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by

Jennifer A. Neilson

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The Dissertation Committee for Jennifer A. Neilson certifies that this is the approved version of the following dissertation:

Artistic Expression, Aesthetic Value and the Law

Committee:

__________________________
Kathleen Higgins, Supervisor

__________________________
Anna-Sara Malmgren

__________________________
A.P. Martinich

__________________________
Kendall Walton

__________________________
Paul Woodruff
Artistic Expression, Aesthetic Value and the Law

by

Jennifer A. Neilson, B.A.; M.A.

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Dedicated to the memory of my father,

Bruce Neilson
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The aim of this project is to develop a legally relevant theory of artistic value, based on which a judge can reliably determine whether a work has sufficient such value to be granted constitutional protection, even though it would otherwise count as obscene. Within this framework I argue that a moral flaw can count as an aesthetic virtue in a narrative work, at least when the audience learns something from the immoral content of the work. Since expert testimony is sometimes required in legal cases about artistic value, I also develop a legally applicable theory of aesthetic testimony, such that expert testimony can be used to determine the valence of aesthetic properties, which is essential in determining a work’s overall artistic value. My theory of which properties of works are relevant to their aesthetic evaluation depends both on which categories the work is appreciated in, and on the conventions of those categories. I address these issues within Canadian and American legal contexts.
# Table of Contents

Introduction.............................................................................................................................................. 1

I. Freedom of Expression and Obscenity in Canada and the United States......................... 9
   Part One: Introduction.......................................................................................................................... 9
   Part Two: The Value of Freedom of Expression ............................................................................ 11
   Part Three: Limits on Freedom of Expression .............................................................................. 18
   Part Four: The Challenge of Defining ‘Undueness’ in Canadian Case Law ...22
   Part Five: History of Obscenity Decisions in the United States ........................................... 26
   Part Six: The National Endowment for the Arts ......................................................................... 32
   Part Seven: Shortcomings of the Community Standards Test ............................................... 41
   Part Eight: Against the Reasonable Person Test ........................................................................ 48
   Part Nine: Conclusion...................................................................................................................... 51

II. Conventionalism about Aesthetic Value ................................................................................... 53
   Part One: Introduction...................................................................................................................... 53
   Part Two: Previous Accounts of Artistic Value ........................................................................... 55
   Part Three: Aesthetic Conventionalism .......................................................................................... 67
   Part Four: Serious Artistic Value ..................................................................................................... 82
   Part Five: Conclusion...................................................................................................................... 89

III. Can Moral Flaws Count as Aesthetic Virtues?
    Defending Cognitivist Contextualism............................................................................................ 91
    Part One: Introduction...................................................................................................................... 91
Introduction

For a liberal democratic society to function, the public must be free to express its views, in particular when these views advance the values underlying freedom of expression. Artists are often at risk of running afoul of legal restrictions on expression when they use their art to challenge political, social and artistic norms. Although expression that would otherwise be excluded from constitutional protection due to its obscene nature is protected if it has serious artistic value, little has been said about what this means, or how a work can be shown to have it. This leaves a significant gap for judges, to whom the task of determining whether or not a work has “serious artistic value” falls. This task is particularly daunting since no rubric or guidelines for how to make this determination exists in the legal precedent, and justices often do not have the art historical background necessary to make the judgment on their own. Philosophers of art have, however, been concerned with such issues for some time now. The central aim of this project is to develop an account of artistic value that is not only philosophically robust, growing out of the discipline’s dialogue on this issue over the past century, but also applicable within the confines of legal decision-making.

While the law speaks in terms of artistic value, and the philosophical literature has been concerned with the broader concept of aesthetic value, the work of philosophers on aesthetic value can be of use to the courts. I will now clarify what I mean by these terms, and justify my application of philosophical work on aesthetic value to legal questions about artistic value.

The word “artistic” comes from the French artistique, meaning “having to do with
This term has historically been used to imply not only that an object is the product of human creation, modification or selection, but also that the object is well-made. I take on the former, but not the latter of these senses. Artistic value belongs only to works that are the product of human agency, as opposed to aesthetic value, which can also be found in nature. Whether or not something is a product of human action matters in court cases, since courts are concerned with accountability for action, and a non-human cannot be held accountable for its “behavior.” Since the law governs the realm of human action exclusively, legal discussions are concerned with the class of artistic value, rather than its aesthetic counterpart.

The word “aesthetic,” on the other hand, comes from the Greek aesthesis, which means “of the senses.” Thus, some philosophers use the term “aesthetic properties” to refer to only perceptual properties. In art historical circles, “aesthetic” is sometimes used to refer to the sublime or the beautiful. I do not use it in any of these senses. Whereas in ancient times the word “aesthetic” was used to refer to the ability to receive stimuli through the senses, the modern sense of the term is due to Alexander Baumgarten, who uses it to refer to the ability to make judgments on the basis of stimuli received through the senses (as opposed to making judgments based on the exercise of the intellect).¹ In his later writings, Baumgarten uses the term “aesthetic” to refer to the capacity for sensory perception of beauty in both art and nature.² According to Baumgarten, judgments of the senses are based on feelings of pleasure or displeasure. Such judgments

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² Ibid.
are judgments of taste—aesthetic judgments in the modern sense. Immanuel Kant’s understanding of the aesthetic faculty as the capacity to make judgments of beauty based on the senses is derived from Baumgarten’s use of the term “aesthetic.” According to Kant, the “aesthetic power of judgment” is the ability to make “judgments about the beauty in natural things,” as well as about art.³ If this is so, then aesthetic value must, according to Kant, be a sort of value which is had by both natural phenomena and human productions.

With respect to artistic value, on the other hand, Kant says: “By right we should not call anything art except a production through freedom, i.e., through a power of choice that bases its acts on reason.”⁴ In other words, artistic value is a sort of value that can only be had by things which could possibly count as art (whether or not they actually are art). And nothing which is not a product of human agency (through production, modification or selection) could count as art. Thus, only products of human agency can have artistic value. Although the way that these terms have been used in the recent past is inconsistent, like Kant I use “artistic” to apply exclusively to products of human agency, and “aesthetic” to apply to both products of human agency and natural phenomena. I will now provide a more detailed account of how I will use related terms throughout the rest of this project.⁵

³ I Kant (1793) Critique of Judgment §30
⁴ Ibid. §43
⁵ More recently, Berys Gaut has also distinguished between them in the same way that I do here (B Gaut (2007) Art, Emotion and Ethics (Oxford: OUP) 35). I appeal to Gaut in particular here, and elsewhere in what follows, in large part because he is responsible for the most recent book-length treatment of several important issues that arise in the following chapters, including addressing the relationship between moral and aesthetic value, whether or not a work’s cognitive value can enhance its value qua art, the question of what makes it the case that a property of a work is aesthetically relevant.
I take the *aesthetic properties* of a work to be those properties that are relevant to their aesthetic value.⁶ By *aesthetic value* I mean the value that an object or event has as art (or would have if it were considered as art). Using the term aesthetic value enables us to talk about a certain class of properties of objects that are not man-made alongside those that are. For example, just as a waterfall could be considered beautiful because of the way that it reflects light in interesting ways, so could a prism. An object that is an excellent knife because it is sharp and has a comfortable handle might, when considered as art, be revealed to be a very poor sculpture. Aesthetic properties can be perceptual, like the property of being smooth; relational, like the property of being made in response to World War II; temporal, like being made in the 1950s; and so on. Not all properties of these kinds will be aesthetically relevant, just as not every work will have aesthetically relevant properties of each of these kinds. Aesthetic properties can be had both by nature (ex. a graceful heron), and by that which is made, altered or selected by human beings.

As I define the terms, all artistic properties are aesthetic properties, although not all aesthetic properties are artistic, since not all objects with aesthetic properties are products of human intentionality.⁷ I will speak of aesthetic properties when discussing the philosophical literature, since claims made therein apply not only to products of human agency, but also to objects in the natural world. However, when I examine and lay out the relevant legal precedent, I will speak in terms of artistic value. Since artistic value is a subset of aesthetic value, as I have defined it, I take my application of the

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⁶ My use of the term “aesthetic properties” differs from Sibley’s use of the term in significant ways. See Part II for details.
⁷ I recognize that if one adopts a more restrictive definition of aesthetic properties, it is possible that not all artistic properties would count as aesthetic. However, using the definitions that I have given above, they do.
philosophical literature on aesthetic value to the question of artistic value that comes up in the legal context to be justified.

The aim of this project is to develop a legally relevant theory of artistic value, based on which a judge could reliably determine whether a work has sufficient artistic value to be granted constitutional protection, even though it would otherwise count as obscene. I will identify works as *prima facie obscene* when they meet the first two parts of the current legal definition of obscenity (by appealing to the prurient interest and depicting sex in an offensive way), but for which it has yet to be determined whether they nevertheless qualify for constitutional protection in virtue of having serious political, scientific, literary or artistic value (failing to satisfy the third part of the definition).

Since expert testimony will sometimes be required in such cases, I develop a legally applicable theory of aesthetic testimony, such that expert testimony can be used to determine the valence\(^8\) of individual aesthetic properties. This determination is essential in assessing a work’s overall artistic value. My theory of which properties of a work are relevant to the aesthetic evaluation of the work depends both on which categories of art the work is appreciated in, and on the conventions of those categories. Throughout this project I will refer to specific art works in discussing a variety of points. An image of any work of visual art or sculpture that is mentioned can be found in the Appendix of Images, following the Bibliography and Table of Authorities.

The aim of the first chapter is to locate the concept of artistic value in the Canadian and American legal contexts. I begin by investigating the reasons why freedom

\(^8\) i.e. whether the property contributes to or detracts from the work’s value (has a positive or negative valence).
of expression is seen as especially valuable, and therefore worthy of constitutional protection. I outline three types of legal tests of artistic value that appear in the Canadian and American precedent: the community standards test, the reasonable person test, and the internal necessities test. I then argue that neither the community standards test nor the reasonable person test is well suited to the task of determining whether a work has artistic value. I argue that the courts should instead adopt a version of the internal necessities test, which asks whether the offending segment of a work is necessary to the work’s overall value or purpose.

In the second chapter, I offer a legally-relevant philosophical account of artistic value, called aesthetic conventionalism, according to which determining the artistic value of a work requires first identifying the aesthetically relevant properties of that work by appeal to the category in which the work is properly appreciated and the conventions of that category. I then advance a theory of how to determine whether a particular property of a work has a positive or negative impact on its overall aesthetic value. If the work is no more sexually explicit than is necessary to attain the level of aesthetic value it attains, such that its aesthetic value would be reduced were its offensiveness decreased, then the work counts as having serious artistic value, as required by the law for it to retain constitutional protection despite being prima facie obscene.

The third chapter is devoted in large part to defending the claim that morally reprehensible obscene features of works can contribute to the overall aesthetic value of those works. In that chapter, I offer an account of why and under what circumstances a moral flaw can count as an aesthetic virtue in a work of art. I argue that although the
moral features of art works are often aesthetically relevant, moral flaws need not always decrease the aesthetic value of a work. Establishing that a work’s aesthetic value can increase in virtue of its having a moral flaw will depend on an argument for *aesthetic cognitivism*, the view that a work’s aesthetic value can increase in virtue of or be partly constituted by its *cognitive value* (the value that it possesses in virtue of what we can learn from it). The third chapter provides a legally-applicable theory that explains when morally reprehensible content is aesthetically relevant, and when it contributes to or detracts from the value of a work.

In the fourth chapter I address the problem that arises when judges call on expert witnesses to testify as to whether a particular aesthetically relevant property has a positive or negative impact on the overall value of a work. *Pure cases of testimony* are those cases in which a listener learns that something is the case on the basis of her informant’s claim that it is, but independently of any evidence that the informant offers for that claim. Normally, we take testimony to be a very reliable way of gaining information about the world, unless there are defeaters present. If I tell you that I live in an apartment, you are very likely to form the belief that this is so. Strangely, however, the same cannot be said of a testimonial report of beauty, or of the aesthetic merit of an art work.

In the debate about the relationship between aesthetic testimony and justified belief *optimists* claim that pure aesthetic testimony only differs in degree from most other kinds of pure testimony, arguing that one can, under the right circumstances, gain

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9 R Hopkins (2011) “How to be a Pessimist about Aesthetic Testimony”
10 i.e. unless there is some particular reason not to do so
justified aesthetic belief through testimony. Pessimists claim, on the other hand, that pure aesthetic testimony is different in kind from most other kinds of pure testimony, such that it can never be a source of justified aesthetic beliefs. No-difference theorists, as I will call them, claim that pure testimonial reports on aesthetic matters result in justified beliefs just as often as pure testimonial reports on other matters.

I reject the no-difference theorist’s claim and show that a series of misunderstandings undercut the arguments for it. I then argue that no version of pessimism (about moral or aesthetic testimony) is tenable, since its most plausible version turns out to be based on a deep epistemological confusion. I end by explaining why forming aesthetic beliefs through instructional testimony (i.e. testimony in which the testifier provides reasons for his belief) is preferable to arriving at them through pure testimony whenever this is practical. In some cases, the judge will have experienced the work, and will be capable of deciding on the aesthetic value or disvalue of the work as a whole, or of one or more of its aesthetic properties. In more difficult cases, however, although the judge has direct experience of the work, she may deem herself insufficiently expert or ill suited to the task of determining its aesthetic value, or the value of its aesthetically relevant properties. In this case, she should, in order to fulfill her moral and legal obligation to decide the case to the best of her ability, rely on expert aesthetic testimony, even if only pure testimony is accessible or admissible.
Part One: Introduction

Freedom of expression is very valuable, perhaps even essential, to modern liberal democracies. However, some limits on that freedom are necessary to protect other values. An important role of constitutional jurisprudence is to establish the grounds on which such limits ought to be based, and to provide grounds for establishing when exceptions to such limits are desirable, given other societal aims and values. In Canada and the United States constitutional protection is currently withheld from artifacts that are obscene, according to the legal definition of that term. The American definition stipulates that if an artifact, ‘taken as a whole’ has ‘serious literary, artistic, political or scientific value’, however, then it cannot be considered obscene in the legal sense, and thus retains First Amendment protection. In Canada, although obscene expression is prima facie protected under Section 2(b) of the Canadian Charter of Rights and Freedoms, laws limiting obscene expression have been deemed “reasonable and demonstrably justified” by the courts, and are thus permissible. Artistic value is one ground for excluding works from counting as obscene, according to Canadian obscenity law. Since the concept of artistic value plays such an important role in determining whether or not a work is constitutionally protected, and thus open to or immune from censorship, it is important to be clear about what is meant by artistic value, and what criteria have to be met in order for a work to count as having it. This is particularly important because, as has been recognized by American and Canadian courts and legal
a lack of clarity in the law will result in self-censorship (a chilling effect) among those who fear that their speech might be unprotected. This is no less undesirable in the arts than in any other arena of speech. In Canada, a *community standards test*, in which a judge relies on her perception of the standards of the community, is currently used to determine whether a work has sufficient artistic value to exclude it from counting as obscene. As it stands in the United States, a *reasonable person test*, in which a judge’s assessment of what a reasonable person’s assessment would be, is used to for this same purpose.

I begin by examining the reasons why freedom of expression is seen as particularly valuable, and thus worthy of constitutional protection. I then look at some of the limits on that freedom that have been accepted by the courts and assess the reasons for limiting freedom of expression in those cases. After outlining the legal history that has led us to the legislative and precedential position in which we now find ourselves in both Canada and the United States, I argue that neither the reasonable person test nor the community standards test is adequate for identifying whether or not a particular work has artistic value. I favor instead a version of the *internal necessities test*, which asks whether the offending segment of a work is necessary to the work’s overall value or purpose. Finally, I explicate what it means for a work’s aesthetic value to be “serious,” as the law requires, providing grounds on which a judge or jury could decide whether or not this is so. This will leave us ready for chapter two, in which I develop my *conventionalist* account of how to determine when a work has aesthetic value.

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11 As per the U.S. and Canadian Supreme Courts in numerous decisions, as well as legal scholars such as Frederick Schauer, Rodney A. Smolla, Richard Moon and Wayne Sumner.
Philosophers of art theorize about the relevance of various factors, including a work’s moral qualities, to its aesthetic merit, and philosophical debates about how to determine which properties of a work are its aesthetic properties have been ongoing since Immanuel Kant first brought up the question in the 1793. However, it is not philosophers of art but judges who are called upon to decide the question of when an artifact has artistic merit, and they must do so without the relevant philosophical training. Developing an account of how to determine, within the context of a legal decision, whether an artifact has sufficient artistic value to deserve constitutional protection despite being obscene is a central aim of this project. Although judges have, in the past, been hesitant to pronounce on the artistic merit (or lack thereof) of an artwork, I posit that this is because they were without adequate tools for the job, which this project aims to provide. Moreover, an account such as the one that I will offer may have the additional positive outcomes of emboldening funding agencies with respect to funding art works that could potentially be seen as offensive as well as providing both judges and funding agencies with a rubric for making defensible decisions when it comes to funding and protecting art. The robust constitutional protection that is recommended by this account is likely, by extension, to minimize the chilling effect on the artistic community.

Part Two: The Value of Freedom of Expression

Freedom of expression is one of the most, if not the most, highly valued liberty in modern liberal democratic societies. In the 1860’s John Stuart Mill offered several arguments in

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12 I Kant (1793) Critique of Judgment
favor of responding to bad speech with ‘more and better speech,’ instead of censorship. These arguments have been echoed in Supreme Court judgments in both the United States and Canada ever since. Mill gives several compelling arguments for the claim that protecting freedom of expression is conducive to truth in the long run. He argues that because no censor is infallible, nor do censors always act in good faith, we cannot rely on them to adjudicate between good and bad speech on our behalf. Also, since most statements are a mixture of truth and falsity, in censoring the false we also end up censoring some truth. Moreover, even false claims are useful in promoting the discovery of truth and the advancement of knowledge. For instance, to be able to recognize truth, one must have some ground for comparison; one’s ability to recognize truth and falsity is enhanced by experience of both. Further, if society advances truth through indoctrination then it does not create a community of critical reasoners, for critical thinking is a skill that one develops through practice. Participating in a public forum in which one is exposed to truth and falsity helps the individual to cultivate her intellect and judgment by comparing true and false beliefs, and a society made up of such individuals will be the better for it. Finally, according to Mill, providing citizens with an open forum, or marketplace, in which to debate and discuss ideas will cause the truth to emerge.

13 These arguments are found throughout On Liberty.
15 Ibid. 28-29
16 Ibid. 52
17 Ibid. 40
18 Ibid. 43
19 Ibid. 41
20 Ibid. 49-50
A further compelling reason to protect freedom of expression that has consistently received considerable attention in judicial judgments is that freedom of expression is essential to the democratic process. The ability to discuss both popular and unpopular ideas, to voice opinions, to criticize the government and to go against the majority, are hallmarks of meaningful democracy. Because a central justification for protecting freedom of expression in both Canada and the United States is that freedom of expression is essential to the democratic process, political speech receives the highest degree of constitutional protection. Compared to the many other types of expression, from commercial speech to pornography, protecting political speech is seen as most vital to the proper functioning of a liberal democratic society.\(^{21}\) In a benchmark Canadian case, *Keegstra* (1990), the court explains why political expression receives the most protection from the courts:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) [freedom of expression] guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.\(^{22}\)

If the citizens cannot openly discuss their views amongst themselves, and share their views with their representatives, it becomes incredibly difficult for the representatives to represent the views of the people.

Prioritizing the protection of political speech is also an essential part of American

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\(^{21}\) Commercial speech used to fall outside of First Amendment protection. Now, certain commercial speech has some First Amendment protection, but not the level of protection that individual speech receives.

\(^{22}\) *Keegstra (R. v.)* [1990] 3 S.C.R. 211
jurisprudence. In *New York Times v. Sullivan* (1964) it was established that criticizing a public official for his official conduct cannot be libelous unless the official in question can show “actual malice,” that is, that the would-be libel was committed with either knowledge of its falsity or reckless disregard for its potential falsity. This shows that the freedom to criticize public officials, even when the criticism is factually incorrect, is so important to the democratic process that the courts do not generally consider it libelous. In his concurring opinion, Justice Goldberg states that the First Amendment affords “an absolute, unconditional privilege to criticize official conduct [which has] to do with the political ends of a self-governing society.”

In the political, as well as in other arenas, it is very important for the government to be clear about what restrictions on speech are currently in place, so as to avoid the chilling effect that unclear restrictions can have on permitted speech. This effect can nullify the public’s ability to engage in civil disobedience or to use rhetoric to emphasize how unjust a law is, and can end up silencing valid criticisms of the way things are in the business world, in the arts community and elsewhere. Moreover, it is important that those running for office as members of the local arts council, school board, or neighborhood watch committee feel free to express their views, however unpopular they may be. Any discomfort that may be caused by exposure to these views is far outweighed by the benefit of knowing the views of those that one may choose to elect as one’s representative. This enables one to select representatives who share one’s views and avoid those who do not. Protecting freedom of speech is also essential to protecting

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minority opinions, both by ensuring that minorities have the opportunity to be heard, and by preventing the chilling effect that can be caused by fear that one’s expression may be censored, that one could be punished for expressing it, or that one’s views will not be taken seriously because of one’s minority status. Current examples in both the Canadian and U.S. Supreme Court show that freedom of expression case law takes seriously the negative consequences of the chilling effect that unclear precedent can have on speech.24

Now that we have established the essentiality of protecting political speech to the democratic process, we will go on to examine how protecting other types of speech can be justified. Protecting commercial speech can be justified by analogy with political speech, by claiming that it is important for the proper functioning of the economy and society. Being able to advertise one’s wares and tell the public about their benefits, or to publish consumer reports deriding poor quality products, is relevantly similar to political speech, and plausibly also very important to the proper functioning of a liberal democratic society. In the United States Supreme Court case Whitney (1927), Justice Brandeis recognizes that free speech is valuable both as a means and as an end in itself, which is to say that it is not only valuable as a means to democracy.

Those who won our independence…valued liberty both as an end and as a means….They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an

24 C.f. United States Supreme Court cases: Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992); Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F. Supp. 774 (CD Cal. 1991); Speiser v. Randall, 357 U.S. 513 (1958); and Canadian Supreme Court cases: Keegstra (R. v.), [1990] 3 S.C.R. 211. Further, for example, even some falsities can sometimes not count as libel, so that newspapers do not have to be fearful of being sued (New York Times v. Sullivan, 376 U.S. 254 (1964)).
inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.\textsuperscript{25}

Just as protecting commercial expression is instrumental to some further (likely economic) end, many other kinds of speech are instrumental to many other valuable ends, and both are and ought to be protected on account of their instrumental value.

Artistic expression is worthy of constitutional protection because it is part of the human experience and is central to what it means to be human. One justification for protecting speech that is not as central to the democratic process is that it is an important part of a meaningful and free life for one to be able to express the essence of who one is, and to share important aspects of one’s unique identity, including one’s sexuality and sexual identity, with other people. Producing art is one way of doing this. Art is, and should be, entitled to full constitutional protection because the ideal “that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence” undergirds not only “our political system [but also our] cultural life.”\textsuperscript{26} The public has an interest in experiencing art, and in government support of the arts so that the arts remain accessible. Having a vivid arts community, including artists and ready access to their art, helps people to develop and flourish.

Others have argued that the experience of art also helps to enhance the citizens’ ability to participate in the political process, and thus that the same justification can be offered for its protection as for protecting political speech. Alexander Meiklejohn points out:

\textsuperscript{25} Whitney v. California, 274 U.S. 357 (1927)
\textsuperscript{26} Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622 (1994), Kennedy, J., delivering the opinion of the court.
[There] are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. [The] people do need novels and dramas and paintings and poems, ‘because they will be called upon to vote’. The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government.27

President John F. Kennedy espoused a similar view, but from the point of view of the artist, rather than the audience. He said:

The artist, however faithful to his personal vision of reality, becomes the last champion of the individual mind and sensibility against an intrusive society and an officious state…. In serving his vision of the truth, the artist best serves his nation. And the nation which disdains the mission of art invites the fate of Robert Frost's hired man, the fate of having “nothing to look backward to with pride, and nothing to look forward to with hope.”28

These considerations apply even when the expression is offensive, since sometimes the offensive nature of speech is inextricably linked to the content of the expression. This tight connection between offense and expression is particularly common in the case of artistic expression. As Justice Souter puts it “In artistic . . . settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power.”29 This is similar to the point that Mill makes that in censoring falsity, one ends up censoring some truth as well, or in this case that in censoring speech that may be without value, one ends up censoring some valuable speech as well.

Part Three: Limits on Freedom of Expression

There is a substantial bias towards protecting speech in Canada and the United States. As Oliver Wendell Holmes put it in *Abrams* (1919):

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition….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.\(^{30}\)

However, the courts have found that under certain circumstances limiting speech is necessary. There are two ways to accomplish this in a modern liberal democracy. A government can either exclude that which it needs to regulate from the legal category of speech, or it can include it in the legal category of speech and endorse certain specific exceptions to the guarantee of freedom of expression. The United States operates in the former way, and Canada in the latter. Although the First Amendment states that “Congress shall make no law…abridging the freedom of speech,”\(^{31}\) Congress is not, strictly speaking, prohibited from making laws that limit freedom of speech. Some acts that are clearly expressive do not count as speech in the legal sense, and are thus excluded from protection. For example, threats of imminent harm and incitement are expressive, but in the United States they do not count as speech for legal purposes.

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\(^{30}\) *Abrams v. United States*, 250 U.S. 616 (1919), Holmes, J.

\(^{31}\) *U. S. Bill of Rights*. The 14\(^{th}\) amendment makes it the case that this prohibition applies to state governments as well because of the ‘doctrine of incorporation’, which interprets due process as impossible without freedom of speech.
Moreover, many expressive acts that are technically conduct (that is, non-speech action), rather than speech, count as speech for legal purposes in both the United States and Canada and thus receive constitutional protection. Examples include flag burning and marching in a silent protest. In this context speech, then, is understood as the conveyance of an idea or occurrence of an expressive act.  

In the United States violent acts and acts of incitement to violence that raise the risk of imminent lawless action (formerly known as “clear and present danger”) do not count as speech, and are thus not protected by the First Amendment. This is so because in order to maintain a minimally well-ordered society the government must be able to regulate these types of expressive acts. Standard examples of incitement to violence that raise the risk of imminent lawless action include shouting fire in a crowded theatre when there is no fire, and Mill’s example, that “an opinion that corn dealers are starvers of the poor…may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer.” It is clear from these examples that the context in which the expression is issued must be taken into consideration. Since there are many ways in which expressive acts can cause harm, it seems fitting that the government be

34 “[T]o support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” Gitlow v. New York, 268 U.S. 652 (1925)
35 JS Mill (1861/1978) 62
36 “Speech innocuous at one [time] may at another time fan such destructive flames that it must be halted.” Dennis v. United States, 341 U.S. 123 (1951)
37 For example by provoking a fight, inhibiting one’s ability to find work, silencing speech of a minority group or unpopular view (particularly in the political arena), inhibiting military recruiting efforts, and so on.
able to impose some limits on freedom of expression.\textsuperscript{38} 

In Canada, obscene expression counts as speech in the legal sense, as does incitement,\textsuperscript{39} although violence and threats of violence do not.\textsuperscript{40} The former are thus protected under Section 2(b) of the \textit{Canadian Charter of Rights and Freedoms}, which protects “freedom of thought, belief, opinion and expression,” but, as in other modern democracies, obscene expression is limited by legislation. In Canada, unlike in the United States, such limitations on constitutionally protected liberties are justified under Section 1 of the \textit{Charter}. The \textit{Oakes} test sets out four requirements to determine whether a piece of legislation that infringes on a protected right is “reasonable and demonstrably justified in a free and democratic society”\textsuperscript{41} and thus permissible under Section 1 of the \textit{Charter}.\textsuperscript{42} “The section 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement.”\textsuperscript{43} The burden of proof lies with the government to show that prohibiting the expression in question is (a) a pressing and substantial concern, and that the legislation effectively addresses this concern (b) rationally, (c) proportionately, and (d) with minimal impairment of freedom.\textsuperscript{44} Canadian precedent has shown that how much justification the government must provide to establish that a particular piece of legislation satisfies these requirements

\begin{itemize}
\item \textsuperscript{38} When the American government seeks to limit a ‘fundamental’ right, such as freedom of speech, it must show that there is a compelling state interest in limiting the speech in question, and that the limitation is necessary to, and is the least rights-restrictive means to, achieving that end.
\item \textsuperscript{39} \textit{Keegstra (R. v.)} [1990] 3 S.C.R. 211
\item \textsuperscript{40} \textit{Irwin Toy Ltd. v. Quebec (Attorney General)} [1989] 1 S.C.R.927
\item \textsuperscript{41} \textit{Canadian Charter of Rights and Freedoms}. S.1
\item \textsuperscript{42} \textit{Oakes (R. v.)}, [1986] 1 S.C.R. 103
\item \textsuperscript{43} \textit{RJR MacDonald v. Canada (Attorney General)}, [1995] 3 S.C.R. 199
\item \textsuperscript{44} \textit{Bryan (R. v.)}, [2003] B.C.S.C. 1499
\end{itemize}
depends on how central the speech in question is to the values underlying the freedom of expression.

Expression, depending on its nature, is entitled to varying levels of constitutional protection... When [freedom of expression and other fundamental] values come into conflict... [f]reedom of expression claims must be weighed in light of their relative connection to a set of even more fundamental or core values which include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.... Where the expression in question is farther from the "core" of freedom of expression values, a lower standard of justification may be applied.\textsuperscript{45}

Under some circumstances expression may “be accorded a very low degree of protection under s. 1 [in which case] an attenuated level of justification is appropriate.”\textsuperscript{46} Although artistic speech does not generally fall into the least protected category, pornography often does. Artistic speech is, as a rule, treated as more valuable than low value speech, but less valuable than political or commercial speech.\textsuperscript{47}

Let us now look at the history of obscenity law, first in Canada, and then in the United States. We will see that ever since 	extit{Hicklin}, the British obscenity decision handed down in 1868, judges have struggled to define obscenity in a substantive and meaningful way that aligns with our intuitions about what should and should not be deprived of constitutional protection due to its obscene nature. Let us keep in mind that clarity is of utmost importance in freedom of expression decisions, so as to avoid the chilling effect that unclear prohibitions can have on the public in general, and the artistic community in

\textsuperscript{45} RJR MacDonald v. Canada (Attorney General), [1995] 3 S.C.R. 199
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
particular.

**Part Four: The Challenge of Defining “Undueness” in Canadian Case Law**

The British *Hicklin* test (1868), which defined obscene material as tending “to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall,”\(^{48}\) formed the basis for Canadian obscenity rulings until 1959, when parliament enacted a new statute on obscenity. From then on, Canadian obscenity law, as stated in section 163 of the *Criminal Code* identified as obscene:

> any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.\(^{49}\)

The key question that the Canadian courts have grappled with in attempting to determine whether particular works are obscene is what exactly constitutes *undue* exploitation of sex. Several different tests of “undueness” have emerged from the case law. *Brodie* (1962) was the first Canadian Supreme Court case to deal with the issue of obscenity following the enactment of the new statute.\(^{50}\) The case addressed the question of whether the novel *Lady Chatterley’s Lover* by D.H. Lawrence is obscene, and thus subject to the limitations outlined in the statute. The Supreme Court ruled that the work is not obscene, although two different tests of when a work counts as obscene came out of this decision.

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\(^{48}\) *R. v. Hicklin* (1868), LR 3 QB 360  
\(^{49}\) *Criminal Code*, Sec. 163. This is a brief summary of subsections 1-5 of Sec.163. I have chosen not to write them out in full as the details of these subsections are not particularly relevant to the discussion at hand.  
\(^{50}\) *Brodie, Dansky, Rubin v. The Queen*, [1962] S.C.R 681
Justices Abbott, Martland and Judson argued that in determining whether or not the undue exploitation of sex is a dominant characteristic of the work, one must take the work as a whole into consideration, and examine whether the offending portions of the work are necessary to its artistic purpose. As they put it “One cannot ascertain the dominant characteristic of book without an examination of its literary or artistic merit…” They go on to define “undue exploitation” as “more emphasis on the theme of sex than was required in the treatment of such serious work of fiction.” This is a version of the internal necessities test, which asks the judge or jury to determine whether the offending segment of a work is necessary to the work’s overall value or purpose.

Justice Ritchie agreed that the work was not obscene, but offered a different set of criteria for what constitutes undue exploitation of sex. He argued that whether a dominant characteristic of the work is the undue exploitation of sex should be determined according to the existing standards of decency in the community. However, he agrees that in order to determine what the dominant characteristics of a work are, we must consider the work as a whole, including all, but not only, its artistic aims. He says that he takes undue to mean “‘undue having regard to the existing standards of decency in the community’…[where determining this] involves the reading and consideration of the publication as whole.” He goes on to note that it is in the “interest of the public good [to]… preserv[e] intact the work of a writer who on the evidence in this case was regarded as great artist by respectable teachers, authors and critics.” This is a version of the community standards test, according to which the judge relies on the standards of the

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52 Ibid.
community at large to determine the answer to some question that is brought before the court.

It was not until *Dominion News*, later that year, that a choice was made between these two tests, and that the community standards test was adopted and further refined.\(^{53}\) According to this decision, whether or not a dominant characteristic of a work constitutes the undue exploitation of sex is to be determined by a national and temporally variable standard of decency. In *Towne Cinema* (1985) the court shifted from using a standard of decency set by the community, to requiring instead a standard of tolerance. The focus of what the court required, in other words, shifted away from what the community finds decent, to what the community is prepared to tolerate (a less stringent requirement).\(^{54}\) In addition, this decision introduced a new harm test for undueness, stating that a work has the undue exploitation of sex as a dominant characteristic whenever it results in harm to the audience on the basis of its being degrading or dehumanizing.

When *Butler* reached the Supreme Court of Canada in 1992, the Court took the opportunity to reconcile the three tests (i.e. the internal necessities test, the community standards test, and the harm test) that had been proposed since the new statute was enacted in 1959. According to this decision, one must ask first whether the work “contains sexually explicit material that by itself would constitute the undue exploitation of sex,” and second whether or not it qualifies for an exception in virtue of having literary, artistic, political or scientific value. This decision sets harm as the sole basis for determining whether the offending material counts as undue exploitation of sex (for

\(^{53}\) *Dominion News and Gifts, Ltd. v. The Queen* [1962] S.C.R. 251

\(^{54}\) *Towne Cinema Theatres Ltd. (R.v.),* [1985] 1 S.C.R. 494

24
instance, by being “perceived by public opinion to be harmful to society, particularly women,” by degrading or dehumanizing them).\textsuperscript{55} However, whether or not a work is harmful in the relevant way is to be decided on the basis of national and temporally variable community standards. Further, the court stipulates that the question of a work’s artistic value is only to be raised “when a publication contains material which, taken by itself, would constitute undue exploitation (as determined by the community standards test).”\textsuperscript{56} In what the court calls an “internal necessities” test (but which we will soon see is actually a community standards test in sheep’s clothing), the court states that:

The portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole.\textsuperscript{57}

In this quote the court reveals that it sees the undue exploitation of sex as being the dominant characteristic of the work, and the portrayal of sex as being essential to its artistic value, as mutually exclusive. It then prescribes that which of these two is the case is to be determined, with reference to and in the context of the work as a whole, based on a standard of tolerance within the community. As was made clear in Brodie (1962), taking the context of the work as a whole into account requires considering its artistic value. “One cannot ascertain a dominant characteristic of a book without an examination of its literary or artistic merit.”\textsuperscript{58} This means that it would be up to the community as a whole to determine whether or not the work has the requisite artistic value, and whether

\textsuperscript{55} Butler (R. v.), [1992] 1 S.C.R. 452
\textsuperscript{56} LW Sumner (2004) The Hateful and the Obscene 100
\textsuperscript{57} Butler (R. v.), [1992] 1 S.C.R. 452
\textsuperscript{58} Brodie, Dansky, Rubin v. The Queen, [1962] S.C.R 681
or not the offending elements are necessary to the aesthetic aims of the work. This is particularly noteworthy because prior to Butler an internal necessities test had always been used to determine whether a work had sufficient artistic merit to receive constitutional protection despite containing substantial sexually explicit content. Butler thus “established community standards as the measure of both harm and artistic merit for erotic materials...”

As you can see, offering a satisfying definition of obscenity is a task that the Canadian courts have taken seriously, but that has proved to be very challenging. Despite having tried to combine the best parts of several tests proposed by the Court over the years, the Butler test remains inadequate, as I will argue in section seven. Let us now see whether the American courts have fared any better.

**Part Five: History of Obscenity Decisions in the United States**

Judges in the United States have had at least as much difficulty defining obscenity as those in a similar position in Canada, and have even gone as far as throwing up their hands and issuing the well-known proclamation “…I know it when I see it.”

American precedent on this issue begins with the United States Supreme Court adopting the Hicklin (1868) test from the United Kingdom, with which we are already familiar. Interestingly, the Hicklin case did not have to do with sexual content, but rather with an offensive anti-Catholic booklet. While the Hicklin test was in effect it was not uncommon for literary works (including Lady Chatterley’s Lover and Ulysses) to be

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59 LW Sumner (2004) 101
60 Jacobellis v. Ohio, 378 U.S. 226 (1964), Stewart, J.
censored because they contained a few passages that, when considered in isolation, were seen to pose a risk of corrupting the youth.

It was not until 1957, when the courts were faced with a case involving the sale of a magazine that included erotic literature and nude photography that the American court developed a new test for obscenity. In Roth (1957) the American courts abandoned the Hicklin test. Until Roth, it had been assumed based on precedent that obscenity could be regulated consistent with the constitutional requirement that free speech be protected.\(^{61}\) In the Roth decision Justice Brennan considered this question explicitly for the first time in the court’s history, finding reason to deem obscenity unprotected by the First Amendment.\(^{62}\)

The Roth test asks “whether [according] to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest.”\(^{63}\) The court goes to some length in this decision in defining “prurient.” It is defined as “having a tendency to excite lustful thoughts,” or as “a shameful or morbid interest in nudity, sex, or excretion.”\(^{64}\) Justice Brennan, writing for the majority, also states that we should ask if the work “offend[s] the common conscience of the community by present-day standards.”\(^{65}\) Although this seems to be an improvement, at least in terms of precision, over the Hicklin test, not all of the justices in Roth agreed that enough had been done in terms of specifying when a work would count as obscene. Justice Harlan, in his dissent, points out that

\(^{61}\) Roth v. United States, 354 U.S. 476 (1957)
\(^{62}\) Ibid.
\(^{63}\) Ibid.
\(^{64}\) Ibid.
\(^{65}\) Ibid.
…whether a particular work is [obscene] involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind. Many juries might find that Joyce's “Ulysses” or Bocaccio's “Decameron” was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are “utterly without redeeming social importance”.

Perhaps in response to Justice Harlan’s concerns, in *Memoirs v. Massachusetts* (1966) the *Roth* test was further refined to include an explicit statement that the work must, in addition to the aforementioned criteria, “have no redeeming social value.” Although this phrase was used in *Roth*, in that case it was assumed that anything that was obscene was necessarily without redeeming social value. This additional requirement resulted in the finding that *Fanny Hill*, a novel written in 1749 by John Cleland, was not, in fact obscene, since it had not been proven that the work was without redeeming social value. However, as Justice Black points out in *Ginzburg* (1966), it is hardly clear what conditions must be met in order for a work to count as having “no redeeming social value.” He said: “Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached.”

It was not until 1973 that a more satisfying test of obscenity would be developed by the court.

The problem of defining obscenity, and differentiating it from sexually explicit publications that are not obscene, proved to be particularly challenging for the courts between the *Roth* decision in 1957 and the *Miller* and *Paris Adult Theatre* decisions in

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66 Ibid.
1973, during which time the court struggled with various unsuccessful attempts to define obscenity, and, in fact, the question of whether or not obscenity is protected speech. It was during this period that Justice Stewart famously stated: “I shall not today attempt further to define [obscene material]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…” Justice Black, in his separate concurring opinion in *Ginzburg*, lamented the lack of guidance offered by the court:

> My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity" as that term is confused by the Court today. …we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted.70

In other words, Justice Black sees what the court was doing during this period (the 1960s) as even worse than censorship in advance of publication which is itself undesirable. The uncertainty about what decision the court would reach in a particular case, since it was not following any general principles, but rather deciding on the basis of different reasons in each case, raised serious concerns about the chilling effect on allowable speech that this lack of clear guidelines about what counts as obscene might cause.71

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71 There is cause to wonder whether the pornography industry is prone to suffering from chilling effects in the way that other industries, such as the newspaper industry, are. However, it stands to reason that if there were any legitimate, non-exploitative producers of pornography who were genuinely concerned with
The test developed in *Miller* (1973) superseded the *Roth* test, and offered further, more specific guidelines as to what types of value could help an otherwise obscene work to retain First Amendment protection. *Miller* explicitly establishes the use of a community standards test for determining whether a work is obscene, but is unclear about what sort of test is to be used for determining whether a work has artistic value.

According to the Miller test a work is obscene if it would be found

1. appealing to the prurient interest by an average person applying contemporary community standards,
2. depicts sexual conduct, specifically defined by the applicable state law, in a patently offensive way and
3. taken as a whole, has no serious literary, artistic, political or scientific value.  

The *Miller* test has three parts. In the first part, “prurient interest” is understood in the same way that it is in *Roth*, as described above. It is unclear in the *Miller* decision what the relevant community is, by whose standards the work is to be judged. This is a problem, since in many cases considering the standards of a local or regional community would yield a much different result from considering the standards of the nation as a whole.

The most important contribution that the second part of the *Miller* test makes is to exclude any work whose content is not prohibited by an applicable state law either as written or as construed from counting as obscene. The difficulty with this part of the test is that it condemns not only works that infringe on applicable state laws, but also works that are relevantly similar (at the court’s discretion) to material that does so. This causes

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*Miller v. California*, 413 U.S. 15 (1973)
a significant problem in terms of the chilling effect of the law, since it is no longer possible to determine whether the content of a particular work will count as prohibited by state law for the purposes of the Miller test.

The third part of the Miller test provides much-needed refinement to the requirement that the work, taken as a whole, have no redeeming social value, which was added to the Roth test in Memoirs. To recall, the third part of the Miller test specifies that the work taken as a whole, must have no serious literary, artistic, political or scientific value.73 I will use the term prima facie obscene to identify works that meet the first two parts of the Miller test for obscenity, but may nevertheless qualify for constitutional protection in virtue of having political, scientific, literary or artistic value. Although answering the question of whether a work has political or scientific value may be relatively straightforward, determining whether or not a work has artistic value may not be so simple. It need not be the case that the same standards are used to determine whether a work has scientific, political and artistic value. The Miller court did not provide any guidance as to how one might go about determining whether a work has artistic value,74 or whether a community standards, internal necessities or reasonable person test was to be used in making this determination.

In Pope v. Illinois (1987) the U.S. Supreme Court finally made clear which test was required.75 Although the Illinois State Appellate Court found that whether a work has serious artistic value should be determined using a community standards test, the

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73 Miller v. California, 413 U.S. 15 (1973)
74 For current purposes I will understand the term ‘artistic value’ to include literary value.
Supreme Court subsequently ruled that a reasonable person test was to be used to determine artistic value. In this context, a *reasonable person* test requires that an ordinary and informed person, possessed of average intelligence, knowledge and abilities, would find that the work has serious artistic value. The key difference between the reasonable person test and the community standards test is that the former does not assume that a reasonable person has any of the biases that a member of a particular community might have.

As we have seen, the definition of obscenity offered by the U.S. Supreme Court has changed over time, as judges have struggled with the challenge of defining obscenity. Although the Supreme Court has succeeded in refining previous definitions of obscenity, the test for obscenity still lacks sufficient precision to prevent an unacceptable chilling effect on freedom of expression, particularly within the artistic community. In addition, as I will argue in section eight, the reasonable person test is inappropriate for determining whether or not a work has serious artistic value for the purposes of the *Miller* test.

**Part Six: The National Endowment for the Arts**

Censorship, which can be legitimate or illegitimate, is government restriction on communicating a message, either on the basis of content or such that adequate alternative means of communication are not available. One context in which government censorship occurs is when a government prohibits the import, distribution or public display of an art

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76 For example, prohibiting the purchase of sexually explicit material by children is likely legitimate, whereas censoring political views the public may wish to express in a modern liberal democracy likely is not.
work, or effectively makes it impossible by denying funding that would otherwise be available to a work or exhibition in which it appears, on a basis other than its artistic merit. Since the National Endowment for the Arts (NEA) is the main source of public funding for the arts in the United States, if the NEA denies funding to works on the basis of grounds other than obscenity or lack of artistic merit, it runs afoul of the constitutional protection of freedom of expression.

The government of the United States was not involved in funding the arts (except for commissioning or purchasing individual works for its own use) until the creation of the Works Projects Administration as part of the New Deal in 1935. This funding, however, was not put in place to celebrate or promote the arts, but rather to put people back to work during the Great Depression. It was not until 1965, when the National Endowment for the Arts was founded, with the aims of “encourag[ing] expression of a diversity of views from private speakers;” helping Americans to “achieve a better understanding of the past, a better analysis of the present, and a better view of the future;” “support[ing] new ideas;” and “help[ing] create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry,” that the government began to take a serious interest in funding the arts. The Endowment was to be non-partisan, both politically and artistically, in the sense that it would foster excellence, rather than

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77 However, the government can certainly restrict the time, place and manner in which works of art can be displayed, and can (just like anyone else) choose not to display a particular art work on its premises, or for a period of time. It may, for instance, prohibit radio stations and other broadcast media from broadcasting offensive speech at times of day when children are likely to be listening (FCC v. Pacifica Foundation, 438 U.S. 586 (1978), the George Carlin case), without infringing on the constitutional right of its citizens to free speech.
79 U.S.C. §951(3)
80 U.S.C. §§951(10),(7)
promoting or encouraging any particular political or artistic agenda. “Conformity for its own sake is not to be encouraged, and…no undue preference should be given to any particular style, school of thought or expression….The standard should be artistic and humanistic excellence.”

Having provided these guidelines to the NEA about the aims that Congress hoped that the granting agency would advance, Congress left making particular determinations up to the Council. “For the first twenty five years of its existence, Congress never once attempted to place substantive limitations on the professional discretion of the Endowment….” However, a small number of controversial projects, including a Mapplethorpe retrospective, and an exhibit involving Serrano’s *Piss Christ* (a photograph of a plastic crucifix suspended in urine—see Appendix of Images), among others sparked controversy and a political interest in limiting the NEA’s artistic discretion. In 1990, spurred by legislation proposed by the infamous Senator Jesse Helms, Congress placed a restriction on the NEA to limit the funding of obscene works. It stated:

None of the funds authorized to be appropriated for the [NEA] or the National Endowment for the Humanities [NEH] may be used to promote, disseminate, or produce materials which in the judgment of the [NEA] or the [NEH] may be considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

This requirement faced both a constitutional challenge (presumably because of the lack of specificity in the definition of obscenity), and accusations that it was unclear. Further,

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82 RA Smolla (1992) 174
the fact that “grant recipients [were] asked to sign [an anti-obscenity pledge] that [said] one thing, while the Endowment promise[d] that it [meant] another,” led to its being replaced by what I will call the *decency requirement* in 1991:

> artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

To this, chairman John Frohnmayer “announced that he would regard the new directive as merely advisory, on the logic that questions of decency were already intrinsically part of the calculus of artistic merit.”

From literally, and interpreting “questions of decency” to refer to obscenity as defined in *Miller v. California*, this would be circular, since, according to *Miller*, to determine whether a work is obscene, one must first determine whether it has artistic merit, while the reverse also holds according to Frohnmayer. Interpreting Frohnmayer charitably then, means understanding him to mean that if a work has artistic merit, then it cannot also be obscene, for works with artistic merit are by definition excluded from being obscene according to United States law. The government may withhold funding from any work that qualifies as obscene under the *Miller* test, which excludes works with literary, artistic, political and scientific value. If a work is obscene (in the sense specified by the *Miller* test) it is not be protected by the First Amendment, and thus the government is free not only to withhold funding from it, but also to prohibit it.

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84 RA Smolla (1992) 176.
85 20 U. S. C. §954(d)(1)
86 RA Smolla (1992) 176-77
The tricky point here, however, is that this is not the case for any work that is obscene, indecent, or offensive in any way that falls short of satisfying the requirements for obscenity outlined in *Miller*, which are stronger than those offered in the NEA restriction above. Such expression is constitutionally protected. However, “Sexual expression which is indecent but not obscene is protected by the First amendment…the First Amendment has never been read to allow the government to rove around imposing general standards of decency.” It is unconstitutional for the government to ban, and perhaps even to withhold funding from, works that are indecent or offensive, but not obscene (in the legal sense).

In 1998 the question of whether the decency requirement is constitutional was brought before the Supreme Court. Several performance artists had submitted applications for NEA grants before the decency requirement was enacted. As is the usual procedure, their applications were considered by an advisory panel, which recommended that their projects be approved. However, in 1990 the Council—headed by Frohnmayer—although it had previously followed the recommendations of the advisory panel in more than 99% of cases, recommended disapproval, which resulted in the funding being denied.

The majority in this case argued that the decency requirement is constitutional for several reasons. First, they argue that since the decency requirement states that the NEA must merely “take into consideration” general standards of decency, the NEA is not

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88 Karen Finley, Tim Miller, John Fleck, and Holly Hughes. Sometimes known as the “NEA Four”  
89 RA Smolla (1992) 174
prohibited from awarding grants to indecent or disrespectful works. Further, the court
claims that the decency requirement does not “place conditions on grants, or even specify
that those factors must be given any particular weight in reviewing an application.” The
court claims that it does not “perceive a realistic danger that [the decency requirement]
will be utilized to preclude or punish the expression of particular views” nor that it is
“persuaded that [the decency requirement] itself will give rise to the suppression of
protected expression.”

The court recognizes that the terms of the decency requirement “are undeniably
opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise
substantial vagueness concerns.” However the majority did not believe that this opacity
and vagueness would result in a significant chilling effect. The court stated that:

As a practical matter, artists may conform their speech to what they
believe to be the NEA decisionmaking criteria in order to acquire funding.
But when the Government is acting as patron rather than sovereign, the
consequences of imprecision are not constitutionally severe.

In his dissent, Justice Souter points out several shortcomings in the arguments offered by
the majority in this case, which I find particularly persuasive. He argues that the decency
requirement is unconstitutional because it:

mandates viewpoint-based decisions in the disbursement of government
subsidies. [Further,] the Government has wholly failed to explain why the
statute should be afforded an exemption from the fundamental rule of the
First Amendment that viewpoint discrimination in the exercise of public
authority over expressive activity is unconstitutional.

In particular, Souter notes that “this principle applies not only to affirmative suppression

90 NEA v. Finley, 524 U.S. 569 (1998), O’Connor, J., delivering the opinion of the court.
91 Ibid.
of speech, but also to disqualification for government favors…When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.”

This is as it should be, for the constitutional guarantees of equal protection and freedom of expression require that government programs be open to all Americans equally, regardless of the viewpoint that they are advancing. Not only is it evident from the text of the decency requirement, but evidence from the Congressional Record also shows that Congress’s purpose in enacting this requirement “was to prevent the funding of art that conveys an offensive message.” As Souter points out, one of the bill’s supporters identified as motivation for the bill the fact that “the Endowment’s support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens,” and that “Congress . . . [should] listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again.” The majority also argues that since the decency requirement requires merely that the NEA take decency and respect into consideration, “it does not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful.’” Souter argues, however, that the statute cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel… ha[s] given some thought to the offending qualities and decided to underwrite them any way. That, after all, is presumably just what prompted the congressional outrage in the first place.

If the NEA awarded a grant to an offensive work, and upon questioning, stated that it had

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93 Ibid.
95 NEA v. Finley, 524 U.S. 569 (1998), O’Connor, J., delivering the opinion of the court..
taken decency and respect into consideration, but decided that these factors were outweighed by the merit of the work, this would very likely not have satisfied Congress, given the clear intent behind the decency requirement. The NEA would presumably see this, and thus the decency requirement would effectively deter them from awarding grants to works that Congress might see as offensive and that might lead to an investigation of the grounds for the NEA’s decision. This perception on the part of the NEA makes it the case that even though the decency requirement insists only that the NEA take decency “into consideration,” this requirement does effectively preclude funding works that might be seen as offensive by Congress.

In response to the majority’s claim that the “prospect for chilling expressive conduct… is not present here,” Souter argues that

[T]hat is simply wrong. We have explained before that the prospect of a denial of government funding necessarily carries with it the potential to ‘chil[1] . . . individual thought and expression.’ In the world of NEA funding, this is so because the makers or exhibitors of potentially controversial art will either trim their work to avoid anything likely to offend, or refrain from seeking NEA funding altogether.97

Since the NEA is the predominant source of public funds for artistic projects, producing work (or applying for funding to produce a work) that one perceives to likely be ineligible for NEA funding might seem like a waste of time to some artists. In addition, the chilling effect is multiplied, since it is often the case that those who receive NEA grants are eligible for other (private) funding, contingent upon receipt of the NEA grant, and vice-versa. In addition, receiving an NEA grant carries with it a significant amount of prestige in the art community, and may well open up other opportunities for an artist.

97 Ibid. Citations and internal quotation marks omitted.
In this way, “the chilling effect caused by [the NEA’s viewpoint-based selection criteria] is exacerbated by the practical realities of funding in the artistic community.”

The Canada Council for the Arts is Canada’s parallel funding agency to the NEA. It was founded in 1957, but has not suffered from the same controversy as the NEA. One significant reason for this, according to political scientist Michael Rushton, is that the political structure that underlies the power of the Canada Council and the NEA is very different. In Canada, the activities of the Canada Council need only be approved of by the Cabinet to continue. In the United States, in contrast, the NEA is subject to scrutiny by the entire Congress, and any member of Congress may introduce and try to win support for limits on the NEA’s discretion in awarding grants. Members of the public see Congress in general, and their representatives in particular, as accountable for granting decisions made by the NEA. As a result, significant pressure has been placed on individual Congresspersons by their constituents to prevent unpopular or offensive works from receiving public funding, in spite of First Amendment protection. As a result of the tension between this public outcry, and the potential for additional court challenges of the constitutionality of the limits placed on the NEA by Congress, Congress decided that the NEA would no longer be permitted to give individual grants to artists in 1997.

The guidelines that the NEA follows in deciding how to allocate its funds rely on the definitions of obscenity and artistic value, and the interplay between them. The NEA should not legally be permitted to refuse funding to projects on the basis of indecency or

98 Bella Lewitzky Dance Foundation v. Frohnemayer, 754 F. Supp. 774 (CD Cal. 1991)
offensiveness if they are not obscene according to the *Miller* test. This means that developing an account of what makes a work artistically valuable is not only relevant to determining whether works can legally be censored, but also whether they or an exhibition containing them can be denied funding on the basis of being obscene. Such a theory could be used to decide which works to fund in a principled manner, since withdrawing funding from any exhibition in which a particular work appears amounts to censoring that work, and may be unconstitutional.

Part Seven: Shortcomings of the Community Standards Test

Since Canadian courts currently use a community standards test to determine whether or not a work has artistic merit, it is particularly important to assess the suitability of such a test for this purpose, particularly as compared to the internal necessities test (which asks whether the offending segment of a work is necessary to the work’s overall value or purpose), the test which fulfilled this role in Canada until 1992. I will argue that although the community standards test is well suited to determining whether a publication is obscene, it is poorly suited to the task of determining whether a work has “serious artistic value.” The internal necessities test is a much better type of test to use in this case. However, the details of such a test must be filled out in order for it to be an effective and reliable means of determining a work’s artistic merit. I endorse a version of the internal necessities test, and I take on the task of filling out a version of this test in chapter 2. In this section, I argue that the community standards test (according to which the judge relies on the standards of the community at large to determine the answer to some
question that is brought before the court), is unsatisfactory for determining whether a work has artistic value because unfamiliarity with the genre, medium or artistic tradition in which the artist is working can interfere with the community’s ability to accurately judge its artistic value. In addition, some art that is valuable, including transgressive art, will be unacceptable (by its very nature, in the case of transgressive art) according to community standards. The version of the internal necessities test which I argue for in the next chapter provides tools for determining whether a particular property of a work is aesthetically relevant, and thus whether, when positive, its having such a property can show that a work has the artistic value necessary to redeem it in the eyes of the law.

A community’s lack of familiarity with the medium or genre in which an artist is working may inhibit that community’s ability to see that the work has artistic merit. For example, if a work, such as the 1964 film Dr. Strangelove, which is intended as satire, is interpreted by the public as sincere, its aesthetic value may go unappreciated. Another factor that can contribute to a work’s artistic value is the contribution that it makes to an artistic tradition or movement. Often, art works are part of an ongoing dialogue between artists and art critics, and lacking the knowledge of works that a new work refers to, builds on or to which it responds can make it very difficult to appreciate its aesthetic value. Jackson Pollock’s drip paintings (e.g. *Blue Poles: Number 11*, 1953 and *Number 1, 1950 (Lavender Mist)*), are often misunderstood by the general public, who cannot see how these works fit into the tradition of painting with which they are familiar, and so might draw the conclusion that this is not art. Pollock’s drip paintings are, however,

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100 Works of art can be transgressive in a variety of different ways, for instance, by flouting artistic, political, moral, societal and other norms.
iconic of the abstract expressionist movement. Further, when viewed in the light of his earlier work—which was done in a more expressionist style, but has a similar appearance to that of the drip paintings (e.g. The She-Wolf, 1943)—the drip paintings can be seen as the next step in the development of both Pollock’s personal style and as representative of a shift toward abstraction in the larger art community. Serrano’s Piss Christ, an incredibly controversial work, can be better understood as referring back to Gauguin’s Yellow Christ. Manzoni’s Artist’s Shit can be seen as a response to Duchamp’s Readymades, and the artistic value of Elisofon’s Duchamp Descending a Staircase (1952) might well be lost on someone unfamiliar with Duchamp’s Nude Descending a Staircase (1912). (Images of all of these works can be found in the Appendix of Images). Although none of these examples are obscene, strictly speaking, it should be clear that a lack of understanding of the tradition in which an artist is working can blind the viewer to the aesthetic value of a work. As Reubenfeld observes, “[A] society with state control over art might never have known Pollock’s great abstractions, Schoenberg’s tone poems or Carroll’s captivating Jabberwocky.” A community that may not have the relevant familiarity with artistic media, genres and traditions that a work refers to is not an appropriate judge of that work’s artistic value.

The shortcomings of the community standards test can also be seen in the case of works that are morally flawed, but whose moral flaws enhance their overall value (a class of works which I discuss further in chapter 3). These works will not pass the

102 In the third chapter, I argue that it is possible for a work’s moral flaws to enhance its moral, cognitive and aesthetic value.
community standards test. However not all such works should be censored, since some such works will be artistically valuable overall. An artwork has a moral flaw when it tends to incline morally sensitive audiences to disengage imaginatively from a work for moral reasons. A work can do this by presenting the world of the work as morally different from the actual world, or from the actual world as the audience believes it (perhaps wrongly) to be. A moral flaw that makes it challenging for the audience to remain imaginatively engaged with the work, but when the author encourages audience members to remain engaged through the work, the flaw may enhance the work insofar as it can help those who remain engaged to understand a new moral perspective.

A work can also present something that is actually morally acceptable, but which the audience believes to be morally unacceptable, as acceptable in the world of the work. For example, a novel that presents homosexuality as morally acceptable, at a time when this goes against the moral beliefs of the reader and her society, might incline the audience to disengage imaginatively from the work. Since homosexuality is not objectively immoral, if a work like this were read by an audience with opposing moral views, this might cause that audience to disengage imaginatively from the work. However, if the views of the community to which the community standards test appeals are immoral, the community risks censoring a morally and aesthetically valuable work on

103 I distinguish between two different types of moral flaws, and expand on this claim, in the second chapter.
104 For an audience to count as morally sensitive its members must have a set of moral commitments, and be capable of identifying the moral features of a fictional world. Their moral beliefs need not be true. They must be able to detect discrepancies between their beliefs about what is morally acceptable in the actual world and what is morally acceptable in the world of the work. They will likely be responsive to reasons for changing their moral views. I do not mean to appeal to Noel Carroll’s use of this term, which requires that ‘morally sensitive audiences’ have correct moral views (N Carroll 1996).
the grounds that it is morally reprehensible.

A work such as a novel advocating the morality of homosexuality might tempt the skeptical reader to continue to engage imaginatively with the work, and if it succeeds, thereby deepen her understanding of her own moral beliefs, and make her aware of new moral possibilities. If, despite making it difficult for the reader to maintain imaginative engagement with the work because of its moral stance, the work successfully conveys a moral point of view, then that moral flaw might enhance the moral and cognitive value of the work. When audiences with immoral beliefs overcome moral flaws, those flaws can increase the work’s value, and engaging with the work can be morally beneficial to the audience. The community will miss out on both this benefit, and on the opportunity to experience this valuable work if the work is censored because its content conflicts with their moral standards.

A final consideration against using the community standards test to determine whether a work has sufficient value to receive constitutional protection despite being obscene is that works whose value derives from their transgressive nature are likely to fail this test. The value of some art lies in its having the ability and audacity to push the limits of what is seen as acceptable or legitimate not only politically and socially, but also artistically. Such art is meant to be progressive, perhaps even transgressive. Transgressive art is valuable, at least in part, because it invites us to question the legitimacy of some norm—societal, artistic, political or other—of a particular society. This value is more epistemic or social than it is aesthetic, but these contributions are no less worthy of protection. Both questioning the norms of the society that we live in, and
learning what artists thought ought to be questioned in societies of the past, are valuable activities. Works that lead us to engage in them are valuable insofar as they succeed in that aim. The purpose of such art cannot be achieved without violating community standards.

Many artistic movements have taken crossing boundaries as one of their goals, and stated as much in their manifestos. For example, in the Futurist Manifesto (1909) F. T. Marinetti writes that “The essential elements of our poetry will be courage, audacity and revolt…. we today are founding Futurism, because we want to deliver Italy from its gangrene of professors, archaeologists, tourist guides and antiquaries.” The more recent Stuckist movement’s manifesto (1999) favors the artist “who takes risks on the canvas rather than hiding behind ready-made objects…. [and] is at the forefront of experimentation, unencumbered by the need to be seen as infallible.”105 The Manifesto for an Independent Revolutionary Art (1938) states that “True art is unable not to be revolutionary, not to aspire to a complete and radical reconstruction of society.”106 The Cinema of Transgression Manifesto (circa 1985) states that “All values must be challenged. Nothing is sacred. Everything must be questioned and reassessed in order to free our minds from the faith of tradition.”107 Similar statements can be seen in

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manifestos of other movements in the 20th century.\textsuperscript{108} Such aims should be condoned because they lead us to question the norms of the society in which they were written, and that questioning is valuable. These words encapsulate the aims of many artists, whose works, if obscene and put to a community standards test, might not be accepted for the very reason that they succeed at challenging social norms.

When works are first made available to the public, it is quite common for them not to be accepted as art, or as artistically valuable, by the general public, and sometimes even by the artworld. Historically, there are many artistically valuable works that at first were not accepted by the community as art. For instance, Marcel Duchamp was asked to remove his \textit{Nude Descending a Staircase, No. 2} (1912), which was a comment on Eadweard Muybridge’s photographic techniques, from the 1913 Armory Show in New York City. Duchamp’s \textit{Fountain} (1917) caused an even louder uproar, although in December 2004, 500 British artworld professionals voted it the most influential work of the 20th century.\textsuperscript{109} A more recent painting, Chris Ofili’s \textit{The Holy Virgin Mary} sparked outrage in 1999 for juxtaposing religious and pornographic imagery and elephant dung. The historical censorship of books that we now consider to be classics, such as Twain’s \textit{Huckleberry Finn} is another excellent case in point.

It takes time for transgressive art to be accepted by the community as artistically valuable, and for that acceptance to be reflected in community standards. But if we rely on community standards to determine whether such a work should be accessible to the


community, the work will never have the opportunity to eventually be accepted and seen as artistically valuable. The community is simply not equipped to judge the artistic value of the kinds of artworks whose legitimacy is likely to be questioned in court.

**Part Eight: Against the Reasonable Person Test**

In the United States, although whether or not something is obscene is determined according to community standards, the nested question of whether a work has serious artistic value has, since *Pope v. Illinois*, been determined using a reasonable person test.

To recall, a reasonable person test asks whether an informed person of average intelligence, knowledge and abilities would find that the work has serious artistic value. It is important to keep in mind that as opposed to the community standards test, the reasonable person test does not assume that a reasonable person has any of the biases that an average member of a particular community might have. I will now argue that the reasonable person test is inadequate for determining whether a work has serious artistic (or literary) value. Although some of the same considerations discussed in the previous section also apply here, there are additional reasons for thinking that the reasonable person test is deficient in this context.

The reasonable person test was developed as a standard of care in criminal and tort proceedings, to be used in determining degrees of culpability. A reasonable person is a legal fiction, and is not the same as an average person. In criminal and tort proceedings the test must be applied within the context in which the activities in question (for which the accused is being tried) took place. A reasonable person is assumed to be informed,
capable, fair and aware of the law. In the context of determining artistic value, the court has stated that it understands the reasonable person test to yield the same result as relying on the judgment of a rational juror.\textsuperscript{110} It is thus clear that the court does not require any special expertise or training for a person to be an adequate judge of artistic value using the reasonable person test.

The United States Supreme Court has pointed out that the judgment of a rational juror is unlikely to differ from the outcome of a state-wide community standards test.\textsuperscript{111} If this is the case, then the reasonable person test will run afoul of many of the pitfalls that I discussed at length in the previous section, such as those passing judgment not having the requisite art-historical background knowledge, being unable to deal with transgressive works, etc.

For most genres of art, knowledge of the conventions of the genre, as well as expertise with respect to other works belonging to the same genre and experience working within it can all improve one’s ability to assess the aesthetic merits of an art work. Some of these judgments can be complicated, such as determining whether the position of a blob of paint on a canvas contributes to or detracts from the overall aesthetic value of the work, or whether a moral flaw in a work of literature is such that it impedes imaginative engagement on the part of the audience. Since it is very common for people to graduate from high school, and often even college, without even the vaguest notion of what Cubism is, or what features of a cathedral make it a gothic one, it should not be contentious to claim that the average person is unlikely to be a good judge of artistic

\textsuperscript{110} Pope v. Illinois, 481 U.S. 497 (1987), Scalia, J., concurring. \\
\textsuperscript{111} Ibid.
value. Unfortunately, reasonable non-expert people cannot be trusted to make reliable judgments about art, particularly when an artist’s First Amendment protection is at stake.

Further, as Justice Stevens argued in his dissent in Pope,\textsuperscript{112} it is not unusual for two reasonable people to reach different conclusions about the artistic value of a sexually-oriented work. As he put it, the reasonable person test “assumes that all reasonable persons would resolve the value inquiry in the same way.”\textsuperscript{113} He argues that “communicative material of this sort is entitled to the protection of the First Amendment if \textit{some reasonable persons} could consider it as having serious literary artistic, political, or scientific value.” In his argument, Stevens cites a 1946 case where the court made the reasons for accommodating a plurality of reasonable tastes very clear:

Under our system of government, there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals, as it does from one generation to another. . . . From the multitude of competing offerings, the public will pick and choose. What seems to one to be trash may have, for others, fleeting or even enduring values.\textsuperscript{114}

In my view, this is a serious concern. If we accept that different reasonable people may, with due care, come to opposing conclusions about the artistic value of a work, we should not expect a jury to reach a decision about what a reasonable person would find in a particular case, and use this as a basis on which to decide whether a work that would otherwise count as obscene merits First Amendment protection.

Despite their different judgments in the case, both Justice Scalia\textsuperscript{115} and Justice Stevens\textsuperscript{116} see problems with using the reasonable person test in the context of determining artistic value. Scalia says that in his view “it is quite impossible to come to an objective assessment of… literary or artistic value.”\textsuperscript{117} In other words, requiring that a jury determine whether a work has artistic value is unacceptable because of the “lack of an ascertainable standard.”\textsuperscript{118} He argues, somewhat comedically, I think, that “we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: De gustibus non est disputandum. Just as there is no use arguing about taste, there is no use litigating about it.”\textsuperscript{119} He further claims that “For the law courts to decide ‘What is Beauty’ is a novelty even by today's standards.”\textsuperscript{120} My view, however, is that one reason why the courts have shied away from answering the question of whether a work has artistic value is that they have lacked a rubric or system according to which each work can be assessed. Developing just such a rubric will be my aim in chapter two.

**Part Nine: Conclusion**

Given the important role that the concept of artistic value plays in both Canadian and American freedom of expression jurisprudence, the courts are in need of a fully developed philosophical account of this concept, and of how it is to be applied. The aim of this chapter was to take a first step in that direction by situating the legal concept of

\textsuperscript{117} Pope v. Illinois, 481 U.S. 497 (1987), Scalia, J., concurring.
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
artistic value in both Canadian and American jurisprudence, and to offer a detailed account of the legal history of this concept in obscenity decisions and federal arts funding. Further, I argued that the community standards and reasonable person tests are ill suited to the task of determining whether a work has sufficient artistic value to be protected by the constitution despite the fact that it would be obscene (and thus unprotected) if it did not have this value. In the next chapter I will develop in detail a version of the internal necessities test, and argue that it is best suited to this purpose.
II. Conventionalism about Aesthetic Value

Part One: Introduction

Canadian and American courts use whether or not a work has serious artistic value (among other things) as a guide to whether it is constitutionally protected. Given this reliance on the concept of artistic value, a legally-relevant philosophical account of this concept is needed. In this chapter, I argue that to determine the aesthetic value of a work, one must begin by identifying the aesthetically relevant properties of the work. One must then establish whether these properties have a positive or negative impact on the overall aesthetic value of the work. I then argue that if any aesthetic property of the work has a positive impact on its overall aesthetic value, then the work should count as artistically valuable for legal purposes. If the aesthetically relevant offensive features of the work, moreover, are no more offensive than they need to be for the work to achieve its aims, then the work should count as having serious artistic value, and thus receive constitutional protection.

In the previous chapter we saw where the concept of artistic value comes up in the law, and how it is relevant to determining whether a work counts as obscene under the law, which determines whether it can permissibly be censored. We also saw why the

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121 I use the terms ‘aesthetic properties’ and ‘aesthetically relevant properties’ interchangeably. The way in which I am using them has been explained very clearly by Aaron Meskin. “Aesthetic judgments should be understood as statements that attribute aesthetic properties. More precisely, aesthetic judgments are the mental states associated with statements that attribute aesthetic properties....Evaluative aesthetic judgments are a subspecies of these statements, which attribute value. More specifically, they attribute what Nick Zangwill [2001] has called “verdictive aesthetic properties” (e.g., aesthetic or artistic goodness) rather than what he calls “substantive aesthetic properties” such as fragility or elegance.” A Meskin (2004) “Aesthetic Testimony: What Can We Learn from Others about Beauty and Art?” Philosophy and Phenomenological Research 69:1, 66
community standards and reasonable person tests are inadequate for determining whether or not a work has artistic value. It is now time to take a closer look at existing views of the nature of aesthetic value in order to determine whether any existing view might provide a suitable basis for the first part of my analysis: a legally applicable account of when a particular property of a work is one of its aesthetic properties. I begin this chapter by reviewing previous attempts to provide an account of what makes it the case that a particular property of a work is an aesthetic property, and thus a property that is relevant to its aesthetic value (aesthetically relevant or one of the properties that makes the work better or worse as a work of art). I discuss and reject Roger Scruton’s aesthetic attitude theory, as well as the accounts advanced by Frank Sibley and Alan Goldman. In the process, I assess some of the most recent criticisms of these views. I then argue against Berys Gaut’s account, which, as I will show, is really no account at all.

I then advance my own view, *aesthetic conventionalism*, which provides an account of what makes it the case that a particular property of a work is an aesthetic property. On that basis, I develop and argue for a test that provides tools for determining whether a particular property of a work is an aesthetic one, and when it is, for determining whether having that property makes it the case that the work has the artistic value necessary to redeem it in the eyes of the law. I claim that an account of aesthetic value must begin with an account of which properties of a work are aesthetically relevant. I argue that the first step towards determining which properties of works are aesthetically relevant is to distinguish between standard, contra-standard and variable properties of the
work, where standard properties are never aesthetically relevant, contra-standard properties always are, and variable properties are only sometimes aesthetically relevant. I then advance the view that whether or not a variable property is aesthetically relevant generally depends on the conventions of the category, although artists can also, through their efforts, make relevant some properties of their works that would not otherwise be aesthetically relevant. Finally, based on determinations available to the court as a result of this theory of aesthetic value, I offer an account of what it means for a work’s artistic value to count as serious in the legal sense.

**Part Two: Previous Accounts of Artistic Value**

In the past century Frank Sibley, Roger Scruton, Alan Goldman, Berys Gaut and others have developed accounts of what makes it the case that a given property of a work is one of its aesthetic properties, that is, one of the properties that improves or degrades the work qua work of art. Each gives a unique explanation of how to answer the question “Is the property of being f one of work x’s aesthetic properties?” There have been two main approaches to addressing the question of what unifies aesthetic properties, and sets them apart from other properties. First, there are those who have argued that there is a distinctly aesthetic attitude, of which aesthetic properties are the proper object. They have been called “aesthetic attitude theorists.” Second, there are those who have

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124 I Kant (1793) *Critique of Judgment*; and R Scruton (1974) *Art and Imagination* (London: Methuen & Co.) Kant was an early aesthetic attitude theorist, who argued that being in a position to make judgments of taste requires adopting an aesthetic attitude, defined by disinterested liking or disliking, of which aesthetic properties are the proper object. See I Kant (1793) §5.
attempted to identify some feature that all aesthetic properties share, by which they can be identified.\textsuperscript{125}

The main challenge of advancing an aesthetic attitude view is to find a way to “[specify the aesthetic attitude] independently of the properties at which it is directed.”\textsuperscript{126} Scruton, a proponent of the aesthetic attitude theory states that in taking the aesthetic attitude towards a work, one attends to certain properties of the work, and not others. The properties of the work that one attends to when one takes the aesthetic attitude towards the work are the aesthetic properties of the work. In other words, for a property $f$ to count as an aesthetic property of work $x$, it must be one of the properties that one attends to when one takes the aesthetic attitude towards the work. He characterizes an attitude as aesthetic when it meets three criteria. The aesthetic attitude must include pleasure or enjoyment at experiencing the work in which the property appears, although he interprets “pleasure or enjoyment” in a somewhat unconventional way, as we will see.\textsuperscript{127} The aesthetic attitude must involve normativity, namely, a sense that you are taking the appropriate attitude towards the work, and an expectation that others will take the same attitude towards it.\textsuperscript{128} However, the third criterion stipulates that in the case of the aesthetic attitude, if someone does not take that attitude towards the work, then assigning blame is inappropriate. Scruton further qualifies the first criterion, arguing that we must not only enjoy the object, but we must enjoy it “for its own sake.”\textsuperscript{129} As Scruton

rightly points out, this phrase requires further analysis. He provides a three part analysis of what it means to enjoy or appreciate a work for its own sake. To appreciate a work for its own sake, one must a) have a desire to experience the work, b) arising from and accompanied by a thought of the work, c) and the desire to experience the work must be solely motivated by the thought of the work, rather than for any instrumental reason.\(^{130}\)

In his recent book Berys Gaut raises two objections to Scruton’s view. I will now briefly assess the validity of these objections, before arguing that Scruton’s view provides an unsuitable basis for determining which of a work’s properties are aesthetically relevant in a legal context. Gaut first objects that it is possible to attend to the aesthetically relevant properties of the work, but to do so instrumentally, that is, in the interest of some end other than aesthetic appreciation. He uses the example of a student studying Shakespeare in order to get a good grade in an English class. Gaut claims that the properties of the work that the student attends to in taking this sort of instrumental attitude towards the work are aesthetic properties of the work, but that they would not qualify as aesthetic properties on Scruton’s view.\(^{131}\) However, Scruton does not claim that the only way to identify aesthetic properties is by taking the aesthetic attitude. Rather, he argues that aesthetic properties are just those properties that one attends to in taking the aesthetic attitude towards a work. One can, however, attend to them with a variety of aims in mind, including instrumental ones. As a result, Gaut’s claim that one is appreciating a work aesthetically when one attends to its aesthetic properties for instrumental reasons is consistent with Scruton’s position.

\(^{130}\) Ibid. 144-45
\(^{131}\) B Gaut (2007) 31-32
Gaut’s second objection to Scruton is that since aesthetic appreciation can involve not only enjoyment and pleasure, but also discomfort, shock and feelings of alienation, among other negative responses, Scruton’s first criterion, which requires that one must experience pleasure or enjoyment in response to the work, must be false. However, Scruton’s explanation of what it means to enjoy or appreciate a work for its own sake appeals not to pleasure or enjoyment but to the desire to experience the work. A charitable interpretation of Scruton’s first criterion would therefore understand him to be using “pleasure or enjoyment” in a very broad sense, as he does in his later explanation of enjoyment for its own sake, to mean something like satisfaction, or the fulfillment of the desire to experience the work. This is consistent with our appreciating some works in virtue of (or despite) their being shocking or discomforting.

Let us now assess the potential of Scruton’s position as a candidate for filling out the first part of a judicial test for artistic value. Recall that the purpose of exploring the various accounts of how to determine which of a work’s properties are aesthetically relevant was to determine whether any of them could be used in a judicial context. Scruton’s view is not a good candidate for this, however, since it does not provide a sufficiently clear standard by which to judge which of a particular work’s properties are aesthetically relevant. In particular, instructing a judge or jury to take the aesthetic attitude and then ascertain which of the work’s properties they are attending to in doing so is impractical and it would be difficult to verify that they had succeeded. Adopting the

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132 Although Scruton’s aim was to provide an account of what makes it the case that a property of a work is aesthetic, rather than to give criteria for determining whether this is so, the fact that his account provides insufficient guidance in the latter case makes it a poor candidate for use in a courtroom context.
aesthetic attitude would likely be difficult for those who are unaccustomed to it, and recognizing that one has successfully assumed the aesthetic attitude might also prove challenging at first, not to mention determining whether or not (other) members of the jury have successfully done so. Furthermore, one would likely need considerable experience considering works from the aesthetic attitude in order to identify which are the features one is attending to in that attitude. In addition, jurors might be unable to successfully take the aesthetic attitude towards works that they find offensive. If this is so, it would inhibit them from identifying the aesthetically relevant properties of the work, and proceeding with the case.

Sibley, by contrast, is not an aesthetic attitude theorist. He says that aesthetic terms or expressions are those that require “the exercise of taste, perceptiveness, or sensitivity, of aesthetic discrimination or appreciation,” and identifies aesthetic concepts as corresponding to these terms.\(^\text{133}\) His stated purpose in “Aesthetic Concepts” (1959) is not to seek out the differences between various sub-groups of aesthetic concepts, but rather to try to identify “what they all have in common.” The list of examples that he gives is as follows: “unified, balanced, integrated, lifeless, serene, somber, dynamic, powerful, vivid, delicate, moving, trite, sentimental, tragic,” although he states that the list is “not limited to adjectives; expressions in artistic contexts like ‘telling contrast,’ ‘sets up a tension,’ ‘conveys a sense of,’ or ‘holds it together’” are also legitimate examples of aesthetic terms. Sibley argues that although we sometimes base claims about the aesthetic features of a work on other aesthetic features, “often when we apply

\(^\text{133}\) F Sibley (1959) 421
aesthetic terms, we explain why by referring to [non-aesthetic] features…. When no explanation of this kind is offered, it is legitimate to ask or search for one."  

This is one way of expressing the view that aesthetic properties supervene on physical or perceptual properties, although Sibley makes it clear that on his view no non-aesthetic feature is necessary for an aesthetic property to be present, nor do aesthetic properties admit of identification by way of necessary and sufficient conditions, for “whereas each square is square in virtue of the same set of conditions…aesthetic terms apply to widely varied objects; one thing is graceful because of these features, another because of those…” A description of the totality of the perceptual features of a work can, however, make an aesthetic term inapplicable to or inappropriate for a particular work, although “the presence of just a few such features need not count decisively; other features may be enough to outweigh those which, on their own, would render the aesthetic term inapplicable.” “Though on seeing the picture we might say, and rightly, that it is delicate or serene or restful or sickly or insipid, no description in non-aesthetic words permits us to claim that these or any other aesthetic terms must undeniably apply to it.”  

Perceptual properties of works can also count “typically or characteristically” towards the attribution of an aesthetic term, although this is merely a tendency.  

According to Sibley the list of aesthetic properties is long and varied, and many of the terms on the list do double-duty as non-aesthetic properties (such as being delicate).

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134 Ibid. 424
135 The fact that Sibley does not believe that any non-aesthetic feature is necessary for an aesthetic feature to be present is one of the ways in which his definition of aesthetic properties differs from mine.
136 Ibid.
137 Ibid. 427
138 Ibid.
Sibley explains that the answer to the question of whether or not a particular property of a work is among its aesthetic properties cannot be found by consulting conditions, guidelines or rules. Rather, taste must be developed in each individual through practice and experience. I am broadly sympathetic to Sibley’s view, particularly his claim that “in using aesthetic terms we learn from samples and examples, not rules, and we have to apply them, likewise, without guidance by rules or readily applicable procedures, to new and unique instances.”¹³⁹ I think, however, that more guidance can be given than he has to offer. In the view that I develop in part three, I argue that in determining the aesthetic relevance of some properties we are guided by the conventions of artistic categories, even though there are not hard-and-fast rules of the kind that Sibley rejects.

Gaut objects to Sibley’s view as a candidate for a theory about when a property of a work counts as one of the work’s aesthetic properties on the grounds that since Sibley fails to give an account of what the properties on his list have in common, he has not, in effect, offered a theory at all. As far as the courts are concerned, I must agree that Sibley has failed to offer a theory that could serve as the basis for a rubric for determining when a property of a work is aesthetically relevant. His account is too vague to be of use in a legal context, since, as we saw in the previous chapter, the law must be such that one can reasonably predict whether the courts would find that one’s expression is constitutionally protected. On Sibley’s view, however, for any property that does not appear on his list, it would be up to the courts to determine whether it was sufficiently similar to those that appear on the list to count as aesthetically relevant, thereby potentially helping the work

¹³⁹ Ibid. 431
to secure constitutional protection. His claim that the way to determine relevance in virtue of similarity is by developing one’s taste through practice and experience makes this sort of determination too subjective to be acceptable in a judicial context (given that a recognized aim of the legal system is to minimize variability and unpredictability between particular courts, cases and judges).

Unlike Sibley, Goldman does offer a theory that could serve as the basis for an account of how to determine whether a property of a work is one of its aesthetic properties, although like Sibley he is not an aesthetic attitude theorist. He sees his project as one of explaining how the aesthetic merit of artworks and the beauty of natural phenomena emerge from their more basic properties. According to Goldman, aesthetic properties are relational: they relate a work to an observer by way of an enjoyable response. They are also at once descriptive, expressive (of approval or disapproval) and normative (in the sense that in judging, one expects others to agree). On this view, aesthetic judgments ascribe relational properties to works, such as the property that some property (which could itself be relational) causes a pleasurable response in a suitably qualified and situated observer.

Goldman claims that works have four types of properties that are relevant to their aesthetic evaluation: phenomenal properties as well as low level, mid-level and high level properties. Both mid and high level properties are aesthetically relevant, on Goldman’s view. High level properties, such as being beautiful, supervene on mid-level properties. Mid-level properties, such as being elegant, supervene on low level properties of the

\footnote{A Goldman (1990) 23}
work. Mid-level properties are relational properties between an observer of the work and a feature of the work, in which the work produces an enjoyable response. Low level properties are non-evaluative and are themselves relations between phenomenal properties, such as colored blotches at locations on a canvas. For two or more phenomenal properties to constitute a low level property, they must be related in one of four ways, according to Goldman. Two properties of the same work may be related to one another \textit{structurally}, which is to say, spatio-temporally, such as the physical relationship between paint splotches or chords in a musical progression. Properties of different works can be related \textit{temporally}, for instance if the works were created in the same year, or one was created as part of a centennial celebration of another. A property of a work can stand in a \textit{representation}al relation to a property of an object (be it another work, an everyday object, or something in nature, for instance), as a self-portrait of Rembrandt stands in relation to the appearance of the man himself. A property of a work can also stand in an \textit{expressive} relation to a property of an observer. Goldman gives the example here of some property of a musical work being related to sadness in a listener in this way.

Gaut criticizes Goldman by claiming that his view captures properties that are not actually aesthetic, such as the relation between feeling nauseous today and feeling nauseous last week (when this property is of some value to someone). Gaut appeals to the intuition that we clearly do not want to count this relation as an aesthetic property. Since this is a relation between phenomenal properties, Gaut seems to believe that on Goldman’s view it counts as an aesthetic property. However, Goldman specifies at the
outset that he is interested in understanding what makes artworks and beautiful natural phenomena aesthetically meritorious. In particular, his aim is to understand the relationship between the phenomenal properties of artworks and beautiful natural phenomena and their aesthetic properties (how the latter arise from the former). Gaut mis-characterizes Goldman’s view as holding that “any phenomenal properties standing in the specified relations count as aesthetic.”141 The example of nausea makes it clear that Gaut understands Goldman’s claim to be about any phenomenal property of anything. This amounts to saying, in Goldman’s terminology, that all low level properties are aesthetic properties, which is not Goldman’s claim. Gaut’s criticism that Goldman’s account applies to nausea misses the fact that Goldman states at the outset that he is working within the framework of art works and natural beauty.

Gaut also criticizes Goldman’s view for excluding properties that are aesthetic, such as the property of representing a tree, as opposed to representing the way that a tree looks to someone. Gaut contends that on Goldman’s view, the relata of which low level properties are composed can only be phenomenal properties of works or objects, rather than the works or objects themselves. Although this is true, on Goldman’s view, it is unclear why it is problematic. Gaut claims that the negative implication of this is that a painting of a tree can only represent “the phenomenal aspect of a tree—how the tree looks to someone—not the tree itself.”142 However, this seems unproblematic, since representational paintings can only represent objects from a certain point of view, under certain perceptual conditions, and so on. I, at least, do not know what it would mean to

141 B Gaut (2007) 32-33
142 Ibid. 33
represent a “tree itself” without representing it under any of these guises. That said, I am sympathetic to the claim that Goldman’s view captures more properties of works than are aesthetically relevant, and also fails to capture some that are. I will offer some original reasons in support of this after I develop my account in part three, since my arguments against Goldman’s position depend on that account.

Like both Scruton’s and Sibley’s views, but for different reasons, Goldman’s position is not well suited for use in the courtroom. The problem with Goldman’s view, in particular, is that his system is only effective for determining which properties of art works are aesthetically relevant. That is to say that one must know, in advance of embarking on a Goldmanian analysis of the work, that it is art. If it is not art, then Goldman’s view does not get off the ground. This is problematic for two reasons. First, the question of whether or not something is art is one that the courts are even less well equipped to address than the question of whether or not a product of human action has artistic value. Second (and more importantly), in the legal context it is often the case that non-art (or at least artifacts that are not clearly art) are charged with being obscene, and their First Amendment protection is threatened. In cases like these, as well as in clear cases of art, the courts must rely on the same procedure for determining whether or not the artifact in question has artistic value. To fail to do so is to fail to treat similar things similarly (in the eyes of the law, two artifacts that may be obscene are relevantly similar).

The final and most recent contributor to this debate is Berys Gaut. He notes that two features that the aesthetic properties on Sibley’s list have in common are that they are evaluative (although not all evaluative terms belong on the list), and that they “figure in
art-critical evaluations,” namely, those “evaluations that are as such aimed at the
evaluation of art *qua* art: that is, not art as an investment, as a social symbol, and so on,
but at establishing the value of art as art.”\textsuperscript{143}

Gaut argues that for a property $f$ to count as an aesthetic one, it need only be relevant to how good or bad the work of art is as a work of art. If it is aesthetically relevant, then it is an aesthetic property, if not, it is not. He defines aesthetic properties of a work $W$ as “$W$’s properties...that have aesthetic value (that is, that give $W$ its value $qua$ work of art).”\textsuperscript{144} What, then, is aesthetic value, on Gaut’s view? He says that the “the (wide) aesthetic value of an artwork $W$ is simply the value of $W$ $qua$ work of art.”\textsuperscript{145} According to Gaut, “(wide) aesthetic value and artistic value turn out to be one and the same” in the case of art.\textsuperscript{146} Aesthetic value, according to Gaut, supervenes on aesthetic properties. He defines aesthetic terms as follows: “(wide) aesthetic terms are terms that are evaluative of art $qua$ art.”\textsuperscript{147} Aesthetic terms ascribe aesthetic value by referring to the aesthetic properties which form the basis for that value. Gaut’s view on natural objects is that their “aesthetic properties...are those of their properties that can figure among the aesthetic properties of works of art.”\textsuperscript{148}

Unfortunately, this account is not very informative. Since we are asking “Is the property of being $f$ one of work $x$’s aesthetic properties?” if what we mean by “aesthetic properties” is “those properties that are relevant to a work’s aesthetic value,” then it is

\textsuperscript{143} Ibid. 34
\textsuperscript{144} Ibid. 35
\textsuperscript{145} Ibid. 34
\textsuperscript{146} Ibid. 35
\textsuperscript{147} Ibid. 34
\textsuperscript{148} Ibid. 35
unhelpful to answer that \( f \) is an aesthetic property of the work only if it is relevant to the work’s merit or demerit *qua* work of art. We are clearer on how to tell whether a particular property of a work is relevant to the work’s merit or demerit *qua* work of art than we are on whether it is one of the work’s aesthetic properties. In other words, Gaut has only succeeded in restating the question.

In his objections and replies section, Gaut begins to address what, at first, sounds like this objection. He begins by saying that according to this objection “claiming that the aesthetic value of art is simply its value *qua* art has merely replaced one conundrum—the meaning of ‘aesthetic’—with another at least as intractable...” This sounds like the objection that I have just posed; however, he continues “…—the meaning of ‘art.’” He then goes on to argue that his account does not require a definition of art, leaving my concern unresolved. Whereas the objection that Gaut addresses here is concerned with the possibility that offering the account that he proposes would first require defining art, since art figures prominently in his definition of aesthetic value, my objection is concerned with his having replaced the notion of an aesthetic property with the idea of relevance to a work’s merit or demerit *qua* work of art, which is no more illuminating.

**Part Three: Aesthetic Conventionalism**

None of the accounts that we have seen is well suited to serve as a basis for determining which of a work’s properties are aesthetically relevant for legal purposes. I will now

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\(^{149}\) *Ibid.* 39
develop an account of aesthetic value which includes a two-stage process for determining whether a property $f$ of a work is an aesthetic property of that work, rather than (or in addition to) being a formal, physical, axiological, relational, temporal or other type of property. One aim of this project is to develop the basis for a rubric that could be used to determine whether or not a work has artistic value that is clear and straightforward enough to be suitable for use in the courtroom, in the way that the views examined in the previous section were not. On my view, aesthetically relevant properties supervene on non-evaluative properties, although these are not limited to phenomenal properties in the way that they are on Goldman’s view, but can also include other types of properties such as temporal and relational properties. Unlike Goldman’s account, my view does not require the court to determine whether or not the work in question is art before investigating which of its properties are aesthetically relevant.

The first stage of the process of investigating which of a work’s properties are aesthetically relevant is to identify the category of art in which the work is properly appreciated. In order to do this, it is necessary that the work be a product of human action (or selection), but it need not be art.$^{150}$ If the work is not art (or if it is indeterminate whether or not the work is art), one need only construe it as art for the purposes of categorizing it in the way that I outline in the remainder of this section. Kendall Walton argues that we appreciate works as belonging to certain categories. Art forms, genres, periods, schools and styles make up their own categories,

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$^{150}$ It may be possible to use this rubric to determine whether natural objects have aesthetic value, but I am not concerned with this question here, since the courts are not interested in objects that are not products of human agency.
among many other things. Knowing which art form a work instances, for example, is important because this guides our appreciative practices. Within a given category, features of a work are standard, variable or contra-standard. We attribute higher level properties to works on the basis of knowledge about which properties are standard for the art form in question. For example, a painting with an object protruding from the canvas would be surprising and innovative as a painting, such as Rauschenberg’s 1964 Paris Biennale-winning *Canyon*,\(^{151}\) whereas a three-dimensional sculpture is not.\(^{152}\) Standard properties are properties the lack of which would “tend to disqualify a work from that category.”\(^{153}\) Contra-standard properties are “feature[s] whose presence tends to disqualify works as members of the category.”\(^{154}\) For example, three-dimensionality is a standard property of sculpture, whereas three-dimensionality (objects protruding from or falling into the canvas) is a contra-standard property of paintings. Variable properties are those properties whose presence or absence does not tend to disqualify works from belonging to a category.

Properties that are standard for a work in a category do not play a role in our aesthetic appreciation of that work, whereas contra-standard features do, and variable features sometimes do. For example, it is a standard property of movies that characters seem to move around on the screen, and we would certainly find it odd and out of place if a film critic commented on this in his review, saying something like “this was an excellent movie because the characters seemed to move around on the screen,” since,

\(^{151}\) I do not mean to include paintings with a thick or rough texture.  
\(^{152}\) *Ibid.*  
\(^{153}\) K Walton (1970) 339; my emphasis.  
\(^{154}\) *Ibid.* My emphasis.
being standard for the category, this is true of all but the most anomalous of movies. Just as having characters that seem to move around on the screen is not noteworthy at all, if a movie did not have any characters that seemed to move about on the screen (imagine an abstract film, perhaps), that would be noteworthy, and would have some impact (positive, negative, or neutral) on the overall aesthetic merit of the film. That is the effect that contra-standard features have. Variable properties like the date on which the film was released or when the little dot appears in the top corner where the film strip has been spliced together may or may not be aesthetically relevant. As we will see, whether or not it is relevant generally depends on the conventions of the particular category, although it is possible for an artist to make a variable property aesthetically relevant, even if it is not generally so according to the conventions of the category.

Categories of art are individuated by which non-aesthetic properties of the works are standard, contra-standard and variable for works in each category. Supposing that perceiving a work in a category implies appreciating it in that category, works may be appreciated in an indefinite number of categories of art. Because a work’s aesthetic properties depend on which category it is perceived in, works may appear to have different aesthetic properties when viewed in different categories. Walton argues, however, that “it is correct to perceive a work in some categories, and incorrect to perceive it in others. The aesthetic properties that are correctly attributable to work are only those it is seen to have in the categories it is correct to perceive them in.” He claims that the following considerations count in favor of a work w’s being correctly

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155 K Walton (1970) 338
perceived in a category: i) it has a relatively large number of properties standard in that category, ii) \( w \) is better or more pleasing when perceived in that category, iii) \( w \)’s maker intended it to be perceived in that category, iv) that category is well established and recognized in the society where \( w \) was made. Considerations i) and ii) are not sufficient for the correctness of perceiving \( w \) in that category; either iii) or iv) are also necessary.

According to Walton, i) is required since standard properties are used to define categories. When a work has equal numbers of standard properties when considered in two categories, ii) acts as a principle of charity, guiding us to perceive it in the category that offers the greatest aesthetic advantage to the work. Both i) and ii) and either iii) or iv) is necessary, Walton says, because without at least one of the latter it would be possible to create \textit{ad hoc} categories for works, in which they would count as masterpieces. To achieve this, the \textit{ad hoc} category would be created so as to make positive, but currently aesthetically irrelevant features of the work aesthetically relevant, and vice-versa for negative properties. Relying on criteria i) and ii) alone would imply that works are correctly appreciated in \textit{ad hoc} categories, of which they are the only members.

Let us take a moment to get clear on the dialectic that will follow. First, I will outline Stephen Davies’ claim that neither iii) nor iv) is necessary to prevent works from being correctly appreciated in \textit{ad hoc} categories. Davies’ argument successfully undermines Walton’s argument. However, I will go on to argue that Walton’s position, that either iii) or iv) is necessary, is ultimately correct. I will then argue against an additional objection, which claims that ii) is unnecessary, by arguing \textit{both} that i) and
either iii) or iv) can conflict and that ii) and either iii) or iv) can conflict).

Stephen Davies has objected that neither iii) nor iv) is actually necessary on the grounds that Walton’s argument for this claim fails.\textsuperscript{156} Davies argues that it is possible to create an \textit{ad hoc} category such that the work for which it was crafted is an ideal exemplar of the category, but not so that it turns out to be a masterpiece. He charges Walton with equivocating on the term ‘masterpiece’, using it to mean both \textit{masterwork} and \textit{ideal exemplar}. To get a handle on the objection, let us begin with the non-art example of crabapples. The property of being extremely sour is standard for crabapples appreciated in the category of crabapples, but variable in the category of apples. A particular crabapple can be a perfect exemplar of the category of crabapples, and it can also be the very best (most delicious, most beautiful, etc.) crabapple in that category. That does not, however, make it an exquisite apple (or fruit, or food). Just because a category was designed to make the aesthetic defects of a work (such as being extremely sour in our example) standard, it does not follow that there will be any really excellent works in that category (i.e. the category of crabapples). According to Walton criteria iii) and iv) are necessary to prevent it from being the case that it is acceptable to appreciate works in \textit{ad hoc} categories. But, according to Davies’ argument it is not the case that more masterworks could be created in this way, and thus, \textit{contra} Walton, criteria i) and ii) do not on their own make it acceptable to appreciate works in \textit{ad hoc} categories. Therefore, according to Davies neither iii) nor iv) is necessary.

Davies has seemingly undermined Walton’s argument for the claim that either iii)

\textsuperscript{156} S Davies (1991) \textit{Definitions of Art} (Ithaca: Cornell UP) 200-201
or iv) is necessary to prevent works from being correctly appreciated in *ad hoc* categories. However, I will now offer an original argument for Walton’s claim. Imagine crafting an *ad hoc* category for a work in which the work has more standard properties than it does in the category that it would otherwise be correctly appreciated in. Suppose further that the work is just as aesthetically meritorious when considered in the *ad hoc* category as it is when considered in the other category. In this case, according to i) and ii) alone, the work is correctly appreciated in the *ad hoc* category. To recall, i) and ii) stipulate that for a work to be correctly appreciated in a category, the work must i) have a relatively large number of properties standard in that category, and ii) be better or more pleasing when perceived in that category. According to Davies’ argument, these criteria alone preclude the possibility of a work being correctly appreciated in an *ad hoc* category. Since it is possible to construct an *ad hoc* category that satisfies i) and ii), either iii) or iv) is also necessary. To avoid this result we must keep the requirement that either iii) or iv) must be satisfied.

A separate objection that has been raised against Walton’s criteria is that under certain circumstances, works can have different standard properties according criterion i) than they have according to either iii) or iv). For example, according to i) for a Bach concerto that was composed for *harpischord*, but is now almost exclusively performed on piano, being performed on piano would be standard. But according to iii) or iv) being performed on harpsichord would be standard for that work. On the face of it, this seems to create a problem for Walton’s view. However, the only way that different properties can be standard for a work according to the different criteria is if they prescribe that the
work is correctly appreciated in different categories. In this case i) prescribes that the work be appreciated as a Bach piano concerto, and iii) or iv) prescribe that it be appreciated as a Bach concerto for harpsichord. One reason for thinking that there is something wrong here is that, strictly speaking, there is no such thing as a Bach piano concerto, which is just to say that Bach did not compose any concerti for piano. Although people sometimes speak of Bach piano concerti, it is clear that when they do they are referring to Bach concerti for harpsichord (usually) that have been arranged for piano. In that case, it seems that iii) and iv) which stipulate: iii) that w’s maker intended it to be perceived in that category and iv) that category is well established and recognized in the society where w was made, should be interpreted as referring to the arranger and her society, which resolves any potential conflict between i) and either iii) or iv). There are other ways to interpret this such that it does not create a problem for Walton, however. First, one could argue that this work is a Bach concerto for harpsichord, but that with the invention and proliferation of the piano, it became standard for Bach concerti for harpsichord to be performed on the piano. Another option would be to argue that which instrument within an instrument family a piece is performed on is variable, rather than standard, within certain categories. The category of Bach concerti could be one such category.

Although a Bach concerto for harpsichord is correctly appreciated as a Bach concerto (or possibly even a Bach concerto for harpsichord), it can also be appreciated fairly successfully in a variety of other nested categories, such as Baroque classical music, classical music, instrumental music and so on. There is a question, then, of which
of these categories condition ii) is likely to favor—that is, which of these categories is such that the work is likely to be more pleasing when perceived in that category. In most cases the work will be perceived as most successful in the smallest category that either its maker intended it to be perceived in, or that is well established and recognized in the society where the work was made (as per iii) and iv)). This is because the most fruitful comparisons—those that reveal the intricacies and innovations in the work that make it unique—will be possible when it is compared to those works that are most similar to it, and they will be the works in this category. One caveat, however, is that if there are too few works in this smallest category, it may be more fruitful to use a slightly larger category that has more works in it with which the work in question can be compared.

When a series of works that are significantly different from those that have come before are created, a new category can emerge. This process begins when a work is created that is radically different or different in a significant way from those works that have come before it. If this trend catches on, in time a new category will be created in which works of this new kind are properly appreciated. But Walton has not told us how new categories, which can help provide a framework for understanding works that are new and significantly different from those that we are familiar with, are created. I will now offer my own account of how new categories are created.

When a work is created that is very dissimilar, or differs in significant ways from the works that have come before it to which it is most similar (for instance, within the same medium and tradition), it must be appreciated in the category in which it has the largest number of standard properties (and so on, according to Walton’s criteria).
However, such a work will likely have a large number of contra-standard properties in the category in which it is correctly appreciated. Sometimes, rather than being a “one-off,” the work inspires other works that play on the ways in which this work was different from those that came before it. When a few (let us say three) such works have been created, if they are all considered as belonging to the category in which the first one, when it was first created, was properly appreciated, they will (ex hypothesi) share many contra-standard properties for that category. It will thus be the case that considering all three (say) as members of a new category in which their shared features are standard will become correct, since they will have more standard properties in that new category than the one in which, had other similar works not existed, it would have been proper to appreciate them.

Let us take Duchamp’s *Bicycle Wheel* (1913), the first readymade, as an example. Since there were no readymades before Duchamp created this work, it was, at the time of its creation, correctly appreciated as a sculpture. However, it was a highly unconventional sculpture, with many contra-standard properties for the category, such as being composed of parts that could be found in an average household, and requiring minimal fabrication on the part of the artist. Within only a few years Duchamp created other readymades, including, among a number of others, *Bottle Dryer* (1914), *In Advance of a Broken Arm* (1915) and *Fountain* (1917). These new works shared many of the contra-standard features of sculptures that *Bicycle Wheel* had, but when considered as readymades these features became standard, rather than contra-standard features. Since these works have more standard properties when appreciated as readymades than as
sculptures, this is the category in which they are correctly appreciated. And that is how new categories are created.

With this machinery in place, we are now ready to examine how the category in which a work is correctly appreciated is relevant to whether a property $f$ of a work is an aesthetic property of that work. If the property is standard with respect to the category in which the work is properly appreciated, then it is not an aesthetic property, if it is variable then it might be, and if it is contra-standard then it is an aesthetic property.

Since standard properties are had by virtually every member of the category, they are unremarkable. For a critic to pronounce (favorably or negatively) on the three-dimensionality of a sculpture or the fact that a modern Hollywood film was in color would be odd, since these are standard properties for works in these categories. They are not noteworthy, since we assume that modern films will be in color and that sculptures will be three-dimensional.\textsuperscript{157}

Contra-standard properties, on the other hand, are always noteworthy—they always aesthetically relevant. For example, for a critic to fail to mention that the role of the sugar plum fairy in the Nutcracker ballet was played by a man instead of a woman would be shocking. Similarly, a tour of a renaissance cathedral would be remiss if the guide failed to point out the incongruity between the rest of the building and its one gothic spire. Determining whether a contra-standard property contributes positively or negatively to a work’s aesthetic value comes at a later stage, but contra-standard

\textsuperscript{157} Standard properties are relevant to determining the category in which the work is properly appreciated, and thus relevant in one sense to the content of the aesthetic judgments that we make about them. However, standard properties are not relevant to specific determinations of whether or not the work is aesthetically valuable \textit{qua} member of a category.
perceptual properties are always relevant to a work’s aesthetic value.

I will now discuss the case of variable properties. Whether a variable property of a work is aesthetically relevant depends on the conventions of the category in which the work is being appreciated. I call my view *aesthetic conventionalism*; although it takes its name from the case of variable properties, I use this name to refer to the view as a whole. For example, although the number of pages that a novel has is a variable property, it is a convention of literature that how many pages a novel has (or any other feature of it that can vary from one edition to the next, such as the typeface) is not aesthetically relevant. Similarly, it is a convention of musical works and films that their duration is not aesthetically relevant (except in the sense that a film or piece of music can be too short or too long, by which we actually mean that its plot moved too quickly or that it was tedious or boring). For paintings conventionally the particular date on which they were completed, or what day of the week it was, is not seen as aesthetically relevant, although the historical period in which a painting was created or its temporal relation to the creation of another work often is. It is a convention of art that the market value of works in all categories is irrelevant to their aesthetic value. Composition is aesthetically relevant for works of visual art, as is the content of a narrative or representational work. However, although this is a general rule, there are exceptions.

Variable properties that are not usually aesthetically relevant for works in a particular category can be made relevant through the efforts of the artist. Although having been painted on a particular date is not normally aesthetically relevant for
paintings, it becomes aesthetically relevant in works that make reference to that date, either directly or indirectly. For example, in his *Date Paintings* series, On Kawara draws attention to the fact that each of his paintings was started and finished on the same day (itself a contra-standard feature of paintings) by depicting only the date in white letters and numbers on a black background on each canvas, and destroying the work if he is unable to finish it by the end of the day. An artist might similarly make the date of the work’s creation aesthetically relevant by including a newspaper clipping on which the date appears, or by making reference to a historic event or its anniversary. A painting can draw attention to a property of it that is not normally aesthetically relevant, thereby making it aesthetically relevant. The duration of a musical work or film, and the number of pages of a literary work can similarly be made aesthetically relevant by the artist. For example, the length of the silent musical work *4’33”* by John Cage is made aesthetically relevant by its title. Similarly, one can imagine a short story about a mathematician in which it is significant that the story is approximately π pages long. As we have seen, because artists can make properties aesthetically relevant for a work for which the property would not normally be aesthetically relevant, it is not the case that for any property of a work that is variable for the work as a member of a particular category, that property is always (or never) aesthetically relevant for works belonging to that category. For any property that aestheticians assert is never aesthetically irrelevant, an artist will surely come up with a clever work of conceptual art that proves us wrong. Taking a

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158 Thanks to James Sherman for this example. This could be done, for instance, by writing a story three pages and 0.14159 of a fourth page in length, measured by the number of characters. For example, if the maximum number of characters on the page were 2622, the fourth page would contain 370 characters.
property that is not normally aesthetically relevant to the type of work that the artist is creating, and making it relevant to the aesthetic value of a particular work is often a feature of successful conceptual art.

Following this program, once a work is found to be obscene, a judge must assess whether it has artistic value by first, checking to see if it has any properties that are contra-standard for the category in which the defense claims it should be considered. If it does, those properties are aesthetically relevant, so the judge moves on to step two. If not, the judge must look at the variable properties of the work and determine which (if any) of those are aesthetically relevant by reference to the category in which it is being appreciated. In this case, the judge determines which properties are aesthetically relevant by appealing to the conventions of the genre, medium, period, or other category in which it is properly appreciated and is being considered. If some of its properties are aesthetically relevant, the judge moves on to step two. If not, the work does not have artistic value. In step two the judge assesses the aesthetically relevant properties to determine whether they are positive (they enhance the value of the work) or negative (they decrease the value of the work). Throughout this process, the judge may choose to rely on the testimony of experts, or her own experience. In chapter four, I argue that testimony is a legitimate source of justified beliefs about aesthetic value. If any aesthetically relevant property is found to enhance the value of the work, then the work has artistic value.

We are now in a position to evaluate Goldman’s view that both mid and high level properties are aesthetically relevant, (although phenomenal and low-level properties
are also relevant to a work’s aesthetic evaluation).\textsuperscript{159} Despite being both sophisticated and insightful, Goldman’s view is overbroad, and captures more properties than are actually aesthetically relevant. For instance, on Goldman’s view properties that count as standard, and are thus aesthetically irrelevant (on my view) count as aesthetic properties. Standard properties are often phenomenal properties that are related to one another, or to other phenomenal properties, structurally. Any, even non-occurrent enjoyment of the presence of a standard property will qualify that property as aesthetically relevant on Goldman’s account. By contrast, my view captures all and only properties that are actually aesthetically relevant.

One other potential problem with Goldman’s view is that he only allows that aesthetic properties can supervene on phenomenal (that is, perceptual) properties of art works. However, it seems that in at least some cases, non-phenomenal properties of artworks can be the basis for aesthetically relevant properties. We saw in section two that Gaut identifies this problem; however, he fails to show how it is problematic. For example, many theorists believe that information about the artist’s life can have an impact our aesthetic appreciation of art works. Similarly, whether a painting was painted from a photograph, or whether the artist worked without a photographic intermediary. Having been painted on a particular date cannot be a phenomenal property of a painting. As a result, this view cannot recognize all of the aesthetically relevant features of On Kawara’s \textit{Date Paintings}.

In addition, some properties that ought to count as aesthetically relevant do not,\textsuperscript{159} See p. 68
on Goldman’s view. For example, in the drip paintings created using Jackson Pollock’s action painting technique, which aims to emphasize the physical act of painting itself, it is important to appreciate the temporal order in which the drips were laid down (more than just their spatial relationship of some being on top of others). This is a feature that Goldman cannot accept as aesthetically relevant. Similarly, in On Kawara’s Date Paintings the date on which each painting was made is aesthetically relevant, and this cannot be so on Goldman’s view. Since my view can accommodate these works, whereas Goldman’s cannot, my view is preferable.

Perhaps we should interpret Goldman not as trying to identify aesthetically relevant properties (as I am attempting to do), but rather as trying to identify those properties that are, for some works, aesthetically relevant (or potentially aesthetically relevant). If we interpret this to be his aim, then his theory will not come out as overbroad. However, since he only allows aesthetic properties to supervene on relationships between phenomenal properties, he does not capture all aesthetically relevant properties.

**Part Four: Serious Artistic Value**

As far as the law is concerned, a work should count as having aesthetic value when it has at least one aesthetic property with a positive valence. A positively valenced aesthetic property contributes positively to the aesthetic value of the work, as opposed to a negatively valenced one which detracts from the aesthetic value of the work as a whole. The reason we must set the requisite number of positively valenced aesthetic properties
for a work to count as having aesthetic value is that there are no principled grounds for
deciding how many such properties are sufficient.

In the United States, the law not only requires that a work have artistic value to be
exempt from the requirement that it not be obscene, but also that that artistic (or literary)
value be “serious.” A parallel situation arises in Canadian case law, with respect to
determining whether a work that is *prima facie* obscene qualifies for constitutional
protection depends on whether its artistic value is serious insofar as the sexual content
present in the work is “necessary to the work’s overall value or purpose.” As we saw in
the previous chapter, Canadian and American courts have said very little about how to
determine whether a work has literary or artistic value, and they have said even less about
how to determine whether that value is serious. As philosopher and legal scholar
Frederick Schauer points out in his 1976 treatise on American obscenity law, “There has
been extremely little case law on what in fact constitutes serious literary [or]
artistic…value.”160 One option open to the courts would be to say that all artistic or
literary value is serious. This seems an unlikely route to take, however, since the courts
have limited protection to works that have literary or artistic value when “taken as a
whole,” and in that case they did mean to exclude some works by that locution. This
limitation was implemented in the case of works with political and scientific value as
well, and was meant, for example, to exclude *prima facie* obscene films from protection,
even if they began with a brief geography lesson. And so we can assume that “serious” is
similarly meant to exclude some works.

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Schauer makes two suggestions about what the courts might mean by the requirement that literary and artistic value be serious. He suggests that to count as serious a work must have “the purpose of stimulating the mind, and...[have] this effect on a significant number of people.”\textsuperscript{161} Moreover, Schauer proposes that for a work’s literary or artistic value to count as serious, the work must express some idea and that “the idea must...not [be] a mere pretext for the distribution of [explicit] pictures or explicit text ‘illustrating’ that idea.”\textsuperscript{162} I think that this is a very promising suggestion, but one that is in need of further development to be of use in a judicial context. I will now develop a more rigorous account of the seriousness of literary and artistic value that is consistent with Schauer’s suggestions.

On my view, the value qua art of both literature and other arts can be subsumed under the umbrella of artistic value, so literary and artistic value need not be discussed separately. Although it is unclear whether a work of instrumental music could be obscene, discussing literary and artistic value together solves the further problem of figuring out which category music belongs to, although “it is clear that serious and predominant musical value would ‘save’ a work from being obscene.”\textsuperscript{163}

I propose that for a work to have artistic value that is serious, it must be no more sexually explicit\textsuperscript{164} than is necessary to achieve the level of aesthetic value that it achieves. In other words, if it is the case that the work would be less aesthetically valuable if it were less sexually explicit, then the work’s artistic value counts as serious.

\textsuperscript{161} F Schauer (1976) 144-45
\textsuperscript{162} F Schauer (1976) 143
\textsuperscript{163} F Schauer (1976) 145, fn. 38
\textsuperscript{164} Recall from the previous chapter that this test will only be applied to works that already meet the first two parts of the test for obscenity by appealing to the prurient interest and being patently offensive.
Determining whether a work has serious artistic value relies on much of the same apparatus as was relied on in determining whether it has artistic value *simpliciter*. To identify a work’s artistic value as serious, one must first determine a) what level of aesthetic value the work achieves, b) which features of the work contribute to or detract from that value, and c) whether the aesthetically relevant elements of the work in virtue of which it is *prima facie* obscene are necessary to the work’s achieving the level of aesthetic value that it achieves.

One might object that it is unclear what the work is properly compared to when we speak of it being less sexually explicit. However, various versions of the same work that are sexually explicit to different degrees are frequently created, and we have no problem calling them versions of the same work, and comparing them to one another. In film in particular, different versions are often created in order to appease the MPAA ratings board, since a film’s receiving a rating of NC-17 inevitably reduces its viewership, as does a rating of R, compared to PG-13, for films with a younger target audience. If the producers are unsatisfied with the ratings board’s assignment of a more stringent rating, it is common for the film to be re-edited into a new, less sexually explicit version.\textsuperscript{165} If the decrease in explicitness compromises the integrity of the work, then the overall aesthetic value of the work decreases as a result. It is up to a court to determine, in a particular case, whether a particular work could be less sexually explicit without detriment to its aesthetic value; if not, then it has serious artistic value, and is thus subject

\textsuperscript{165} *This Film is Not Yet Rated* (2006) IFC Films
to constitutional protection, even if it would otherwise count as obscene.\textsuperscript{166}

One of the ways in which the aesthetic value of a work can be decreased is by altering the work in a way that prevents it from achieving one or more of its aims. Most art works aim to communicate something to their audiences. The content that an art work aims to communicate is its aim. Art works often have many aims. One aim of Monet's well-known Waterloo Bridge paintings\textsuperscript{167} was to explore (and help those who viewed them to notice and explore) the way that light at different times of day affects the way that we see the world. Given that aim, there are things that Monet could have done differently that would have enabled him to achieve that aim equally effectively (i.e. signing his name in a different color, or putting a particular splotch of paint over here rather than over there), and other things that, had he done them differently, would have undermined this aim. Doing everything in the way that it was done--not altering the grammatical structure of any sentence in the novel, or changing the style of any brush stroke in the painting--is \textit{not} essential to the aim(s) of the work. This may be essential to the work being the work that it is, but that does not make it essential to the work's ability to achieve its aim(s). Artists can, of course, be wrong about what the aims of their work are. The reason for this is that there are aims that are manifest in the work. We can identify aims that are manifest in works, for which some particular property of the work is either necessary or not.

I will now discuss two examples of works that are quite violent, and offer an

\textsuperscript{166} A judge might elect to rely on expert testimony in making this determination.

\textsuperscript{167} They are named \textit{Waterloo Bridge}, with such apt subtitles as: \textit{Dawn, Effect of Sun in the Mist, Fog Effect, Grey Weather, Hazy Sun, Misty Morning, in the Fog, Misty Weather, Sunlight in the Fog, and at Sunset, Pink Effect}. A few examples are included in the appendix of images.
analysis of whether they are more violent than is necessary to achieve the level of aesthetic value that they achieve, which will hopefully illuminate the point. I will use examples of violent films, instead of obscene ones, in the hope that some of my readers will be familiar with the examples I discuss. Let us compare the films *Seven* (1995) and *A Clockwork Orange* (1971), both of which are extremely and graphically violent, and have more to them than simply violence for its own sake.

Director David Fincher’s *Seven* follows the story of two homicide detectives on the trail of a serial killer who forces each of his victims to enact one of the Seven Deadly Sins to absolve humanity of its ignorance of them. One aim of the film is to help the viewer get inside the head of a person who takes the concept of sin so seriously that he is compelled to seek out a person who is guilty of each sin, and force him or her to practice it to excess, thereby murdering him or her. If the film did not graphically and violently illustrate the ways in which excessive forced indulgence of these sins were used to murder the characters, this point would fail to come across, to the significant detriment of the film’s artistic merit.

*A Clockwork Orange* is a Stanley Kubrick film based on the novel by the same name written by Anthony Burgess. It follows the life of a teenager in a fictional future Britain who, along with his friends, is prone to random acts of extreme violence. The authorities eventually catch up with him, and he is arrested and sent to prison, where he learns of an experimental rehabilitation program that would shorten his sentence. This treatment re-programs convicts using brainwashing through music therapy. The therapy works, and he ends up hating violence, but he gets out of jail only to find that the people
whom he wronged before he was imprisoned are still after him. One central aim of this film, as in the novel, is to show that although technological manipulation of the mind might seem like a promising solution to the most grievous social ills, in practice it has unexpected negative consequences, such as ruining the protagonist’s ability to enjoy classical music (an important pleasure for him previously). The extreme violence in which the protagonist participates is thus a premise of, rather than an essential part of the theme of the work. To establish this premise, the film must include evidence of the extreme and unprovoked nature of the protagonist’s violent behavior. However, these scenes need not be prolonged, nor need they be very numerous or extremely graphic to establish this point. In Stanley Kubrick’s adaptation, the scenes establishing the protagonist’s violent history are prolonged, numerous and extremely graphic; more so, I would argue, than is necessary given the overall aims of the film. Although these features of the film may appeal to a certain viewership, since they exceed what is required given the aims of the film, this excess is detrimental, in my view, to the overall aesthetic value of the film.168

Although neither of these films is obscene, A Clockwork Orange is more violent than is necessary to achieve its aims, whereas Seven is not. This analysis can be used as a model for analyzing when a work is more sexually explicit than is necessary to achieve its aims. Whether or not the reader agrees with my interpretation of these films, I hope that this discussion has effectively illustrated what it would mean for a work to be “no

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168 This is not to say that A Clockwork Orange is wholly without aesthetic value, for although its level of violence counts against the film’s aesthetic merit, this can be outweighed, and probably is, by the film’s aesthetically meritorious features.
more offensive than is necessary to achieve its aim.” Incidentally, before *A Clockwork Orange* was released it received an X rating (now known as NC-17) from the MPAA. In order to reduce its rating to R, Kubrick cut 30 seconds of sexually explicit material from the film, and replaced it with material that was less explicit.

The integrity of a work sometimes depends on the presence of its sexually explicit elements. To determine whether this is so in a particular case, one must ask whether the work could be less explicit without detriment to its aesthetic value. If the work is no more explicit than is necessary to achieve its aims, such that its aesthetic value would be reduced were its sexual explicitness decreased, then the work counts as having serious artistic value, as required by the law for it to retain constitutional protection despite the fact that it would otherwise count as obscene. If not, then any artistic value that it has counts as serious, and it is subject to constitutional protection, even if it would otherwise count as obscene.

**Part Five: Conclusion**

I have argued for a legally-relevant philosophical account of aesthetic value according to which only some of the properties of works are aesthetic properties, and thus relevant to the aesthetic value of the work. This account provides the basis for a version of the internal necessities test, which asks whether the offending elements of a work are necessary to the work’s overall value. In order to determine whether a work is more sexually explicit than it needs to be to attain the level of aesthetic value it does, one must first determine whether the work has any value, and then identify the contribution (if any)
that the offending elements of the work make toward (or against) that value. My account is precise and concrete enough to be used to determine whether or not a work has serious artistic value, such that it cannot count as ultima facie obscene, and thus retains constitutional protection in spite of the offending content.

I have proposed an aesthetic conventionalist account of what makes it the case that a particular property of a work is an aesthetic property, according to which standard properties of art works are never aesthetically relevant, contra-standard ones are always, and variable properties can be aesthetically relevant. I then argued that whether a variable property of an art work is aesthetically relevant depends on the conventions of the category in which it is being considered (although the artist can make a normally irrelevant variable property aesthetically relevant). Having identified some aesthetically relevant properties of a work, one can then assess the valence of those properties, thereby assisting the courts in determining whether the work has the artistic value necessary to grant it constitutional protection despite being obscene.
Part One: Introduction

In the previous chapter I offered an account of how to determine whether or not a work would be less aesthetically valuable if it were less sexually explicit; that is, whether or not its artistic value counts as serious. This can, in some cases, be relatively straightforward. However, many of the most interesting cases of prima facie obscene works are works with moral flaws, namely, works that present the world as morally different from the way that its audience believes it to be, or the way that it actually is. For such a work not to count as ultima facie obscene, it must, like all other prima facie obscene works, be shown to have serious artistic value. For that to be so, it must be the case that the features of the work that make it prima facie obscene make a positive contribution to the work’s overall aesthetic value. The hotly debated question we must now address, then, is whether or not a work’s aesthetic value can increase in virtue of its having a moral flaw.

Part Two: Definitions and Positions

The relationship between moral and aesthetic value can only be understood by understanding its component parts, namely if and when moral flaws and virtues are aesthetically relevant, and when a moral flaw or virtue can enhance or detract from a

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169 This chapter and its earlier incarnations have benefitted from comments from Stephen Davies, Dominic M. McIver Lopes, James Harold, Kathleen Higgins, Anna-Sara Malmgren and A.P. Martinich, and helpful comments at presentations at American Society for Aesthetics Pacific Division meeting, the American Philosophical Association Central Division meeting and the University of Texas at Austin graduate colloquium.
work’s aesthetic value. All of the parties to the debate about the relationship between moral and aesthetic value refer to moral or ethical flaws or defects in works of art (and by contrast, moral or ethical merits). However, many of them have simply assumed that their intuitive understanding of the notion of a moral flaw is the one that is adopted by the others who discuss the issue. Unfortunately this is not the case, and this assumption has succeeded in muddying the waters of this debate significantly. Using a broader or narrower definition of a moral flaw in a work can influence ideas about how such a flaw can affect the aesthetic value of a work.\footnote{For an example of an author who uses an overbroad definition of “moral flaw”, see D Jacobson (2006) “Ethical Criticism and the Vice of Moderation” in Contemporary Debates in Aesthetics and the Philosophy of Art (Matthew Kieran, ed. Oxford: Blackwell) 342-355. See J Harold (2008) “Immoralism and the Valence Constraint” British Journal of Aesthetics, 48:1, 48-49 for a discussion of Jacobson’s overbroad definition of moral flaw, which results in far too many works counting as morally flawed, and thus the impression that there is no relationship between moral and aesthetic value.} For this reason, it is particularly important to be clear about how we use the term. In addition, those discussing this issue have failed to acknowledge that the relationship between a work’s moral features and the moral convictions of its audience may differ from the relationship between that same work’s moral features and the moral landscape (i.e. the sum of the moral facts) of the actual world.\footnote{Presenting a different moral landscape is not the same thing as saying that the work is on balance morally defective.}

A work has a moral flaw when it presents the world as morally different from the way that the world actually is in such a way that this that results in a conflict, either with the audience’s beliefs about the moral landscape of the actual world, or about the moral facts of the actual world themselves. I distinguish between two types of moral flaw. An artwork has a \textit{surface moral flaw} when it tends to cause imaginative resistance in a
morally sensitive audience, by presenting the world as morally different from the way that they believe it to be.\textsuperscript{172} A work has a \textit{deep moral flaw} just in case it presents what is objectively immoral\textsuperscript{173} as morally acceptable, or it presents what is either morally required or permissible as immoral, whether or not this is in contrast with the audience’s moral views. There is a third type of moral flaw that has been proposed in the literature, according to which a work is morally flawed when it “prescribes” an unmerited response.\textsuperscript{174} As I will argue in part three, this type of moral flaw collapses into my definition of deep moral flaw. A moral flaw can be both surface and deep if it satisfies both definitions. However, a moral flaw need not satisfy one definition in order to satisfy the other. Defining moral flaw in a way that is not excessively broad will enable us to discern interesting patterns of correspondence between ethical merits and demerits and aesthetic ones.

Those engaged in the debate about what impact, if any, the moral value of artworks has on their aesthetic value must be clear about which definition of moral flaw they are using, so as to avoid talking past one another. The major parties to this debate are contextualists, autonomists and ethicists. Ethicists argue that moral virtues can enhance the aesthetic value of a work, and moral flaws can detract from it, but not vice-versa. Contextualists and autonomists about the relationship between moral and

\textsuperscript{172} For an audience to count as morally sensitive its members must have a set of moral commitments, and be capable of identifying the moral features of a fictional world. Their moral beliefs need not be true. They must be able to detect discrepancies between their beliefs about what is morally acceptable in the actual world and what is morally acceptable in the world of the work. I do not mean to appeal to Carroll’s use of this term, which requires that the audience have true moral beliefs.

\textsuperscript{173} For the purposes of this paper I will be assuming that there are objective moral truths, but this is not to say that morality is absolute in the sense that these truths cannot change over time or differ from place to place.

\textsuperscript{174} B Gaut (2007) Chapter 10
aesthetic value agree that an ethical flaw in a narrative artwork need not decrease that work’s aesthetic value, nor need an ethical merit increase its aesthetic value. They disagree, however, about why this is the case. According to autonomists, artworks’ ethical qualities are never aesthetically relevant and thus ethical qualities of artworks, whether positive or negative, have no impact on works’ aesthetic value. By contrast, contextualists such as myself claim that a work’s ethical qualities can influence its aesthetic value. Indeed, they argue that an ethical flaw (or merit) in a narrative artwork can increase, decrease, or be neutral with respect to that work’s aesthetic value.

According to contextualists, positive ethical qualities are not necessarily associated with positive aesthetic qualities; both positive and negative ethical qualities can co-vary with either positive or negative aesthetic qualities (although some ethical qualities may be aesthetically irrelevant). As Daniel Jacobson says, on this view “a moral defect or merit in an artwork can figure either as an aesthetic defect or merit, or can be aesthetically irrelevant.”

Matthew Kieran, another proponent of this view,

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175 For the purposes of this paper I intend my claims to apply only to narrative art works, although they may apply to other types of works as well. Narrative works include not only literary works, but also theatre, film, sculpture and visual art and so on, whenever it “tells a story.” Cf. Journal of Aesthetics and Art Criticism special issue entitled The Poetics, Aesthetics, and Philosophy of Narrative 67:1 (2009). I refer to the artist as author throughout this chapter for the sake of simplicity, although in narratives the artist could in fact be the playwright, director, writer, painter and so on.

176 Since the debate about the relationship between moral and aesthetic value has, to date, focused on the impact of moral flaws on aesthetic value, I will not be addressing the effect that ethical merits may have on aesthetic value. I suspect that ethical virtues may sometimes result in aesthetic flaws when they fail to teach the audience, or deepen the audience’s understanding of virtue.

177 The term “contextualism” was adopted for use in this debate by Berys Gaut. See B Gaut (2007). Most of those whom Gaut classifies as “contextualists” identify themselves as “immoralists.” Carroll, who does not identify himself as an immoralist, may also fall into this category. See B Gaut (2007) 50.

178 This taxonomy was laid out in B Gaut (2007).

asserts that “a work’s value as art can be enhanced in virtue of its immoral character.”\textsuperscript{180}

More precisely, a work’s aesthetic merit can increase \textit{in virtue of} its having a particular moral flaw. This is to be distinguished from the view that removing an art work’s ethical flaw would make it aesthetically worse overall. As Berys Gaut observes “it is perfectly true that making an immoral work morally better may overall be an aesthetically bad thing. But that is quite compatible with holding that the work is aesthetically flawed in so far as it has an ethical flaw that is aesthetically relevant.”\textsuperscript{181} The contextualist makes a stronger claim than the one that Gaut asserts, which is merely that removing an aesthetically relevant ethical flaw from a work might undermine the effectiveness of other aesthetically relevant features of the work, thus decreasing its overall aesthetic value.

Contextualists have not yet explained \textit{why} negative ethical qualities of artworks do not always co-vary with negative aesthetic qualities. As Gaut points out “the burden is on the contextualist to say something about when, where and why the value relation inverts: why should a positive value-relation sometimes become negative?"\textsuperscript{182} In this chapter, I provide a new argument for contextualism by defending the claim that a moral flaw in an artwork does not always count as an aesthetic flaw, and elaborating the conditions under which a moral flaw can count as an aesthetic merit. This argument relies on a clear definition of “moral flaw”, and my distinction between two different

\textsuperscript{181} B Gaut (2007) 63-64.
\textsuperscript{182} \textit{Ibid.} 55
kinds of moral flaw that, until now, have been treated as one and the same.\textsuperscript{183} This distinction is essential to assessing the conditions under which a moral flaw can count as an aesthetic flaw or virtue in a work of art.

With this distinction in place, I argue that a surface moral flaw that results in complete imaginative disengagement (\textit{i.e.} the audience member ceases to imagine that which the work presents) in morally sensitive audiences\textsuperscript{184} cannot increase the aesthetic value of a work, since failing to engage its audience imaginatively constitutes an aesthetic defect in any narrative work. However, when a morally flawed work manages to sustain the audience’s imaginative engagement, the flaw may count as a virtue insofar as it facilitates the audience’s understanding of a new moral perspective. That the work sustains the audience’s engagement in the face of this inclination to disengage can also be an aesthetic virtue.

This will not satisfy some critics of contextualism, however, who will only grant that ethical features can be inversely correlated with aesthetic value if the aesthetic value increases in virtue a work’s having a \textit{deep} moral flaw. In defense of contextualism, I argue that the audience can learn from a work in virtue of its having a deep moral flaw, that is, in virtue of the work’s presenting that which is actually immoral as morally

\textsuperscript{183} This is true not only in the contextualist camp, but in the debate at large. The autonomist steers clear of this problem, since moral flaws play no role in his view. It is not clear, however, whether the concept of a moral flaw plays the same role (or need play the same role) in the other views on offer, or whether those who invoke a moral flaw in their explanations of the relationship between moral and aesthetic value are using the term in the same way, for several different definitions have been used. See B Gaut (2001) “Art and Ethics” in \textit{The Routledge Companion to Aesthetics} (B Gaut and D Lopes, eds. London: Routledge) 351; and N Carroll (2000) “Art and Ethical Criticism: An Overview of Recent Directions of Research” \textit{Ethics} 110: 1, 350-387.

\textsuperscript{184} For an audience to be morally sensitive it must be made up of average people who are able to function in society (\textit{i.e.} not sociopaths), and who can tell the difference between right and wrong (even if some of their beliefs about what is right and wrong are in fact false).
acceptable. Such a work could have cognitive value in virtue of having a deep moral flaw. In this case, whether contextualism is true depends on whether the cognitive value of that work counts as, or increases the work’s, aesthetic value. In sections six and seven of this chapter I argue for aesthetic cognitivism, the view that at least one of the things that we appreciate about art (qua art) is that it can teach us. If my arguments are persuasive, then I will have effectively shown that moral flaws can count as aesthetic virtues, and thus that cognitivist contextualism is true.

**Part Three: Moral Flaws**

Two opposing intuitions drive the two different definitions of “moral flaw.” The first focuses on the audience members’ reaction to a work, and their ability to remain imaginatively engaged with it. I agree with Noël Carroll\(^{185}\) and Kieran\(^{186}\) that if we are unable or unwilling to imaginatively engage with a work for moral reasons, then that work has a moral flaw. These are the surface moral flaws. Whether a work has a surface moral flaw depends on the relationship between a morally sensitive audience’s beliefs about the moral facts of the real world and the moral facts as they are presented in the work.

For a work to have a surface moral flaw it does not suffice for a character to unjustifiably act in a way that we find morally reprehensible. For example, if a work presents a character, the narrator, or indeed every person inhabiting that fictional world as

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believing that gratuitous torture is morally acceptable, then that is not a surface moral flaw. By contrast, if it is true in the world of a work that gratuitous torture is morally acceptable, and a morally sensitive audience\textsuperscript{187} believes this to be wrong and is thus tempted to disengage, then the work has a surface moral flaw. For although such features may hinder the audience’s ability to find the characters believable (or psychologically realistic), they do not result in a conflict between the audience’s moral beliefs and the moral landscape presented in the work.

Contra Kieran and Carroll, however, I claim that surface moral flaws are not the only type of moral flaw. The second intuition focuses on the work’s moral features and the relationship between those features and the moral features of the actual world. If an act is morally required in the actual world (regardless of the audience’s beliefs), but it is either merely permitted in the world of the work or forbidden in the world of the work, then the work has a deep moral flaw. Similarly, when actions that are forbidden in the actual world, but that are either required or permitted in the world of the work, this results in a deep moral flaw. For instance, a work that presents the village elders as having done their duty by forcing the widow onto her husband’s funeral pyre\textsuperscript{188} has a deep moral flaw (assuming that forcing a widow onto her husband’s funeral pyre is objectively immoral). A moral flaw does not count as deep unless it presents something actually immoral as moral. For example, a novel that presents homosexuality as morally acceptable, at a time when this is contrary to the moral beliefs of the reader and her society, might tempt the

\textsuperscript{187} See note 3 supra.

reader to disengage imaginatively from the work. This is a surface moral flaw, but
(assuming that homosexuality is not, in fact, immoral) it is not a deep one. The source of
the clash between the audience’s moral standards and the moral facts of the world of the
fiction is not a deep moral flaw in the work, but rather a flaw in the audience’s immoral
views. To an audience that knows that homosexuality is not immoral, this work has no
moral flaw at all. If the audience’s moral beliefs are mostly true, then it will generally be
the case that those works with surface moral flaws also have deep moral flaws.

There is a third definition of moral flaw in the literature, according to which a
work is morally flawed if it “prescribes” an immoral, and thus unmerited, emotional
response in its audience. Emotional responses are immoral, on this view, when they are
unmerited—that is, when they are inconsistent with the emotional response that a morally
good person would have to the situation. An emotional response to a fiction is unmerited
just in case: a) if the thing you are imagining were happening in real life, and b) you had
the same response to it, then c) your response would be morally reprehensible. For
instance, feeling satisfaction at the triumph of an antagonist is an unmerited response. An
unmerited response is not a response that is not called for by the prescriptions of the work
and may, in fact, be a response that the work aims to elicit. This way of characterizing a
moral flaw collapses into my characterization a deep moral flaw. Assuming that works
of fiction can prescribe imaginings it is nonetheless not the case that they can prescribe

\[189\] B Gaut (2007) Chapter 9
\[190\] Art works prescribe that their audiences imagine truths about fictional worlds. To prescribe an
imagining is just to invite the audience to imagine something about a fictional world, or give us some
direction as to what we should imagine if we want to engage with this particular fiction. Alice in
Wonderland prescribes that we imagine that Alice is a little girl who falls down a rabbit hole. In addition to
that audience members have emotional responses (although such responses can be caused by an audience member’s following the imaginative prescription). Audience members cannot experience these emotions in response to the fiction unless they engage imaginatively with it.\textsuperscript{191} The third definition must therefore be reformulated to assert that morally flawed works prescribe imaginings which in turn prompt immoral emotional and psychological responses. It is only by means of prescribing imaginings that a work can invite its audience to have an actual immoral response to the work. Using my terminology, this third definition amounts to the claim that the moral landscape in a morally flawed fictional world includes facts about the sorts of emotional responses that are morally appropriate which do not match the facts in the actual world.

A benefit of distinguishing between deep and surface moral flaws is that it enables us to make sense of the fact that members of different cultures and people living in different times identify different features of works as moral flaws, and thus different works as having or not having moral flaws. In the real world, which moral beliefs are seen as true and which as false also changes over time and between cultures, as evidenced by the history of book banning.

Achieving a shared understanding of what constitutes a moral flaw in an art work, and acknowledging the proper role to be played by the competing intuitions that have, until now, driven different understandings of the aesthetic contribution that moral flaws

\textsuperscript{191} Some involuntary physiological responses to fictions such as startle responses and skin conductance responses, for example, can be directly caused by some art forms (particularly audio-visual art forms such as film). However, such responses cannot be prescribed by a fiction, since audience members have no control over whether they respond in these ways. See J Neilson “Resolving the Paradox of Horror: A Study of Emotion” unpublished MS.
can make to art works, is essential to understanding the relationship between moral and aesthetic value. With the relevant distinctions in place let us now proceed to examine one of the effects that moral flaws can have on audiences: imaginative resistance.

**Part Four: Imaginative Resistance**

With the definitions of surface and deep moral flaw in place, I will respond to the challenge to the contextualist by explaining under what conditions a moral flaw increases or decreases the aesthetic value of a narrative artwork. In this section I argue that surface moral flaws can sometimes cause an audience to disengage imaginatively (that is, to stop following along with the work imaginatively). A surface moral flaw that causes this to happen can never count as an aesthetic virtue. I will argue in the next section, however, that there are other circumstances under which a surface moral flaw can enhance the aesthetic value of a work.

One way in which the moral character of a work can affect its aesthetic value, I claim, is by inducing imaginative resistance. Imaginative resistance occurs when what the work presents causes or motivates us to disengage imaginatively from it. This happens when a work presents something that we deem morally reprehensible as morally acceptable. A work need not have a moral flaw, nor need it be fictional for imaginative resistance to occur. Non-fiction art works such as documentary plays like Moisés Kaufman’s *The Laramie Project* and Wallace Shawn’s *Aunt Dan and Lemon*\(^\text{192}\) as well as non-fiction novels like Truman Capote’s *In Cold Blood* can induce imaginative

\(^{192}\)Thanks to Paul Woodruff for suggesting these examples.
resistance due to the horrifying nature of the events that they depict. However, since they are true stories that take place in the actual world, they do not have moral flaws. It seems likely that the audience’s knowledge of their truth helps to enable audience members to overcome the temptation to disengage imaginatively, as does the skill of their authors. The presence of a moral flaw is not necessary for imaginative resistance to occur.

Imaginative resistance can provide a foundation for Noël Carroll’s argument against the autonomist that, since narrative art works aim to engage their audiences both imaginatively and emotionally, a moral flaw in a narrative work that fails “to secure audience uptake is an aesthetic defect in an artwork.”¹⁹³ In my terms, if a work induces complete imaginative disengagement, it thereby causes the work to fail on its own terms, and thus (I will argue) decreases its aesthetic value.¹⁹⁴

Imaginative resistance is an umbrella term for the inability (imaginative blockage) or unwillingness (imaginative refusal) to engage imaginatively with a narrative work due to the content of the work. Contents “that are inconsistent with our aesthetic, semantic and metaphysical beliefs” can sometimes lead to imaginative resistance.¹⁹⁵ This occurs, for instance, in the case of bald contradictions, moral falsehoods¹⁹⁶, and simple mathematical falsehoods. “With cases of blockage we typically…have no option but to decline the invitations to imagine altogether.”¹⁹⁷ I do not claim that imaginative

¹⁹³ N Carroll (2000) 377
¹⁹⁵ A Meskin and J Weinberg (2006) 13
¹⁹⁶ I will use ‘moral falsehoods’ as shorthand for moral assertions that conflict with our beliefs about what is morally true in the actual world.
¹⁹⁷ A Meskin and J Weinberg (2006) 20
resistance is the only potential cause of imaginative disengagement, but rather offer it as an example that strikes me as particularly apt in the moral case.

We generally resist imagining that things we believe to be morally reprehensible in this world are morally acceptable in a fictional world. As in the example given earlier, we resist imagining that village elders did their duty by forcing the widow onto her husband's funeral pyre.198 We have no trouble imagining, however, that a character, all of the characters, or the narrator of the fiction believes this to be so, albeit incorrectly.

Since art works aim to engage their audiences, a work that induces substantial imaginative resistance fails on its own terms (qua artwork). As such, a moral flaw that causes complete imaginative disengagement is also an aesthetic flaw. This is one clear way in which a surface moral flaw in a work can influence its aesthetic value. And here we have the grounds for rejecting the autonomist position about the relationship between moral and aesthetic value that I mentioned in section two. Recall that autonomism claims that moral virtues and flaws have no impact on aesthetic ones. If a moral defect can decrease a work’s aesthetic value, this provides a strong prima facie reason for rejecting autonomism.

Imaginative resistance can cause us to disengage imaginatively to a limited degree, or altogether, when a work presents something that we deem morally reprehensible as morally acceptable. When complete imaginative disengagement (i.e. putting down the novel, or ignoring the television, for instance) results from the content of the work, I have argued that this constitutes an aesthetic failure. It seems possible,

198 K Walton (1994)
however, that a work of fiction (such as a bad science fiction movie) could cause some imaginative resistance, but not enough to cause us to disengage with it completely. In the case when partial imaginative disengagement is the result (when the audience cannot or will not imagine that $p$, but continues to follow along imaginatively with other parts of the content of the work), this can also (although it does not necessarily) have a negative impact on the work’s aesthetic value. This may cause some cognitive dissonance as one continues with the work, and may hinder one’s aesthetic enjoyment of it.

Although a work’s having a surface moral flaw can prevent its audience from remaining imaginatively engaged, an author can enable her audience to overcome the temptation to resist imagining caused by the presence of a surface moral flaw. Our ability to imagine something that we might tend to resist imagining can be increased or decreased by the way that the author frames the contents of the imagining.

According to Aaron Meskin and Jonathan Weinberg, it is because an author doesn’t just ask us to imagine that something contrary to our moral sensibilities is true, but also tells us how to do so, that she succeeds in enabling us to imagine it.\(^\text{199}\) Julia Driver echoes this thought when she explains:

> Imaginative resistance can be overcome when a work of fiction provides reasons for a change in perspective that are good reasons. Sometimes a work of fiction will do this by providing information, or making information salient; but other times it will do this by working on our sympathies, by providing us with alternative points of view.\(^\text{200}\)

For instance, *Star Trek* makes travel faster than the speed of light seem plausible by

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\(^{199}\) A Meskin and J Weinberg (2006) 190

posing the use of a warp drive. In the fiction, the warp drive is powered by a warp core in which extremely high levels of energy are created through matter anti-matter collisions. These reactions are regulated by fictional dilithium crystals. Although traveling faster than the speed of light seems implausible on its face, once the author offers some background explaining how it is possible, we find it much easier to imagine. In this way it is possible to “reformat offensive representations so that their conflicts might fly beneath the radar.” Similarly, a surface moral flaw can be overcome by telling a back story that explains why doing something that would be wrong in the actual world is morally acceptable in the world of the work.

In the television show *Dexter*, the title character is both a forensic pathologist and a serial killer with an irresistible psychological compulsion to murder. He uses his access to police information to track down and kill violent criminals. In order to fulfill his compulsion, he often has to frustrate attempts by the police to apprehend and/or prosecute the criminal that he intends to kill. In the world of the work Dexter is deserving of sympathy (since he has no control over his compulsion). The fact that he finds a way around frustrating aspects of the justice system (such as criminals getting off on technicalities) helps us to accept that what he is doing is actually the right thing to do in the fiction. The writers do not just ask us to imagine that Dexter acts rightly in killing these criminals, and foiling the justice system in order to do so, they also tell us how to imagine this by making it true in the world of the fiction that Dexter does the right thing. When we are faced with moral facts in a fiction that run contrary to our own moral

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convictions, how prone we are to disengaging imaginatively depends not only on how deeply we disagree with what the work presents, but also how it is presented to us.

In this section I have argued that when imaginative resistance results in complete imaginative disengagement, this constitutes an aesthetic flaw in the work. When the imaginative disengagement is partial, this may or may not constitute an aesthetic flaw in the work. When complete imaginative disengagement is caused by a surface moral flaw in the work, the work has both a moral flaw and an aesthetic flaw resulting from it. It is, however, possible for an author to frame the content that the work presents so as to enable the audience to accept potentially troublesome content, as in the case of Star Trek or Dexter. I will show in the next section that when this occurs, it can have a positive impact on the aesthetic value of the work.

**Part Five: Moral Flaws and Cognitive Value**

A surface moral flaw that causes an audience to imaginatively disengage from a work can never count as an aesthetic virtue, but what of a surface moral flaw that the artist enables a morally sensitive audience to overcome? I maintain, along with Kieran, 202 that encountering a moral defect in a work can enhance our understanding of the world (even while making it difficult for us to continue imaginatively engaging with the work). 203 A work with a merely surface moral flaw, such as a novel advocating the morality of homosexuality, might challenge the skeptical reader to remain imaginatively engaged,

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and if it succeeds in doing so, thereby enhance her understanding of her own moral convictions, and awaken her to new moral possibilities.

Hawthorne’s *The Scarlet Letter* (1850) tells the story of Hester Prynne, a young married woman whose husband sends her ahead of him from England to Boston. When he does not arrive, it is presumed that he was lost at sea. At the time, however, women were not permitted to re-marry without proof of their husband’s death. After some time, Hester gets pregnant, and is thus labeled an adulterer by the townspeople. She is harassed, shunned, and forced to wear a red cloth with an embroidered letter ‘A’ on her dress, to identify her as an adulterer. When the child is born, they try to separate the child from her mother, and it is only due to the efforts of the town priest (who turns out to be the child’s father) that the two are allowed to remain together.\(^{204}\) This novel presents the world as one in which Hester is undeserving of the blame and punishment that she is subjected to (although the other townsfolk believe her to be deserving of it). Contemporary readers of the novel would likely have believed, however, that a woman has done something blameworthy if she enters into a romantic relationship with a man other than her husband, even if her husband has been missing for a long time and is presumed dead. Thus, those readers would likely have been tempted to resist imagining that Hester’s actions were morally acceptable. Since it is actually morally acceptable to enter into a new romantic relationship if one sincerely and justifiably believes that one’s spouse is dead, this work does not have a deep moral flaw. Nor, for modern audiences,

\(^{204}\) Hester’s husband arrives in Boston, using an alias, just after the child is born. He does not reveal himself to be her husband, but rather seeks revenge in his own way. This and further details about the plot of *The Scarlet Letter* are not necessary for the current discussion.
does it have a surface moral flaw. For contemporary audiences, however, the work did have a surface moral flaw. One piece of evidence for this claim is that the *Church Review and Ecclesiastical Register* stated that in *The Scarlet Letter*, Hawthorne “perpetrates bad morals.”\(^{205}\) However, overcoming that surface moral flaw had the potential to lead at least some of the novel’s contemporary readers to an enhanced moral perspective. They might have learned, for instance, that when blame and punishment are justified is at least sometimes more complicated and context-sensitive than general principles such as social mores, religious rules and even legal regulations are able to capture.

If, despite making it difficult for the reader to remain imaginatively engaged in the work because of its moral stance, the work succeeds in conveying a new moral perspective, then the surface moral flaw might enhance the cognitive value (and perhaps other types of value) of the work. When audiences with immoral beliefs overcome surface moral flaws, those flaws can increase the work’s cognitive and moral value.

Deep moral flaws can also contribute to the cognitive value of a work.\(^{206}\) If the audience is able to remain imaginatively engaged with a work that has a deep moral flaw, then it is possible for audience members to learn something about the nature of immorality from the work. For example, an audience member could learn that an unfamiliar moral view is possible, or that one he thought untenable is at least comprehensible. He might come to know the motivations for moral views inconsistent

\(^{206}\) It seems probable that a deep moral could not increase a work’s moral value. Since the correct judgment of a work as immoral is based on the presence of a deep moral flaw, the presence of such a flaw, given its nature, simply could not increase the moral value of a work.
with his own, including how someone might come to adopt such a view, or why someone might maintain it. He might learn about the nature of the mistake that someone who adopts or maintains such a view is making, that leads him to do so. The work might teach him about the consequences, theoretical and practical, of other moral stances. He might also learn something about himself—about the appropriateness of his responses to other moral views, for instance—that he was too harsh or too lenient in his condemnation of the view when he was ignorant of its motivations.

As an example of a work with a deep moral flaw, de Sade’s *Justine* (1791) follows a virtuous orphan girl in pre-revolutionary France from the age of 12 to 26. Unlike her sister Juliette, who gives in to vice shortly after their father dies, Justine is steadfastly virtuous in her actions and choices, even in the face of appalling abuses. When she is reunited with her sister many years later, it is revealed that Juliette’s temporary period of vice led her to a comfortable and relatively happy life, whereas Justine’s unflinching attempts at virtue brought her nothing but hardship and abuse.

*Justine* is morally flawed insofar as the work presents acting viciously as not only morally acceptable, but in fact, as mandatory in order to have a happy life, as evidenced by the consistent prosperity of the vicious, attained through their vice, in contrast with the constant depravity encountered by Justine due to her perseverance in acting virtuously. As de Sade puts it in the introductory chapter, “The scheme of this novel…is doubtless new…throughout to present Vice as triumphant and Virtue a victim of its sacrifices.”

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207 Interestingly, alternate titles for the novel include *Good Conduct Well Chastised* and *The Misfortunes of Virtue*

It attempts to teach the reader that trying to lead a virtuous life never results in prosperity (unlike children such as the young Justine believe), nor does choosing a life of vice lead to hardship.

If, though full of respect for social conventions and never overstepping the bounds they draw round us, if, nonetheless, it should come to pass that we meet with nothing but brambles and briars, while the wicked tread upon flowers, will it not be reckoned—save by those in whom a fund of incoercible virtues renders deaf to these remarks—, will it not be decided that it is preferable to abandon oneself to the tide rather than to resist it? Will it not be felt that Virtue, however beautiful, becomes the worst to all attitudes when it is found too feeble to contend with Vice, and that, in an entirely corrupted age, the safest course is to follow along after the others? 

Since it is false that trying to be a good person and act virtuously never results in prosperity, that is not something that can be successfully taught. *En route* to this conclusion, however, de Sade is trying to convince his readers that virtue does not always, and in fact, often does not (at least in the face of widespread social corruption) lead one to prosper. This true claim (familiar from prisoner’s dilemma type situations) can be taught, and for the audience to come to believe this was one of the author’s aims (at least as he is manifested in the work). A parallel claim can be made for the aim of teaching the audience that choosing a life of vice leads to hardship.

A further way in which a work with a deep moral flaw can teach its audience is by helping them to better understand an immoral perspective that they may not share by helping them to inhabit that perspective, or see what it would be like for the world to be that way. *Justine*, for instance, enables its audience to see what it would be like to inhabit a world in which virtuous action is foolish, since it does not lead to happiness,

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209  M de Sade (1965) 457
and vicious action praiseworthy. Being enabled to see the world from another moral perspective, even an immoral one, is cognitively valuable insofar as there are people who view the actual world in morally different ways. Understanding the ways in which immoral individuals view the world is no less valuable than understanding the ways in which morally upright individuals view the world. Although it may be true that a work need not have a deep moral flaw in order to teach this lesson, this does not undermine my argument because I am not claiming that a deep moral flaw is ever necessary or essential to teaching the audience a particular lesson, but rather making the more modest claim that works can teach their audiences by means of a moral flaw.

As though recognizing that the work’s portrayal of the world as morally different than his readers believe it to be is likely to result in some measure of imaginative resistance on their part, de Sade preemptively asks his readers to bear with him, since this discomfort is necessary to convey one central message of the work (as evidenced by his use of “obliged”). At the end of the introductory chapter, he addresses his reader directly, saying:

Such are the sentiments which are going to direct our labors, and it is in consideration of these intentions that we ask the reader’s indulgence for… the sometimes rather painful situations which, out of love for truth, we have been obliged to dress before his eyes.210

In virtue of enabling audience members to expand their knowledge of the moral realm in these and other ways, having a deep moral flaw can increase an artwork’s cognitive value.

An artist’s ability to keep an audience imaginatively engaged is a skill that can be

210 de Sade (1965) 458
exercized more or less successfully. If an artist enables his audience to overcome the temptation to disengage imaginatively that is induced by the presence of a surface moral flaw for the sake of some further positive end, this demonstrates a level of skill above and beyond that required to maintain an audience’s engagement in the absence of such a flaw. The creator of a narrative work who takes on the challenge of including a surface moral flaw in the work, and then exercises the necessary skill to overcome the additional challenge that this entails, has thus created a work that is more aesthetically valuable as a result. The presence of the moral flaw gives the author an opportunity to exercise and display this skill to a great degree. Surely, among the many features of a work of art that can enhance its aesthetic value is its exhibiting the extraordinary skill of its maker. In addition, just as facing and overcoming obstacles in life makes achieving the ends attained through that effort all the more valuable, the fact that the audience has worked to overcome the temptation to disengage imaginatively can itself enhance the experience of the work.

It is not the case that of overcoming the difficulty alone is valuable. Rather, the overcoming is valuable in virtue of the fact that it enables the author to achieve something that is itself valuable. For the moral flaw to enhance the aesthetic value, the flaw must not be an artificial obstacle that artist erects simply for the purpose of overcoming it. It must be a means to some valuable achievement, such as enabling the audience to attain new moral understanding. It is part of the value and purpose of most art to help its audience to explore unfamiliar perspectives and worldviews. Creating an alternative moral world and trying to get people to engage with it is a way of pursuing
one of the important purposes of art; it is not just erecting an obstacle for the purpose of finding a creative way to overcome it—and thus is not an artificial obstacle. Surface moral flaws thus enhance the aesthetic value of works just as challenges that arise in the natural course of life on the way to achieving valuable goals make achieving those goals more satisfying.\footnote{211}{Those who are skeptical of the claim that surface moral flaws can enhance a work’s aesthetic value by means of enhancing its cognitive value may find this argument more persuasive than that which follows. Those who are open to aesthetic cognitivism, however, will likely find the arguments that follow more convincing.}

Before we proceed, let us take stock of our progress so far. Those works with a moral flaw that is both surface and deep, and in which the artist succeeds in helping the audience to overcome the temptation to disengage imaginatively, can have increased aesthetic value as a result. In this case the depth of the work’s moral flaw is not responsible for the increase in its aesthetic value. Because the temptation to disengage is due entirely to the surface nature of the flaw, rather than its being deep, this may not be enough to establish the truth of contextualism to the critic’s satisfaction. She may object that the objectively immoral content presented within the work is not what explains the increase in the work’s aesthetic value, for the same increase would be had if the work had only a surface moral flaw and the work’s audience had incorrect moral beliefs. In order to establish contextualism, the depth of a moral flaw must be responsible for the relevant increase in the work’s aesthetic value. Since a work’s having a deep moral flaw can increase its overall cognitive value, as I have shown, one way to establish contextualism is to show that an increase in a work’s cognitive value (due to the presence of a deep moral flaw) can enhance its aesthetic value.
Part Six: Aesthetic Cognitivism

Aesthetic cognitivism is the claim that (at least) one of the things that we appreciate about art (qua art) is that it has cognitive value—that it can teach us. This is to be distinguished from art’s ability to “exhibit an appropriate type of understanding” or to enable “the audience to learn something from it.”\textsuperscript{212} I will use the term ‘learn’ to include knowledge that audience members gain without the artist (or artist as manifested in the work) having intended them to do so, whereas I will reserve the term ‘teach’ for cases in which the increase in knowledge was intentional (or appears so in the case of an artist as manifested in the work). I take it that one can neither learn nor teach something false.

In drawing this distinction, I mean to stipulate that the claim that art can teach us requires that the actual artist or the artist as manifested in the work must understand that which is taught, that he communicate that knowledge, and that the audience learn something through the work (i.e. the audience must not already know what is being taught).\textsuperscript{213}

Aesthetic cognitivism can be divided up into two smaller claims: first, that art can teach us; and second, that its ability to teach us can contribute to art’s aesthetic value.\textsuperscript{214} Non-cognitivists, such as Peter Lamarque, deny (at least) the second of these claims.

According to cognitivists, cognitive value is just one kind of aesthetic value. The claim that art’s capacity to teach partly determines its aesthetic value turns, in this case, on what counts as aesthetic value, strictly speaking. Berys Gaut grants that what art teaches us

\textsuperscript{212} B Gaut (2007) 136
\textsuperscript{213} Ibid. 138
\textsuperscript{214} The latter is what Gaut calls the aesthetic claim. Ibid. 137
can deeply enhance our aesthetic appreciation of it, whereas Lamarque argues that although art can teach us, the fact that it does so does not enhance our aesthetic appreciation of it. In other words, he claims that what art teaches us increases the work’s cognitive, but not its aesthetic value. As we have seen, one way to establish contextualism is to show that the cognitive value to be gained from art can increase aesthetic value or itself be aesthetically valuable. To establish the truth of her position, the contextualist must argue for aesthetic cognitivism.

There are many great works of literature that have, interwoven with the plot, lessons about aspects of the world or endeavors that the reader might not (and need not) know anything about before engaging with the work. Melville’s *Moby Dick*, for instance, teaches the reader about seafaring, whaling, the architecture of ships, navigation, how the whale is divided up and the blubber reduced once the whale is caught, and many other interesting details that someone with no whaling experience would have no access to, short of reading a whaling encyclopedia or watching an educational film on the topic. In Chapter 96 of *Moby Dick*, a whale has just been captured, and the reader learns about the process of rendering the blubber by cooking it in large cauldrons in the belly of the ship.

The hatch, removed from the top of the works, now afforded a wide hearth in front of them…. With huge pronged poles [the whale-ship's stokers] pitched hissing masses of blubber into the scalding pots, or stirred up the fires beneath, till the snaky flames darted, curling, out of the doors to catch them by the feet. The smoke rolled away in sullen heaps. To every pitch of the ship there was a pitch of the boiling oil, which seemed all eagerness to leap into their faces. Opposite the mouth of the works, on the further side of the wide wooden hearth, was the windlass. This served for a sea-

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sofa. Here lounged the watch, when not otherwise employed, looking into the red heat of the fire, till their eyes felt scorched in their heads.…  

Zola’s *Germinal* similarly teaches the reader about mining, and the social conditions in which miners found themselves in the mid-19th century. Rabelais’ *Gargantua and Pantagruel* is a virtual encyclopedia of lessons on medicine, law, gourmandism, theology and other aspects of life at the time with which Rabelais was familiar.

Cognitive merits of art works are not simply aesthetic merits insofar as their removal would undermine the effectiveness of other aesthetically relevant features of the work. Removing a work’s educational content would make it aesthetically worse, because the cognitive merits *themselves* contribute to the work’s aesthetic value. If cognitive merits of artworks were merely aesthetic merits insofar as their removal would undermine the effectiveness of other aesthetically relevant features of the work, then it would be possible to excise those portions of a work (which make no direct contribution to its aesthetic value), and recomplete it such that the work ended up at least as good as the original. So the relevant question is whether these works with the educational content excised, or re-completed with content that did not teach the reader something new, would be just as aesthetically valuable as their educational counterparts. I think it is clear that they would not. But let us briefly run through the various possible alternate versions of *Moby Dick* in which it has no cognitive value. This process will help us to isolate the variable of cognitive value.  

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218 Whether or not you are happy to agree that it is, in fact, the same work is irrelevant, for you can simply say that it is the work that matches *Moby Dick* in the actual world as closely as possible.
The first option is to simply excise the educational aspects of the novel, without replacing them. Although some works might benefit from such a process (such as works of philosophy that are over-written, for instance), a novel that has been through this process would be incomplete relative to the author’s conception of the completed work, and likely much the worse for it. Alternatively, the educational aspects of the work could be removed, and the work could be re-completed in a variety of ways, such that it was no longer educational. The second option would be to re-complete the work with platitudes—content which describes the world of the work in ways that are obvious to the reader.219 Such a work would be dull, and thus aesthetically poor. Third, one could re-complete the work with more plot or further character development. Ishmael could continue the search for *Moby Dick*, for instance. However, it seems in this case that the re-completion would be a sequel, spin-off or other type of fan fiction, rather than a re-completion of the original work. Fourth, the work could be re-completed with false information that is implausible given the way things are in the actual world. For example, the passage from *Moby Dick* quoted above could be re-written such that whale blubber is rendered using ice, instead of fire.220 It would, however, be too difficult to sustain the reader’s attention given the cognitive dissonance caused by not understanding *how* whale blubber could be rendered by cooling it (for instance). Whether or not the reader knew the facts about how whale blubber is rendered in the actual world, the implausibility of this claim would be distracting.

219 In other words, telling us that which, as a convention of narrative fiction, we would already assume to be the case unless we were told otherwise, known as the reality principle. See K Walton (1990) *Mimesis as Make-Believe: On the Foundations of the Representational Arts* (Cambridge: Harvard UP) 145.

220 Thanks to A.P. Martinich for suggesting this objection.
Any option besides excising the educational content from the text without replacing it could have the aesthetic virtue of maintaining the scale of the work. This seems like a minor virtue in any case, but additionally, many modern readers do not enjoy the large scale common in 19th century novels. Whichever of these adaptations you think yields a work that is closest to the original *Moby Dick*, minus its cognitive value, none is superior to the original. Similarly, it is widely accepted that abridged versions of the classics are aesthetically inferior to the original works, even when the excised passages have been carefully selected as those that contribute least to the work’s aesthetic value. Without their cognitively valuable content, works of narrative fiction would be aesthetically inferior.

Readers take satisfaction in what they have learned throughout the course of the novel, even when learning about whaling or mining was not their primary aim in engaging with the work. Unlike reading an encyclopedia entry, for instance, learning by experiencing an artwork is aesthetically satisfying. Reading an educational novel is not the most efficient means of learning about a topic in most cases; however, the imagery is often more vivid, and the interface through which the facts are presented is much more human. In reading *Germinal* one empathizes with the plight of the miners who are trapped underground, and of the children who head off to work in the mines in the dark, having had little to eat. This sort of personal perspective on the facts is perhaps what makes the satisfaction of having learned them aesthetic.

Most importantly, the interweaving of factual lessons with the narrative enables the author to use a variety of literary devices, the use of which clearly adds to the
aesthetic value of the work. Vivid and poignant use of simile, metonymy, parable, metaphor, hyperbole, apposition, allegory, synecdoche and other literary devices requires a certain level of familiarity with the topic at hand on the part of the reader. These devices would be ineffective without the factual lessons on whaling provided throughout the narrative, for instance, unless the reader already had the requisite knowledge. Melville must inform his audience, whose members’ familiarity with the topic will vary widely, in order for his literary devices to succeed. For example, the successful use of literary devices in the following passage depends, among other things, on the knowledge of the process of rendering whale blubber imparted in the passage cited earlier.

[T]he harpooners wildly gesticulated with their huge pronged forks and dippers; as the wind howled on, and the sea leaped, and the ship groaned and dived, and yet steadfastly shot her red hell further and further into the blackness of the sea and the night, and scornfully champed the white bone in her mouth, and viciously spat round her on all sides; then the rushing Pequod, freighted with savages, and laden with fire, and burning a corpse, and plunging into that blackness of darkness, seemed the material counterpart of her monomaniac commander's soul. 221

This metaphor compares Captain Ahab’s soul, adrift on the seas, blinded as in darkness to all aims other than capturing Moby Dick, his soul burning with a rage sustained by the whale, to his ship (the Pequod), plunging into the night, devouring the flaming, spitting corpse of a whale, which itself sustains the fire. This metaphor would not be effective if the reader were not familiar with the process of rendering whale blubber, the part of the ship where this takes place, and the nature of the whale-ship’s stokers themselves. Any approximation of this passage without the educational content in place, or with false or

221 H Melville (2001) 421
platitudinous content instead, would not be as effective as this passage is. Educational content not only provides the reader with the aesthetically satisfying experience of having learned something by means of engaging with a fictional narrative, its characters and situations, but also enables the author to use of a variety of literary devices that would otherwise be unavailable, thus increasing the work’s aesthetic value.

Both surface and deep moral flaws can enhance a work’s aesthetic value in virtue of contributing to their cognitive value. Unless there is some relevant dissimilarity between works that teach us something empirical in nature, and those that teach us something moral (for instance, in virtue of having either a surface or a deep moral flaw), then it must also be the case that teaching its audience about morality can enhance the aesthetic value of narrative fiction. I doubt that there is any such difference. Similarly, there is no reason to think that there is any relevant difference between works that teach us about morality in virtue of having a surface moral flaw, those that teach us about (im)morality in virtue of having a deep moral flaw, and those that teach us about morality in virtue of some other characteristic (such as by explicitly teaching about morality by including a “moral of the story”).

Just as replacing the passages in *Moby Dick* that teach us about whaling with passages that do not teach us anything new would make the work aesthetically worse, de Sade’s *Justine* would be a lesser work aesthetically if the passages that teach audience members about morality (or rather immorality) were replaced, such that the work no longer had a moral flaw. Further, just as Melville does in *Moby Dick*, de Sade makes use of literary devices in his descriptions of the episodes that take place in the book that
depend on the work’s moral landscape being what it is.

At one point in the novel, Justine is falsely accused of theft and imprisoned, awaiting execution. In order to escape from prison, she conspires with an old convict, who (unbeknownst to Justine) arranges for a fire to break out in the prison to facilitate their escape, and states that “no question about it, many people will be burned; it doesn’t matter…” The plan is successful, but 21 people are killed in the blaze. They take refuge at the home of a poacher ally of the convict, where the convict justifies her way of life—the perspective which is presented as morally right within the novel.

The callousness of the rich legitimates the bad conduct of the poor; let them open their purse to our needs, let humaneness reign in their hearts and virtues will take root in ours; but as long as our misfortune, our patient endurance of it, our good faith, our abjection only serves to double the weight of our chains, our crimes will be their doing, and we will be fools indeed to abstain from them when they can lessen the yoke wherewith their cruelty bears us down.

Just as in the case of *Moby Dick*, it is unclear what passages like this could be replaced with, such that *Justine* would remain the same work in any sense, but without its moral flaws. The immoral aspects of *Justine* are as integral and numerous in it as are the facts about whaling in *Moby Dick*. To alter *Justine* in this respect would leave the work totally unrecognizable. Moreover, many of *Justine*’s literary devices would not succeed without the distorted vision of morality that it presents to its readers. Such devices include, for example, the above description of faith and patient endurance of one’s misfortunes (including those brought on by one’s own actions) as a second set of
prisoner’s chains laid on top of the original set, which are one’s misfortunes themselves; or the insistence that the crimes of the less advantaged, no matter how horrendous, are always justified, insofar as they are equated with an animal’s throwing off the yoke imposed on it by its master.

Part Seven: Objections and Replies

In *Art, Emotion and Ethics*, Gaut raises several objections to cognitivist contextualism. In this section, I show that Gaut is mistaken in his analysis of the options available to the cognitivist contextualist, and thus that his criticisms do not stand. Gaut suggests that the only two ways to understand Kieran’s assertion that we can “allow ourselves to take up moral judgments and attitudes in imagination” are to take it that he means either “that one imagines taking up a moral attitude towards some state of affairs or that one actually takes up an attitude directed towards an imagined state of affairs.” He suggests that these are two horns of a dilemma, from which the cognitivist contextualist cannot escape, since on the first interpretation the work can teach us something but has no moral flaw, and on the second, it has a moral flaw, but cannot teach us anything.

I will address the second horn first. Gaut claims that Kieran’s statement could be interpreted as meaning that in experiencing narrative fiction, audience members take up “an actual attitude directed towards merely imagined states of affairs,” in which case the work has invited us to take up an immoral attitude, and is immoral insofar as it has done so, on Gaut’s view. However, he claims that it cannot teach us about immorality in this

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224 M Kieran (2002) 68
225 B Gaut (2007) 184, his emphasis.
case, since it presents an immoral state of affairs as morally good, and since that state of affairs is by definition not morally good, this is a false claim. Since someone cannot successfully teach someone something false, we cannot learn from works that are morally flawed in this way.226

There are several problems with this line of argument. First, most philosophers and psychologists working on the emotions agree that some physiologically felt affect is a necessary component of any emotion. Works of fiction present a world that is different than our own in certain respects. In so doing, they can “prescribe” beliefs or belief-like states (such as imaginings) for their audiences to accept,227 which, if audiences accept them, can cause in affective responses on the part of audience members. Works of fiction cannot, however, “prescribe” emotional responses directly, without a belief or belief-like intermediary prompting the emotional response.

Some involuntary physiological responses to fictions such as startle responses and skin conductance responses, for example, can be directly caused by some art forms (particularly audio-visual art forms such as film). However, such responses cannot be “prescribed” by a fiction, since audience members have no control over whether they respond in these ways.228

On this basis, I reject Gaut’s claim that a work can “prescribe” that the reader “respond with an actual immoral attitude.”229 Rather, the work can merely “prescribe”

226 B Gaut (2007) 184-185
227 As Kendall Walton puts it, “a fictional truth consists in there being a prescription or mandate in some context to imagine something. Fictional propositions are propositions that are to be imagined.” K Walton (1990) 39, his emphasis.
228 See J Neilson “Resolving the Paradox of Horror: A Study of Emotion” unpublished MS.
229 B Gaut (2007) 185
that the audience imagine that an immoral state of affairs is moral, with the aim that the imagining will causing an unmerited emotional response in the audience.

Second, although it is true that one cannot teach or learn falsehoods, “presenting an immoral state of affairs as morally good” need not amount to an attempt to teach that it is the case that that immoral state of affairs is actually a moral one. It might, rather, be used as a device to teach the value of the opposite state of affairs. For instance, in the short story *The Lottery*, it is morally acceptable (perhaps even morally required) in the world of the work that the villagers stone the winner of the lottery to death, not because the author, Shirley Jackson, aims to teach us that this is actually morally acceptable, but rather to highlight the power of peer pressure, and the cost of failing to speak out against injustice, among other messages. In discussing Graham Greene’s *The Destructors*, Gaut once again assumes that the work can only be trying to teach us that the immoral attitude that it invites us to take up is actually moral (in Gaut’s terms). Contra Gaut, the work does not either teach us that bullying can be enjoyed (which he recognizes as true), or that bullying is morally good (which is false, and thus cannot be taught). Rather, it invites us to imagine that it is true in the world of the work that bullying is morally acceptable, as a way of teaching us why bullying can be enjoyed (perhaps among other lessons). That is, it teaches us about the immoral perspective within which bullying is taken as good by helping us to inhabit that perspective.

As Kieran asserts, then, we can “allow ourselves to take up moral judgments and

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<sup>230</sup> I am using the terms ‘teach’ and ‘learn’ as factive terms, and taking it to be impossible to teach or learn things that are false (although I recognize that in informal parlance, they are not always used this way).

<sup>231</sup> B Gaut (2007) 185
attitudes in imagination,”\textsuperscript{232} if what is meant by this is that we can “actually takes up an attitude directed towards an imagined state of affairs.”\textsuperscript{233} As I have shown, in getting us to do so, a work can teach us something about the nature of immorality. Thus, the cognitivist contextualist has escaped the second horn of the dilemma. Although by avoiding either of the horns, one avoids the dilemma altogether, in case the reader has remained unconvinced of the cognitivist contextualist’s ability to avoid the second horn, I will now show that it is possible to escape the first horn as well.

On the first horn, Gaut claims that Kieran’s assertion could be interpreted as stating “that one imagines taking up a moral attitude towards some state of affairs.” Gaut acknowledges that works can teach us by “prescribing” imaginings of this kind. However, Gaut claims that neither imagining having an immoral attitude, nor a work’s “prescribing” that one do so requires that the work be immoral (i.e. amounts to the work having a moral flaw). In order to count as immoral and cognitively valuable such a work would have to “[teach] us something by getting us to respond in an immoral way.” Since “it is possible to learn by imagining having immoral attitudes…it is [not] only by the actual having of such attitudes that one can learn about immoral attitudes.”\textsuperscript{234} So on this construal of Kieran’s assertion it turns out that although such a work may teach us something, it is not morally flawed (a view that I agree with) for such a work has neither a surface nor a deep moral flaw on my view.

There are, however, two ways to interpret the claim that one imagines taking up a

\textsuperscript{232} M Kieran (2002) 68
\textsuperscript{233} B Gaut (2007) 184, his emphasis.
\textsuperscript{234} B Gaut (2007) 185
moral attitude towards some state of affairs. First, as Gaut recognizes, this claim could be interpreted as meaning that a work “prescribes” that one imagine of oneself, a character in the imagining, that one delights in an immoral activity. Another way to interpret this claim, however, is that the work “prescribes” that we imagine that the immoral activity is, in fact, delightful in the world of the work. On this latter construal of the first horn, the work in question is actually morally flawed according to both Gaut’s definition and my own. The work is morally flawed on my view because it presents an actual immoral activity as being morally acceptable. It is morally flawed on Gaut’s view because the work “prescribes an imagining” that is likely to elicit an immoral response, if the audience follows the prescription. Since narrative works can only present worlds that are different from our own in specific respects, and cannot “prescribe” emotional responses directly, without a belief or belief-like state acting as an intermediary, Gaut’s view must be reinterpreted accordingly. On this reinterpretation, Gaut’s claim is that works, in presenting the world as being a certain way, prompt emotional and psychological responses in their audiences, some of which are immoral (and unmerited). Under this new interpretation of the first horn of the dilemma, a work that is morally flawed on both Gaut’s and my accounts “teaches us something by getting us to respond in an immoral way,” or using my terminology, it teaches the audience something by presenting something that is actually immoral as morally acceptable. So Gaut is wrong to claim that works that invite us to respond immorally cannot both teach us something and be morally flawed. And in fact, such works can teach us something in virtue of their moral flaws.
Thus, even on the alternate understanding of Kieran’s assertion that we can “allow ourselves to take up moral judgments and attitudes in imagination”\(^{235}\) which Gaut proposes, namely, that it means that a work can teach one something when “one imagines taking up a moral attitude towards some state of affairs,” \(^{236}\) the cognitivist contextualist has shown that morally flawed works can teach their audiences in virtue of having those moral flaws.

I have argued, along with Kieran, that immoral art works can provide imaginative experiences of morally bad responses and attitudes, thereby deepening our understanding of these responses and attitudes. Unlike me, however, both Gaut and Kieran seem to have identified the set of morally flawed works as those works that elicit or aim to elicit (or in which the artist or manifest artist elicits) morally bad responses and/or attitudes in a morally sensitive audience. By contrast, on my view whether or not a work is morally flawed depends on the relationship between the moral facts presented by the work and those moral facts that actually hold or that the audience believes to hold in the actual world.

**Part Eight: Conclusion**

The debate about whether a moral flaw in a work can have a positive impact on its aesthetic value has, until now, been mired in confusion due to a lack of precision (and explicitness) in the authors’ use of the term “moral flaw”. I began by clearly and explicitly identifying two types of moral flaw, and showing how they map on to the ways in which this term has been used in the literature. With these definitions in place, I then

\(^{235}\) M Kieran (2002) 68
\(^{236}\) B Gaut (2007) 184, his emphasis.
focused on clarifying the contextualist position, which states that moral flaws, when aesthetically relevant, can either enhance or detract from the overall aesthetic value of the work. I offered an original explanation, much lacking in the debate so far, of why this is the case, and under what conditions it can occur.

Clarifying contextualism in this way revealed that whether or not contextualism is true depends first, on whether a moral flaw in an artwork can enhance its cognitive value, and second, on whether an increase in a work’s cognitive value can, in turn, increase its aesthetic value. I established the first of these claims by arguing that surface moral flaws can enable audience members to achieve a new moral perspective, and deep moral flaws can enrich an audience’s understanding of the nature of immorality. I then addressed the second claim by arguing that what the work teaches the audience provides a background which is essential to enabling the author to use certain literary devices that would otherwise be unavailable to him. I also argued that the experience of learning by means of engaging with an artwork is often aesthetically satisfying.

With this account of why, and under what circumstances, a moral flaw in a work can have a positive impact on the work’s overall aesthetic value in place, prima facie obscene works no longer present the challenge that they once did to the trier-of-fact who is tasked with determining whether or not their artistic value counts as serious, and qualifies them for constitutional protection. In order to complete my account of artistic value in a way that makes it applicable in a legal context, more must be said about what entitles judges to rely on the opinions of expert witnesses in order to determine whether an aesthetically relevant feature of a work contributes to or detracts from its overall
aesthetic value.
IV. Optimism about Aesthetic Testimony

Part One: Introduction

Legal cases sometimes arise in which a judge or jury must assess a work’s artistic value, so as to determine whether it merits constitutional protection despite being obscene, for instance. In some cases, the judge will have experienced the work, and will be capable of deciding on the aesthetic value or disvalue of the work as a whole, or of one or more of its aesthetic properties. In more difficult cases, however, although the judge has direct experience of the work, she may regard herself as insufficiently expert or ill suited to the task of determining its aesthetic value, or the value of its aesthetically relevant properties. Given that neither the community standards test nor the reasonable person test is well suited to establishing the artistic value of a work, as we saw in the first chapter, there is no other recourse but to expert testimony. However, there are those who argue that justified beliefs cannot be formed on the basis of aesthetic testimony.

Even among those who grant that aesthetic knowledge is possible, some argue that nothing short of direct experience of the work can provide a basis for justified beliefs.

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237 Thanks to Kathleen Higgins, Anna-Sara Malmgren, and the participants at the 2010 Mind, Language, Knowledge conference at the University of Texas at Austin for their very helpful feedback on an early version of this chapter.

238 From now on I will simply refer to a judge, but this should be taken to mean whatever party (judge or jury) may be relevant in the legal proceeding at hand.

239 For the purposes of this paper, I will use the terms ‘artistic’ and ‘aesthetic’ interchangeably. However, it is worth recognizing that the law is concerned exclusively with artistic value, that value belonging only to works that are the product of agency, rather than the merely aesthetic which can be found in nature. Aesthetic value is more general, applying to both products of agency and non-artifacts such as trees and flowers, which are relevantly different from artworks insofar as they are not products of human agency. See B Gaut (2007) 35.

240 Only to the level of specificity required by the law, such as whether it has any at all.

241 For instance, if she is not a member of the intended target audience.
about aesthetic merit. A less extreme view, favored by Robert Hopkins, is that one must grasp the grounds for the belief (one’s own grounds, or the grounds offered by a testifier) in order for it to count as justified. The former view excludes all knowledge or justified belief by testimony about art; the latter allows for *instructional testimony* (testimony in which the testifier presents reasons), but not *pure testimony* (in which no reasons are presented). In this chapter I argue against both of these views, with the aim of showing that expert testimony, even when pure, can yield justified belief in the case of art, even if instructional testimony is to be preferred whenever possible. I end by arguing that in a legal context judges and juries cannot be required to grasp the grounds of a testifier’s beliefs. Given the practical and other considerations at play in legal cases, they are justified in forming judgments and making decisions on the basis of the pure elements of a testifier’s statement alone, without regard for any reasons that were presented.

**Part Two: The Positions**

Although we normally take testimony, even without independent supporting reasons, to be a very reliable way of gaining information about the world, some claim that the same cannot be said of pure testimonial reports of aesthetic merit. Pure cases of testimony are those cases “in which H learns that $p$ on the basis that her informant T claims that $p$, and independently of any evidence that T offers for that claim.”\(^{242}\) For example, if I ask someone where the nearest bus stop is located, and she tells me that it is around the corner, and solely on that basis I learn that the bus stop is around the corner, that is a case

\(^{242}\) See R Hopkins (2011)
of pure testimony. No-difference theorists, as I will call them, claim that pure testimonial reports on aesthetic matters result in justified beliefs just as often (in principle) as pure testimonial reports on other matters. In other words, they deny that aesthetic testimony is epistemically inferior to most other kinds of testimony. Both optimists and pessimists about aesthetic testimony accept the claim that pure aesthetic testimony issues in justified beliefs less frequently than most other kinds of testimony, and thus agree that it is distinctively problematic. They disagree, however, about whether there are any circumstances under which pure aesthetic testimony can yield justified belief, and if so what those circumstances are. Pessimists claim that pure aesthetic testimony is never a source of justified aesthetic beliefs, although different sub-groups among the pessimists offer different explanations as to why this is so. Unavailability pessimists claim that pure aesthetic testimony cannot issue in justified beliefs either because aesthetic claims are not truth-evaluable or because all aesthetic claims are false, and thus there are no justified aesthetic beliefs. Those who hold this former view are semantic non-cognitivists, whereas proponents of the latter are error theorists. In contrast, unusability pessimists argue that although there are justified aesthetic beliefs, some further norm renders forming justified beliefs on the basis of pure aesthetic testimony impossible.

Optimists, on the other hand, claim that although pure aesthetic testimony yields justified

beliefs less frequently than most other types of pure testimony, this difference is a matter of degree. On the optimist view one can, at least under the right circumstances, gain justified aesthetic beliefs through pure testimony.\footnote{M Budd (2003); A Meskin (2004); A Meskin (2006)}

I begin by rejecting the no-difference theorist’s claim that pure aesthetic testimony yields justified beliefs just as often as most other cases of pure testimony and show that a series of misunderstandings undermine the arguments in favor of this claim. These same misunderstandings ground the no-difference theorist’s specific arguments against optimism.\footnote{B Laetz (2008) 359-60} However, since I will have shown that their foundation is flawed, I will not argue against those criticisms directly. I then argue that no version of the pessmimist view is tenable, since unavailability pessimism has been convincingly argued against elsewhere,\footnote{See A Meskin (2006) for a thorough discussion of the shortcomings of relativism, expressivism, emotivism, and error-theory with respect to solving the puzzle of aesthetic testimony. These positions are discussed at some length in A Meskin (2004) and R Hopkins (2007). I will focus on assessing views consistent with semantic cognitivism.} and the mere possibility of unusability pessimism is based on a deep epistemological confusion. I then offer a few considerations in favor of optimism. I end by explaining why arriving at aesthetic judgments through instructional testimony is preferable to arriving at them through pure testimony whenever this is practical.

**Part Three: Against No-Difference Theory**

No-difference theorists have argued that, assuming that aesthetic knowledge is possible, pure aesthetic testimony is equally or more reliable than most other kinds of pure
testimony, and that it is a source of justified beliefs at least as often as they are. As Brian Laetz puts it, “…if one accepts [that one can acquire] aesthetic knowledge via other means [i.e. that aesthetic knowledge is possible], it is difficult to maintain that there is any interesting epistemic contrast between aesthetic and nonaesthetic testimony.” In order to show that we have reason to reject the no-difference view, I will explain why Laetz comes to this conclusion, and show that his starting assumptions lead us to an undesirable position, according to which art works make up a fringe of hard cases around a core of non-art for which aesthetic testimony is less problematic. I begin by arguing that art is not an anomalous hard case for pure aesthetic testimony, but rather a paradigm case that we should take as a model for understanding how aesthetic testimony works in other cases, albeit to a lesser degree. I then argue that the ease of forming justified beliefs increases with increased familiarity and understanding of the function of an artifact. This goes to show that the reliability of pure aesthetic testimony about art and non-art lie along a spectrum that is continuous with pure garden variety testimony about non-art. This runs contrary to the no-difference theorist’s claim, since testimony about the items at one end of the spectrum yields justified aesthetic belief much more readily than testimony about those at the other end, which is precisely what the no-difference theorist denies.

The aesthetic testimony debate so far has centered around pure testimony about

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248 B Laetz (2008) 355
249 I would like to take a moment to express my deep regret that Brian Laetz passed away suddenly on March 18, 2010. He was a valued colleague of mine at the University of British Columbia, and I am deeply saddened by his untimely passing.
250 B Laetz (2008) 355

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the aesthetic properties, value or disvalue of art.\textsuperscript{251} One optimist, for instance, identifies his target as “informal testimony about beauty, artistic value or aesthetic value…[which] consist[s] in the expression of evaluative aesthetic judgments…that purport to attribute verdictive properties such as beauty, aesthetic value, or artistic goodness.”\textsuperscript{252} Art works have been used as standard examples in this debate by optimists and pessimists alike, in spite of each’s view that his conclusions apply not only to art, but to other aesthetically-evaluable objects as well. I claim that this is because the rarity of forming justified beliefs about art works on the basis of pure testimony makes them the paradigm problem case for the puzzle of aesthetic testimony. Pessimist Robert Hopkins and optimist Aaron Meskin’s exclusive use of art examples betrays their (entirely appropriate) concern with aesthetic evaluations of art. Their work to date is best interpreted as pertaining most centrally to aesthetic testimony about art. Not being primarily concerned with such evaluations, but rather with the larger class of aesthetically-evaluable objects is where the no-difference theorist begins to go wrong.

A proponent of the no-difference theory, Brian Laetz argues that on the whole, pure aesthetic testimony produces justified beliefs no less reliably than other types of pure testimony. Instead of taking art works as his paradigm example, Laetz takes aesthetic evaluations of non-art objects (such as toasters) as central. He finds that just as in other areas such as politics and religion, there are “difficult issues, understood by few.”\textsuperscript{253} In this case, those “difficult issues” involve art works. On his view art works

\textsuperscript{251} It is important to note that I mean ‘art’ in the classificatory, rather than the honorific, sense.

\textsuperscript{252} A Meskin (2006) 111

\textsuperscript{253} B Laetz (2008) 360
are anomalies in the larger pool of aesthetically-evaluable objects. Since art works are relatively few in number as compared to aesthetically-evaluable non-art objects such as sleek new cars, ugly sofas, pretty eyes and breathtaking views, and testimony about non-art objects is not seen as distinctively problematic, there are no grounds for claiming that pure aesthetic testimony in general is distinctively problematic. However, just because the distinctive set of problems with obtaining aesthetic testimony does not afflict aesthetically-evaluable non-art as severely as it does art, does not mean that it does not afflict them at all.

Taken as a whole, the class of aesthetically-evaluable objects (including both art and non-art) is too large and heterogeneous with respect to the likelihood of pure aesthetic testimony yielding justified belief to be informative. In order to better understand this set of objects and how they relate to the problem of aesthetic testimony, I propose that it will aid our understanding of them if we take them to lie along a continuum, with avant-garde and conceptual art works at one end, aesthetically-evaluable non-art such as nature in the middle and mundane everyday objects at the other end. The objects for which it will be least likely that pure aesthetic testimony will yield justified belief are, on my view, those objects that are the least familiar to us, and whose function is least well understood. The more familiar the object and its function, and the more relevant that function to aesthetic evaluations, the further it will lie away from avant-garde art along the spectrum, and the more closely it will resemble more mundane cases of pure testimony, like testimony about where the bus stop is located.

\footnote{Ibid.}
The no-difference position gets its bite by taking pure aesthetic testimony about non-art as the paradigm case of justified belief formation on the basis of aesthetic testimony. Laetz uses examples, for instance, of aesthetic judgments about a new car, a haircut, someone’s eyes, a mountain vista and kitchen tiles. To reiterate his conclusion, he asserts that “any broad area of discourse, like aesthetics, will include difficult issues understood by few. But this provides no reason to indict most testimony in these areas, and neither does it in aesthetics,” on his view. This may be true in some areas. However, when the ‘difficult issues understood by few’ are not disparate and scattered along the fringes of the area of discourse, but rather stand in a cluster, and represent an important and interesting class of works, it is unacceptable to write them off as anomalies in an otherwise uniform category. The class of art works is just such an important and interesting class, and thus its members should not be discounted as outliers or hard cases, but rather a paradigm case that is indicative of how aesthetic testimony works more generally.

I will now argue that justified beliefs formed on the basis of pure aesthetic testimony are, generally speaking, more reliable in non-art cases, where the object of the testimony is more familiar and its function is better understood. Unlike Laetz, Meskin explicitly recognizes that pure aesthetic testimony about nature more frequently results in justified beliefs than pure aesthetic testimony about art. He claims that it is easier to form justified beliefs about the beauty of natural objects and landscapes, for instance, on the

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255 I do not mean to suggest that these items could not be part of (or all of) an artwork, but the items that Laetz refers to are everyday objects, rather than works of art.
256 B Laetz (2008) 360
basis of what we are told, than it is in the case of art. For example, if a friend had been out walking as the sun was setting, and he told me that the sunset had been especially spectacular, I would be very likely to form the justified belief that it was, even if he does not tell me what was so spectacular about it. Although there are people who do not appreciate the splendor of nature, this is often because they have not had the opportunity to experience it, and there are far fewer people who have not had the opportunity to experience nature and come to appreciate it than there are who have not had the opportunity to experience and appreciate art. I claim that, similarly, one forms justified beliefs on the basis of pure testimony more often for man-made non-art objects than for works of art. Since the function of these objects plays a role in our aesthetic evaluations of them, and many of us are familiar with their functions and what it means for them to function well, many of us are well equipped to evaluate them aesthetically. For example, the (primary) function of a toaster is to toast bread. If a toaster is designed in a way that is compatible with or enhances its function (perhaps by looking good in your kitchen, or making you want to use it, without compromising its toasting ability), this is more likely to be an aesthetically meritorious design feature than one that inhibits its function. In addition, because of the relative familiarity of many non-art objects, the expertise that is required in order to evaluate them is more commonplace than it is in the

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257 A Meskin (2006) 120
258 This does not imply, however, that we are all equally well equipped to testify about the aesthetic value of all types of non-art objects. The claim is simply that justified aesthetic beliefs are more readily formed about a haircut, for example, based on testimony from a randomly selected person on the street, than about avant-garde art.
I am happy to admit that it is easier to form justified beliefs on the basis of pure testimony about the aesthetic merit of non-art than it is for testimony about art. However, forming justified aesthetic beliefs on the basis of pure testimony about non-art is still more problematic than forming justified non-aesthetic beliefs on the basis of pure testimony. This is, in part, because justified beliefs are more difficult to form on the basis of any sort of evaluative testimony, as opposed to mundane factual testimony. It is important to note, at this point, the difference between aesthetic testimony about taste and aesthetic testimony about merit. Aesthetic testimony about a person’s taste is given when a testifier recommends a film, for instance, on the basis that he believes the hearer is likely to enjoy it. In giving aesthetic testimony about the merit or demerit of a work, on the other hand, the testifier provides an assessment of the work, irrespective of personal taste.

Although most people are qualified judges of the aesthetic properties of most non-art such as sunsets and sports cars, known (or observed) differences in taste (in the case of aesthetic testimony about taste) or deficiencies in competence (when it comes to aesthetic testimony about merit) can play a huge role in whether or not we accept testimony from another person. For example, although many film critics are good sources of aesthetic testimony about merit, many people read movie reviews not to find out about the aesthetic merit of a film, but rather to find out about whether they are likely

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259 For example, how aerodynamic a sports car is (or at least how aerodynamic it looks to the untrained eye) often plays a role in the aesthetic evaluation of it.

260 There may be some non-aesthetic beliefs for which this is not the case, such as moral beliefs.

261 Of course, this sort of qualification admits of degrees.
to enjoy it (taste). This is because many people who read movie reviews have critics
whose views they trust, and find generally coincide with their own evaluations, and
others whose comments they disregard, because they know that their taste differs from
that of a critic. This tendency to disregard aesthetic testimony about both taste and merit
applies, in particular, to decisions having to do with personal appearance and home décor.
I am unlikely, for instance, to trust the opinion of someone with a haircut that is very
unflattering, or the opinion of a shop girl whose clothes are two sizes too small about the
aesthetic merit of the outfit that I am trying, since these features indicate that these
testifiers are incompetent to offer aesthetic testimony about merit. Similarly, I am
unlikely to trust the girl with the shaved head (on top) and mullet (in back) or her friend
who is dressed in pink leather as to the quality of the haircut of someone they saw earlier,
since their fashion choices indicate that they will likely be unable to reliably determine
what is to my taste. These can be explained as situations in which I have observed either
that the testifier is incompetent to provide testimony about aesthetic merit, or that we
have a difference in taste that renders this person unqualified to testify about what is to
my taste. As a result, pure testimony about the aesthetic value of non-art is problematic
in the same way that testimony about art is, but to a lesser degree.

Even if this is true, one might ask why we should think that pure aesthetic
testimony about art is more problematic than such testimony about non-art. Recall that
the pure case of testimony is one in which a qualified testifier has a belief or knowledge,
and conveys it honestly, but does not explicitly share the reasons for his belief with the
hearer. It counts as a case of pure testimony if, on the basis of the testimony alone, the
hearer forms a justified belief (and perhaps even acquires knowledge) about the subject of the testimony. Relying on pure testimony, however, does not preclude one from using any background information that one might have about the testifier or her qualifications.

Aaron Meskin has identified two reasons to think that pure testimony about art is distinctively problematic. First, unlike in most mundane cases of pure testimony, the average person is not equipped to judge the aesthetic value of an artwork. Second, in addition to the problem of qualified judges being rare, it is often difficult (or impractical) to determine whether a particular testifier is a qualified judge than it is in many other cases of pure testimony. I agree with both of these claims, and believe that we have a further reason to think that the second is correct. In many areas other than art, it is significantly easier to demonstrate one’s competence to judge than it is when it comes to art. For example, if an auto mechanic claims that he knows how to fix your car, he can demonstrate this by making the repair, after which the car will run smoothly (if he was right). In the case of art, on the other hand, there is no easy way to demonstrate that one is equipped to make an aesthetic judgment.262

I will now argue, contra the no-difference theorist, that the reliability of pure aesthetic testimony about art and non-art lie along a spectrum that is continuous with pure garden variety testimony about non-art. In order to show that the difference between pure aesthetic testimony and pure testimony of more mundane varieties is a difference of degree, I will begin by showing that members of the class of art works are themselves

262 Even if it is possible to give criteria that, if satisfied, will make a person more likely to be a good (or qualified) judge, as Hume tries to do, it is still much more difficult (at least as a practical matter) to demonstrate that one satisfies these criteria in the case of aesthetic evaluations.
spread along one end of this spectrum. First, let us assume (as is the case according to
the optimist) that pure aesthetic testimony about art is different in degree, rather than in
kind, from most other kinds of testimony. I will now examine what follows from this
assumption, and compare this with what actually occurs. If what follows from this
assumption and what actually occurs coincide, then that will provide some evidence for
the claim that aesthetic testimony is different in degree, rather than in kind, from other
kinds of testimony. In addition, their coincidence will provide further evidence for the
claim that aesthetic testimony about non-art is likely to lie between aesthetic testimony
about art and most other kinds of testimony about non-art on the spectrum.

If the difference between pure aesthetic testimony about art and most other kinds
of pure testimony results from both our relative unfamiliarity with art works (as
compared to everyday non-art objects) and the difficulty of identifying their function(s),
in addition to the two factors that Meskin identifies (noted above), then we should expect
to see a continuum within the class of artworks. Art works for which it is nearly
impossible to form justified beliefs on the basis of pure aesthetic testimony (perhaps such
as avant-garde art works) will be located at one end. Works that are more similar to
aesthetically-evaluable non-art objects in terms of the ease with which justified beliefs
can be formed on the basis of pure testimony about them (perhaps such as photographs
and photorealist paintings) will be found at the other end of the spectrum for artworks.
This spectrum is continuous with the spectrum for pure testimony about non-art, on my
view (see Fig. 1). I will call this the continuity assumption. If this assumption holds,

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263 Photographic conceptual art would likely not be included here.
then the average person should be better equipped to make judgments about some kinds of art works than others, and will quite often be sufficiently well equipped to legitimately testify about them. For this reason, pure aesthetic testimony about these kinds of art ought to result in justified beliefs more frequently than for the kinds that fewer people are qualified to evaluate. I will now argue for both of these claims.
Figure 1
All Pure Testimony

Pure testimony
most likely to yield
justified beliefs

Pure testimony
least likely to yield
justified beliefs

Mundane cases of
pure testimony about
non-art objects

Pure aesthetic
testimony about
non-art

Location of bus stop
Sunset

Rembrandt
painting

Pure Testimony about Art

Pure testimony
most likely to yield
justified beliefs

Pure testimony
least likely to yield
justified beliefs

Familiar
Realist and Photorealist Paintings

Unfamiliar
Avant-garde art works
The person on the street would likely be able to make a judgment about the artistic value of a realist painting, since mistakes in perspective, the placement of shadows and the way objects look in the distance compared to up close are jarring even to the uninitiated. This presupposes that skillful execution plays a significant role in establishing the aesthetic merit of realist paintings, which I take to be fairly uncontroversial. Since the average westerner has seen many a realist painting, no special training or background is required to make aesthetic judgments about realistic (and photorealistic) paintings, and thus testimony about them is more readily acceptable than testimony about other types of art. Popular art will also fall into this category, as do pantomime, and quite a bit of theatre (excluding the experimental and the avant-garde), since although familiarity with the genre aids in appreciating art in general, the conventions of these genres are familiar enough (given a shared cultural background) that no special background is required.

Evaluating abstract and conceptual art, by contrast, often requires knowledge of the tradition in which the artist is working, which most people do not have; they are thus less accessible to the non-expert than realist visual art. Ballet, opera, classical music, and contemporary painting (to name just a few) also require exposure to a variety of examples of the art form at a minimum, and experience of them benefits from further training and exposure beyond that. Similarly, members of one culture with their own ideas about, say music, might not be equipped to judge the music of another culture because of differing appreciative practices (as in music in a western vs. non-western scale). As a result,

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264 Children as young as eight years old often use perspective in drawing. Much younger children are able to recognize objects drawn using perspective as, farther away when they are smaller, for instance.
reliable testimony from the average person on realist visual art works is much easier to come by than reliable testimony about abstract art and classical music, for instance, simply because more people are better qualified to pass judgment about them.

If the continuity assumption is correct, then average people should be better able to judge certain kinds of art works, like non-abstract photographs and photorealist paintings than some other works, because of both their ubiquity in our culture and their relative similarity to everyday perceptual experiences. If this is so, then they will often be well enough equipped to testify about these works legitimately. In this case, pure aesthetic testimony about these kinds of art should result in justified beliefs more frequently than it does for the kinds that fewer people are qualified to evaluate. I have argued that average people are, in fact, better judges of certain kinds of art works than others. This gives us some reason to believe that the continuity assumption is correct. The continuity assumption is inconsistent with no-difference theory because the latter posits that it is no more difficult to form justified beliefs on the basis of pure aesthetic testimony about art and non-art than it is to form justified beliefs on the basis of pure testimony about anything else.

In this section I have argued that taking pure aesthetic testimony about non-art as the central case, and thus as representative of pure aesthetic testimony in general, was a mistake. This mistake led Laetz to the uncomfortable conclusion that the case of art is just a fringe hard case that we should accept as difficult, instead of trying to explain why it is so. I then showed that art is not an anomalous hard case for pure aesthetic testimony, but rather one paradigmatic case, and thus that we should look to cases of art to
understand what is going on (but to a lesser degree) in other cases of pure aesthetic testimony. Since pure aesthetic testimony tends to be more reliable when the object of the testimony and its function are familiar, it makes sense to think of cases both within the category of art works, and within the category of non-art as distributed along a spectrum. Pure aesthetic testimony about art, as the least reliable sort of pure testimony, lies at one end. Pure aesthetic testimony about non-art is somewhat less reliable. Most cases of non-aesthetic testimony about non-art lie at the far end, as they are the most reliable.

**Part Four: Critique of Pessimism**

Setting the no-difference position aside, we can now move on to the debate between optimists and pessimists. Aaron Meskin, on the optimist side, argues that some pure aesthetic testimony can be a source of justified aesthetic beliefs and, perhaps, even knowledge. He claims that there are cases in which one can be justified in forming aesthetic beliefs purely on the basis of someone else’s testimony. However, most people are unreliable aesthetic judges, and those who are reliable can be difficult to identify. This creates a problem for much aesthetic testimony. Hence, most testimony about art is unlikely to provide a basis for forming justified beliefs. Since my allegiance lies with the optimists, I will focus first on arguing against the pessimist position. I will then consider some additional reasons for favoring optimism.

I will begin by considering unavailability pessimism, which is underwritten by an adherence to semantic non-cognitivism or error theory about the aesthetic. To recall, unavailability pessimism is the view that pure aesthetic testimony cannot issue
in justified beliefs. Semantic non-cognitivism about the aesthetic is the view that aesthetic claims are not truth evaluable. Error theory about the aesthetic, on the other hand, is the view that all aesthetic claims are false. A requirement of all views that satisfactorily explain what is distinctly problematic about aesthetic testimony (what Aaron Meskin calls “the puzzle of aesthetic testimony”) is that they satisfy the *asymmetry thesis*. It requires that the view have the consequence that forming aesthetic beliefs through testimony is less likely to result in true beliefs than forming them through direct experience of the object.\(^{265}\) As Meskin puts it, any satisfactory explanation of the problem of aesthetic testimony must explain the apparent “asymmetry between the epistemic position of someone who has perceptual acquaintance with an object and someone who has only heard testimony about the object.”\(^{266}\) Semantic non-cognitivism comes in various guises\(^{267}\), which are unified by the claim that sentences of a certain type (in this case, aesthetic claims) are not truth-apt. Error theory is the view that all sentences of some types (in this case, at least the aesthetic ones) are false. As Meskin has argued, neither semantic non-cognitivism nor error theory about the aesthetic satisfies the asymmetry thesis, and thus neither can provide an adequate solution to the puzzle of aesthetic testimony.\(^{268}\) Since semantic non-cognitivism and error theory cannot, we can set unavailability

\(^{265}\) It is important to note that Laetz and Meskin both use the term ‘asymmetry thesis’, but define it differently. For Laetz the asymmetry thesis states “that aesthetic testimony is epistemically inferior to [all] non-aesthetic testimony” B Laetz (2008) 355. I follow Meskin’s use of the term (A Meskin (2006) 112).

\(^{266}\) A Meskin (2006) 115

\(^{267}\) These include expressivism, emotivism, experientialism, projectionism and at least some forms of relativism.

\(^{268}\) Neither semantic non-cognitivism nor error theory about the aesthetic satisfies the asymmetry thesis because in either case the hearer is no worse off epistemically than someone with direct experience of the work.
pessimism aside as potential solutions to the puzzle of aesthetic testimony.

Optimism does, however, satisfy the asymmetry thesis. On the optimist view, justified aesthetic beliefs can be formed on the basis of testimony. However, it is still not easy to form justified beliefs on the basis of aesthetic testimony, particularly in the case of art, as compared to forming justified beliefs on the basis of direct perception. Although forming justified belief on the basis of direct experience is easier than doing so on the basis of testimony, there nevertheless are a few conditions that need to be met in order for this to be possible in the case of art works. These include conditions on one’s perceptual apparatus (eyesight), external conditions (lighting), cognitive functioning (fever, hallucinations, intoxication), experience of the genre, the artist’s other work, art-historical knowledge, and other such information. However, despite many of these conditions being met, one is less likely to form justified beliefs on the basis of testimony than on the basis of direct experience. In the former case, in addition to relying on the proper functioning of the testifier’s physical processes and cognitive apparatus and the conditions under which he perceived the work, one must rely on his competence without having access to his cognitive resources (such as prior experience of similar works, education, and so on). One must, moreover, trust that the testifier is both being honest and communicating his thoughts clearly, which anyone who has graded undergraduate papers will know is not always as straightforward as it might seem.

As Meskin points out, one is almost always in a better position to assess one’s own ability to judge the aesthetic merit of an art work than to assess a testifier’s
competence and sincerity in the same matter.\textsuperscript{269} It is more likely that I will be wrong in my assessment of the testifier’s qualifications than I will about my own, since I am privy to all kinds of facts about my personal history that are relevant to assessing a person’s ability to judge an art work. Qualities that are relevant to such a determination likely include at least some of those that Hume laid out as the criteria for being an ideal judge in \textit{Of the Standard of Taste}, such as expertise, experience, and delicacy of taste.\textsuperscript{270} It is at least impractical to obtain the quality and quantify of information about these sorts of qualifications that I have access to about myself from a (potential or actual) testifier.\textsuperscript{271} Once this is clear, it is easier to see that the optimist has no trouble satisfying the asymmetry thesis. However, unusability pessimism, the view that some norm renders forming justified beliefs on the basis of pure aesthetic testimony impossible, also satisfies the asymmetry thesis. I will now argue against it on other grounds.

Robert Hopkins has been the strongest advocate of unusability pessimism to date. To recall, unusability pessimists hold that despite aesthetic claims being truth evaluable, there is some further norm that prevents us from forming justified beliefs on the basis of pure aesthetic testimony. Hopkins proposes two candidate norms that he claims might stipulate the conditions under which aesthetic belief formation is justified. He bases this proposal on his account of moral testimony, positing analogous norms in the aesthetic

\textsuperscript{269} A Meskin (2006) 122-23
\textsuperscript{270} D Hume (1898) “Of the Standard of Taste” \textit{Essays, Literary, Moral and Political} (London: Ward, Lock) 134-149
\textsuperscript{271} A Meskin (2006) 122-23
In his own words, Hopkins’ view is that “testimony can make moral knowledge available to those to whom it is directed. The difficulty, if any, must lie in some norm rendering it illegitimate to use that knowledge.”

The first candidate norm is the Acquaintance Principle, the view that justified aesthetic beliefs can only be formed on the basis of direct experience of the work. I call the resulting view AP Unusability. The second proposed norm, which Hopkins calls the Requirement, posits that justified aesthetic beliefs can only be formed when one “grasps the aesthetic grounds for an aesthetic belief...in virtue of which the belief is true.”

I will begin my attack on unusability pessimism by arguing that these norms are deficient in the case of moral testimony that Hopkins uses as his starting point. I will then argue independently that neither the Acquaintance Principle nor the Requirement is a plausible candidate for governing aesthetic belief-formation. Although this does not preclude the possibility of an alternate norm being proposed that might do the job, I will then go on to argue that unusability pessimism rests on a deep epistemological confusion that renders any version of it untenable in both the moral and the aesthetic case.

4A: Against Pessimism about Moral Testimony

In his “What is Wrong with Moral Testimony?” Hopkins develops an account of moral testimony, on which his later account of aesthetic testimony is based. Pure moral testimony is widely seen as more problematic than many other varieties of testimony.

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272 R Hopkins (2007)  
273 R Hopkins (2007) 626  
275 R Hopkins (2007) 10
For example, it would be surprising to find that a striking worker on a picket line thought that going on strike was the right thing to do because his friend and co-worker told him that it was. In moral cases, just as in aesthetic ones, we seem to think that something more is required for justification than in bus stop location type cases. If, however, the moral account is not sound, then it will be far less likely that its aesthetic counterpart is satisfactory.

It is worth noting at the outset that Hopkins’ view, that moral testimony can never result in justified beliefs, may not be as intuitive as it might seem. Most notably, if he is right, then the people who have for millennia consulted their priests and rabbis, imams and arhats to find out what the right thing to do is did not form justified beliefs on the basis of their testimony. In the moral case, just as in the aesthetic case, Hopkins identifies optimists and pessimists, and subdivides the latter into unavailability and unusability varieties. He argues extensively for the claim that unavailability pessimism about moral testimony is untenable, before offering a candidate norm that might dictate the conditions under which it is permissible to form moral beliefs. Since, he argues, offering merely pragmatic justification for one’s belief seems unsatisfying, Hopkins asks “what is it that a valid and sound [pragmatic] argument fails to provide, when directed at a moral belief?” He answers that “it fails to give one a grasp of the moral reasons for that belief.” He thus formulates The Requirement, which states that “having the right to a moral belief requires one to grasp the moral grounds for it.” In other words, for it to be

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276 Ibid. 627
277 Ibid.
278 Ibid. 630, his emphasis.
279 Ibid., his emphasis.
permissible to form a moral belief (or possible to form a justified moral belief), one must grasp the moral grounds for that belief. Moral grounds, in this case, refer to the moral facts about the situation that make one belief appropriate, rather than another. Just as in the aesthetic case, pure testimony will never satisfy the Requirement. Luckily for the optimist, this is not how moral testimony works (and thus not likely to be how aesthetic testimony works either).

To form a justified belief that striking is the right thing to do, for instance, on the basis of pure testimony is to rely on the authority of another individual (or group of individuals), instead of one’s own judgment of what is the right thing to do, on the balance of reasons in forming that belief. Some have argued that acting on the basis of another person’s say so without weighing the reasons (including their having issued a command) amounts to a failure to exercise one’s autonomy.280 One might argue that the situation is analogous in the case of belief formation. In other words, the claim would be that believing some ethical proposition \( p \) solely on the basis of another person’s having said that \( p \) is unjustified. I will now argue that this claim is false.

According to Joseph Raz’s widely accepted account of authority,281 an authority’s command provides a reason to act without further weighing the balance of reasons.282 A person who is in a position of authority must meet the following conditions in order for


282 This assumes that the content of the command falls within the authority’s jurisdiction.
his command to count as this kind of reason.

1) His command must be “based on the balance of relevant reasons that already independently apply to those subject to the directives.”

2) It must “make those subject to the authority likely better to comply with the relevant, independently applying reasons by accepting and following the directives as authoritative, rather than by trying to follow the applicable reasons on their own.”

3) “If [1] and 2] are satisfied, then the fact that an authority has issued a directive is a reason to do what is directed which excludes and replaces (at least some of) the relevant, independently applying reasons.”

In other words, if the speaker has considered the relevant reasons in issuing the command, and if the hearer is more likely to do the right thing by following the command, rather than by thinking through the reasons on his own, then the speaker’s having issued the command is a reason for the hearer to follow it, and to disregard countervailing reasons.

This account of when a command from a person in a position of authority gives the hearer a reasons to act, offered by Joseph Raz, is widely accepted, although it must be modified to accommodate the case of the worker who cites his coworker’s belief that striking was the right thing to do as his reason for believing that this is so. Raz’s account of when the commands of an authority can count as reasons for action must be adapted to the case of belief formation in order to apply to cases in which the hearer is not subordinate to the testifier. Testimony in cases like these can provide reasons for belief (which may in turn provide reasons for action) but not reasons for action themselves. If

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what someone says gives you a reason to act and a reason to disregard any opposing
reasons, then that statement similarly justifies forming the belief that acting that way is
the right thing to do. As Raz recognizes, the cases are parallel, although in the case of
justifying belief formation, rather than action, the speaker need not be in a position of
authority. Let us now develop an analogous set of criteria for a moral belief formed on
the basis of testimony to count as justified:

1) It must be the case that the testifier has likely based his testimony on
the balance of relevant reasons that already independently apply to the
hearer.

2) Accepting the testimony must make the hearer’s subsequent belief
more likely to be true than the belief that he would form by trying to
comprehend the relevant, independently applying reasons on his own.

3) if 1) and 2) are satisfied, then the fact that a testifier has asserted a
claim is a reason to believe what is claimed which excludes and
replaces (at least some of) the relevant, independently applying
reasons for believing the testifier’s claim.

Let us now try out Hopkins’ example of the striking worker using Raz’s
framework. Hopkins invites us to imagine the following:

Perhaps you are a member of a union that has just voted to strike. The
consequences for those you serve will be dire, causing you serious doubts
over whether to inflict them. On the other hand, your collective demands
are just, and loyalty to the union requires obeying the call. Faced with
these conflicting pressures, you do not know what to think. Some of your
peers, although equally sensitive to these considerations, have made up
their minds. Although none thinks the answer obvious, each has
independently and tentatively come to the same conclusion. Why should
you not reason as follows? There is a subject matter, here the question of
whether to strike, and a set of thinkers attempting to find out about it.
These thinkers, all of whom are of reasonable competence in such matters,
have given the topic decent consideration, and have settled on the same
answer. Surely this provides some grounds for thinking that answer

284 J Raz (1986) 64-65
correct. Further, while it is true that the informants themselves express very limited confidence in their view, that they all do so mitigates this. For it suggests that they have all applied the same method to get their answer—for instance, that they are all sensitive to the same considerations, and the rather delicate overall balance between them. Their settling on a common method for reaching an answer is best explained by its being appropriate, and their settling on a common answer is best explained by its being the right one.\textsuperscript{285}

Hopkins claims that deciding to strike on the basis of “the likelihood that your informants have converged on the right answer, the fact that their shared caution about that answer itself suggests they’ve converged on the same method for settling the issue, and so on” (he calls these Humean considerations) is unsatisfying, because one must offer moral grounds for decisions like this one, rather than pragmatic grounds.\textsuperscript{286} He says:

> Whatever you are doing, you are not offering moral grounds for your decision. To do that, you would have to return to the factors you found difficult to reconcile. You would have to talk about the justice of the union’s demands, the cost to those it serves, and so forth. This is something that you remain unable to do, at least in a satisfactory way. For, while you can list the relevant considerations, you were unable to come to a settled opinion of the balance between them. Although you now believe the balance to lie one way, rather than another, you remain unable to say why it lies just so, to explain quite how one set of considerations outweigh the others. Thus, while the testimony of your peers, supported by the Humean considerations, may have left you in a position to know what should be done, it does not leave you knowing why it should be. Insofar as you have settled the matter on Humean grounds, you have reasons for your belief but not moral reasons for it.\textsuperscript{287}

This is the answer that Hopkins gives to the question of why, intuitively, we find the striker’s reliance on the testimony of others as the ground for his belief so unsettling.

However, other than his account’s ability to explain this intuition, which the optimist

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\textsuperscript{285} R Hopkins (2007) 627 \\
\textsuperscript{286} Ibid. 630 \\
\textsuperscript{287} Ibid.
\end{flushleft}
account also explains, Hopkins does not offer any arguments in favor of adopting his account of why the hearer is not justified in believing that he should strike on the basis of testimony.

The Razian account offers an alternate explanation that merits at least equal consideration, simply in virtue of its completeness and influence. Let us now consider Hopkins’ example using the Razian model. Hopkins stipulates that the hearer is considering the opinions of his peers, who are “equally sensitive to these considerations” (that is, the considerations that he has been weighing). He further stipulates that they are all “of reasonable competence in such matters, [and] have given the topic decent consideration.” Thus, it seems that 1) is satisfied. Now to 2). Is the hearer more likely to end up with a true belief by believing the claim, rather than by trying to follow the relevant, independently applying reasons on his own? I think not. Since none of the hearer’s peers “thinks the answer obvious” and they have reached their conclusions only tentatively. In addition the peers are only “equally sensitive” to the considerations on either side—that is, they are no more sensitive to them than the hearer himself. So what’s missing here, on the Razian view, is not that the hearer has failed to grasp the moral grounds for the belief, but rather that he is not more likely to come to the right conclusion by taking his peers’ views as authoritative. This is the explanation that Raz would give for the intuition that the hearer in this case is not justified in believing that striking is the right thing to do on the basis of testimony.

Let us now consider an example of moral testimony that cannot be the basis for forming a justified belief on Hopkins’ view (since no pure moral testimony can), but that
we intuitively feel is justified, and that the Razian view supports. Imagine taking your young child to the doctor, and asking the doctor under what circumstances you should take her to the hospital. You want to do the right thing both by taking her to the hospital when she needs medical attention, and by keeping her at home when she does not need to go to the emergency room both because it will be better for her, and because it is a social harm to use emergency room services unnecessarily. The doctor might tell you that if the child’s fever reaches 104 degrees, you should take her to the hospital. Since the doctor is in a better position than you are with respect to understanding the consequences of not seeking medical attention for a child with a high fever, as well as the impact of taking the child out in the cold, and backing up the emergency room, he is better positioned to evaluate the consequences of taking the child to the hospital or keeping her at home. The relative weights of the relevant consequences of these actions constitute the moral grounds for the choice. Although you do not grasp the moral grounds for this belief, you would be right to form the belief that taking your child to the hospital when she has a 104 degree fever, but not when it has only reached 103 degrees, is the right thing to do.

According to Hopkins, however, the parent is not justified in believing that taking the child to the hospital when her fever reaches 104 degrees is the right thing to do, for this belief is based on moral testimony, the moral grounds of which the parent does not grasp. Hopkins might think that it is appropriate, in some sense, to take the child to the hospital under these circumstances. He cannot admit, however, that the parent is justified in believing that that is the right thing to do on the basis of the doctor’s direction.

On the Razian framework, however, condition 1) is met, since the parent believes
that the doctor has likely based his testimony on the balance of relevant reasons, and the
doctor (being a responsible medical professional) has done so. Condition 2) is also
satisfied, since the hearer will be more likely to take the child to the hospital under the
appropriate circumstances by following the doctor’s advice than by trying to determine
on his own when the child needs to go to the hospital. Thus, 3) the fact that the doctor
has told the parent that he should take the child to the hospital when her fever reaches
104 degrees is a reason to believe that this is the right thing to do which excludes and
replaces (at least some of) the relevant, independently applying reasons to the contrary.

One might object that the considerations that the doctor has access to, but that the
parent does not, such as the risks associated with not seeking medical attention for a child
with a high fever, and the consequences of an unnecessary visit to the emergency room,
both for the child and for others in need of its services, are not the sort of considerations
that Hopkins has in mind as the moral grounds for the belief, since they are pragmatic,
rather than moral considerations. However, this objection misses the fact that, contra
Hopkins, the moral grounds for our beliefs in many cases just are pragmatic
considerations about the consequences of acting one way, rather than another. Hopkins
mentions several possible moral grounds for deciding whether or not going on strike is
the right thing to do, including that “the consequences for those you serve will be dire…,
[that] your collective demands are just, and [that] loyalty to the union requires obeying
the call.” Although I do not dispute that these are perfectly good moral grounds for
decision-making, they are no less pragmatic than those I have offered (in the hospital
example).
Since Raz has moral authority in mind in developing this view, since it is rigorous, and precise, as well as being widely accepted and highly influential among moral philosophers, and since Hopkins’ fails to offer any arguments in favor of accepting his Requirement, this is a serious blow against Hopkins’ proposal.

4B: Against Pessimism about Aesthetic Testimony

I will now go on to evaluate the norms that Hopkins proposes may govern aesthetic belief formation. I will dispense with the Acquaintance Principle in short order, so as to spend more time on the Requirement, which is, at least prima facie, more promising.

Objections to the Acquaintance Principle as a norm for justified aesthetic belief formation are, for the most part, fairly familiar. Recall that “the Acquaintance Principle demands that one have experienced—presumably seen, touched or both—[the object of the judgment].”288 One problem for this view lies in determining what kind of acquaintance satisfies this principle. If one understands acquaintance narrowly (as it has traditionally been understood), one risks excluding photographs, video and audio recordings. On this narrow interpretation, aesthetic judgments about the music of The Beatles, for instance, are unavailable to anyone who has not heard them perform live. But there are plenty of people who were not yet born when The Beatles stopped performing who (at least claim to) appreciate their music aesthetically, not to mention those who never had the opportunity to see them in person. Since most experiences of music these days are recorded, most of our judgments about music are undermined on this narrow interpretation of acquaintance.

288 R Hopkins (2011) 10
One way around this is to broaden the acceptable forms of acquaintance to include photography, audio and video recordings. However, even with a broad interpretation of acquaintance, AP unusability excludes the possibility of taking testimony even when it is impure—that is, even when extensive reasons for the testifier’s belief are offered along with the belief itself. On this view one cannot pass aesthetic judgment on a work on the basis of any description or argument, no matter how detailed, of the work, its aesthetic properties, and how they come together to make the work beautiful (for instance), no matter how qualified the testifier is. One consequence of even a broad interpretation of acquaintance is that judgments about many art works that are spatially and temporally distant from ourselves, and those that have been lost, are impossible. The performances of dancers who passed away long before video could capture and preserve their movements for posterity, and the musicians of yesteryear are among those performances whose works can no longer be judged aesthetically on this view, regardless of how detailed the descriptions of them are, and the number and credibility of their sources. In addition, sketches and detailed descriptions made by those with first person experience of ancient temples, sculptures and other structures (including such famous works as the Hanging Gardens of Babylon, Cambodian temples that have been overtaken by the jungle such as Ta Som, the Sculpture of Zeus at Olympia, the Lighthouse of Alexandria and the Colossus of Rhodes) that have since been lost to or

289 Thanks to Josh Dever for this suggestion. An alternate solution (for photographs and video recordings, at least) would be to endorse the transparency thesis, which holds that viewing a photograph (or experiencing another type of recording) is just like looking through binoculars; you see the scene that the photograph is of directly through the photograph. See K Walton (1984) “Transparent Pictures: On the Nature of Photographic Realism” Critical Inquiry 11:2, 246–276; D Lopes (2003) “The Aesthetics of Photographic Transparency” Mind 112:4, 433–448.
severely damaged by the elements cannot, on this view, serve as a basis for aesthetic claims about them. However, critics (among others) still seem to be justified in forming aesthetic beliefs about works that are spatially and temporally distant, and of which photographs or audio and video recordings are unavailable, on the basis of testimony. These considerations render AP unusability untenable, in my opinion.

The Requirement is a *prima facie* more promising option, although it too precludes forming justified aesthetic beliefs on the basis of pure testimony. To recall, the Requirement states that “having the right to an aesthetic belief requires one to grasp the aesthetic grounds for it.” For present purposes, I will adopt Hopkins’ proposed interpretation of what it might mean to grasp the aesthetic grounds for an aesthetic belief (although he is admittedly circumspect about how helpful this interpretation is, proposing only that will provide us with enough of an understanding of the Requirement to move forward). He says:

To grasp the aesthetic grounds for an aesthetic belief is to grasp those facts in virtue of which the belief is true. If a pot, for instance, is beautiful, then (according to the Requirement) having the right to believe it is so is to know what makes that pot beautiful: its shape, its colouration, the texture of its surface, and so forth. Presumably the demand is not just that the subject knows the pot to have those features, but that further she has some appreciation of how those facts bear on the pot’s being beautiful.

With this understanding of the principle in mind, we must now assess its validity as a principle guiding justified belief formation when aesthetic knowledge is made available through pure testimony.

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290 R Hopkins (2011) 9
291 Ibid. 10
As Hopkins implies in the passage just cited, it is possible for a person to know which features bear on an object’s aesthetic merit (e.g. “its shape, its colouration, the texture of its surface, and so forth”), all the while failing to appreciate how those features are relevant to its being beautiful. It is by considering a case like this that I will show that when this knowledge and this appreciation do come apart, we do, and can legitimately, rely on pure testimony in aesthetic belief formation.

Take Thomas Pynchon’s *Gravity’s Rainbow*, for example. This notoriously difficult, but also widely praised, novel is one that many have attempted to engage with, with mixed results. Many who have had the time, energy and inclination to see it through have found themselves rewarded with a deeply enriching literary experience. Many others have made the attempt, in pursuit of this experience, and given up a few (or a few hundred) pages in. Those who give up for lack of time, sufficient background in the genre, or the desire and persistence required to engage with this work are like those who despite having seen the shape, color and texture of the pot, could not see how they contributed to its beauty. However, in situations like these, the reader need not (and I will argue, ought not) conclude that the work is no good, or that there is nothing to be gained from expending the energy to engage with it. Far from it. When those who struggle through the first few hundred pages persevere, that is often a testament to their belief that the novel is good—perhaps even a paragon of the age. But they believe this, not because they were able to see how the literary properties of the work made it beautiful, but on the basis of pure aesthetic testimony, because they see the properties, and trust that those who can see how they make it beautiful are right. The question that
remains is whether or not this belief is rational or justified. I claim that it is.

If we think that it is reasonable to struggle with a work in an attempt to see how its aesthetically relevant properties come together to make it beautiful (graceful, striking, etc.), then we must hold that the belief that it is worth engaging with is justified, even if it was formed on the basis of pure aesthetic testimony. In many cases, pure testimony is the only possible source for such a belief, since the people in question have likely not had an expert explain how these properties make the work beautiful, and they are clearly not seeing this for themselves, or it would not be such a struggle. Moreover, if you have reason enough to believe that *Gravity’s Rainbow* is aesthetically valuable to read the first 500 pages of it, but find yourself unable, at least for now (for lack of interest, time, ability, or some other reason), to see how its aesthetically relevant properties contribute to its overall aesthetic value, that hardly seems reason to reject the belief that it is a great work of literature. In fact, it would be intellectually irresponsible to disregard the testimony of so many others in the face of one’s personal inability to see how the features of the work come together to make it aesthetically valuable.

It is important to keep in mind here that it is possible to dislike a work, and yet to recognize that it is aesthetically meritorious. As I pointed out earlier, aesthetic testimony about taste and aesthetic testimony about merit are not one and the same. A work may fail to be to one’s taste, that is, not appeal to one’s personal preferences, and still be a

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292 Other properties of the work such as being violent or gory can also distract the audience, preventing its members from seeing how the properties of the work come together to make it aesthetically valuable, even though they would otherwise be capable of appreciating it.
good, or even excellent, work of art. For example, *The Sopranos* is an award-winning, but graphically violent television drama that aims (at least in part) to explore the question of how, psychologically, a person can be a devoted family man, while at the same time regularly murdering people in cold blood. That the show explores this theme is (arguably) one of its main aesthetic virtues. Although the show has a huge following, many viewers find it too violent, and choose not to watch regularly. However, it is this violence, in combination with the show’s other features, that makes it aesthetically good. Seeing how the features of the show come together to allow it to explore the banality of evil is essential to appreciating its aesthetic merit. One could, however, both see and appreciate this, all the while choosing not to watch the show regularly because of a dislike for the violence necessary to this end. This would be consistent with recognizing the show’s aesthetic merit. Thus the claim made above does not make it impossible (or irresponsible in any way) to experience a highly-regarded work and dislike it. Rather, the claim is that when one recognizes that one has been unable to see how the properties of the work come together to its aesthetic advantage, the responsible conclusion to come to is often that one has fallen short in one way or another, rather than that the work has no aesthetic merit.

One objection to pessimism that Hopkins responds to is “the homely thought that we often take the recommendations of others on aesthetic matters, and that we are right to do so…. [Taking such a recommendation] can only be rationalised by appeal to a

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293 Similarly, I may quite enjoy a novel or a movie, and find it to my taste, all the while recognizing that it is aesthetically mediocre.
warranted belief that the film is worth seeing.\textsuperscript{294} This is, of course, impossible, if it is illegitimate to form beliefs on the basis of testimony when it comes to aesthetic matters, as he claims. Although Hopkins grants that this objection is seriously problematic for the unavailability pessimist, he believes that the usability pessimist (who claims that some norm makes it impossible to form justified beliefs on the basis of pure aesthetic testimony) has a satisfying reply. He claims that norms of use, like the Acquaintance Principle and the Requirement do not hold across the board. Certain circumstances can cause them to lapse. Hopkins claims that this is what is going on when we follow the recommendation of a friend in choosing which movie to go see. Assume that one wants to see a movie. Hopkins observes that one cannot see them all to figure out which is a good one to see, that choosing at random would be risky, given the quality of what is usually playing on the silver screen and that remaining agnostic would preclude going to see a movie, which \textit{ex hypothesi} is what one wants to do. Since there are no options besides taking a recommendation, Hopkins claims that the Requirement (or other relevant norm of use) lapses, and it is therefore epistemically appropriate to take a recommendation.\textsuperscript{295}

Whether or not you find this story plausible, the optimist is able to explain the same phenomenon much more simply. Positing norms of use, such as the Requirement, which lapse whenever one has no other reasonable option but to rely on the testimony of others, is more complex than positing that no additional norms that govern what one may

\textsuperscript{294} \textit{Ibid.} 12
\textsuperscript{295} \textit{Ibid.}
take as the basis for a justified belief are at play here.\textsuperscript{296} If both the optimist’s and the pessimist’s explanations are otherwise equally good, moreover, the virtue of simplicity gives the optimist the advantage. Hopkins recognizes that at this point in the argument the optimist’s explanation is at least no worse than the pessimist’s. He allows that “optimists might concede that [the pessimist’s] description of the case is coherent, but ask why it should be preferred to their own…”\textsuperscript{297} So he should be willing to grant that this consideration of simplicity gives the optimist the upper hand for now.

In response to the objection from optimists that there is no reason to prefer this view over their own view,\textsuperscript{298} Hopkins claims that “any force my friend’s recommendation has for me is purely pro tempore. Once I’ve seen the film for myself, her view should count for nothing in my assessment of it.”\textsuperscript{299} Recommendations are pro tempore just in case they cease to be in effect once one has direct experience of the recommended work. The case to examine in order to determine whether recommendations are always pro tempore is whether or not the friend’s view should continue to play a role in the assessment when, after having seen the film, one remains uncertain about whether or not it was good. This can happen, for instance, when one likes certain aspects of the film, but finds other aspects of it troubling. A recent film that provoked this response in me is \textit{The Imaginarium of Dr. Parnassus}, in which a relatively realistic (if far-fetched) storyline is interspersed with trips into the imaginations of the characters. As a result of the combined implausibility of some of these sequences, and

\textsuperscript{296} In addition to those that apply in all cases of testimony (such as sincerity and competence, for example).
\textsuperscript{297} R Hopkins (2011) 13
\textsuperscript{298} Although I claim that there is, in fact, a reason to prefer the optimist position, namely that it offers a simpler explanation of the same phenomenon.
\textsuperscript{299} R Hopkins (2011) 13
the excellent costuming and set design, among other things, I left the theatre feeling unsure about my own assessment of this film. Had I been accompanied by a friend with insights that I did not share into allusions that I had missed or other aesthetically significant aspects of the film, I would have happily deferred to her authority, acknowledging that I had likely missed something in my appreciation of the film. If this response to ambivalence following direct experience of an art work is appropriate, then Hopkins’ claim that I may not continue to appeal to a friend’s recommendation in forming my own view is false.

The mistake that Hopkins is making here is in running together two things that should be kept separate: aesthetic testimony about taste and aesthetic testimony about merit. To recall, the former is my judgment about whether or not the movie was to my taste, whereas the latter is my judgment about the aesthetic merit or demerit of the movie. These two are commonly (and mistakenly) lumped together. On the one hand, a friend can testify as to whether she thinks you are likely to enjoy a movie, or whether it will be to your taste. In order to be well suited to offer this sort of testimony, the testifier must know you and your taste in movies, and someone who has similar taste to yours is likely to be best suited to that task. On the other hand, a friend can testify as to the aesthetic merit or demerit of a movie. Not all friends will be equally qualified to offer this sort of testimony, but a friend with a strong background in cinema (or a film critic) likely will be. Aesthetic testimony about taste is pro tempore, as Hopkins suggests. When a friend recommends a Kung-Fu movie because he knows that you enjoy fast-paced Kung-Fu movies, and this movie is indeed fast-paced, the belief that you form on the basis of this
testimony will be totally overridden by your own judgment of the movie once you see it. Even if after seeing it you are still undecided as to whether you loved it or hated it, your friend’s recommendation no longer enters into the balance. Aesthetic testimony about merit, offered by someone in a position to comment on the aesthetic merit or demerit of the movie, regardless of personal taste, is not pro tempore. That is, it does not expire once the hearer has direct experience of the recommended work. It is inappropriate to disregard expert judgment simply because one was unable, in this case, to see how the features of the work came together to make it aesthetically meritorious. Since Hopkins does not distinguish between the two, he inadvertently implies that testimony of both types is pro tempore. Since they are not, it is not always illicit to use the resource of testimony after having seen a movie, assuming that it is testimony of the relevant sort.

Hopkins’ attempt to explain how unusability pessimism can account for our taking the recommendations of others on aesthetic matters fails on three counts. First, he fails to recognize that people often act appropriately in sustaining engagement with works when they cannot yet see how the features of the work come together to contribute to the work’s aesthetic merit. This can only be explained in virtue of their acting on the basis of pure testimony, which we must take to be epistemically appropriate in at least these cases. This is evidence for the optimist’s claim that pure testimony can, under the right circumstances, yield justified aesthetic belief. Second, Hopkins’ explanation posits norms of use, such as the Requirement, that lapse under fairly ordinary circumstances, such as when deciding which movie to go see. The optimist explanation of this
phenomenon is, by contrast, much simpler, positing no additional norms, rather than norms specific to the aesthetic case that are only sometimes in effect. Third, Hopkins’ explanation falls short because he fails to distinguish between testimony about personal preferences based on taste, and testimony about the aesthetic merit or demerit of the work. Since the proposed norm of use only comes back into effect after one has seen the movie for oneself in the former case, this is further evidence that the Requirement does not function as Hopkins proposes, or, as the optimist would have it, that there is no norm currently on offer that makes forming justified beliefs on the basis of testimonial reports about aesthetic matters impossible.

Whether or not you are convinced by the arguments against the norms that Hopkins has proposed, I will now show that unusability pessimism as a whole is untenable, because it rests on an epistemological confusion. Hopkins claims that there is a difference between norms prohibiting belief formation that are epistemic in source and those that are epistemic in content. Norms that are epistemic in source, according to Hopkins, prohibit forming a belief transmitted through some source, such as testimony, that does not make knowledge available. In contrast, norms that are merely epistemic in content are, for Hopkins, norms that prohibit forming a belief even in cases when knowledge is available. He clarifies that the unavailability pessimist holds that the norm prohibiting aesthetic belief formation is epistemic in source, whereas the unusability pessimist believes that the relevant norm is merely epistemic in content. I claim, however, that the distinction between norms that are epistemic in source

\[\text{300 See note 12 supra.}\]

\[\text{301 R Hopkins (2011) 2}\]
and norms that are epistemic in content rests on a confusion, since it is impossible for one to be prohibited from using knowledge that is made available, and which one knows to be available, by an epistemic norm. Epistemic norms govern belief formation, identifying the situations in which one is justified in forming a belief on the basis of information. Norms face certain limitations, however; for instance, they cannot prohibit us from forming beliefs when we cannot help doing so, nor can they prescribe that we ought to form a belief when this is impossible. For example, there could not be a norm that prescribed that we believe things at will, since this is something that we are unable to do. The claim that knowledge can be available to a person, and that he can know that it is available, but that it is illicit for him to use it to form a belief (even under certain limited circumstances as per the Acquaintance Principle or the Requirement) is just such a norm—one that it is impossible for him to follow. The biggest challenge to unusability pessimists is to explain how they can coherently posit an epistemic norm that makes using available knowledge illicit.

Since positing his norm of belief formation is incoherent, the unusability pessimist might opt to argue instead that unusability pessimism posits a norm of assertion that blocks one from testifying to others about beliefs formed on the basis of pure aesthetic testimony. Under this interpretation of the unusability pessimist view, one person could form a justified belief on the basis of direct experience of an art work, and then testify about that belief to a second person. That second person could also form a justified belief on the basis of pure aesthetic testimony. She could not, however, then

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302 If you find this implausible, I will pay you $100 to believe in Santa Claus.
testify on the basis of that belief to a third person. The claim would then be that rather than it being illicit to use available knowledge to form a belief, it would be illicit to assert a belief formed on the basis of that testimony. The purpose of this norm would be to prohibit asserting beliefs gained through testimony as though they were first-hand knowledge. This would be a coherent norm; however, substituting it for his norm of belief formation would significantly alter the pessimist position. Most importantly, it would require abandoning the pessimist’s central thesis, namely, that pure aesthetic testimony cannot yield justified beliefs.

As a matter of fact, there are norms of assertion governing our interactions with art works. In particular, we use the “must be” locution (in aesthetic, as in other cases) to indicate that a belief is the product of inference (in this case, from testimony). If a listener were to ask “How do you know?” in a case like this, one would not be able to offer a better explanation than that one had inferred it from another’s testimony (for example). Suppose that someone describes to me a painting that she saw and found very beautiful, but I have not seen it, nor have I been able to see how the aesthetic properties of the work come together to make it beautiful. I cannot fairly assert that the painting is beautiful. It would be totally appropriate, however, for me to remark: “That must be a beautiful painting.” In this way we use ‘must be’ to indicate that we do not have direct knowledge of the work in question.

Given the weaknesses in Hopkins’ position, which is arguably the most promising version of pessimism currently on offer (as he points out), and given that his best

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303 Thanks to Mark Sainsbury for suggesting this point.
alternative seems to be to abandon his central thesis, the pessimist is now at a severe
disadvantage as compared to the optimist.

**Part Five: Testimony in the Courtroom**

I have, so far, offered a general argument in favor of optimism about aesthetic testimony.
I will now argue that even readers who remain unconvinced by these arguments should
be willing to accept that relying on pure testimony is permissible in a legal context.
Because of the challenges inherent in obtaining reliable testimony about art, and in
knowing whether the testimony that one receives is, in fact, reliable, arriving at aesthetic
judgments by instructional testimony is preferable to arriving at them through pure
testimony whenever this is practical. To arrive at a belief by instructional testimony is to
form a justified belief on the basis of a testifier’s explicitly revealing not only the content
of her belief but also her reasons for believing it. This method of reporting on an art
work’s aesthetic value or properties is quite common among critics and connoisseurs. It
is also much more effective at helping people to improve their ability to judge art works
than is accepting assessments of them on the basis of pure testimony. We use this
method of testifying with children all the time, when we say things like “Do you see how
the bottom of your shoe is the same shape as the bottom of your foot? That is how you
tell which shoe goes on which foot.” We use instructional testimony to help people see
for themselves what makes it the case that something is true, or that a belief is justified.

Judges and juries are sometimes called upon to assess the aesthetic value of an art
work in the course of a legal proceeding. One example of such proceedings are freedom
of expression cases to determine whether an obscene novel or photograph can be censored; expert witnesses often play an important role in such cases.\textsuperscript{304} Experiencing the work for oneself is, in some cases, sufficient for deciding on the aesthetic value or disvalue\textsuperscript{305} of the work as a whole, or of one or more of its aesthetic properties. However, even if the judge has experienced the work herself, expert witnesses can help to shed additional light on the case for one side or the other. In addition, the judge may simply be insufficiently expert in the genre or tradition in question, or she may find her aesthetic education to be lacking.

In cases where the judge finds her background to be lacking, testimony from experts can be enormously vital in obtaining the best possible outcome in the case. Expert testimony has been relied upon in English courts since as early as 1782, and is an essential part of legal proceedings in most modern liberal democracies.\textsuperscript{306} Expert testimony is presently used in a large percentage of court cases, including those involving fingerprint, blood, DNA, and forensic evidence, as well as the analysis of accident and crime scenes, and in assessing costs and damages to determine the appropriate compensation. Expert witnesses are also used in cases that rely on video or audio recordings (such as security camera footage and recordings from phone taps) as evidence, and they are charged with presenting this evidence in court. As Justice Ritchie remarked in the 1962 Canadian Supreme Court case \textit{Brodie}, “It is not only relevant but desirable to consider evidence of the opinions of qualified experts as to the artistic and literary

\textsuperscript{304} For example, the trial for \textit{Naked Lunch} by William S. Burroughs included testimony about the work’s artistic value from Allen Ginsberg and Norman Mailer.

\textsuperscript{305} Only to the level of specificity required by the law, such as whether it has any at all.

\textsuperscript{306} PV Cullen (2006) "A Stranger in Blood: The Case Files on Dr John Bodkin Adams" (London: Elliott & Thompson)
The importance of expert testimony in obscenity cases has also been recognized by numerous legal scholars. Expert testimony has played an important role in numerous American obscenity cases including those for the novels: *Lady Chatterley’s Lover* by D.H. Lawrence; *An American Tragedy* by T. Dreiser; *Ulysses*, by James Joyce; *Naked Lunch*, by W. S. Burroughs; *Tropic of Cancer*, by Henry Miller; and *God’s Little Acre* by Erskine Caldwell, among others. In fact, in the United States from 1961 to 1973 the prosecution in an obscenity case was required to offer expert testimony in order to meet its burden of proof. Not only did the state have to bring in witnesses to show that “the dominant theme of the material, taken as a whole, appeals to the prurient interest” according to the community standards test. The state also had to present expert testimony to show that the work was without redeeming social value (such as artistic value) and thus not subject to First Amendment protection. Expert testimony is especially important in obscenity cases because the work at issue must be considered “as a whole,” and a sufficient understanding of the work as a whole may be beyond the abilities of the non-expert judge or juror. It can require an expert eye to identify important connections between the thematically essential elements of the work, both those that contribute to the work’s being *prima facie* obscene and those that do

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309 The Supreme Court overturned the precedent that established this requirement in *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49 (1973).
This may be one reason why expert testimony was, for a time, required in American obscenity cases.

When experts testify, the grounds of their beliefs are usually both relevant and admissible, and are generally offered by the witness. If an expert witness fails to offer the grounds of his belief up front, he is likely to be asked to share, and questioned on, his reasons for his beliefs during cross-examination. And that is as it should be.

This may, at first glance, appear to be a point in favor of Hopkins’ Requirement and unusability pessimism, which prescribes that one must grasp the aesthetic grounds of one’s aesthetic belief for that belief to be justified. However, in some cases, the grounds of an expert’s belief will count as hearsay, and will thus not be admissible in court. In Canada hearsay is generally inadmissible in court (although it is admissible in Canadian Human Rights Commission proceedings). Hearsay is usually not admissible in the United States either, although there are a significant number of exceptions to the rule in that jurisdiction. The general purpose of the hearsay rule is to prohibit the use of testimony offered outside of the courtroom to prove the truth of the matter asserted in court. United States Federal Rule of Evidence #703 stipulates the conditions under which the grounds for the beliefs that an expert witness testifies to are admissible in court.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the

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311 F Schauer (1976) 281
312 Earlier I proposed that since the Requirement does not make sense as a norm of belief formation, perhaps what Hopkins had in mind was actually a norm of assertion prohibiting asserting beliefs gained through testimony as though they were first-hand knowledge (i.e. without a disclaimer or “must be” locution). It is interesting to note that a parallel prohibition exists in the courts, in the form of the hearsay rule. This is analogous to the norm of assertion that I discussed earlier in that both prohibit the passing-on of knowledge or belief acquired on the basis of testimony.
particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. 313

This rule makes it clear that even in those cases when the grounds for the expert witness’ beliefs are inadmissible, the belief itself remains admissible.

Further, the legal system cannot reasonably require that judge or jury actually succeed in grasping the grounds for their beliefs, although it is, of course, desirable that they do so. Although instructional testimony (and other types of impure testimony) are regularly offered, it is not clear that the judge (or perhaps more likely, the jury) will always grasp the reasons behind the testifier’s belief. It would be unreasonable for the legal system to require of judges and juries that they grasp the grounds for every belief that an expert witness testifies about in order to form a justified belief about it. Since juries, in particular, are supposed to be juries of one’s peers—in other words, average citizens—it will often be the case that difficult abstract or technical matters are simply beyond the firm grasp of many jurors. Moreover, it would be impossible, as a practical matter, to assess whether such a requirement had been met, that is, whether a judge or juror had, in a particular case, successfully grasped the grounds behind the testifier’s belief. So they must be able to form justified beliefs on the basis of the expert’s

313 Federal Rules of Evidence (703)
testimony anyways. In addition, were this required, the practical implications would be devastating. Legal proceedings would grind to a halt.

Jurors must be able to form justified beliefs on the basis of testimony whether or not they have grasped the grounds for the beliefs. So it must be permissible to form beliefs and make decisions based on the pure aspect of the testimony alone (impure testimony when the reasons are not grasped). If this is permissible, then it must be the case that their beliefs are justified, at least according to whatever epistemic standard of justification is appropriate in a legal context. Since the standard of justification in the legal context is as or more demanding than the standard of justification for everyday purposes, Hopkins cannot be right that for an aesthetic belief to be justified, the believer must grasp the aesthetic grounds of the belief.

**Part Six: Conclusion**

I began this chapter by arguing that the no-difference theorist’s claim that aesthetic testimony is no less likely to result in justified beliefs than most other kinds of testimony is based on the mistake of taking aesthetic evaluations of non-art as central, and treating aesthetic evaluations of art as fringe hard cases. I proposed instead that the reliability with which justified beliefs can be formed on the basis of pure testimony varies along a spectrum with everyday testimony about non-art as being the easiest to obtain, aesthetic testimony about non-art in the middle, and aesthetic testimony about art being the most challenging, and thus lying at the far end of the spectrum.

I then went on to examine the pessimist position, agreeing with Hopkins and

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314 We will have to agree on a set of conditions that must be met for such a belief to count as justified. Perhaps they will resemble the Razian conditions that I modified for belief formation earlier.
Meskin that unavailability pessimism is untenable. This left unusability pessimism on the table. I argued that Hopkins’ Requirement is not the best available account of the conditions that must be fulfilled in order for pure testimony to justify belief formation. The alternate account that I proposed was a modified version of Joseph Raz’s account of legitimate authority. This account showed that in the strike example that Hopkins proposed, it was the lack of increased likelihood that the striking worker would get it right by listening to his friends that was fuelling the intuition that he was not justified in forming the belief that striking was the right thing to do on the basis of testimony, rather than that he had failed to grasp the moral grounds of the belief.

On this basis, I concluded that it was unlikely that Hopkins’ analogous aesthetic account would hold water, but I examined it on its own merits all the same. However, Hopkins’ claim that the pessimist can explain how we are able to take advice from friends on which movie to see because the norm governing aesthetic belief formation that he proposes lapses under certain circumstances was unsatisfying. In addition, his failure to distinguish between evaluations of whether or not another person is likely to enjoy a movie, as opposed to whether or not it is a good movie enabled me to show that not all beliefs formed on the basis of pure aesthetic testimony are pro tempore, as he had claimed. Most importantly, however, I argued that unusability pessimism in both the moral and the aesthetic contexts is untenable because it rests on an epistemological confusion, namely, the idea that it could be impermissible to use knowledge that is available, and that one knows to be available.

Finally, I brought these conclusions into the real world. Even if the reader
remains unconvinced by my general account of the possibility, under the right conditions, of forming justified aesthetic beliefs on the basis of testimony, I have shown that pure aesthetic testimony can, at least in a legal context, yield justified belief, although it is admittedly preferable to use instructional testimony whenever possible.
Conclusion

The central aim of this dissertation has been to provide a philosophical account of aesthetic value suitable for use by Canadian and American courts. The first chapter focused on locating the legal concept of artistic value within the context of both Canadian and American constitutional law. Although protecting freedom of expression is so valuable that limiting it is the exception, rather than the norm, both countries place limits on expression when it meets their technical, legal definitions of obscenity. The courts recognize, however, that without special protection for valuable speech that might otherwise count as obscene, that speech might be limited unnecessarily. Each country has thus found its own way to prevent speech with scientific, political, literary or artistic value from being deprived of constitutional protection on the basis of obscenity. Once this special protection was granted, however, it was left to the courts to determine whether, in a particular case, a work had literary or artistic value, and thus received constitutional protection despite being obscene. Both Canadian and American courts struggled with developing a standard that could be applied consistently across cases to determine not only whether a work was prima facie obscene, but also whether its obscenity could be redeemed by its artistic value. Further, in both countries the law requires not only that the work have artistic value, but that the artistic value in question be ‘serious’, although no guidance has been provided as to how the courts should make that further determination.

The courts did the best that they could with such little guidance, using a community standards test to determine whether or not a work is prima facie obscene, and
a community standards test in Canada and a reasonable person test in the United States to
determine whether or not it has artistic value. Although the community standards test is
suitable, in my view, for determining *prima facie* obscenity, in the first chapter I argued
that neither the community standards nor the reasonable person test is adequate for
determining whether or not a work has artistic value, and that the internal necessities test
should be used instead. Further, the court has yet to give any content to the requirement
that the artistic value in question be serious. This places justices whose job it is to settle
the question of whether a work that is *prima facie* obscene is eligible for constitutional
protection on the basis of its serious artistic value in a rather precarious position. One
significant deleterious effect of this lack of clarity in the law, and the resulting lack of
consistency in judicial obscenity decisions (at least until *Miller* in the United States, and
*Butler* in Canada) is the undesirable chilling effect that it has on expression.

In chapter two I set out to offer a philosophical account of artistic value, including
conditions under which such value would count as serious. My fully developed view
provides a basis for a version of the internal necessities test, the use of which I argued for
in chapter one. The first step in my proposed analysis would begin by finding a
satisfying and legally applicable way to answer the question, of whether a property of a
particular work is one of its aesthetically relevant properties. I began by considering four
existing philosophical accounts of aesthetic value, a class to which all relevant artistic
value belongs, in search of a foundation for a legally relevant theory of artistic value.
Although Scruton, Sibley, Goldman and Gaut have made interesting and valuable
contributions to the literature on aesthetic value, upon examining each of their accounts
in turn, I found that none provided a suitable basis for an account of how to determine whether a particular property of a work is one of its aesthetically relevant properties in a legal context. I then set out to develop my own account, which I call *aesthetic conventionalism*. On my view, one must begin determining whether a property is aesthetically relevant to a work by categorizing that property as standard, contra-standard or variable for the type of work in question. Doing this requires appreciating the work within the category of art in which it is appropriately appreciated, which is determined according to Walton’s guidelines. Any property that is standard for a work in a category in which it is properly appreciated is not one of its aesthetically relevant properties. In contrast, contra-standard properties of works in categories are always aesthetically relevant. The case of variable properties, from which my view takes its name, is more complicated, however. Whether or not a variable property is aesthetically relevant for a work in a category depends on the conventions of the category in question. Further, it is possible for the artist to make a variable property of a work that would otherwise be aesthetically relevant according to the conventions of the category aesthetically relevant through his artistic choices. With this method of determining, for any property of a work, whether or not that property is aesthetically relevant, in place, I moved on to the second part of the analysis.

The second step in my proposed analysis is to determine of a particular property that is aesthetically relevant whether it contributes positively or negatively to the overall aesthetic value of the work. At this point in the analysis, in particular, the judge or jury may need to call upon one or more expert witnesses. Although this is, and has for
centuries been, common practice in courts around the world, some unique philosophical problems may arise when expert witnesses are asked to testify about the aesthetic value of an art work. I addressed these potential worries in chapter four. If the work is found to have at least one aesthetically relevant property that enhances the overall aesthetic value of the work, it counts as having artistic value for legal purposes, on my view.

The final step in developing a legally applicable account of artistic value is to identify what it means for a work to have not only artistic value, but ‘serious’ artistic value. At the end of chapter two I argued that a work has serious artistic value just in case if it could not be less *prima facie* obscene without its overall aesthetic value decreasing.

In chapter three I addressed the question of how the moral properties of artworks can influence their aesthetic value. Determining whether or not a work would be less aesthetically valuable if it were less sexually explicit (that is, whether or not its artistic value counts as serious) can be relatively straightforward for works *without* moral flaws. Works with moral flaws (many of which are *prima facie* obscene), must similarly be shown to have serious artistic value if they are to receive constitutional protection. In the case of works with moral flaws, however, this is somewhat more complicated. For a work with a moral flaw that is *prima facie* obscene to count as having serious artistic value, it must be the case that the features of the work that make it *prima facie* obscene make a positive contribution to the work’s overall aesthetic value. In chapter three I set out to show that it is possible for a moral flaw in a work to have a positive impact on the work’s overall aesthetic value.
To this end, the two main aims of the chapter were to offer a new definition of “moral flaw”, by distinguishing between two types of flaw that had previously been conflated and to argue that a moral flaw of either type can, under the right circumstances, enhance the overall aesthetic value of the work in which it appears. I began by analyzing the way that the term “moral flaw” has been used in the literature on the relationship between moral and aesthetic value. In so doing, I illustrated that the parties to the debate are neither explicit about the way that each uses the term, nor consistent in their use of it. In order to clear up this confusion, I explicitly defined two types of moral flaw that make appearances in the literature. I invoked imaginative resistance in order to clearly define surface moral flaws, and used an analysis of imaginative resistance to discredit the autonomist position. I then argued that the presence of a surface moral flaw in a work can have a positive impact on the work’s cognitive value. Although, by definition, the presence of a surface moral flaw tends to tempt the reader to disengage imaginatively from the work, when the author succeeds in maintaining the reader’s imaginative engagement through the work, and the reader reaches a new moral understanding through his experience of it, this can enhance the cognitive value of the work. Further, I argued that the work’s having a surface moral flaw can enhance its aesthetic value directly when something valuable is gained by the setting up of and enabling the audience to overcome the flaw on the part of the artist.

Similarly, I argued that the presence of a deep moral flaw can enhance the overall aesthetic value of a work, however, in this case I argued that deep moral flaws can do so by enhancing the cognitive value of the work, the increase in which in turn has a positive
impact on the work’s aesthetic value. In this section, I began by arguing that works with
deep moral flaws (whether or not they have surface moral flaws as well) can teach their
readers about, for instance, the nature of immorality. I then argued that a work’s
cognitive value can increase in virtue of an increase in its aesthetic value. *Moby Dick*
would be a lesser work aesthetically without the encyclopedic knowledge of whaling that
its readers gain, not to mention the presence of the literary devices that this background
knowledge enables Melville to employ. In just the same way, de Sade’s *Justine* would be
aesthetically inferior without the deep (and surface) moral flaws that run throughout it,
intertwined with the plot, and that make the use of many of its literary devices possible.

The fourth chapter focused on defending the claim that it is legitimate for courts
to rely on expert testimony in determining whether or not a work has artistic value. I
began by outlining the positions in the debate about whether or not pure testimony
(testimony unaccompanied by supporting reasons) can be a source of justified belief. I
argued first against the no-difference theorist’s claim that there is no difference between
aesthetic testimony and most other sorts of testimony with respect to their ability to yield
justified belief. I then attacked the pessimist’s claim that neither moral nor aesthetic
testimony can result in justified belief, regardless of the circumstances. Since the
pessimist’s aesthetic account was derived from his account of moral testimony, I used a
well-respected account of authority to undermine the intuitions on which the pessimist’s
case for the illegitimacy of forming beliefs on the basis of moral testimony relies. I then
offered independent criticisms of his argument against the legitimacy of forming beliefs
on the basis of aesthetic testimony. My primary criticism of this view (which applies
equally to his view of moral testimony) was that it rests on an epistemological confusion. His view, unusability pessimism, is that testimony (either moral or aesthetic) cannot be the source of justified beliefs because some norm (that is not at play in most other cases of testimony) makes it illegitimate to use testimony that nonetheless makes knowledge available and that the hearer knows to be available. This view relies on the false assumption that it is possible for a norm to prohibit the use of available knowledge, which in turn presupposes that one has control over whether or not to make use in belief formation of knowledge that is made available. This leaves the optimist, who argues that it is possible, under the right circumstances, to form justified beliefs on the basis of pure aesthetic testimony as the last remaining option. Although the grounds for expert witnesses’ beliefs are most often relevant and admissible in court, even in cases when the judge or jury is unable to fully grasp those grounds, and in cases when they are inadmissible, it is possible for triers-of-fact in a legal case to form justified beliefs on the basis of pure testimony alone. With the legitimacy of pure aesthetic testimony secured, my account of how determinations of artistic value can be made within a legal context was complete. When *prima facie* obscene art works come before the court seeking constitutional protection on the basis of their artistic value, judges now have a clear path to follow in making that determination. The improved transparency and greater consistency that judges’ following this rubric would provide would decrease the chilling effect on the artistic community, and thereby be of value to art’s makers, purveyors and audiences alike.
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Representative example of the Today Series (aka Date Paintings), On Kawara (2000)
Waterloo Bridge, Claude Monet (1899-1901)

Waterloo Bridge, Claude Monet (1899-1901)
Waterloo Bridge, Claude Monet (1899-1901)
### Appendix B: Table of Authorities

<table>
<thead>
<tr>
<th>Citation</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abrams v. United States, 250 U.S. 616</td>
<td>1919</td>
</tr>
<tr>
<td>Bella Lewitzky Dance Foundation v. Frohmayer, 754 F. Supp. 774</td>
<td>CD Cal. 1991</td>
</tr>
<tr>
<td>Brandenburg v. Ohio, 395 U.S. 444</td>
<td>1969</td>
</tr>
<tr>
<td>Canadian Charter of Rights and Freedoms</td>
<td></td>
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<tr>
<td>Canadian Criminal Code</td>
<td></td>
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<td>Canadian Human Rights Act</td>
<td></td>
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<tr>
<td>Dennis v. United States, 341 U.S. 123</td>
<td>1951</td>
</tr>
<tr>
<td>Federal Rules of Evidence (703)</td>
<td></td>
</tr>
<tr>
<td>Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123</td>
<td>1992</td>
</tr>
<tr>
<td>Ginzburg v. United States, 383 U.S. 463</td>
<td>1966</td>
</tr>
<tr>
<td>Gitlow v. New York, 268 U.S. 652</td>
<td>1925</td>
</tr>
<tr>
<td>Hannegan v. Esquire, Inc., 327 U.S. 146</td>
<td>1946</td>
</tr>
<tr>
<td>Hicklin (R.v) (1868), LR 3 QB 360</td>
<td></td>
</tr>
<tr>
<td>Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R 927</td>
<td></td>
</tr>
<tr>
<td>Jacobellis v. Ohio, 378 U.S. 226</td>
<td>1964</td>
</tr>
<tr>
<td>Keegstra (R. v.), [1990] 3 S.C.R. 211</td>
<td></td>
</tr>
<tr>
<td>Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003)</td>
<td></td>
</tr>
<tr>
<td>Memoirs v. Massachusetts, 383 U.S. 413</td>
<td>1966</td>
</tr>
<tr>
<td>Miller v. California, 413 U.S. 15</td>
<td>1973</td>
</tr>
<tr>
<td>NEA v. Finley, 524 U.S. 569</td>
<td>1998</td>
</tr>
<tr>
<td>Oakes (R. v), [1986] 1 S.C.R. 103</td>
<td></td>
</tr>
<tr>
<td>Paris Adult Theater I v. Slaton, 413 U.S. 49</td>
<td>1973</td>
</tr>
<tr>
<td>Pope v. Illinois, 481 U.S. 497</td>
<td>1987</td>
</tr>
<tr>
<td>RJR MacDonald v. Canada (Attorney General) [1995] 3 S.C.R. 199</td>
<td></td>
</tr>
<tr>
<td>Rosen v. United States, 161 U.S. 29</td>
<td>1896</td>
</tr>
<tr>
<td>Rosenberger v. University of Virginia, 515 U.S. 819</td>
<td>1995</td>
</tr>
<tr>
<td>Roth v. United States, 354 U.S. 476</td>
<td>1957</td>
</tr>
<tr>
<td>Speiser v. Randall, 357 U.S. 513</td>
<td>1958</td>
</tr>
<tr>
<td>Towne Cinema Theatres Ltd. (R.v.), 1 S.C.R. 494 (1985)</td>
<td></td>
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<tr>
<td>United States Code</td>
<td></td>
</tr>
<tr>
<td>Whitney v. California, 274 U.S. 357</td>
<td>1927</td>
</tr>
</tbody>
</table>
Bibliography


203


VITA

Jennifer Amey Neilson grew up in Vancouver, British Columbia, and lived in Trois-Rivières, Québec in 1993-94. She graduated from North Delta Senior Secondary school in Delta, British Columbia. She entered the University of British Columbia in Vancouver in 1999, where she participated in the Arts One program. She spent a year abroad studying at the Universidad de Chile in 2001-2002, and received the degree of Bachelor of Arts (Hons.) in philosophy from the University of British Columbia in May 2003. During the next year she taught English as a second language in Vancouver. In January 2005, she entered the Master of Arts program at the University of British Columbia in January 2005. She spent a semester studying abroad at the University of Auckland, New Zealand in Spring 2006, and received the degree of Master of Arts in philosophy from the University of British Columbia in May 2006. In September 2006 she entered the Graduate School of The University of Texas at Austin. She and her future husband James spent the spring of 2008 as visiting students at Oxford University, and the fall of 2008 in Vancouver, before returning to complete their studies at UT Austin.

Permanent E-mail Address: jenn.neilson@gmail.com

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