosing*."). *But see* Ayres v. City of Chicago, 125 F.3d 1010, 1016-17 (7th Cir. 1997).

147. *Mastrovincenzo II*, 435 F.3d at 102.

148. *Id.* at 102.

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junction.¹⁴⁹ The court's determined that "[n]otwithstanding the existence of a dictionary definition to the contrary, 'paintings', as it is . . . understood in common parlance, refers . . . only and specifically to painted canvases."¹⁵⁰ To find otherwise, the court decided, would allow the City's exception for artwork to swallow its licensing rule, and would be contrary to the intentions of the parties to the injunction.¹⁵¹ In review, the Second Circuit opined that the district court could not have itself believed the plaintiffs' work to be "paintings," because such a finding would have eliminated the necessity of performing First Amendment analysis.¹⁵²

In a partial dissent, Judge Sack questioned the court's insistence that a hand-painted hat could not be a "painting."¹⁵³ Analogizing to another example of art in public space, Judge Sack doubted that certain Renaissance frescos would be considered any less great artworks because they appeared on utilitarian parts of buildings.¹⁵⁴ More immediately, he questioned why the plaintiffs' creations would be any less "paintings" within the meaning of *Bery* than "the endless, mass-produced 'prints,' the dissemination of which is now exempt from the City's licensing requirement."¹⁵⁵ Looking behind the quick listing of the *Bery* injunction itself, the dissent noted that the injunction was entered into after the Second Circuit staked out an expansive new swath of entitled expression, offering that the injunction should be read in light of the litigation informing it.¹⁵⁶

All told, the approach applied by the Second Circuit in the *Bery* and *Mastrovincenzo* cases has its advantages: it distinguishes what kinds of wares require analysis of their expressivity, gives some guidelines on conducting such analysis, and does not define an artist by her tutelage.¹⁵⁷ It strikes a blow for objectivity, if not simplicity, and gives great deference to the City in its role as arbiter of public space. The court, of course, is no foe of art, per se. There are a number of problems, however, with what the Second Circuit has created in this area.

149. *Id.* at 102-03.

150. *Id.* at 104. Plaintiffs offered a definition of "painting" as "something produced through the process or art of painting." *Id.*; see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1621 (2002).

151. *Mastrovincenzo II*, 435 F.3d at 104 (citing World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co., 345 F.3d 154, 184 (2d Cir. 2003)).

152. *Mastrovincenzo II*, 435 F.3d at 105.

153. *Id.* at 107 (Sack, J., dissenting).

154. *Id.* at 107-08.

155. *Id.* at 108.

156. *Id.*

157. See *supra* notes 135-52 and accompanying text.

The *Bery* court did not exaggerate when it acknowledged in its opinion the unavoidable difficulty posed by its ruling.¹⁵⁸ Yet, in concluding that the artist-plaintiffs were entitled to protection, the court proclaimed it would all be worth it: “difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment’s protective arm. Courts have struggled with such issues in the past; that is not to say that decisions are impossible.”¹⁵⁹ This is cold comfort looking back at the legal landscape constructed by the decision, where the four media ennobled as *always* communicating an idea or concept have been laid down as an exclusive listing.¹⁶⁰ The *Bery* court’s holding, in that regard, is confusing because it seems radically and arbitrarily to narrow the application of the precedents cited on the matter of expression. The court chided the City for its “myopic” view of “the essence of visual communication,” and discussed the reciprocal enrichment of text and image, claiming, “the two cannot always be readily distinguished.”¹⁶¹ Yet the court’s focus on expression is absent from its holding; it was willing to discuss the communicative validity of visual things but not to provide real guidance for artists and politicians going forward.

The resulting injunction is both under- and over-inclusive.¹⁶² First, the *Bery* injunction makes no mention of drawings in its listing, even though drawing is a traditional mechanism of visual representation,¹⁶³ often a foundational step for painting, sculpture, and printmaking, and practiced extensively by art vendors in New York City.¹⁶⁴ The *Bery* injunction makes no exception for collage or any number of other media with reassuringly historical pedigrees of artistic expression.¹⁶⁵ Yet the injunction is used to protect

158. See *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

159. *Id.*

160. See *Mastrovincenzo II*, 435 F.3d at 103-04 (majority opinion) (discussing *Bery* Injunction, *supra* note 110). *Expressio unius est exclusio alterius*: the inclusion of one is the exclusion of the other.

161. *Bery*, 97 F.3d at 695.

162. See *Mastrovincenzo v. City of New York (Mastrovincenzo I)*, 313 F. Supp. 2d 280, 294 (S.D.N.Y. 2004) (describing *Bery* as “arguably at once too broad and too narrow”).

163. See generally BETTY EDWARDS, *DRAWING ON THE RIGHT SIDE OF THE BRAIN* (1989).

164. See Lueck, *supra* note 34 (describing vendors of “\$5 portraits” as a problem in crowded Times Square). R

165. See *Mastrovincenzo I*, 313 F. Supp. 2d at 283 (citing *Bery* Injunction, *supra* note 110). For a listing of categories of media permitted for vending and display by San Francisco’s Arts Commission, including drawing, castings, computer-generated art, enameling, and engraving, see Kernberg, *supra* note 56, at 180. R

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any vendor selling mass-produced pictures of celebrities or photographs of landmarks, as well as “any sidewalk calligrapher or Chinese-character painter.”¹⁶⁶ *Bery* effectively removed expressivity from the analysis of paintings, photographs, prints, and sculpture, even as it vaunted the expressive potential of those media.¹⁶⁷ Centuries of aesthetic scholarship and discourse are flattened to a legal presumption.¹⁶⁸

The Second Circuit in *Mastrovincenzo* was limited in what it could do with *Bery* as binding precedent.¹⁶⁹ The test it created to separate expressive art from merchandise is unwieldy, however, despite the court’s attempt to make it “as straightforward as we can devise.”¹⁷⁰ The first step, looking for a utilitarian function of the item and balancing that function against its expressive uses, jumps ahead of itself. In order to weigh the functional and the expressive, the court must first make a measure of expressiveness based strictly on its observations. In *Mastrovincenzo*, the court placed its faith more in its “objective” examination of the contested items, and less in other factors, such as the vendors’ expressed motives.¹⁷¹ But ultimately, the court went through the motions of taking those factors into account anyway, and concluded that the First Amendment protected the plaintiffs’ work.¹⁷² By this process the court carved out a new category for the plaintiffs’ work: short of “expression,” but not purely based on merchandise, it is only “predominantly expressive.”¹⁷³ An item’s classification in this category entitles it to some First Amendment protection, just not as much as

166. *Mastrovincenzo I*, 313 F. Supp. 2d at 291; see also Lueck, *supra* note 34.

167. See *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1138-39 (D. Nev. 2004).

168. I am presumptuously pegging the starting point of this scholarship and discourse with IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* (1790).

169. See *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 93 (2d Cir. 2006).

170. *Id.* at 95.

171. *Id.* at 95-97. The court also completely rejected any “pernicious” inquiry into the artist’s training as such. *Id.* The court is apparently comfortable with the idea of conducting an “objective” inquiry into whether or not an item has expressive elements, *id.* at 91, but identifies the need for judicial sagacity to avoid “absurd” results in practice. *Id.* at 95. See Farley, *supra* note 80, at 832-36 (describing how “courts’ high ambitions towards aesthetic relativism easily give way to subjective aesthetic determinations”).

172. *Mastrovincenzo II*, 435 F.3d at 96. This was despite the court’s finding that the artists’ hats could also be used for “calming and controlling unruly hair.” *Id.*

173. *Id.* at 85. For a discussion of the difficulties in making a similar determination in the right of publicity context, see Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 *LOY. L.A. ENT. L. REV.* 471, 488-89 (2003).

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that enjoyed by fully expressive things, like paintings.¹⁷⁴ If an artist thinks her work falls into this interpretive crevasse, the rest of the *Mastrovincenzo* order will offer little guidance for how to proceed.

This hierarchical relationship between visual expression and goods both expressive and utilitarian is also, arguably, impermissibly based on content. The Supreme Court has said that time-place-manner restrictions are only valid “provided that they are justified without reference to the content of the regulated speech”¹⁷⁵ The Second Circuit in *Mastrovincenzo* distinguished the plaintiffs’ wares as those of which a “dominant purpose is not clearly expressive,” from “the more-easily-classified” artworks in *Bery*.¹⁷⁶ A distinction with such significance to litigants seeking constitutional safe harbor should arguably not be based on the courts’ facility in making clear sense of an item’s content.¹⁷⁷ If the medium is—in whole or in part—the message, the law’s preference between media may be construed as something of a constraint on content.

Finally, the presumptive protection of these works is based on the understanding that paintings transmit concrete ideas or concepts to viewers,¹⁷⁸ and thus places the emphasis on the reception of the audience, rather than on the expressive faculties of the artist. The road taken by the courts of the Ninth Circuit avoids many of the practical problems of the Second Circuit, but shares this last conceptual difficulty: discerning when a visually expressive work communicates an idea, and drawing a line at the level of abstraction permissible to determine the grant of protection.

III. THE DISTRICT OF NEVADA AND THE NINTH CIRCUIT’S APPROACH TO DEFINING PROTECTED VISUAL EXPRESSION

A. *White v. City of Sparks*

In 2004, an artist named Steven White sued the city of Sparks, Nevada, alleging that the Sparks Municipal Code prohibited him from selling his paintings on the city’s streets and parks without a license in violation of his First Amendment rights.¹⁷⁹ White prac-

174. *Mastrovincenzo II*, 435 F.3d at 102.

175. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

176. *Mastrovincenzo II*, 435 F.3d at 102.

177. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

178. *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

179. *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1132 (D. Nev. 2004); *see also* Sparks Municipal Code §§ 5.59.010 to 5.59.160 (2007), available at http://www.ci.sparks.nv.us/governing/muni_code/Title_5/59/index.php (last visited Apr. 17, 2007).

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ticed his art by working in public areas and selling paintings to passersby.¹⁸⁰ The City of Sparks's policy on street vending generally prohibited the sale of goods in parks and other areas designated as public facilities, but defined "goods" only as merchandise not protected as speech under the First Amendment.¹⁸¹ An artist, like White, who wished to sell art in these areas was required to seek a determination by the city's staff that his work constituted protected speech; the staff in turn was instructed to get a legal opinion before making a determination.¹⁸² The City evaluated whether or not the work was protected speech based on whether it "present[ed] . . . a religious, political, philosophical or ideological message . . . based on common sense and the plain meanings of the four categories."¹⁸³

The plaintiff encouraged the court to adopt the *Bery* court's holding that visual art, at least art manifested as "painting," is per se entitled to First Amendment protection because it is inherently expressive.¹⁸⁴ The court rejected this interpretation: "[a]pplying such a blanket presumption of protected status would . . . be out of step with Ninth Circuit precedent and the First Amendment's fundamental purpose—to protect *expression*."¹⁸⁵ The court cited the Southern District of New York's opinion in *Mastrovincenzo* with approval.¹⁸⁶ The City of Sparks argued that art must adhere tightly to one of the four categories to be protected.¹⁸⁷ The court denied the City's interpretation and reiterated the Ninth Circuit's standard: that merchandise must "carry or constitute a political, religious, philosophical or ideological message in order to merit First Amendment protection . . . read broadly to encompass both explicit, understandable messages and implicit, abstract expression."¹⁸⁸ Ultimately, the court agreed with the *Bery* court's

180. *White*, 341 F. Supp. 2d at 1132.

181. *Id.* at 1137.

182. *Id.*

183. *Id.*; see *A.C.L.U. of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir. 2003).

184. *White*, 341 F. Supp. 2d at 1138 (citing *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996)).

185. *Id.* at 1139.

186. *Id.* (citing *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 286 (S.D.N.Y. 2004)).

187. *Id.* In a footnote within its opposition papers, the City of Sparks noted that the plaintiff's paintings did not include "potentially protected symbols such as white buffalo and Indian faces," elements which presumably would have made the City more amenable to their sale in the parks. *Id.*

188. *Id.* at 1140. The court suggested that if the work of artist Jackson Pollock could fit within this standard, it would be difficult for many works of art not to. *Id.*

acknowledgement of a distinction between art and merchandise for protection purposes, but disapproved of its imprecision.¹⁸⁹

B. The Ninth Circuit and “Expressive Merchandise”

The district court in *White* drew upon the Ninth Circuit’s test for protected expression, which does not apply only to visual art. The Ninth Circuit has chosen to enumerate types of messages, rather than methods of expression, that are worthy of First Amendment protection.¹⁹⁰

The Ninth Circuit has had occasion to pass judgment on the suitability of vending regulations with respect to “expressive merchandise” as one of these categories. In 1990, a group of nonprofit organizations won a challenge to San Francisco’s peddling ordinance, which prohibited the unlicensed vending of any goods “other than books, pamphlets, buttons, bumperstickers [sic], posters, or items that have no intrinsic value other than to communicate a message.”¹⁹¹ The regulation failed primarily because it acted as a prior restraint on speech,¹⁹² but was also criticized for charging exorbitant fees and because it made “few, if any, permits presently available to anyone.”¹⁹³ Most importantly for purposes of this analysis, the court dismissed the City’s rationale that First Amendment protection only applies to items with “pure communicative value,” and waved off the conclusion that the sale of merchandise not up to such a standard would automatically be considered a lowly commercial transaction.¹⁹⁴ Instead, the court agreed with the plaintiffs that the merchandise they wished to sell was fully protected under the First Amendment, because it conveyed “core” First Amendment messages.¹⁹⁵

Jackson Pollock is a useful touchstone; the Supreme Court has described his work as “unquestionably shielded.” *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

189. *White*, 341 F. Supp. 2d at 1139-40.

190. See *A.C.L.U. of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1109 (9th Cir. 2003); *Perry v. L.A. Police Dep’t*, 121 F.3d 1365, 1371 (9th Cir. 1997); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996); *Gaudiya Vaishnava Soc’y v. City of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990).

191. *Gaudiya*, 952 F.2d at 1061. The plaintiffs were unable to acquire permits in part because permits were only issued to natural persons. Applicants for permits were required to pay a non-refundable \$300 fee, and an annual permit tax. *Id.*

192. *Id.* at 1062. New York City’s ordinance does not suffer this particular deficiency, because *all* discretion in the awarding of permits has been stripped by statute. See *Bery v. City of New York*, 97 F.3d 689, 692 (2d Cir. 1996).

193. *Gaudiya*, 952 F.2d at 1061 n.3.

194. *Id.* at 1063.

195. *Id.*

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So, like the Second Circuit, the Ninth Circuit has acknowledged that a range of things, not just books or newspapers, may be considered expressive merchandise for First Amendment purposes. Furthermore, the Ninth Circuit has not expressed concern about any additional instrumentality that expressive merchandise may have. The Ninth Circuit has obviously focused more on the message than the medium. Specifically refusing to adopt the logic of *Bery*, the District Court for the District of Nevada has re-affirmed its allegiance to a purely message-based theory of the First Amendment.¹⁹⁶ From the artist's point of view, this is a mixed bag. While the *White* court was clear that the Ninth Circuit test would be broad enough to cover any work of art that could be implicitly read with an abstract philosophical, religious, ideological, or political message, the court's interpretation still relies on the discernment of *some* message by the government to win entitlement. Unlike the Second Circuit, which only requires artists to work in certain time-tested media to get protection, the Ninth Circuit allows artists to gamble on the aesthetic faculties of the courts. This, of course, requires the kind of intimate dance between artistic and legal judgments that judges often dread or bungle.¹⁹⁷ The *White* court cited *Hurley* for support, finding that the City of Sparks's policy came too close to requiring a "particularized message."¹⁹⁸ Yet, even at their most abstract and implicit, artworks must still have a message cognizably particular to one of the four categories to merit protection.

IV. OTHER DISTRICT COURT DECISIONS

In 2004, the City of New Orleans charged an artist, Marc Trébert, with a criminal misdemeanor for selling his artwork in Jackson Square.¹⁹⁹ Trébert held a city permit to vend artwork in the "Jackson Square set-up area," and relied upon it in selling his digital photographs, which he embellished with pastels.²⁰⁰ The New Orleans Municipal Code provides that artists may sell only "original" art in that area of Jackson Square; Trébert's work was considered insufficiently original because he relied on a "mechani-

196. *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1139 (D. Nev. 2004).

197. See *supra* notes 80-90 and accompanying text.

198. *White*, 341 F. Supp. 2d at 1140.

199. *Trébert v. City of New Orleans*, 2005 WL 273253, *2 (E.D. La. Feb. 2, 2005).

200. *Id.* at *1-2.

cal or duplicative process” to create it, namely photography.²⁰¹ The City argued that Trébert’s work fell outside the scope of the First Amendment because it was not expressive “art.”²⁰² The District Court for the Eastern District of Louisiana, however, found that the City misunderstood the issue: “[t]he question is not whether plaintiff’s work is art, but whether it is ‘speech.’”²⁰³ The court quickly found that Trébert’s work was protected speech and granted his summary judgment motion.²⁰⁴

While the Eleventh Circuit Court of Appeals has yet to decide the scope of protected expression for artwork, the Middle District of Florida has held that visual art incorporating elements of written expression is per se protected by the First Amendment.²⁰⁵ Only a few months before the Second Circuit’s ruling in *Mastrovincenzo*, the Southern District of New York issued an opinion permitting painting “graffiti” on mock subway-car doors as expression protected under the First Amendment.²⁰⁶

What emerges from this patchwork of cases is that there is no clear set of standards for what constitutes “speech” in the realm of visual expression. The tentative approach used in Florida is appealingly straightforward: so long as art has writing in it, it fits within the scope of cases discussing the protection of writings. Had *Mastrovincenzo* and Santos created their works in Tampa, perhaps they would have been able to reap the benefits of this interpretation, since their style of graffiti art is based on expressively stylized

201. *Id.* at *2. In citing *Trébert*, the City of New Orleans reasoned that “[p]reserving the distinctive charm, character and *tout ensemble* of the [French] Quarter” was a significant governmental interest, and that Trébert’s work undermined said qualities. *Id.*

202. *Id.* at *5.

203. *See id.* at *5, n.1 (suggesting the names of luminaries in the field of photography, art institutions enshrining photography, and courses offered by Tulane University’s art department on photography, should the plaintiff ever need evidence that photography is, in fact, an art form).

204. *Id.* at *11.

205. *See* *Celli v. City of St. Augustine*, 214 F. Supp. 2d 1255, 1258-59 (M.D. Fla. 2000) (noting the Second Circuit’s holding in *Bery* but deciding the call on narrower grounds); *see also* *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 286 (S.D.N.Y. 2004) (“[A]ctual speech, as when written or spoken, is always communicative or expressive and thus virtually always protected.”). Were the plaintiffs in *Mastrovincenzo* creating their decorated hats in the Eleventh Circuit, their incorporation of words within the work might have vaulted them above ambiguity. *See supra* note 92 and accompanying text.

206. *See* *Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627, 629 (S.D.N.Y. 2005) (noting that the city’s “heavy-handed censorship would, moreover, fall particularly hard on artists, who frequently revel in breaking conventions or tweaking the powers that be”).

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typography.²⁰⁷ In the case of photography, what struck the Second Circuit as Platonically communicative²⁰⁸ was so offensive to the City of New Orleans that it was willing to litigate in federal court that it did not amount to art.²⁰⁹ The courts are struggling with a way to sort visual expression from visual detritus, to avoid watering down the First Amendment, but lament the incompatibility of legal reasoning and aesthetic judgment.²¹⁰

What the above-mentioned cases have in common is a focus on the work's receiving end—the work's communicative clarity, its medium, and the ease with which it can be analogized to text or absorbed into the First Amendment's protective pantheon by the operation of historical convention. The cases do not examine the artist, her motives, the role that the work plays within the artist's life, or the lives of the artist's intended audience (i.e., not the judiciary). The Second Circuit, in fact, has specifically downgraded the role of the creator in its interpretive method.²¹¹ In the following section, this Comment will argue that courts must turn their attention away from the questions of if and how contested works communicate messages, and instead protect artists' public exhibition rights under a "self realization" theory of free expression grounded in the benefit that the expressive process confers on both the artist and her audience.

V. REEVALUATING THE VALIDITY OF EXPRESSION

A. The Pursuit and Protection of Communicative Value Is Fruitless

During the 1980s, lawyers fighting in the "culture wars"²¹² sought to delineate the protections entitled to artists and their work in the context of securing or withdrawing public funds from institutions

207. *Mastrovincenzo*, 313 F. Supp. 2d at 284.

208. *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

209. *Trébert*, 2005 WL 273253 at *5.

210. *Id.*; see *Mastrovincenzo*, 313 F. Supp. 2d at 288; *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1136 (D. Nev. 2004); see also *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (finding that the First Amendment applies to "art for art's sake"); Farley, *supra* note 80, at 810-15; Posner, *supra* note 81, at 515.

211. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 94 (2d Cir. 2006).

212. See generally *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* (Richard Bolton ed. 1992). For a very angry recounting of the "culture wars" from the conservative perspective, see LYNNE MUNSON, *EXHIBITIONISM: ART IN AN ERA OF INTOLERANCE* (2001) (defending "eternal" aesthetic principles from revisionist art historians).

like the embattled National Endowment for the Arts.²¹³ Sometimes the issue was decency²¹⁴ or obscenity.²¹⁵ Other times, the problem was that the public subjected to the work could not stand living with it.²¹⁶ These kinds of cases provide the least opportunity to evade questions of aesthetic quality or substance, because the public support of that quality or substance is what is at stake.²¹⁷ While those sorts of issues are thankfully not at issue here, they have further complicated any legal encounters with art issues. Judges not inclined solely to reserve protection for traditionally embodied expressive works²¹⁸ may now throw up their hands at the supposed arbitrariness of the whole inquiry.²¹⁹ Perhaps if the law took greater notice of the real and substantial body of scholarship on these issues, the law would lose some of its aura of impenetrability.²²⁰

In cases that turn on the regulation of displaying and selling visual expression in public fora, judicial notice will not fix everything. Though artworks may be “texts” for semiotic purposes, there is no good way to deal with silent visual expressions by analogizing to the printed and spoken word. When judges inquire into whether a creator’s wares are sufficiently expressive to merit First Amendment protection by considering whether “any elements of expression or communication . . . objectively could be so understood,”²²¹ the judge undertakes the misguided task of trying to fix the communicative purpose of the work as if with a printer’s blocks. When a judge gives blanket protection based on the medium of represen-

213. See generally Jennifer Weatherup, *Agencies and the Arts: The Dilemma of Subsidizing Expression*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 271 (2004).

214. See, e.g., *N.E.A. v. Finley*, 524 U.S. 569, 572-73 (1998).

215. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Cincinnati v. Barri*, 57 Ohio Misc. 2d 9 (Ohio Mun. Ct. 1990); see also Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) (criticizing the *Miller* test for obscenity in light of post-modern art practice); Farley, *supra* note 80, at 847 (pointing out that “[a]ny case in which a court must resolve whether an object is art or obscenity necessarily employs the aesthetic theory of formalism”).

216. See *Serra v. U.S. Gen. Servs. Admin.*, 664 F. Supp. 798, 800 (S.D.N.Y. 1987), *aff’d*, 847 F.2d 1045 (2d Cir. 1988); Hoffman, *supra* note 63, at 85 (discussing the “captive audience” problem in the *Serra* case).

217. See Farley, *supra* note 80, at 831.

218. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 103 (2d Cir. 2006).

219. See Posner, *supra* note 81, at 517 (“[A]rtistic value is largely, perhaps entirely, unknowable.”).

220. See Farley, *supra* note 80, at 853-54; see also David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 6 (2003) (claiming that judges should know “more about everything”).

221. *Mastrovincenzo*, 435 F.3d at 87-88.

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tation,²²² she ducks the issue entirely, and dilutes the meaning the protection is supposed to have. And when a judge restricts protection to works with even-abstractly discernable “religious, political, philosophical or ideological”²²³ messages, she sets herself up to perpetuate the presentation of difficult cases.

Yet, many judges and scholars seem to feel completely confident that the First Amendment’s guarantee of freedom of speech applies to visual art and visual expression, despite its potential inarticulateness.²²⁴ Too often these declarations of protection beg a footnote. The Supreme Court says that Jackson Pollock is “unquestionably protected,” but never tells us *why* this is so.²²⁵

The conviction that visual expression belongs within the scope of the First Amendment is correct, but it lacks for theorization. When a court, like the Second Circuit in *Bery*, does explain why a work of visual expression merits special constitutional freedoms, it is for the wrong reason. The *Bery* court, like the *White* court, focused on the communication of a message. Both courts were obviously trying to be sensitive to what they perceived as the dynamism of art and the need to focus on the “essence” of artistic communication, so that their rulings might apply to works old and new.²²⁶ The *Bery* court went so far as to proclaim that “[t]he ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language group to both the

222. *Id.* at 91.

223. *Gaudiya Vaishnava Soc’y v. City of San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1990); *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1144 (D. Nev. 2004).

224. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (describing the non-representational work of Jackson Pollock as “unquestionably protected”); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures . . . are entitled to full First Amendment protection.”); *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (“[T]he First Amendment has been interpreted to embrace purely artistic as well as political expression.”); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (protecting motion pictures that “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression”); David Greene, *Why Protect Political Art as “Political Speech”?*, 27 HASTINGS COMM. & ENT. L.J. 359, 362 (2005) (presenting as a certainty that visual art falls under the aegis of the First Amendment); Meiklejohn, *supra* note 74, at 263 (“[T]he people do need . . . paintings.”); Redish, *supra* note 21, at 627 (“[I]t is highly doubtful that fine art, ballet or literature can be thought to aid one on making concrete life-affecting decisions, yet all three seem deserving of full first amendment [sic] protection.”).

225. *Hurley*, 515 U.S. at 569; *see also Farley, supra* note 80, at 838 (“Probably the most prevalent way that courts deal with the tension between needing to decide an object’s art status, while at the same time being admonished not to do so, is simply to reach a conclusion on that question without any supporting analysis.”).

226. *Bery*, 97 F.3d at 695; *White*, 341 F. Supp. 2d at 1140.

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educated and the illiterate.”²²⁷ Using this conception of art, one might call it “speech-plus”—a visual language with universal communicative value.

The problem is that art is not “speech-plus.” If works of visual expression were true “shortcuts from mind to mind,” our only legal contests over art would turn on the appropriateness of their distinguished meanings, not about whether or not a given object constitutes expression or art. It is the opaqueness of visual expression, not its universality or transparency, that characterizes it with regards to law and society.²²⁸ Positions staked out based on this belief in universal or fixed communicative capacity in art owe much to formalism, a school of thought that posits that through reference to static, inherent aesthetic principles, works of art may become objectively good.²²⁹ Formalism has been in decline in the academy and in practice since the 1960s.²³⁰ Legal conflicts illustrate well the impossibility of looking for fixed communicative value, even at the most abstract levels, in works of visual expression.²³¹

So long as courts support their conclusions about the First Amendment’s protection of art by trying to nail down discrete messages—even those broadly defined²³²—this unsatisfying state of affairs will persist. An artist cannot rely on judicial determinations about the scope of her freedoms if those determinations depend on a process balancing expression and utility, as in the

227. *Bery*, 97 F.3d at 695.

228. See *Hoffman*, *supra* note 63, at 52-57; see also DEUTSCHE, *supra* note 43, at 62-63 (“[T]he notion that *Tilted Arc* bestows on the Federal Plaza an aesthetic use available to all ignores questions recently posed in a multitude of disciplines about differences among users and, further, about the users’ role in *producing* the meanings of their environments. . . . ‘The situation of man confronting the city,’ writes Raymond Ledrut, ‘involves other things than schemas of perceptive behavior. It introduces ideology.’”) (quoting RAYMOND LEDRUT, *LES IMAGES DE LA VILLE* 28 (1973)).

229. Formalism was ascendant in the early 20th Century and is most often associated with the art critic Clement Greenberg. For a theorization of the objectivity of good art, see Clement Greenberg, *Avant-Garde and Kitsch*, in *ART AND CULTURE: CRITICAL ESSAYS* 3, 3-22 (1971).

230. See DEUTSCHE, *supra* note 43, at 232-40; see generally BENJAMIN BUCHLOH, ET AL., *ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM* (2005). Formalist theories of modernist art share something in common with the “marketplace of ideas” conception of freedom of speech: a belief in the existence of a singular truth, objectively discoverable. See BAKER, *supra* note 4, at 6-12; Greenberg, *supra* note 229, at 6.

231. Beyond the difficulty of deciding what is art, some lawmakers contest the appellation of “artist.” See Greene, *supra* note 224, at 375 n.62 (“Senator Alphonse D’Amato famously tore up a reproduction of the photograph [*Piss Christ*] on the Senate floor, saying that ‘[Andres] Serrano is not an artist. He is a jerk.’”).

232. *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1140 (D. Nev. 2004).

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Second Circuit, or the classification of a given work's "message" into certain approved categories, as in the Ninth Circuit. In sum, the jurisprudence in this area has three problems: it subjects visual expression to capricious application of First Amendment intermediate scrutiny without defining its terms,²³³ it supposedly protects "art" without clarifying why, and it perpetuates misunderstandings about art's relationship to objectivity and societal good.

B. Why Public Visual Expression Still Warrants Inclusion in the First Amendment

Professor Thomas Emerson, a free speech theorist, has observed four distinct values advanced by the First Amendment's protection of expression: (i) individual self fulfillment, (ii) advancement of knowledge and discovery of truth, (iii) participation in decision making by all members of society, and (iv) achieving a "more adaptable and hence stable community."²³⁴ Professor Baker has condensed these to two in a theory of liberty: self-fulfillment and public participation.²³⁵ Professor Redish has concluded, "the guarantee of free speech ultimately serves only one true value, which [is] 'individual self-realization.'"²³⁶

The self-realization value is not monolithic because individual self-realization embodies a number of other values within it, as part of a "commitment to free expression."²³⁷ Nor does this theory reject the necessity of regulating free expression in light of other competing social needs and values.²³⁸ Rather, Professor Redish's theory is based on an analysis of how free expression practically and theoretically serves the well-being of democracy. In this conception, the democratic system has two kinds of values: the intrinsic values of self rule and self-control, which are achieved through the existence of a democratic system in place, and the instrumentalist values that promote democracy, such as the development of human faculties to assist in self-rule and self-control.²³⁹ Free expression fosters the intrinsic value of democracy directly by al-

233. *See supra* notes 170-74 and accompanying text.

234. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970); *see also* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . liberty to be the secret of happiness and courage to be the secret of liberty.").

235. BAKER, *supra* note 4, at 47.

236. Redish, *supra* note 21, at 593.

237. *Id.* at 594.

238. *Id.* at 595.

239. *Id.* at 602.

lowing individuals to participate in self-rule, and it fosters the instrumentalist value indirectly by facilitating self-rule by allowing people to cultivate their human faculties.²⁴⁰ This is an expansion of the “classical” democratic theory that vaunted the opportunities posed by political activity to enrich human life.²⁴¹ In other words, it is not only voting and politicking and political thought that develop an individual’s critical intellectual faculties, but also a broad array of expressive activities that may develop individual decision-making power and increase human competence at self-rule and quality living.²⁴² The development of one’s full capabilities, either through making or receiving expression, is actually an end in itself.²⁴³ This development may flourish even by “non-rational” forms of expressive material.²⁴⁴

This is not an absolutist approach, because competing social needs require balancing. “Although the first amendment [sic] cannot practically be interpreted to provide absolute protection, the constitutional language and our own political and social traditions dictate that the first amendment [sic] right must give way only in the presence of a truly compelling governmental interest.”²⁴⁵

Others have theorized in the visual arts context that art deserves unfettered protection against governmental meddling “because its flourishing furthers the intangible and unquantifiable value of increasing the people’s capacity to resist hegemony.”²⁴⁶ This conception of art as the Jeffersonian rebuke to tyranny is too limiting. The value of free expression derives not only from serving society by challenging our institutions, but also through the diffusion of self-realizing behaviors in individuals. Thus, when looking for the scope of First Amendment protection in the realm of visual expression, the first question should not be whether or not the work evinces a specific message, political or otherwise, but rather whether or not the work serves to intellectually or extra-rationally enrich its creator and her intended public.

What would this mean for the plaintiffs in the *Mastrovincenzo* case and others working the streets and sidewalks of New York? Only that any inquiry into the expressive qualities of their work

240. *Id.* at 604.

241. *See id.* at 603 (citing Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966)).

242. *See id.* at 607.

243. *See id.* at 627.

244. *Id.* at 628.

245. *Id.* at 624-25.

246. Hamilton, *supra* note 78, at 112.

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look to analyze expression as it serves the one making it, as well as it serves its public, and dispense with balancing tests, indexing utility, or looking for fixed messages that will tie in neatly with the written or spoken word. Ultimately the tests expounded by the courts do not really clarify the individual's interests at stake in the balancing against the state's—whether or not the court finds someone's work 'expression' or only 'predominantly expressive' is irrelevant to that person's *interest* in self-expression as compared to a city's interest in keeping the sidewalks clear.²⁴⁷

The *Mastrovincenzo* plaintiffs had strong interests, expressive and otherwise, in vending their works on the sidewalk. Santos, in his declaration for the case, declared that his work was not only an expression of the specific word or idea portrayed within his work, but also a reflection of him as an individual artist and an identification of his aesthetic upbringing.²⁴⁸ Mastrovincenzo stated that his overarching expressive ambition was to work in a mode that his audience would be able to appreciate and relate to.²⁴⁹ Both artists had worked in other venues, but were aware of the depth that street-sales could lend expressions, like graffiti, that are rooted in urban public fora.²⁵⁰ The purpose of the work, to “convey[] themes and voices of underrepresented individuals and groups in a large urban environment,” relies on its situs in the public forum to satisfy the creator's expressive intentions and to facilitate the stimulation of the viewer's receptive faculties.²⁵¹ Furthermore, as private interests become ever more interlaced with public policy on the street level,²⁵² a proper weighing of the individual's interest in public self-expression becomes more important. One of New York City's biggest problems with street vending in general is its supposedly harmful effect on private businesses.²⁵³ I would suggest we should be very careful when limiting public expressive activity at the behest of purely commercial stake-holders, lest the application of time, place, and manner restrictions on expression become a mechanism for silencing unruly individuals and promoting a more

247. See BAKER, *supra* note 4, at 623-25.

248. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2d Cir. 2006).

249. *Id.*

250. See *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 291 (S.D.N.Y. 2004).

251. *Id.*

252. See *supra* note 36 and accompanying text.

253. See *supra* note 37 and accompanying text; see also Kettles, *supra* note 33, at 27-32 (discussing the lack of harmful effect posed by street vendors to fixed businesses in Los Angeles).

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packaged culture.²⁵⁴ Given the sheer quantities of expression foisted on most city-dwellers by advertisers and big players in the culture industries, self-rule now more than ever requires citizens to be able to sort through visual detritus to create expression that is individuated, rather than borrowed or absorbed. The Second Circuit's dismissive "get thee to a gallery" routine would put both governmental interests (not dealing with people selling art on the streets) and fixed business interests (restricting the sales of cultural property to particular venues, methods, people) above those of individuals engaged in public expression.²⁵⁵

C. What This Means for New York City's GVL

The Second Circuit has determined that regulations that effectively bar the sale of paintings, prints, sculptures, and photographs on city sidewalks are invalid as time, place, and manner restrictions, but that identical treatment of other predominantly expressive materials is permissible.²⁵⁶ This hierarchy sits on arbitrary and uneven footing.²⁵⁷ The time, place, and manner restriction here has been stretched to fit what the court perceives as the City's problem. The City of New York is obviously concerned about a glut of vendors selling kitsch on the sidewalks under the banner of Freedom of Speech.²⁵⁸ But the present state of affairs under the *Bery* consent decree, allowing free sales of mass-produced works fitting into the privileged media categories, is one of the City's own making with the assistance of the federal courts.²⁵⁹ The current system does not effectively differentiate meaningful or productive expression from "regular merchandise" by giving blanket protection and making faulty assumptions. Part of the problem is the GVL itself, which caps outstanding licenses at such a small number and makes fresh faces on the sidewalk marketplace impossible to come by.²⁶⁰

254. See NAOMI KLEIN, *NO LOGO* 185 (2000) ("In a context of media and marketing overload, meaningful opportunities to express our freedom—at levels loud enough to break through the barrage of commercial sound effects and disturb the corporate landlords—are disappearing fast around us.").

255. See *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101-02 (2d Cir. 2006).

256. See *id.* at 102.

257. See *supra* notes 175-77 and accompanying text.

258. See Lueck, *supra* note 34.

259. See *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 293 (S.D.N.Y. 2004).

260. See Kernberg, *supra* note 56, at 173-74.

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The Second Circuit has shown great deference to the City in evaluating its interests with respect to those of individuals wishing to engage in public expression, and thus the City's regulatory scheme has not come under serious scrutiny.²⁶¹ In *Mastrovincenzo*, the Second Circuit made no demand of proof that the plaintiffs, or vendors in general, were the cause of the City's pedestrian congestion. Instead, the court was satisfied with the City Council's twenty-seven-year-old explanation of why it passed the GVL.²⁶² It is unclear from the opinion whether the legislative history of Local Law 50 of 1979—the law freezing the number of outstanding vending licenses—contained any statistical assessment of vending's con-

261. In the Seventh Circuit, the City of Chicago has been held to a far more exacting burden of proof of governmental interest, which has had the effect of putting cities and citizens on a more level playing field. See *Weinberg v. Chicago*, 310 F.3d 1029 (7th Cir. 2002); *Ayres v. Chicago*, 125 F.3d 1010 (7th Cir. 1997). The City of Chicago has a "peddlers' ordinance," a licensing requirement for vendors. *Weinberg*, 310 F.3d at 1033. The ordinance forbids the vending of any goods, except newspapers, in public or private areas so designated by the city council. *Id.* at 1035. In the *Ayres* case, an activist was ticketed under the peddlers' ordinance for selling t-shirts that propagated the views of her group, the "Marijuana Political Action Committee." *Ayres*, 125 F.3d at 1012. The City argued that the prohibition on peddling throughout downtown Chicago was justified by three benefits: the control of pedestrian congestion, limiting competition with the city's own vending activities, and "aesthetic" interests. *Id.* at 1015. Judge Posner noted that the City was not required to take the least restrictive approach to achieve its goals, but noted that where "the challenged regulation seems likely to obliterate the plaintiff's message, the existence of less restrictive alternatives that would protect the valid regulatory interest is material to the constitutional issue." *Id.* at 1016. In *Weinberg*, a man wishing to sell his self-described "screed" against Chicago Blackhawks owner Bill Wirtz challenged a provision within the Chicago peddling ordinance prohibiting peddling within a 1,000-foot radius of the City's United Center sports complex. *Weinberg*, 310 F.3d at 1037. The City asserted its interest in keeping a clear thoroughfare in a heavily used public area and promoting public safety. *Id.* at 1036. Two city officials testified that peddling was a cause of disruptive congestion, but a videotape of the plaintiff's peddling activities made at the request of the district court contradicted that testimony. *Id.* at 1038. The court criticized the city's lack of real evidence supporting its position, declaring that "[u]sing a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights." *Id.* at 1039. Because the vendor was targeting fans of the Chicago Blackhawks specifically, there was no other venue through which he could adequately replicate his stadium-side sales. *Id.* at 1041-42. The court struck down the ordinance as an unreasonable time, place, and manner regulation. *Id.* at 1042.

262. See *Mastrovincenzo v. City of New York*, 435 F.3d 78, 100 (2d Cir. 2006). The court also omits any discussion of whether or not GVL § 20-453 is narrowly tailored in light of the "other" time-place-manner regulations that govern vendors physically; it is satisfied that no evidence suggests § 20-453 is "mere surplusage." See *id.* It is the government's burden to show justification and narrow tailoring, not the vendor's. See *Weinberg*, 310 F.3d at 1038.

tributions to congestion, or if it was mere conjecture.²⁶³ Either way, New York City has not stood still in the interim. This treatment tips the balance of interests and trivializes the claims of individuals wishing to make use of public fora for expressive purposes. Given the fact that the City undermines its own licensing scheme by widely excepting vendors of written material and veterans,²⁶⁴ the Second Circuit's "thumb on the scales" for the governmental interest is especially frustrating.²⁶⁵

The current state of the law does not respect the individual's self-realization interest in creating works of visual expression, but at the same time saddles cities with no way to meaningfully distinguish expression from decoration. The simplest thing for the City of New York to do to rectify the situation would be to increase the number of outstanding vending licenses dramatically, or eliminate the licensing requirement altogether. This would either completely free the sidewalks for expressive activity, or make it very difficult for any aggrieved citizen to claim a de facto bar to expression under the time, place, and manner rules. This would, of course, force the City to rely on its other time, place, and manner restrictions that govern the spatial setup of vending activities, to prevent the excessive compaction of bodies in the streets.²⁶⁶

Should the City keep its current regime and policy of excepting constitutional speakers from licensing, then the judicial tests for delineating protected expression must be revamped. As I have described above, the blanket protection currently afforded certain media categories is both under- and over-inclusive and severs any tie between the purpose and administration of protection.²⁶⁷ The self-realization interest of the individual has been diminished and marginalized.²⁶⁸ Yet it is well within the sphere of judicial competence to make more balanced decisions on issues of public visual

263. See *Mastrovincenzo*, 435 F.3d at 100-01. For an analysis of street vending's civic impact, and an argument that vending should be broadly legalized, see generally *Kettles*, *supra* note 33.

264. See *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) ("[T]he City's licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored.").

265. Cf. *Redish*, *supra* note 21, at 624 ("[A]ny general rule of first amendment [sic] interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing. The point, however, is to balance with 'a thumb on the scales' in favor of speech.").

266. The City may already rely on these "other" time, place, and manner restrictions contained in GVL § 20-456. See *Bery*, 97 F.3d at 698.

267. See *supra* notes 161-68 and accompanying text.

268. See, e.g., *Mastrovincenzo*, 435 F.3d at 94.

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expression.²⁶⁹ The Second Circuit, in hearing *Mastrovinco*, was able to make a determination of expressivity based on observation, but encumbered its decision with unnecessary steps and procedures in an attempt to make its decision objective.²⁷⁰ Courts, when confronted with plaintiffs seeking First Amendment protection for their public displays, should examine the work itself, the creator's explanation, and the role that the work plays, if any, in the cultural context from which it springs. Courts should not shutter themselves from the self-serving arguments of the individual—for would courts deny constitutional protection to political literature because it serves the financial or power interests of a candidate? Works of visual expression are due equal respect and cannot be analyzed in a vacuum. Were someone to claim First Amendment protection for playing cards or mass-produced reproductions of old liquor advertisements, the courts would be well justified to dismiss such materials as not worthy of constitutional protection.²⁷¹ But just as our democratic values are “process-oriented,” meaning that going through the procedures of democracy is good for the system and for its participants, so could our expression values be “process-oriented.”²⁷² The value of free expression is conferred at many points in the process—at conception, fixation, display, discussion, and critique. Expression worthy of protection and true kitsch are differentiated by the latter's lack of self-realization in the process of creation. When the courts seize upon this distinction expression may productively flourish while “regular merchandise” remains under control, and our case law will be the simpler for it.

CONCLUSION

The current state of federal court decisions on why and how visual expression fits into the rubric of First Amendment protection is unclear and does not fully serve the interests either of individuals interested in creating expression, or of cities seeking to promote orderly use of public fora. Blanket protection for certain media or themes does not effectively differentiate expression from inert merchandise, and dilutes the meaning of First Amendment protec-

269. See Farley, *supra* note 80, at 857.

270. *Mastrovinco*, 435 F.3d at 97.

271. See *People v. Saul*, 776 N.Y.S.2d 189, 192 (N.Y. Crim. Ct. 2004) (finding that playing cards with pictures on the back did not constitute artistic or visual expression). I would expand this reasoning to curtail the sales of many currently protected materials, especially the mass-produced prints and photographs of landmarks sold to tourists, under the *Bery* injunction.

272. Redish, *supra* note 21, at 602.

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tion. The courts should promote a theorization of the free expression right in the First Amendment that privileges the self-realization interest of creators in making expressive works, and dispense with trying to fit visual expression into analogy with written materials or expressive conduct. Expressive activities should be effectively decriminalized in order to stimulate popular creativity and in doing so, stimulate the intellectual and critical faculties essential for democratic self-rule and meaningful living.