"Recognized Stature" Revisited: Could "Community Standards" Rescue Restrictive "Recognized Stature" Definition in Castillo v. G&M Realty L.P.?

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Note

“RECOGNIZED STATURE” REVISITED: COULD “COMMUNITY STANDARDS” RESCUE RESTRICTIVE “RECOGNIZED STATURE” DEFINITION IN CASTILLO v. G&M REALTY L.P.?

CAITLIN M. MCGRAIL*

“The making of a work of art is one historical process among other acts, events, and structures — it is a series of actions in but also on history.”

I. THE GARDEN OF EARTHLY DELIGHTS: SHOULD PROTEST ART BE PROTECTED UNDER THE VISUAL ARTISTS RIGHTS ACT?

On May 25, 2020, the death of George Floyd sparked protests around...
the country.3 In the wake of this nationwide outcry, artists around the country created public protest art with the potential of becoming “monuments of sorts” that “synthesize a moment” in history.4 Protest art takes on the expressive intentions of its creators, imbuing visual media with powerful iconography of resistance.5 Recent examples of protest art include mural portraits of George Floyd on city streets and other images advocating for the Black Lives Matter movement.6 Protest art is “timeless iconography” that inspires vigorous affinity for opposing the status quo.7 Notwithstanding protest art’s significance in the contemporary zeitgeist and its potential historical impact, whether protest art, and public art generally, is legally protected from destruction under the Visual Artists Rights Act (VARA) is an open question.8 In answering this question, courts must turn to the “recognized stature” standard as VARA only prohibits destruction of art when it meets this standard.9


4. See id. (quoting Dorian Sylvain, artist and originator of Mural Moves, a Chicago community arts campaign that mobilized mural painting in Chicago neighborhoods during the summer of 2020).


7. LIZ M CQUISTON, P ROTEST!: A H ISTORY OF  S OCIAL AND  P OLITICAL P ROTEST G RAPHICS 6 (Princeton Univ. Press ed., 2019) (describing impact of protest art as it “represent[s] a power struggle; a rebellion against an established order and a call to arms, or a passionate cry of concern for a cause”).


9. See infra Section II.A and accompanying text for a description of the “rec-
The Second Circuit’s recent definition of “recognized stature” in *Castillo v. G&M Realty L.P.* highlights the challenges courts face in applying the standard. In *Castillo*, the Second Circuit considered whether the destruction of graffiti collective 5Pointz in Queens, New York violated VARA. In affirming the Eastern District of New York’s finding of violations of VARA, the Second Circuit refined the definition of “recognized stature” to place more emphasis on the opinion of art experts than may be appropriate based on administrative guidance and the Act’s legislative history. This Note critiques the Second Circuit’s definition of “recognized stature” because protest art, and public art generally, may fall outside this definition’s limited scope and thus outside the ambit of VARA’s protection, with adverse consequences for cultural and historical preservation.

Acknowledging the inherent challenges in judicial treatment of “recognized stature,” this Note proposes the application of the “community standards” analysis of First Amendment jurisprudence to evaluate recognized stature. Part II provides the history and relevant case law of VARA, offers context for protest art in the visual arts canon, recounts judicial challenges with adjudicating art, and describes the role “community standards” plays in First Amendment analysis. Part III describes the background of *Castillo* with a particular focus on litigation at the district court level. Part IV synthesizes the Second Circuit’s affirmation of the VARA

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10. 950 F.3d 155 (2d Cir. 2020), cert. denied, 141 S. Ct. 363 (2020).
11. See, e.g., id. at 166 (“We conclude that a work is of recognized stature when it is of high quality, status, or caliber that has been acknowledged as such by a relevant community.” (first citing Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 324–25 (S.D.N.Y. 1995), aff’d in part, vacated in part, rev’d in part, 71 F.3d 77; then citing Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999))); U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 77–78 (2019) (“[A]bsent statutory text or direct legislative history, courts were left to develop a workable standard on their own, and despite Congress’ intentions, such battles have occurred.”); Emma G. Stewart, Note, United States Law’s Failure to Appreciate Art: How Public Art Has Been Left Out in the Cold, 97 WASH. U. L. REV. 1233, 1249 (2020) (“The need to assess recognized stature . . . has resulted in costly litigation for both artists and landowners alike. Because a definition of recognized stature is not included in the statute, deciding whether or not a work is eligible for protection from destruction . . . has been a matter of interpretation for the courts.” (footnote omitted)).
12. See infra notes 107–18 and accompanying text for a history of 5Pointz, and Section III for a narrative analysis of the Second Circuit’s opinion.
13. See *Castillo*, 950 F.3d at 166 (noting “recognized stature” determinations should usually rely on expert opinion) and Section II.A for a description of VARA’s legislative history and administrative guidance.
14. For a complete critical analysis of the inadequacies of the Second Circuit’s application of “recognized stature,” see infra Section V.A.
15. See supra note 11 and accompanying text for an explanation of how the absence of Congressional guidance on the “recognized stature” standard resulted in an arguably imprecise judicial definition. For an evaluation of the feasibility of applying the “community standards” doctrine for findings of recognized stature, see infra Section V.B.
violations and damages award in *Castillo*. Part V dissects the Second Circuit’s definition of “recognized stature” and recommends a broader definition of the term that incorporates “community standards” analysis. Finally, the Note concludes in Part VI by contemplating the consequences of losing cultural and historical heritage should protest art fail to gain legal protection.

II. The Birth of Venus: Why Was VARA Enacted and Why Doesn’t It Achieve These Goals?

VARA attempted to protect artists and promote cultural preservation, though courts interpreting its provisions have achieved mixed results. “Recognized stature” remains controversial, primarily due to its ambiguity, even close to thirty years after VARA was enacted. In particular, the Second Circuit’s recent revision to the judicial definition of “recognized stature” in *Castillo* may undermine the cultural preservation of protest art. Protest art spans the art historical canon from the ancient to the present, offering a unique cohesion of a political moment and an artistic viewpoint that resonates with both modern audiences and their future counterparts.

In rebuke of the Second Circuit’s apparent dismissal of community perspective in evaluating whether art is protected, and in response to anxiety about potential judicial transgressions when applying “recognized stature,” this Section explores “community standards” jurisprudence as a potential blueprint to remedy these deficiencies. Subsection A describes the enactment of VARA and subsequent litigation interpreting its provisions. Subsection B illustrates the history of protest art and illuminates its relevance in contemporary life. Subsection C outlines the unsettled precedent of art adjudication. Subsection D presents a brief overview of the ways the Supreme Court has used the “community standards” concept to evaluate whether materials are obscene under the First Amendment and the evolution of “community standards” at the district court level.


17. See infra notes 36–57 and accompanying text for an overview of judicial interpretation of “recognized stature.”

18. See infra notes 31–35 and accompanying text for critiques of “recognized stature.”


20. See supra notes 4–7 and accompanying text for a description of the significance of protest art.
A. Impression, Sunrise: What is VARA?

Enacted in 1990, VARA codifies the moral rights of artists in alignment with international precedent. Moral rights stem from the belief that artists hold more than an “economic interest” in their creations and are entitled to protection of the “creative persona” inherent in their artwork. In addition to protecting moral rights, VARA supports cultural preservation. VARA represents the United States’ commitment to the Berne Convention for the Protection of Literary and Artistic Works (“the Berne Convention”). The United States joined the Berne Convention in 1988, though the Convention’s first signatories date to 1886.


23. Robinson, supra note 22, at 1939 (describing moral rights protection). Robinson notes that art—especially public art—has the potential to “ha[ve] a lasting effect on the artist’s reputation, with impact on his dignity and career.” Id. Robinson notes that visual art is different from other types of art because “a disproportionate percentage of the value of a work of fine art is in the physical object created, rather than the exploitation of derivatives or copies.” Id. at 1936 (footnote omitted). Another commentator similarly calls attention to the difference between economic rights and moral rights: “[u]nlike the economic protection provided by copyright law, moral rights were created to protect an artist’s honor and reputation.” Stewart, supra note 11, at 1235–36.

24. See Robinson, supra note 22, at 1936 (describing twofold aims of VARA). In addition to protecting moral rights, “VARA recognizes a public interest in the encouragement of artists to work and in the preservation of their work once created[,]” embracing a “public duty to preserve the nation’s art and cultural patrimony . . . .” Id.

25. See Damich, supra note 22, at 945–47 (describing history of VARA). VARA’s protections align with article 6bis of the Berne Convention, though Damich argues that VARA “does not bring United States law into conformity with article 6bis.” Id. at 947. Namely, article 6bis protects “all literary and artistic works[,]” (not just visual art); provides for additional moral rights outside of those protected by VARA; and extends the moral rights protections past the artist’s lifetime for “as long as economic (copyright) rights.” Id. Damich additionally asserts that VARA’s sanctioning of moral rights waivers fails to acknowledge “article 6bis’s concern about protecting the artist even ‘against himself.’” Id.

tects artists’ “right of attribution and . . . right of integrity.” 27 This Note concerns the scope of VARA’s protection of the right of integrity, through which artists can either stop or claim damages “for the intentional distortion, mutilation, modification, or destruction of [their] work.” 28 Under VARA, artists may “prevent any destruction of a work of recognized stature . . . .” 29 Additionally, VARA provides caveats for protection. 30

Both VARA and the “recognized stature” standard have been the subject of significant criticism since VARA’s inception. 31 VARA’s most vehement critics argue that its protections impermissibly infringe “basic property and contract rights[.]” 32 Another scholar asserts that VARA’s definition of visual art is unforgivably narrow and the “recognized stature” requirement should be done away with entirely. 33 A less censorious critic

original signatories). Ten countries signed on to the Berne Convention at its inception. See id.


28. Id. at 1936 (describing VARA’s breadth). VARA protects all visual art from forms of damage outside of destruction, such as “distortion, mutilation, and modification . . . prejudicial to an artist’s honor and reputation . . . .” Id. at 1946. One commentator notes that the differing threshold for protection for destruction creates a “loophole” that “incentivizes property owners to destroy artwork that they have damaged or wish to modify. . . . if not of recognized stature, a modified or damaged work may give rise to liability— completely destroy that work, and the liability vanishes.” Stewart, supra note 11, at 1250.

29. 17 U.S.C.A § 106A(a)(3)(B) (West 2021). Notably, the “recognized stature” requirement only applies to destruction of artworks. See Robinson, supra note 22 at 1946–47. The prohibition of destruction of artwork of “recognized stature” is not a part of the Berne Convention because destroyed artwork cannot injure an artist’s standing. See id. at 1940. A scholar analyzing “VARA’s threat to traditional property and contract rights” argues that VARA oversteps by providing a remedy for destruction when the Berne Convention itself does not provide this protection. Drew Thornley, The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal, 67 CLEV. ST. L. REV. 351, 369 (2019). Furthermore, Thornley argues that “recognized stature” provision can be repealed without sacrificing the United States’ adherence to the Berne Convention. See id.

30. See Robinson, supra note 22, at 1948 (“Works that are incorporated into buildings with the artist’s consent and that may not be removed without mutilating or destroying the work are not protected by VARA.”). See infra note 56 and accompanying text for a further discussion of the lack of protection for illegally installed artworks.

31. See Damich, supra note 22, at 962 (“Limiting the right against destruction to works of recognized stature is inconsistent with moral rights theory, the Berne Convention, and the United States copyright law tradition of refraining from judgments as to quality.”); see also Robinson, supra note 22, at 1936 (describing “recognized stature” as a “particularly contentious provision of VARA”).

32. Thornley, supra note 29, at 364 (criticizing “recognized stature” standard). Thornley argues “[t]he 5Pointz ruling reveals the substantial threat the Visual Artists Rights Act poses to our nation’s long-standing commitment to private property and freedom of contract.” Id. at 370.

33. See Stewart, supra note 11, at 1257–59 (suggesting that “[i]n order to adequately protect public artists and serve VARA’s purposes,” VARA’s definition of
lamented the disappointing inclusion of the “recognized stature” standard and predicted the potential for judicial misappropriation. The Castillo defendants joined the chorus critical of the “recognized stature” standard; maintaining that the “recognized stature” standard is “unconstitutionally vague” in their attempt to overturn the Second Circuit’s holding. Congress’ lack of specificity, particularly on the function of the “recognized stature” standard, undercuts the implementation of VARA’s aspirational policies and enables judicial instability. To this end, one scholar characterized VARA cases as reflecting uncertainty about the provision’s function and evidentiary standards. Despite this dearth of legislative guidance, the Southern District of New York in Carter v. Helmsley-Spear, Inc. deftly supplied the first test for courts to determine recognized stature. In Carter, the Southern District of New York’s “recognized stature” test required plaintiffs to “make a two-tiered showing: (1) that the visual art in question has ‘stature,’ i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” In particular, the visual art should incorporate more types of art and the “recognized stature” requirement be eliminated (footnote omitted). The statute’s definition of visual art is limited to a “painting, drawing, print, or sculpture,” and “still photographic image[s] produced for exhibition purposes only” in their original form or “in a limited edition of 200 copies or fewer[.]” The statute’s definition of visual art is limited to a “painting, drawing, print, or sculpture,” and “still photographic image[s] produced for exhibition purposes only” in their original form or “in a limited edition of 200 copies or fewer[.]” The statute’s definition of visual art is limited to a “painting, drawing, print, or sculpture,” and “still photographic image[s] produced for exhibition purposes only” in their original form or “in a limited edition of 200 copies or fewer[.]” The statute’s definition of visual art is limited to a “painting, drawing, print, or sculpture,” and “still photographic image[s] produced for exhibition purposes only” in their original form or “in a limited edition of 200 copies or fewer[.]”
Southern District of New York’s clarification that “plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact” to fulfill this definition forecasts the importance of art experts.\(^{41}\) *Carter’s* test remains dominant in contemporary adjudications of “recognized stature.”\(^ {42}\) In particular, the court’s emphasis on the need for expert witnesses was particularly persuasive for future adjudicators.\(^ {43}\)

After *Carter*, courts continued to flesh out VARA’s boundaries.\(^ {44}\) Scholarly analyses of “recognized stature” determinations indicate that courts have taken differing approaches when weighing the necessity of expert testimony in such cases.\(^ {45}\) Community relevance supported a finding of “recognized stature” in *Hanrahan v. Ramirez*\(^ {46}\) in the Central District of California.\(^ {47}\) The *Hanrahan* court noted that the artwork at issue, an anti-drug and alcohol mural created by a local artist and approximately 300 community members, met the “recognized stature” standard.\(^ {48}\) To support this finding, the court cited to the recognition of the mural in a national mural contest and exhibition at the Canon Building of the United States House of Representatives.\(^ {49}\) Despite the absence of expert testimony, corresponding evidence of public acclaim was sufficient to find “recognized stature” for the *Hanrahan* court.\(^ {50}\)

\(^ {41}\) *Carter*, 861 F. Supp at 325 (providing additional detail on application of “recognized stature” test).


\(^ {43}\) See Monika Isia Jasiewicz, “A Dangerous Undertaking”: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases, 26 YALE J.L. & HUMAN. 143, 176 (2014) (noting significance of expert witness testimony in VARA cases); *Robinson, supra* note 22, at 1951 (“The judge’s comments on the need for expert testimony, his formulation of a two-pronged test for recognized stature, and his insistence on the preservation rationale for the provision have proved both influential and unfortunate.”); *see also* *Hunter v. Squirrel Hill Associates, L.P.*, 413 F. Supp. 2d 517, 520 (2005) (“[Recognized stature] finding generally depends upon the testimony of experts.”).

\(^ {44}\) See *supra* notes 36–56 for a description of VARA’s litigation history.

\(^ {45}\) See *Robinson, supra* note 22, at 1948–63 (reviewing “recognized stature” jurisprudence and noting lack of consistency in judicial deference to expert opinions).


\(^ {47}\) See id. at *4.

\(^ {48}\) See id. at *4 (describing creation of mural and finding that work meets “recognized stature” standard).

\(^ {49}\) See id. at *4 (reasoning that mural met “recognized stature” due to level of recognition).

\(^ {50}\) See *Robinson, supra* note 22, at 1954 (“[R]ecognized stature was found based on national and local community reaction, with little reference to the world
Similarly, in *Martin v. City of Indianapolis*, the Seventh Circuit applied the *Carter* test and affirmed a violation of VARA when the plaintiff supplied letters, articles, and an award program in support of “recognized stature” but no expert testimony. Nevertheless, in *Scott v. Dixon*, the Eastern District of New York held that a “single article” about the work at issue that does not address “the artistic merit of the [work at issue]” in the absence of other evidence does not support a finding of recognized stature, even if other works by that artist may be of “recognized stature.” In *English v. BFC & R East 11th Street LLC*, the Southern District of New York held that VARA also does not protect the destruction of art created on property without the permission of the property owner. Reviewing “recognized stature” jurisprudence since VARA’s enactment, the United States Copyright Office advocates for a more expansive definition of “recognized stature” that better aligns with Congress’s intentions to eschew a “battle of expert witnesses” in favor of extending protection to art that is meaningful in community contexts.
B. Guernica

Why Is Protest Art Deserving of Legal Protection?

Visual art has provided a medium for protest for centuries. Protest art can take a variety of forms, though this Note is particularly concerned with public protest art, such as graffiti and murals. Political graffiti has been recorded as early as ancient Rome and is inescapably entwined with the aesthetics of its historical context. Following artistic progression in the United States in the 1970s, graffiti enjoys broad recognition and appreciation. As the term “graffiti” can conjure connotations of vandalism and other illegal acts, graffiti may now bear the moniker of relatively uncontroversial names such as “street art or urban art.” Nevertheless, these art forms retain an aura of proscribed and spontaneous creativity. Contemporary graffiti has entered the popular imagination through the works of prominent graffiti artists, such as Banksy. The popularity of street art


59. See McQuiston, supra note 7, at 7 (“Social discontent and political protest have been expressed visually as well as verbally throughout the ages.”).

60. See TV Reed, Protest as Artistic Expression, in Protest Cultures, A Companion 78–84 (Kathrin Fahlenbrach, Martin Klimke & Joachim Scharloth eds., 2016) (noting protest art has developed in multiple mediums, including theatre, performance art, music, and “[g]raphic arts,” including posters and murals).

61. See Johannes Stahl, Graffiti, in Protest Cultures 228 (Kathrin Fahlenbrach, Martin Klimke & Joachim Scharloth eds., 2016) (describing history of graffiti as “a continuous factor in the history of protest.” Id. at 229.

62. See id. at 228 (“In our contemporary use, the term also can label an art form, which . . . has developed an own pictural grammar and reached worldwide extension after forceful impulses out of New York and Philadelphia since the 1970s.”).

63. Id. at 231 (describing change in graffiti vocabulary due to ongoing criminalization and scrutiny).

64. Id. at 231 (noting these types of art still reflect “noncommanded and partly nonpermitted public expression . . .”). Stahl notes though graffiti originated from the ancient Greek word for writing (graphein) and was used in Renaissance Italy to refer to a “decorative technique,” it took on its modern meaning in nineteenth century France when “publications focused on graffiti as illegal, scriptural, or pictural use of public walls.” Id. at 228.

65. See Castillo v. G&M Realty L.P., 950 F.3d 155, 168 (2d Cir. 2020), cert. denied, 141 S. Ct. 363 (2020) (“Banksy’s work is nonetheless acknowledged, both by the art community and the general public, as of significant artistic merit and cultural importance.”). The Second Circuit states that “‘street art’ . . . has emerged as
represents the progression of the history of art from traditional canvases on museum walls, to “readymade” art and pop art in the twentieth century that brought artifacts of daily life into the museum space. Street art pushed this further by eliminating the museum context entirely—art can now be found on street corners, sidewalks, and building walls.

Murals also serve as an important vehicle for protest art. Due to their large size and placement on local streets, murals have the potential to transform community spaces into enduring memorials to activism. Throughout the summer of 2020, artists created numerous murals across the United States to “amplify” the current state of societal inequities. Protest art is not only a visual catalyst deployed in the contemporary moment, but a tool that can coalesce powerful emotions and captivating imagery for use in the present; it will ultimately become testimony of times gone by for future generations.

C. The Thinker

Courts have long struggled with how to adjudicate art due to its inher-
a major category of contemporary art.” Id. at 167. The court then quoted with approval Richard Chused’s scholarship describing the cultural impact of street art that has attained the distinction of “high art.” Id. at 167–68 (quoting Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 583 (2018)). Chused notes that “graffiti and street art” has developed into a “major, quickly evolving, internationally recognized art form.” Chused, supra note 65, at 583.


67. See id. at 898–900 (asserting that street art continues transition of art from being mediated by museums to being integrated into everyday life: “[w]hereas pop art grappled with whether ‘everyday objects’ could be art, street art grappled with whether ‘post-museum art’ could exist. Could art be consumed by the masses where the masses exist?” (footnotes omitted)). Peplow notes that though art has moved outside the museum space, the conventional art establishment still intercedes with auctions and museum exhibitions of street art. Id.

68. See Reed, supra note 60, at 84 (describing acclaimed, “deeply political” works of notable twentieth-century Mexican muralists as prominent examples of the “modernist mural art movement”).

69. See id. (Operating “on a grander scale,” “[m]urals can be integrated as permanent parts of neighborhoods, where passersby are confronted with literally larger than life images of protest.”).

70. See Arndt & Green, supra note 8 (“Artists . . . have joined the movement and created street art throughout the United States, including Brooklyn, San Francisco, Austin, Cincinnati, and Charlotte.”).

71. See supra notes 4–7 and accompanying text for scholarly interpretation about the significance of protest art.

72. Auguste Rodin, *The Thinker* (Musée Rodin 1903), http://www.musee-rodin.fr/en/collections/sculptures/thinker-0 [https://perma.cc/VU5D-BUT8] (last visited July 9, 2021). One of Rodin’s most enduring and recognizable sculptures, this work captures a man entranced by the workings of his inner mind while simultaneously evoking the latent potential of his powerful physicality.
Judicial handwringing about making value judgments about art is commonly traced to Justice Oliver Wendell Holmes’ 1903 copyright opinion, *Bleistein v. Donaldson Lithographing Co.* Justice Holmes famously warned his future counterparts from making “aesthetic judgments” due to their lack of experience evaluating the merits of art. This long-established approach to adjudicating aesthetics is termed the “doctrine of avoidance” or “aesthetic neutrality.” Today, judges “perform analytical jujitsu” when confronted with aesthetic judgment, giving the perfunctory nod to *Bleistein* before applying an “ad hoc aesthetic theory of the court’s own devising.” Justifications for this evasive approach include judges’ lack of relevant expertise and their concern about censorship, and the randomness of subjective appraisals. Nevertheless, government bodies, including courts, frequently make aesthetic judgments in varied aspects of law, including tax, customs, freedom of speech, land use, and intellectual property. Within the context of this Note, judges confront aesthetic...
judgments when determining whether the art at issue meets the “recognized stature” standard. Commentators propose varying approaches to reconcile the necessity of aesthetic judgments with its perceived risks. This Note explores the applicability of obscenity jurisprudence, specifically “community standards” analysis, for “recognized stature” determinations.

D. American Gothic: What Are “Community Standards,” What Role Do They Play in First Amendment Jurisprudence, and What Do They Have to Do With Art?

Similar to “recognized stature,” courts have struggled with how to determine whether work is obscene and thus unshielded by the First Amendment. Both obscenity and “recognized stature” require judicial assessment of inherently subjective material. In that context, the Supreme Court has developed the concept of “community standards” as a method of adjudicating issues of obscenity.

Id. (footnotes omitted)).

80. See id. at 444 (“One place where VARA unavoidably demands aesthetic judgment is in its protection against the destruction of works ‘of recognized stature.’” (citing 17 U.S.C.A. § 106A(a)(3)(B) (West 2021)).

81. Compare id. at 458–66 (describing fitting aesthetic judgments within a “First Amendment spectrum”), with Walker & Depoorter, supra note 73, at 376–79 (advocating for adoption of “Community of Practice” method).

82. See infra Section II.D for an overview of obscenity jurisprudence. This Note considers the applicability of the “community standards” approach as opposed to other theoretical frameworks because the Eastern District of New York referenced “community standards” analysis. See infra notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York’s discussion of “community standards.”


84. See Soucek, supra note 75, at 419 (2017) (“Obscene material falls outside the protections of the First Amendment . . . [b]ut not until 1973, in Miller v. California, did the Court finally coalesce around a definition.”).

85. See id. at 382 (“Aesthetic judgment pervades the law . . . . [I]n obscenity cases . . . and throughout intellectual property law, judges and other government officials are constantly deciding what is art, or what counts as artistically or aesthetically valuable.”).

86. See Note, Community Standards, Class Actions, and Obscenity Under Miller v. California, 88 HARV. L. REV. 1838, 1841 (1975) (“’Obscenity’ is understood to be a factual inquiry into what is offensively prurient to particular communities . . . .”).
In evaluating whether a work is obscene, the Supreme Court first considers “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . .”87 In *Miller v. California,*88 the Supreme Court granted “broad discretion” to judges and juries to determine which community’s standards should be applied.89 Additionally, the Supreme Court established that “community standards” should be “statewide standards” as opposed to “national standard[s].”90 In subsequent obscenity cases, the Supreme Court continued to sustain judges and juries deciding “the content of whatever community standards they apply.”91

More recently, in *Brown v. Entertainment Merchants Association,*92 the Supreme Court found a California statute that incorporated “community standards” to impose limitations on the sale of “violent video games” to minors unconstitutional.93 In a concurring opinion, Justice Alito took issue with the “community standards” section of the statute.94 Justice Alito found that the statute’s reference to “community standards” did not evade constitutional course correction, because he reasoned that there is a lack of community accord about what constitutes inappropriate violence that is not at issue in obscenity determinations.95


88. Id.

89. Note, supra note 86, at 1842 (describing import of *Miller* test in obscenity determinations and Supreme Court’s deference to adjudicators in deciding “the relevant community, and in applying that community’s measure of obscenity.”).

90. Id. (“[T]he Court . . . criticiz[ed] at length the national standard requirement . . . .”). In *Miller*, the Supreme Court course corrected “national community standards” utilized in prior cases due to their lack of workability. See id. at 1841; *see also* Soucek, supra note 75, at 419–20 (“[T]he first two prongs of the *Miller* test—both of which are judged against *local* standards” (emphasis added)).

91. Note, supra note 86, at 1842 (discussing Jenkins v. Georgia, 418 U.S. 153 (1974) and Hamling v. United States, 418 U.S. 87 (1974)). Discussing *Jenkins*, the author notes that the Supreme Court does not require identification of the community whose standards are to be applied. *See id.* In its consideration of *Hamling*, the author characterizes the Supreme Court as considering the jury pool the relevant community and giving “jurors free [rein] to apply their own conceptions of community mores.” *See id.* at 1844.


93. *Id.* at 788 (“We consider whether a California law imposing restrictions on violent video games comports with the Fourth Amendment.”). The California statute, Cal. Civ. Code §§ 1746–5 (2009), defined these video games in part as those “patently offensive to prevailing standards in the community as to what is suitable for minors.” *Id.* at 789 (quoting Cal. Civ. Code § 1746(d)(1)(A)). The majority found the statute unconstitutional as it did not pass strict scrutiny. See *id.* at 805.


95. *See id.* (describing applicability of “community standards”). Justice Alito characterized the California statute as attempting to skirt “vagueness problems” by couching its “community standards” within the scope of *Miller*. *Id.* at 808, 812. In finding that “community standards” were not applicable, Justice Alito considered
“Community standards” entered the “recognized stature” conversation when the Eastern District of New York considered the advisory jury opinion while determining whether the destruction of 5Pointz violated VARA in Castillo.96 The Eastern District of New York noted advisory juries are “particularly appropriate in cases involving community-based standards.”97 The Castillo petitioners cited Justice Alito’s reasoning in their petition for certiorari to similarly distinguish “community standards” in the obscenity context from “community standards” in the “recognized stature” context.98 The Castillo defendants dismissed the application of “community standards” in “recognized stature” determinations in their petition for certiorari.99

that obscenity implicates “generally accepted norms concerning expression related to sex[,]” and there are no equivalent mores regarding violence. Id. at 812. Thus, Justice Alito reasoned that these flaws in the statute “fail[ ] to provide the fair notice that the Constitution requires.” Id. at 813.

96. See Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 430–31 (E.D.N.Y. 2018), aff’d sub nom., Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020), cert. denied, 141 S. Ct. 363 (2020) (“Under these principles, the Court will take the jury’s verdicts under advisement in making its independent findings of fact and conclusions of law, especially on issues that require judgment of the community.” (footnote omitted)). The Eastern District of New York declined to inform the advisory jury that “their findings would only be advisory” in order “[t]o enhance the integrity of their verdicts . . . .” Id. at 431. After considering the advisory jury’s findings that twenty-eight out of a sum forty-nine pieces of art at issue had “achieved recognized stature,” the Eastern District of New York judge extended the “recognized stature” designation to another seventeen pieces of art for a total of forty-five pieces of “recognized stature” that had been destroyed. Id. at 431, 439–40. The jury also found that that eight works constituted VARA violations as they “had been mutilated, distorted, or otherwise modified to the prejudice of the artists’ honor or reputation;” VARA violations that do not require a finding of “recognized stature.” Id. at 431. See supra notes 28–29 and accompanying text for a discussion of these VARA provisions.

97. See Cohen, 320 F. Supp. 3d at 430 (quoting NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002)) (justifying use of advisory jury). In NAACP, the Eastern District of New York judge noted that “[a]dvisory juries are particularly useful in cases in which ‘there are special factors . . . which suggest that a jury composed of members of the community would provide the Court valuable guidance in making its own findings and conclusions.’” NAACP, 226 F. Supp. 2d at 398 (quoting Skoldberg v. Villani, 601 F. Supp 981, 982 (S.D.N.Y 1985)). The NAACP judge then cited to numerous cases ratifying the use of an advisory jury to support use of an advisory jury in the instant case to “advise the court on the question of whether defendant gun manufacturers and distributors have created a public nuisance and, if so, to provide guidance on the nature of appropriate injunctive relief.” Id. at 399–400 (citing Note, supra note 86, at 1371–76).

98. See Petition for Writ of Certiorari, supra note 35, at *29 n.20 (“To the extent the ‘recognized stature’ provision might be analogized to ‘community standards’ provisions in other legislation, the ‘recognized stature’ provision has ‘no similar history’ remotely comparable to experience with the conduct regulated in those statutes.” (citing Brown, 564 U.S. at 812) (Alito, J., concurring)).

99. See id. The Castillo defendants intended to undermine the applicability of “community standards” analysis to advance their argument that the “recognized stature” standard is fatally ambiguous and cannot be saved by “community standards.” See id.
Though “community standards” are more commonly found in obscenity jurisprudence, the Eastern District of New York introduced “community standards” to assist in gauging “recognized stature.” Additionally, the Eastern District of New York has used advisory juries, particularly for their use in assessing “community standards,” to adjudicate legal issues outside of obscenity. The particularized ability of local jurors to apply “community standards” is a factor some judges consider when deciding on motions to transfer.

Public opinion has been a part of “recognized stature” determinations since Carter. “Community standards” analysis operates as a viable, though admittedly imperfect, method for courts to incorporate public opinion in the obscenity environment. The workability of “community standards” in the obscenity context and other cases requiring the opinion

100. See Brown, 564 U.S. at 812 (Alito, J., concurring) (noting history of “community standards” evaluation in obscenity context); Cohen, 320 F. Supp. 3d at 430–31 (“Because advisory juries permit community participation and may incorporate the public’s views of morality and changing common law, their use is particularly appropriate in cases involving community-based standards” (quoting NAACP, 226 F. Supp. 2d at 398)).

101. See NAACP, 226 F. Supp. 2d at 400 (E.D.N.Y. 2002) (ordering empanelment of advisory jury in nuisance case because “[i]t is appropriate to take into consideration the values and standards of the community through the use of an advisory jury . . . .”). The Eastern District of New York cited to NAACP to support the assertion that advisory juries can provide relevant guidance for the court in assessing community standards. See Cohen, 320 F. Supp. 3d at 430 (citing NAACP, 226 F. Supp. 2d at 398).

102. See 15 ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3854 (4th ed. 2020) (“Courts also have considered whether a jury in the transferee or the transferee district would be better equipped to apply community standards . . . .”). Miller cites to numerous cases applying this principle: Keefe v. Simons, 2013 WL 3243110, at *6 (noting “where a jury could best apply community standards” is a transfer factor in case with non-obscenity underlying cause of action); Gaing v. Reiner, 2012 WL 386722, at *3 (N.D. Ill. 2012) (same); Coffey v. Van Dorn Iron Works, 796 F.2d 217, 218, 221 (7th Cir. 1986) (same) (first citing Chance v. E. I. Du Pont De Nemours & Co., Inc., 371 F. Supp. 439, 439 (E.D.N.Y. 1974); then citing 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3854 (1986)); Conseco Life Ins. Co. v. Reliance Ins. Co. 2001 WL 1631873, at *5 (N.D. Ill. 2001) (transferring insurance dispute to “permit the application of community standards by the trier of fact” among other reasons); Chance v. E.I. Du Pont De Nemours & Co., Inc., 371 F. Supp. 439, 449 (E.D.N.Y. 1974) (severing and transferring products liability cases when “resolution of these claims is most likely to be achieved by subjecting them to the critical scrutiny of local jurors with knowledge of local practice . . . .” community standards are a vital element in assessing the actions of the parties in this suit.”).

103. See supra notes 38–43 and accompanying text for a description of the Carter test and legacy. This Note refers to “community opinion” or “public opinion” to refer to lay opinions about art, often originating in the local community in which the art resides.

104. See Note, supra note 86, at 1371–72 (“Issues of community participation in the areas of obscenity . . . portray the possibilities and dangers of advisory jury use. . . . The community participation element of advisory juries makes them especially attractive to judges trying cases under civil obscenity statutes.”). This commentator finds advisory juries invite “greater participation of members of the
of local communities or the broader public suggests “community standards” may be a serviceable adjudicative tool in comparably fraught “recognized stature” valuations.105

III. The Last Supper:106 The Betrayal of 5Pointz

Originally a water meter factory, the Neptune Meter’s most famous metamorphosis is arguably its penultimate, “Aerosol Art Centre” “5Pointz: The Institute of Higher Burning[.]”107 Under the auspices of curator Jonathan Cohen, who selected and cultivated aerosol artists to fill its exterior canvases, 5Pointz engendered a local following.108 The once derelict building transformed into a “living monument, spawning” worldwide appreciation and visitation from both artists and lay people.109 Despite the building’s significance as a “cultural institution,” Gerald Wolkoff, the 5Pointz property owner, destroyed 5Pointz in the middle of the night as the latest provocation in his increasingly heated attempts to develop the nonlegal community,” which has the benefit of “the influence of broader community norms” with the risk of “narrow parochialism . . . .” Id. at 1571.

105. See supra Section II.D for a description of “community standards” analysis in obscenity and other cases, and infra Section V.B for the argument in favor of applying “community standards” to “recognized stature” decisions.

106. Leonardo da Vinci, THE LAST SUPPER (Santa Maria delle Grazie 1495–1498). This ill-fated and world-famous mural of Christ eating his final meal amongst his treacherous disciples was itself betrayed by Leonardo’s unorthodox painting technique which caused the mural to decline shortly after its completion. See ANNA ABRAHAM, LEONARDO DA VINCI 34-35 (2014). The Author of this Note hopes the allegorical similarity of The Last Supper’s demise and the perfidy that befell 5Pointz is clear to the reader. See infra notes 107–11 and accompanying text for a description of 5Pointz’s destruction.

107. Mekhala Chaubal & Tatum Taylor, Lessons from 5Pointz: Toward Legal Protection of Collaborative, Evolving Heritage, 12 FUTURE ANTERIOR: J. HISTORIC PRES., HIST., THEORY, & CRITICISM 77, 77–78 (2015) (describing lifespan of the historic Neptune Meter building). The Neptune Meter building in Queens, New York, has undergone many iterations since its construction in 1892. See id. at 77 (“The former Neptune Meter building was constructed in 1892 as a factory for the production of water meters, continuing to serve this function until 1972 . . . .”). Chaubal and Taylor relate Gerald Wolkoff’s purchasing of the property in the early 1970’s before leasing studios within the building to artists and allowing aerosol artists to use the outside of the building. See id. Though intended as a prophylactic measure to limit illegal graffiti elsewhere, what was known as the Phun Phactory “attracted criticism from vocal detractors . . . who feared that the project was glorifying vandalism.” Id. When the Phun Phactory became “unmanageable” for Mr. Wolkoff, the partnership with Mr. Cohen to oversee the site to “increase [the artworks’] quality and cohesion” seemed a suitable solution. Id. at 78.

108. See Chaubal & Taylor, supra note 107, at 77. Passengers on the high-volume New York City 7 subway train could view the site, which boosted its popularity. See Chused, supra note 65, at 585 (“The notoriety of the site was enhanced by its visibility from the heavily used 7 train as it passed nearby on an above ground portion of the New York City subway system.”).

109. See Chaubal & Taylor, supra note 107, at 77 (relating 5Pointz’s impact in both the local and international art communities as “a major destination for international graffiti artists and tourists alike.”).
Confronting the complete devastation of 5Pointz, the 5Pointz artists pivoted from their now futile legal maneuvers to preserve the site to a post-mortem attempt to seek retribution for the destruction under a seldom tried and “obscure” amendment to the Copyright Act, VARA. The artists’ successful suit was the first instance where a federal court found a private property owner had infringed artists’ VARA rights.

5Pointz began when the defendant property owner, Mr. Wolkoff, recruited one of the plaintiffs, Mr. Cohen, to curate a public art space at Mr. Wolkoff’s run-down properties in Long Island City, New York in 2002. This relationship proved fruitful for both Mr. Wolkoff and Mr. Cohen. Mr. Cohen engaged aerosol artists and transformed the space into 5Pointz, a “major global center for aerosol art” that enjoyed significant publicity. The once symbiotic relationship soured when Mr. Wolkoff began the process of developing the site in 2013. Mr. Cohen futilely attempted to save 5Pointz through pleas to the New York City Landmark...
Preservation Commission and fundraising to buy the property outright. With other 5Pointz artists, Mr. Cohen began seeking legal remedies under the Visual Artists Rights Act (VARA). First, the plaintiffs received a temporary restraining order. Following the lapsing of the temporary restraining order, the plaintiffs unsuccessfully attempted to receive a preliminary injunction. The Eastern District of New York denied the preliminary injunction on November 12, 2013 and issued an opinion on November 20, 2013. On the same day, Mr. Wolkoff closed the site to the artists before authorizing workers to “whitewash[ ]” 5Pointz.

Subsequently, nine other 5Pointz artists also sought relief under VARA. Following consolidation of the two suits, the Eastern District of New York held a three week trial. Though initially a jury trial, the plaintiffs consented to waive the jury resulting in the use of an advisory jury. The Eastern District of New York considered the jury’s findings in reaching its verdict, particularly when deciding “issues that require judgment of the community.” Furthermore, the “[c]ourt was keen to learn whether the jurors, as members of the community” believed the art pieces met the “recognized stature” standard. The court also considered the jury to be

118. Id. at 162 (relating Mr. Cohen’s bids to preserve 5Pointz). The New York City Landmark Preservation Committee denied the application. Id. A commentator has speculated that the application was unsuccessful because the aerosol art did not meet the thirty-year requirement for preservation. See Chused, supra note 65, at 591. Mr. Cohen’s intention to purchase the property became unrealistic when an October 2013 variance significantly enhanced the land’s worth from $40 million to $200 million. See Rosano & Kurtz, supra note 26, at 779.

119. Castillo, 950 F.3d at 163 (describing plaintiffs’ initial legal action).

120. Id. (citing Cohen v. G&M Realty L.P., 988 F. Supp. 2d. 212, 214 n.1 (E.D.N.Y. 2013)).

121. Id. at 163 (citing Cohen, 988 F. Supp. 2d at 214) (describing Eastern District of New York’s order denying preliminary injunction with forthcoming opinion).

122. Id.; Cohen, 988 F. Supp. 2d at 214 (Eastern District of New York’s opinion denying the preliminary injunction). One commentator has described the Eastern District of New York’s opinion denying the preliminary injunction as a “woefully inadequate analysis of the legal issues in the dispute.” Chused, supra note 65, at 590. Chused’s critique faults the Eastern District of New York’s holding that the artists were effectively on notice of destruction because of both the “impermanent” nature of graffiti and because use of the art space was contingent on the status of the redevelopment plans. Id. at 596–97.

123. Castillo, 950 F.3d at 163 (describing Mr. Wolkoff’s destruction of 5Pointz).

124. Id.

125. Id. (describing Eastern District of New York trial).

126. Id. When advisory juries are used, judges retain the burden of determining the verdict. See id. Judges consider and implement the advisory jury’s findings at their discretion. See id.


128. Id. at 430 (describing Eastern District of New York appraisal of advisory jury).
a proxy for the opinion of the broader community.\textsuperscript{129} The Eastern District of New York held that Mr. Wolkoff willfully violated VARA, granting the plaintiffs $6,750,000 in statutory damages.\textsuperscript{130} In its holding, the Eastern District of New York concluded that forty-five of the forty-nine works at issue fit the definition of “recognized stature.”\textsuperscript{131} Then, the defendants filed post-trial motions under Federal Rules of Civil Procedure 52(b) and 59(a) to either grant a new trial, find for the defendants, or grant remitter.\textsuperscript{132} In denying the motions, the Eastern District of New York recounted the evidence that led the court to find “recognized stature” had been met.\textsuperscript{133} In explaining its holding on each work of art, the Eastern District of New York detailed why the works met “recognized stature” by one or more of three groups of “art experts, other members of the artistic community, or by some cross-section of society.”\textsuperscript{134} The Eastern District of New York deliberately delineated that each of these categories are sufficient to establish “recognized stature.”\textsuperscript{135}

IV. Autumn Rhythm: A Narrative Analysis of the Second Circuit’s Rumba with Recognized Stature

In affirming the Eastern District of New York’s finding for the 5Pointz artists, the Second Circuit identified the core issue on appeal as whether

\textsuperscript{129} Id. (“[S]ince 5Pointz had achieved worldwide community recognition, the Court was keen to learn whether the jurors, as members of the community, would view the works as having achieved recognized stature under VARA.” (emphasis added)).

\textsuperscript{130} Castillo, 950 F.3d at 163.

\textsuperscript{131} Id. (noting Eastern District of New York’s findings).

\textsuperscript{132} Cohen v. G&M Realty, No. 13-CV-05612(FB)(RLM), 2018 WL 2973385, at *1 (E.D.N.Y June 13, 2018) (citation omitted) (describing post-trial litigation, defendants requested the court “set aside the court’s findings of fact and conclusions of law and grant a new trial or, alternatively, to vacate the judgment in plaintiff’s favor and enter judgment for defendants, or alternatively, for remitter.”).

\textsuperscript{133} Castillo, 950 F.3d at 164 (noting Eastern District of New York’s approach in response to post-trial motions: “marshall[ing] the evidence in the record supporting the court’s findings as to the recognized stature of each work in question.”).


\textsuperscript{135} Id. (“These three categories are conjugated with ‘or’; that is, the artist’s work needs recognition by only one of these groups.”). For example, in describing the evidence in favor of a finding of “recognized stature” for a plaintiff’s work 7 Angle Time Lapse, the court noted that the work enjoyed significant public visibility, “was featured in 14 documentaries,” and “the jury found it achieved recognized stature.” Id. at *31.

the destroyed 5Pointz artworks were of “recognized stature.” After reviewing VARA’s statutory provisions and the protections it affords, the Second Circuit found “that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.” The Second Circuit further clarified that:

[a] work’s high quality, status, or caliber is its stature, and the acknowledgement of that stature speaks to the work’s recognition. The most important component of stature will generally be artistic quality. The relevant community will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.

In justification of this definition of relevant community, the Second Circuit reasoned that the standard safeguards national cultural history. The Second Circuit then conceded the impropriety of courts making value judgments about the quality of art and referenced Justice Holmes’ warning that judges are not qualified to evaluate art. Nevertheless, the Second Circuit maintained that its mutable interpretation of “recognized stature” does not stray too far afield of Justice Holmes’s proscription because “expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature.”

After reviewing the Eastern District of New York’s determinations of recognized stature, the Second Circuit noted that the district court’s holding can only be overturned on the basis of “clear error.” The Second Circuit found no statutory support for the defendants’ contentions that VARA does not protect temporary art, such as 5Pointz. Citing examples

137. *Castillo*, 950 F.3d at 166 (“The crux of the parties’ dispute on this appeal is whether the works at 5Pointz were works of ‘recognized stature,’ thereby protected from destruction . . . .”).


139. *Id.* (emphasis added) (providing additional clarification on definition of “recognized stature”).

140. *Id.* (“VARA protects ‘the public interest in preserving [the] nation’s culture’ (quoting *Carter v. Helmsley-Spear, 71 F.3d 77, 81 (2d Cir. 1995)*)).

141. *Id.* (“After all, we are mindful of Justice Holmes’s cautionary observation . . . .”). The Second Circuit further quotes Justice Holmes that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art].” *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

142. *Id.* (“This approach also ensures that the personal judgment of the court is not the determinative factor in the court’s analysis.” (citing *Robinson, supra* note 22, at 1945 n.84 (2000))).

143. *Id.* at 167 (describing appellate standard of review).

144. *Id.* (“We see nothing in VARA that excludes temporary artwork from attaining recognized stature.”). The Second Circuit clarified that a prerequisite of permanence would contravene Congress’s intent and overstep judicial boundaries
of “temporary” art that have generated acclaim, the Second Circuit concluded that temporary art is not excluded from “recognized stature.” 145 Agreeing with the Eastern District of New York, the Second Circuit observed that VARA provides for “durational limits” in the statute’s text. 146

The Second Circuit then considered and dismissed the defendants’ additional contentions that the district court misapplied the “recognized stature” standard. 147 The defendants first argued that the Eastern District of New York mistook “recognized stature” for “recognized quality” and that evaluation of “recognized stature” should be backdated to the date of destruction rather than determined at trial. 148 The defendants also argued that the plaintiffs’ expert witness’s testimony received undue credence when the expert witness had not observed all of the works at issue, and that Mr. Cohen’s testimony on both his curatorial work and 5Pointz as a whole was afforded inappropriate influence. 149 The Second Circuit found none of these arguments persuasive and concluded that “the district court applied the correct legal standard and did not commit clear error[.]” 150

On July 20, 2020, defendants filed a petition for a writ of certiorari to the Supreme Court. 151 The defendants asserted that the “recognized stature because the statute’s text does not distinguish artwork on its temporal status. Id. (citing 17 U.S.C. § 101).

145. Id. at 168 (describing recent temporary artworks that would meet the definition of “recognized stature”). The Second Circuit proffered The Gates as an example of artwork that would meet the “recognized standard” standard even though it “lasted only two weeks but was the subject of significant critical acclaim and attention, not just from the art world but also from the general public.” Id. at 167. The Second Circuit also pointed to Banksy’s Girl with Balloon that “self-destructed after selling for $1.4 million at Sotheby’s . . . the temporary quality of this work has only added to its recognition.” Id.

146. Id. (“[T]he statute provides that ‘[t]he modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).’” (quoting 17 U.S.C. § 106A(c)(1))). The Second Circuit also rejected the defendants’ contention that the 5Pointz artists’ knowledge of the potential destruction of the art precludes a VARA violation. Id. at 168. The court again referenced the text of VARA, agreeing with the Eastern District of New York that VARA accommodates those prospective situations by requiring a waiver or providing notice to the artists and notes that there is no evidence that this occurred. Id. at 168–69.

147. Id. at 169 (“Wolkoff argues that the district court erred in several other respects . . . [n]one of these contentions, considered separately or in the aggregate, convinces us that any of Judge Block’s findings were clearly erroneous.”).

148. Id.

149. Id.

150. Id. at 170 (affirming Eastern District of New York’s holding finding VARA violations).

151. See Petition for Writ of Certiorari, supra note 35, at *37; see also Blake Brittain, N.Y. Developer Seeks SCOTUS Review of 5Pointz Graffiti Art Case, BLOOMBERG L. (July 20, 2020, 12:01 PM), https://www.bloomberglaw.com/product/blaw/document/XDTB7IV00000000bc=WlsiQmxvb21iZXJnIExhdyIsI9wcm9kdWN0L2JsYXcvbm90aWZpY2F0aW9ucy9pdGVtcy9SRVNFQVVJDSF9UUkFJTJCdXQ--

This Section maintains the Second Circuit’s definition of “recognized stature” elevates expert testimony over other types of evidence at the expense of protecting art outside the mainstream. Subsection A asserts that the Second Circuit’s “recognized stature” guidelines promote the protection of museum-quality artwork and potentially decrease the likelihood that public art, such as protest art, will be safeguarded by VARA. Understanding the difficult circumstance courts find themselves in when making findings of “recognized stature,” this Note argues in Subsection B that the Second Circuit should have considered “community standards” analysis as a method of assessing “recognized stature” and proffers this analysis as a viable tool for future adjudicators.

A. The Second Circuit’s Definition of “Recognized Stature” Leaves Public Art Vulnerable

The Second Circuit’s revised definition of “recognized stature” does not adequately address the role community perception plays in determining recognized stature. Particularly, the Second Circuit’s emphasis on the opinion of “the artistic community” to determine ‘recognized stature’ places a higher premium on these ‘expert’ opinions than the opinions

152. See Petition for Writ of Certiorari, supra note 35, at 5–6 (claiming “recognized stature” violates the Fifth Amendment because “Congress neglected to define this novel phrase, which fails to provide a person of ordinary intelligence fair notice of what is prohibited”).


155. For the Second Circuit’s definition of “recognized stature,” see supra notes 138–39 and accompanying text. For a justification of why community opinion is deserving of weight in the “recognized stature” analysis, see supra, note 57 and accompanying text.
of the *Carter* court’s “cross-section of society.”156 This definition that is
differential to art experts also discounts the weight the Eastern District of
New York gave to both the advisory jury’s opinion and public opinion
generally.157 The Second Circuit did acknowledge the relevance of nonpro-
fessional opinions when the court concluded that “expert testimony or
substantial evidence of non-expert recognition will generally be required
to establish recognized stature.”158

Nevertheless, when the Second Circuit described the “relevant com-
munity” as “typically [ ] the artistic community,” the court undermined
what it described as VARA’s goal to “protect[ ] ‘the public interest in pre-
serving [the] nation’s culture[].’”159 This definition fails to protect art,
including protest and other forms of public art, that is, arguably, part of
the nation’s cultural heritage because of its community relevance and im-
pact, but that has not garnered the commendation of the artistic
community.160

Diagnosing this avertible gap in protection, the United States Copy-
right Office supports an expanded definition of recognized stature.161

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156. Castillo v. G&M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020); Carter v.
Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y 1995), aff’d in part, and va-
cated in part, and rev’d in part, 71 F.3d 77 (2d Cir. 1995) (providing “recognized
stature” test). For a discussion of the *Carter* test for recognized stature, see *supra*
notes 38–43 and accompanying text.

157. See *Castillo*, 950 F.3d at 165, 170 (noting “extensive lay testimony and
documentary evidence” but crediting “expert testimony” as the “linchpin of claims
of ‘recognized stature.’”) For a discussion of the Eastern District of New York’s use
of the advisory jury and analysis of public opinion, see *supra* notes 96–97, 100,
126–29 and accompanying text.

158. *Castillo*, 950 F.3d at 166.

159. Id. (emphasis added) (quoting *Carter*, 71 F.3d at 81); see also Rachel
Horn, Note, *Highway Art Policy Revisited: Rethinking Transfers of Copyright Ownership
in State-Owned Transportation Artwork*, 43 COLUM. J.L. & ARTS 295, 305 (2020) (not-
ing that VARA analysis is particularly significant for public art because “public art is
. . . installed in common spaces—often dynamic places where a community’s plu-
ralistc interests and evolving needs may entail a greater likelihood of removal or
modification . . . .”)

160. See U.S. COPYRIGHT OFFICE, *supra* note 11, at 79 (describing shortcomings
of current “recognized stature” standard and offering commentary on remedial
measures). In preparing the Report, the United States Copyright Office solicited
feedback from the New York Bar Association. See id. A participant maintained
“the preservative aims of the recognized stature provision should not be undercut
by an inflexible dependence on a scholarly consensus of aesthetic importance” and
acknowledged that “[t]he recognized stature of such a localized work may not be
primarily aesthetic in nature at all; the work may have become iconic for non-
aesthetic reasons, or it may reflect the social concerns of the community in a way
that an acknowledged masterpiece may not.” Id. (citing Art Law Committee of the
New York City Bar Association, Comments Submitted in Response to U.S. Copy-
critiqued the “recognized stature standard” as “too narrow, especially in the con-
text of public art (e.g. murals, large-scale sculptures) where the value of the art is
rooted in the community where the art resides.” Id. (citing Art Law Committee of
the New York City Bar Association, *supra* note 160, at 5).

161. See id. at 80 (proposing legislative amendment of VARA).
The United States Copyright Office described the Eastern District of New York’s opinion as “potentially address[ing] some of these concerns regarding the exclusion of certain types of art.”\textsuperscript{162} Endorsing the Eastern District of New York’s “proposed standard,” the United States Copyright Office recognized that “the local community’s relationship with the artwork” should be a factor in judicial decision making about “recognized stature.”\textsuperscript{163} The Office supports “a broader interpretation . . . that accounts for the opinions of those beyond the academic community,” expanding VARA’s sanctuary to more types of art in alignment with legislative intent.\textsuperscript{164} Additionally, as public art often deliberately subsists outside of the broader art establishment context and can be assessed without the intermediary of the museum or the interpretation of art experts, wholesale reliance on art expert opinion may be misplaced.\textsuperscript{165}

B. Can “Community Standards” Jurisprudence Assist Courts in Making “Recognized Stature” Decisions?

The Second Circuit also did not address the viability of the Eastern District of New York’s allusion to “community-based standards” as a method of evaluating “recognized stature.”\textsuperscript{166} In its opinion, the Second Circuit did not respond to the Eastern District of New York’s use of the advisory jury or meaningfully remark on the Eastern District of New York’s lengthy findings of community recognition to support its findings of rec-

\textsuperscript{162.} Id. (reviewing Eastern District of New York’s Castillo opinion); see also Brittain, supra note 8 (describing Second Circuit’s “recognized stature” analysis and relating to United States Copyright Office’s report). In considering the application of VARA to protest art, Attorney Megan Noh noted the possibility that local art that has attained “huge significance to people in the community[ ] . . . may not be on the radar of worldwide art critics.” Id. (internal quotation marks omitted).

Another commentator has noted the Eastern District of New York’s opinion embraces a broader definition of “recognized stature” because the Eastern District of New York did not require the plaintiffs to prove the market value of the art issue, indicating a “liberalizing shift in judicial understandings of what qualifies as a work of ‘recognized stature.’” Horn, supra note 159, at 307.

\textsuperscript{163.} U.S. COPYRIGHT OFFICE, supra note 11, 79–80.

\textsuperscript{164.} Id. The United States Copyright Office summarizes participant feedback on this point as “the less established the artist and less relevant their work is to scholarly research, the more attention should be given to the community’s opinion and not necessarily the expert’s . . . .” Id. at 79.

\textsuperscript{165.} See Peplow, supra note 66, at 898. Though certainly art experts are capable of testifying to the significance of art in any context, art outside of museums seems to self-evidently invite analysis of its significance from non-art expert sources.

ognized stature.\textsuperscript{167} Instead, the Second Circuit credited the ample “expert testimony, which is often the linchpin of claims of ‘recognized stature.’”\textsuperscript{168} Notwithstanding the policy reasons supporting a broader definition of “recognized stature” that recognizes community appreciation of art, the use of a “community standards” approach may prove to be a useful tool for courts struggling with the means to address “recognized stature.”\textsuperscript{169} Despite Justice Alito’s proscription of the use of “community standards” outside the obscenity context in \textit{Brown}, applying “community standards” for “recognized stature” determinations does not suffer from the same deficiencies that applying “community standards” to violence does.\textsuperscript{170} Opinions about art are fundamentally personal and necessarily diverse.\textsuperscript{171} Even with that understanding, the use of “community standards” to evaluate “recognized stature” would not rely on unanimous opinion to dispositively turn the “recognized stature” classification on and off like a light switch.\textsuperscript{172} Instead, “community standards” can be leveraged as a \textit{factor} in determining recognized stature, alongside expert testimony, similar to the methodology the Eastern District of New York employed in \textit{Castillo}.\textsuperscript{173} Notably, the \textit{Miller} use of “community standards” encourages a local standard, aligning with the Eastern District of New York’s use of an advisory jury made up of members of the local community.\textsuperscript{174} Furthermore, the case law verifies the jury’s unique ability to apply “community

\textsuperscript{167} See \textit{Castillo}, 950 F.3d at 166–70 (evaluating Eastern District of New York’s findings of “recognized stature”). The Second Circuit acknowledged the Eastern District of New York’s use of “extensive lay testimony and documentary evidence” but did not go beyond this to explore community recognition, instead favoring expert testimony. \textit{Id.} at 170.


\textsuperscript{169} See supra notes Section II.C for a description of why courts struggle with art adjudication. On the policy front, public art generally is an integral part of community building. See Horn, supra note 159, at 320 (“Public art is a well-recognized means of beautifying shared spaces, fostering community identity and strengthening communal values, encouraging economic development, improving civic participation, and generally enhancing a population’s quality of life.”).

\textsuperscript{170} See supra notes 94–95 and accompanying text for a description of Justice Alito’s concerns about “community standards” analysis.

\textsuperscript{171} See Brian Soucek, supra note 75, at 420 (describing Justice Scalia’s perspective on art opinions). Soucek recalls Justice Scalia’s concurrence in \textit{Pope v. Illinois}, when Justice Scalia stated “[j]ust as there is no use about arguing about taste, there is no use litigating about it.” \textit{Id.} (internal quotation marks omitted) (quoting Pope v. Illinois, 481 U.S. 497, 505 (1987) (Scalia, J., concurring)).

\textsuperscript{172} See supra note 95 and accompanying text for Justice Alito’s reasoning that “community standards” are not appropriate analytical tools outside of obscenity.

\textsuperscript{173} See supra notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York’s use of “community standards” to find “recognized stature.”

\textsuperscript{174} Miller v. California, 413 U.S. 15, 24, 30–34 (1973) (first quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972); then quoting Roth v. United States, 354 U.S. 476, 489 (1957)). See supra notes 88–91 and accompanying text for a description of \textit{Miller’s} definition of what makes up the community in “community standards,”
standards” and provide local perspective in adjudicating sensitive issues of fact.175 Judicial agita about aesthetic judgments is well-documented.176 Relying on juries, particularly the rarely used advisory jury, to assess community impact of works of art will greatly assist courts in making these decisions while simultaneously extending the definition of “recognized stature” in accordance with the aims of VARA and the United States Copyright Office’s aspiration.177 At the very least, the Second Circuit should have credited and evaluated the Eastern District of New York’s continued emphasis on the role of the advisory jury and community opinion to provide well-defined precedent for future adjudications of this undeniably nebulous copyright statute.178

VI. THE PERSISTENCE OF MEMORY:179 THE FATE OF PROTEST ART

The Second Circuit’s interpretation of “recognized stature” has significant implications for the preservation of recent protest art and the avenues both artists and art advocates have open to them to preserve protest art.180 The deficiencies in the Second Circuit’s construction of “recognized stature” alleviate none of the concerns with the application of the “recognized stature” standard.181 Instead, this definition permits the possibility of judicial misappropriation and leaves artworks vulnerable to destruction and their creators without a legal remedy.182 In an interview, and notes 96–97, 100, 126–29 and accompanying text for the Eastern District of New York’s characterization of local jury members.

175. See supra notes 96–97, 100–02 and accompanying text for a description of cases where judges either relied on or noted the importance of juries in applying “community standards.”

176. See supra Section I.C for considerations of judicial disquiet about “judging” art.

177. See supra notes 57, 161–64 for a description of the legislative intent behind VARA and the United States Copyright’s Office perspective on desired modifications to the definition of “recognized stature.”

178. See supra notes 96–97, 100, 126–29 and accompanying text for a description of the Eastern District of New York’s use of the advisory jury and notes 157–58 and accompanying text for a critique of the Second Circuit’s failure to adequately address the Eastern District of New York’s consideration of the advisory jury and community opinion generally.


180. See Brittain, supra note 8 (noting uncertainty of whether VARA applies to protest art).

181. For critiques of VARA, and “recognized stature” in particular, see supra notes 31–35 and accompanying text.

182. See Thornley, supra note 29, at 364 (noting application of “recognized
Sarah Henry, Chief Curator of the Museum of the City of New York, recounted how “[s]o many movements in U.S. history have taken on a life in a single image . . . George Floyd’s face, as captured by artists, is one of those.”

Nevertheless, recently created protest art is already being destroyed. One activist finds her motivation to preserve protest art because “[t]hese walls speak . . . they’re expression of communities. We want these feelings, hopes, calls to action to live on.” Art historian T.J. Clark notes that art will forever be an amber of the moment “when the painter stands in front of the canvas, the sculptor asks his model to stand still,” or perhaps in today’s cultural landscape, the aerosol artist shakes the spray paint canister, or the muralist wets the tip of their brush. Embracing a broader definition of recognized stature, grounded in “community standards” analysis, will encourage the continued development and appreciation of this art. Artists, preservationists, and other professionals removed protest art for preservation and display in other spaces as recent protest art cannot exist in the public sphere indefinitely. Projects of stature” risks inconsistent interpretations from judges and juries”); Crosson et al., supra note 3 (noting protest art’s exposure to demolition). One commentator explained all public art is at risk, stating, “[i]t is public artists that are perhaps most in need of moral rights, and yet the work of these artists is often ignored by and excluded from the legal definition of art in VARA. And this is despite the rise of public art in cultural importance and popularity.” Stewart, supra note 11, at 1234.

183. CBS This Morning, Amid the Racial Justice Movement, Artists Wield Their Art as a Tool for Change, YOUTUBE (Sep. 3, 2020), https://www.youtube.com/watch?v=xUorDsxL4 [https://perma.cc/Y7BB-7XVJ] (CBS This Morning’s Anthony Mason interviews Sarah Henry about museum exhibition “New York Responds”).

184. See Crosson et al., supra note 3 (“Ant Ben hoped his painting would have a life in a Chicago public school once the restaurant decided to take the boards down, but the piece disappeared before that was possible.”). Chicago residents expressed concern about the destruction of the art. See id. One commentator also pointed to the importance of public art generally that contributes to both “shared cultural identities in communities” and drives economic prosperity and “urban development, as “cit[ies] with public art attract[ ] young, creative, and educated people; [this] communicates that the city is vibrant, innovative, and diverse; and even appeals to tourists.” Stewart, supra note 11, at 1238. Stewart asserted that “not only does public art play a role in building the culture of a community, some community cultures are built around public art.” Id.


186. Clark, supra note 1, at 12.

187. Stewart, supra note 11, at 1264 (“Reform [of VARA] is necessary to protect and encourage the continued creation of these artworks”).

this type would encourage property owners to exercise VARA’s notice provision, which bars liability for property owners who give artists the opportunity to remove the art at their own cost as an alternative to outright destruction. This fulfills VARA’s preservationist goals while also providing property owners a viable exit option.189 Nevertheless, should artists need to turn to the courts to remedy destruction of works of “recognized stature,” artists should be mindful of VARA’s restrictions, particularly courts’ historical unwillingness to find VARA protects art installed without permission and the lack of protection for removable works rooted within buildings.190

Since the Second Circuit’s ruling, VARA litigation has risen sharply.191 Several of these cases highlights the relevance of community perspective in making findings of “recognized stature.”192 Following the closure of a queer bar, The Stud, due to COVID-19-related financial distress, the bar’s landlords painted over “iconic” murals on the exterior of the building during Pride 2020.193 Painted to commemorate The Stud’s new cooperative ownership in 2019, one of the mural artists stated the art “convey[ed] that [The Stud] was a space that was safe for everyone. It was the start of a new generation.”194 In November 2020, the artists filed a suit

189. See 17 U.S.C.A. § 113(d)(2) (West 2021) (describing requirements of liability-less removal for property owners); see also Robinson, supra note 22, at 1948 (“When the work can be removed without causing the [ ] harm, however, moral rights do apply, unless the building owner makes an unsuccessful good-faith attempt to contact the artist who fails to remove the work or pay for its removal.”).

190. See supra note 200 and accompanying text for a description of case law considering whether VARA protects art placed without permission of the property owner. See infra note 200 for further analysis on the likelihood of protection of non-permissive art. See supra note 30 and accompanying text for a comment on VARA’s limitations.

191. See Blake Brittain, Activist Artists Cite Novel N.Y. Win to Sue Over Threats to Work, BLOOMBERG L. (Feb. 1, 2021), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X4OSDOM0000000?bna_news_filter=US-law-week&cite [https://perma.cc/N4VX-ZH5D] (comparing filing of six VARA cases in past three months to only 100 VARA filings post 1997, averaging four a year). Brittain speculated that the recent influx of VARA cases may be due to the publicity surrounding the artist’s monumental win in Castillo. Id. Not only do artists and lawyers now, at the very least, know this avenue of relief exists, but they may be more likely to pursue claims following the potential for lucrative damages awards. See id.

192. See id. (describing complaint of LGBTQ artists against landlord who destroyed community-cherished murals).


194. Amanda Bartlett, ‘We Will Not Be Erased’: Graffiti Artist Strikes Back After SF Queer Bar’s Mural is Painted Over During Pride, SFGATE, https://www.sfgate.com/sf-culture/slideshow/The-mural-on-SF-s-oldest-queer-bar-was-painted-204388.php [https://perma.cc/5QS4-DBAK] (last updated Nov. 16, 2020, 5:13 PM) (interview-
alleging VARA violations in the Northern District of California against the landlord of the building; the suit is in mediation before a jury trial in September 2022. The artists’ complaint asserts that the murals meet the “recognized stature” standard, highlighting the murals’ community resonance and subsequent ire following the murals’ destruction.

This pending litigation stresses how public art is integral to community building: it memorializes triumphs, acknowledges hardships, and signals community identity and kinship. Nevertheless, a “recognized stature” definition contingent on art expert testimony may find these murals unworthy of inclusion under VARA despite their cultural merit.

A particularly poignant example of this predicament is the Museum of Modern Art (MoMA)’s alleged removal of Black Lives Matter protest art placed on the boarded-up storefront of MoMA’s design store in SoHo. MoMA’s potential legal liability for destroying the art is an open question, as the works were placed without permission. Nevertheless, the artist behind the protest art, Amir Diop, compellingly distills why leaving the definition of art up to art institutions is problematic:

It just seems as though MoMa [sic] determined what’s art, and what’s not art . . . If I’m not a dead Black artist, they don’t want to

195. See Complaint at 1, 7, Canilao v. City Commercial Inv. LLC, No. 3:20-cv-03030 (N.D. Cal. Nov. 13, 2020); Civil Minutes of Initial Case Management Conference, Canilao, No. 320-cv-03030, ECF No. 23 (recording parties’ consent to court-sponsored mediation and scheduling of jury trial).

196. See Complaint, supra note 115, at 5–7 (describing how “[t]he community venerated the [m]urals” and the “outpouring of emotions and stories” chronicled by local news).


198. For a description of the risk inherent in depending predominantly on expert opinion in “recognized stature” determinations, see supra Section IV.A and accompanying text.

199. See Calma, supra note 197 (describing “shredd[ing]” of mural just days after it was placed).

200. See id. (noting artist did not have MoMA’s consent to paint the mural). Courts have interpreted lack of consent to bar VARA claims. See supra note 56 and accompanying text. Dicta in Castillo may open the door to reconsideration of this principle as the Second Circuit named Bansky as an example of artists befitting the “recognized stature” designation even though Banksy’s trademark is “unauthorized art,” leading to the conclusion that “other unauthorized works could receive VARA moral rights protections.” Intellectual Property—Copyright-Second Circuit Finds Temporary Art Protected Under the Visual Artists Rights Act.—Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020), 134 HARV. L. REV. 1881, 1887-88 (2021).
hear from me . . . . They destroyed a piece from this movement. When I am dead, they’ll be looking for the works that I’ve made.201

The relevance of community opinion poses interesting questions about art that does not reflect the values of a community.202 Vermont Law School recently confronted this issue following student criticism of a mural that depicted the Underground Railroad in a racially insensitive manner.203 Originally intending to remove the mural, Vermont Law School instead decided to shield the mural from view after the artist pursued VARA litigation.204 The District of Vermont denied the artist’s preliminary injunction to bar Vermont Law School from inserting panels to hide the mural on the basis that concealing the murals does not violate VARA’s proscription of either destruction or modification.205 Nevertheless, the District of Vermont anticipated the murals would likely meet the “recognized stature” standard due to favorable press coverage at the time of the mural’s installation, approbative statements from “two witnesses with experience in selecting and exhibiting visual art,” and the absence of conflicting evidence from Vermont Law School.206

These types of divergent opinions from experts and the community raise new uncertainties about future VARA litigation: does VARA, and the “recognized stature” designation specifically, distinguish between the

201. Calma, supra note 197 (interviewing Amir Diop).


203. See id. (describing mixed community opinion of mural, particularly admonishment of both content of mural and “cartoonish” depictions of people of color).

204. See Margaret Grayson, Judge Says Vermont Law School Can Cover Controversial Murals, SEVEN DAYS (Mar. 17, 2021), https://www.sevendaysvt.com/LiveCulture/archives/2021/03/17/judge-says-vermont-law-school-can-cover-controversial-murals [https://perma.cc/AHE3-C483] (describing Vermont Law School’s initial strategy to “paint over” or detach the mural before deciding to place the mural behind panels).

205. See Complaint at 9–11, Kerson v. Vt. Law Sch., Inc., No. 5:20-cv-00202-gwc (D. Vt. March 10, 2021) (“[T]he language of the VARA does not include a protection against concealment or removal from display of artworks by the owner.”). Due to the dubious possibility of the artists’ success on the VARA claim for these reasons, the court denied the preliminary injunction. Id. at 11.

206. Id. at 7–8 (finding works at issue would likely meet “recognized stature” standard).
“problematic nature” of art and “aesthetics?”207 If so, can a work’s “recognized stature” designation change over time?208 The answers to these questions, and how courts should decide them, is beyond the scope of this Note. Nevertheless, the very existence of these thorny questions illuminates precisely why it is so critical that courts take judicial notice of community perspective in “recognized stature” determinations.

207. See Brittain, supra note 191 (quoting interview with art lawyer Kate Lucas).

208. See id. (art attorney Kate Lucas raises possibility that work’s “recognized stature” status is impermanent); see also Keshawn M. Harry, Note, A Shattered Visage: The Fluctuation Problem with the Recognized Stature Provision in the Visual Artists Rights Act of 1990, 9 J. Intell. Prop. L. 193, 201–03 (2001) (noting possibility of “recognized stature” status “fluctuat[ing] over time” and resulting challenges for courts to serve VARA’s “preservative purpose”).