

SHOW ME THE MONET: THE SUITABILITY OF PRODUCT DISPARAGEMENT TO ART EXPERTS

INTRODUCTION

As Theodore Stebbins tells the story,¹ a painting entitled *Two Hummingbirds and an Orchid* was presented to Sotheby Parke Bernet for auction. It was purported to be by the American painter, Martin Johnson Heade, so naturally, Sotheby's contacted Stebbins, the foremost expert on Heade, to authenticate the work. After comparing an 8 x 10 transparency of the painting to photos of known Heade works, Stebbins called Sotheby's to say the painting was authentic² and that it would be included in the next edition of his catalogue raisonné³ on Heade.⁴ A note to that effect was included in the sale catalog for Sotheby's fall American Paintings sale.⁵ Subsequently, Stebbins started to have reservations about his attribution and on the day of the sale he rushed to examine the work in person. With only twenty minutes left before the painting was due on the auction block, he was examining the painting with a magnifying glass and flashlight. In person, Stebbins says, "its colors appeared both chalkier and brighter than one would expect, and the application of pigments—the artist's strokes—did not conform to what I knew of Heade."⁶ Stebbins convinced Sotheby's to withdraw the painting from the sale. After more thorough stylistic and scientific analyses were completed, the work was confirmed to be a modern forgery.

In many ways this story is typical. Leading art experts are frequently solicited to authenticate works in contexts where their conclusions determine the work's market value. Often, experts are forced to work under time

¹ The story that follows is told more fully in Theodore E. Stebbins, Jr., *The Art Expert, the Law and Real Life*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 135, 138-39 (Ronald D. Spencer ed., 2004).

² It is a common and accepted practice in the art trade for an expert to evaluate artworks based on photographs, however, "[t]he authenticator or appraiser who relies solely on photographs in rendering his opinions . . . always runs a risk of being accused of falling below the standard of care if he later turns out to be wrong." Steven Mark Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 *Wis. L. REV.* 595, 609 (1991).

³ A catalogue raisonné is a list of all known works by an individual artist. See discussion *infra* Part I.B.3.b.

⁴ THEODORE E. STEBBINS, JR., *THE LIFE AND WORK OF MARTIN JOHNSON HEADE: A CRITICAL ANALYSIS AND CATALOGUE RAISONNÉ* (2000).

⁵ SOTHEBY PARKE BERNET, *AMERICAN 18TH CENTURY, 19TH CENTURY & WESTERN PAINTINGS, DRAWINGS, WATERCOLORS, & SCULPTURE*, "Lot 132" (New York: October 17, 1980).

⁶ Stebbins, *supra* note 1, at 138.

constraints and, because specialized experts are scarce and art is so costly to ship, they frequently base their conclusions on photographs.⁷ If there is anything atypical about this story, it is that the expert's conclusion could be corroborated by objective scientific tests. Normally, the process of authentication would conclude with Stebbins' subjective analysis of the pigments and brush strokes which his expert eye recognized as foreign to the work of Martin Heade.⁸

So, what happens when science is of no assistance and the expert erroneously asserts that the artwork is not authentic? If the expert's assertions have inhibited others from buying the artwork, the owner might sue the expert for product disparagement.⁹ A court would award the plaintiff-owner damages if he showed that the defendant-expert maliciously communicated a false statement of authenticity regarding his painting to a third party, causing special damages in the form of lost market value.¹⁰ In the age of hundred million dollar paintings,¹¹ colossal special damages are a real possibility.¹² Even when damages are likely to be modest, the cost of litigation is intimidating. Sadly, many of those who possess rare and valuable connoisseurship are reluctant to share their expertise for fear of litigation.¹³ This inhibition creates obstacles for scholarship and inefficiencies in the art trade.

Various solutions have been suggested—from the creation of elaborate umbrella organizations for connoisseurs, to statutory immunity for experts “accredited” by the state. However, such solutions are fatally flawed for both normative and practical reasons. As this comment will show, product disparagement is particularly well suited to the art world. The value of any given artwork is determined by an expert's opinion of its authenticity, quality and condition. Typically, there is a vast information gap between the expert and the investor—much like the highly regulated securities trade. As

⁷ Levy, *supra* note 2, at 610.

⁸ Lee Ann Houseman, *Current Practices and Problems in Combating Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 515 (1982).

⁹ To be clear, no legal action was taken, nor warranted, in the Stebbins anecdote described above.

¹⁰ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 128, at 962 (5th ed. 1984).

¹¹ On January 4, 2004, Sotheby's sold Picasso's “Boy with a Pipe” for over \$104 million (including commission). Will Bennett, *Record \$104m for Picasso's Boy with Pipe*, DAILY TELEGRAPH, May 6, 2004, at 1 (London).

¹² Cf. Sharon Flescher, *The International Foundation for Art Research*, in THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 101 (Ronald D. Spencer ed., 2004) (discussing the possibility of litigation as a risk attendant to giving an expert art opinion).

¹³ See Theodore Stebbins, *Possible Tort Liability for Opinions Given by Art Experts*, in ART WORKS: LAW, POLICY, PRACTICE 988 (Franklin Feldman & Stephen E. Weil eds., 1974), reprinted in FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS 517 (1986); Levy, *supra* note 2, at 650; Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 982 (1976).

a result, art experts have unique opportunities to use their “opinions” advantageously or to wield them recklessly. When one is injured by such wrongful behavior, product disparagement provides a remedy that is both consistent with the normative principles of corrective justice and socially optimal because it promotes efficiency in the art market. Therefore, the best remedy for the chilling of expert opinion is not to reform the law or contract around it. Experts can manage their risk simply by performing their duties with diligence and integrity.

Part I describes the tort of product disparagement and how it functions in the art world by explaining each element and the issues that are peculiar to the art context. Part II demonstrates that product disparagement is well-suited to the art market because it is both a justifiable and efficient safeguard against the unique influence art experts have on the art market. Furthermore, Part II shows that once an expert understands the law of disparagement, he can avoid costly litigation at minimal cost.

I. BACKGROUND

A. *Origin of Disparagement*

Disparagement descends from “slander of title,” a common law tort that originally gave landowners a remedy against those who wrongfully besmirched the title to their land.¹⁴ In time, slander of title extended to include chattels and eventually the tort gave a remedy for disparaging remarks about the quality of one’s property—not just one’s title to it.¹⁵

Disparagement is often characterized as a close relative to defamation.¹⁶ Both torts belong to a class of wrongful speech and both require the publication of false statements to third persons. However, disparagement is fundamentally different from defamation because disparagement protects one’s property while defamation protects one’s reputation.¹⁷ This essential difference explains why there is no equivalent in disparagement to defamation per se. Traditionally, defamation distinguished written communications (libel) from oral ones (slander) because the written word was viewed as

¹⁴ Stebbins, *supra* note 13, at 518.

¹⁵ See *Ruder & Finn Inc. v. Seaboard Surety Co.*, 422 N.E.2d 518, 521-22 (N.Y. 1981). Today courts will alternatively refer to the disparagement cause of action as slander of title, product disparagement, product defamation, disparagement of title, trade libel and injurious falsehood. This comment will sometimes refer to “art disparagement,” as shorthand for disparagement of art works.

¹⁶ See Stebbins, *supra* note 13, at 518.

¹⁷ Levy, *supra* note 2, at 639.

more damaging.¹⁸ Therefore, with four exceptions, slander required a showing of special damages whereas with libel, damages were presumed.¹⁹ By contrast, the basis of liability in disparagement is the same for written and oral communications.²⁰ This is the case not merely because both are equally capable of causing special damages, but because special damages “go to the cause of action itself and not merely to the recovery.”²¹

B. *The Elements*

To make the prima facie case for disparagement the plaintiff must show the following four elements: (1) a false statement, (2) publication to a third person, (3) malice, and (4) special damages.²² Disparagement cases involving expert authentication of artworks raise unique issues with regard to each of these elements.

1. Falsity

No matter how damaging the statement, no matter how malicious its publication, one is never subject to disparagement liability for a true statement.²³ The problem in art disparagement is that authenticity is seldom provable.²⁴ In rare cases, like the Stebbins story above, objective scientific tests can show conclusively that a work is *not* authentic by revealing the existence of anachronistic pigments, canvases or under-paintings.²⁵ How-

¹⁸ KEETON ET AL., *supra* note 10, § 111, at 771-72.

¹⁹ The four exceptions are for disparaging remarks made with regard to (1) loathsome diseases, (2) criminal conduct, (3) unchastity and (4) slander of trade or profession. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 962 (8th ed. 2004).

²⁰ RESTATEMENT (SECOND) OF TORTS § 624 (1977). Though the two torts are distinct, there are cases where the art expert's statement exposes him to both defamation and disparagement. For example, in *McNally v. Yarnall*, the Metropolitan Museum of Art was sued in defamation for its letter questioning the veracity of an expert's attribution. 764 F. Supp. 838, 847-48 (S.D.N.Y. 1991).

²¹ *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992) (citing KEETON ET AL., *supra* note 10, § 128, at 971).

²² *Kirby*, 784 F. Supp. at 1115; *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 271 (S.D.N.Y. 1989). The leading cases require these four elements, though some scholars have broken the four into sub-elements. *E.g.*, Stebbins, *supra* note 13, at 519 (seven components including sub-elements); RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 473 (2nd ed. 1998) (nine components).

²³ *Kirby*, 784 F. Supp. at 1116.

²⁴ Stebbins, *supra* note 13, at 520.

²⁵ *See generally* DuBoff, *supra* note 13, at 987-97. Not surprisingly, experts have not been sued when scientific tests corroborate their opinion.

ever, the plaintiff has the burden to show that his work of art *is* authentic and for this he is entirely reliant on the eye of an expert.²⁶ Except in extreme cases—where a defendant’s attribution is baseless or based on shoddy scholarship—fact-finders struggle to understand and evaluate the expert’s aesthetic analyses. In *Hahn v. Duveen*, the question of whether Leonardo da Vinci authored the defendant’s painting became a “battle between experts.”²⁷ After nearly four weeks of hearing evidence and expert testimony, the jury deliberated for fourteen hours and still, they could not agree on a verdict.²⁸

Like all questions of fact in civil litigation, the standard to determine the falsity of an art expert’s attribution is a preponderance of the evidence. This means that laypeople (a judge or jury) will decide that a work is authentic if they think it is at least marginally more likely than not the work is authentic. In *Hahn*, Justice Black described the plaintiff’s burden to show authenticity as “very heavy,”²⁹ but when the expert-defendant is making a “close call,” the preponderance standard makes the expert’s vulnerability nearly equivalent to the plaintiff’s burden.³⁰ A striking example is *Greenberg Gallery, Inc. v. Bauman*.³¹ In this case, a group of art dealers bought a mobile purported to be Alexander Calder’s “Rio Nero.”³² After failing to resell the work and finding that the mobile’s sheet metal blades did not balance in the proper manner,³³ the dealers began to doubt the piece’s authenticity.³⁴ They sought the advice of Klaus Perls, Calder’s exclusive dealer in the U.S. for twenty years and a leading authority on his work.³⁵

²⁶ Ronald D. Spencer, *The Risk of Legal Liability for Attributions of Visual Art*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 143, 153 (Ronald D. Spencer ed., 2004).

²⁷ 234 N.Y.S. 185, 193 (N.Y. Sup. Ct. 1929).

²⁸ *Id.* at 195. The question of malice was also before the jury, however, Justice Black’s opinion strongly suggests it was the question of authenticity that encumbered a jury verdict. *Id.* at 193-95. Rather than face a retrial, the parties in *Duveen* settled for \$60,000, “forever establishing in the minds of many people that opinions are dangerous things to give.” Stebbins, *supra* note 13, at 519.

²⁹ 234 N.Y.S. at 187.

³⁰ See Spencer, *supra* note 26, at 143.

³¹ 817 F. Supp. 167 (D.D.C. 1993), *aff’d mem.*, 36 F.3d 127 (D.C. Cir. 1994).

³² *Id.* at 167.

³³ Calder is famous for the balance he achieved in his works by using both his training as a mechanical engineer and his artistic talent.

³⁴ *Greenberg Gallery, Inc.*, 817 F. Supp. at 169.

³⁵ Lee Rosenbaum, *Art and Experts on Trial in Authenticity Disputes*, WALL ST. J., April 11, 1995, at A18. As Calder’s exclusive dealer in the U.S., Perls sold, appraised, and authenticated hundreds of Calder mobiles. *Greenberg Gallery, Inc.*, 817 F. Supp. at 170.

Perls determined that the work was not authentic and the dealers sued after the seller refused to rescind the sale.³⁶

After a bench trial, the judge conceded “Perls’ credentials” were “vastly superior” to those of the defendant’s expert, but even so, he held that “the mobile is not a forgery.”³⁷ The judge was more persuaded by the defendant’s expert because she had spent more time examining the mobile and because she alone addressed the issue of Calder’s signature which appeared on one of the twenty-seven blades.³⁸ Perls on the other hand spent a little more than ten minutes with the mobile.³⁹ He compared it with the archival photograph he took of “Rio Nero” before it left his gallery thirty years prior.⁴⁰ Perls concluded that the blades he inspected were not the same as in the archival photograph and therefore not by Calder. Perls did not inspect every blade, but according to Perls, it would only “‘take a minute’ to determine the authenticity of such a mobile . . . ‘You just look at two or three blades and they are wrong . . . you don’t go any further.’”⁴¹ Nevertheless, the judge found this evidence “too inconclusive to support the [plaintiff’s] preponderance burden.”⁴²

2. Malice

In addition to being false, an expert’s statement must be published with malice.⁴³ There has been a great deal of disagreement on what the standard for malice should be.⁴⁴ The First Restatement of Torts actually favored liability for all false statements of fact, regardless of the speaker’s state of mind.⁴⁵ However, this approach was followed only in a few cases involving disparaged title—not disparaged quality.⁴⁶ At the other extreme is Prosser’s view that disparagement is an intentional tort and therefore the standard for malice should be injurious intent or ill will.⁴⁷

³⁶ *Greenberg Gallery, Inc.*, 817 F. Supp. at 167. Although this is a contract case, the question of authenticity is the same as would arise in a disparagement case.

³⁷ *Id.* at 174-75.

³⁸ *Id.* at 170.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 172.

⁴² *Greenberg Gallery, Inc.*, 817 F. Supp. at 175.

⁴³ *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1115 (S.D.N.Y. 1992).

⁴⁴ See DuBoff, *supra* note 13, at 983 n.56; Stebbins, *supra* note 13, at 520.

⁴⁵ RESTATEMENT (FIRST) OF TORTS §626 (1938).

⁴⁶ Stebbins, *supra* note 13, at 521 (citing as an example, *Olsen v. Kidman*, 235 P.2d 510 (Utah 1951)).

⁴⁷ Stebbins, *supra* note 13, at 520-24.

Commentators who have addressed this issue in detail prefer the middle ground definition used in *Gott v. Pulsifer*,⁴⁸ the first case to address the issue in the art context.⁴⁹ In *Gott*, the court held that a statement is malicious if a reasonable man would have ascertained it to be false and would have foreseen a disparaging result.⁵⁰ Similarly, in New York, where the majority of art disparagement cases are brought,⁵¹ the recent case law favors “actual malice” to “common law malice.”⁵² In other words, to prevail, the plaintiff need not show injurious intent, but rather that the defendant had knowledge of the alleged false statement or reckless disregard for its falsity.⁵³

One of the few examples in which the New York courts have addressed malice in the art context is *Travis v. Sotheby Parke Bernet, Inc.*⁵⁴ In *Travis*, the plaintiff bought a painting that he hoped was by Sir Joshua Reynolds from a gallery auction.⁵⁵ He then asked an expert at Sotheby’s to evaluate it.⁵⁶ After some research and consultation with a leading Reynolds authority, the Sotheby’s expert informed Travis that his work was by Tilly Kettle, not Reynolds, making it less valuable.⁵⁷ Travis thought he had Sotheby’s cornered because on an occasion prior to his purchase, Sotheby’s had referred to the painting as a Reynolds.⁵⁸ Both opinions given by Sotheby’s could not be correct, so in the plaintiff’s estimation, Sotheby’s had either negligently induced him to purchase a Kettle, or they had disparaged his Reynolds.⁵⁹ The disparagement claim was dismissed on several grounds, including the plaintiff’s failure to show evidence of malice.⁶⁰ The

⁴⁸ 122 Mass. 235 (1877).

⁴⁹ *E.g.*, Stebbins, *supra* note 13, at 523 (arguing that Prosser’s rule would render disparagement useless as a remedy for wronged property owners).

⁵⁰ 122 Mass. at 239.

⁵¹ *See* Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 507 (1987).

⁵² *E.g.*, Kirby v. Wildenstein, 784 F. Supp. 1112 (S.D.N.Y. 1992); *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989) (applying New York law); *Drug Research Corp. v. Curtis Publ’g Co.*, 166 N.E.2d 319 (N.Y. 1960).

⁵³ *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp 150, 154 (S.D.N.Y. 1983) (applying New York law).

⁵⁴ No. 4290/79 (N.Y. Sup. Ct. Nov. 11, 1982) *excerpted in* HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 571-73 (2d ed. 1987), Stebbins, *supra* note 13, at 534.

⁵⁵ Kai B. Singer, “*Sotheby’s Sold Me a Fake!*”—*Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art*, 23 COLUM.-VLA J.L. & ARTS 439, 446 (2000).

⁵⁶ Stebbins, *supra* note 13, at 534.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 536-37. Travis failed to meet his burden of production on at least three if not all four elements of disparagement. *See id.* at 536-37. Travis presented no evidence of malice. Stebbins, *supra*

judge recognized that malice is likely to exist where the defendant “unnecessarily intermeddles,”⁶¹ but he also acknowledged that statements “recklessly made” may “be deemed to be malice.”⁶²

3. Publication

In disparagement, publication is simply the oral or written communication of a disparaging statement to a third party.⁶³ The contexts in which art experts publish their views on authenticity include (a) responding to requests for authentication; (b) authoring a catalogue raisonné; (c) producing a retrospective exhibition; and (d) giving an unsolicited public comment.⁶⁴ Each of these circumstances raises unique issues for disparagement liability.

a. *Requests for Authentication*

Art owners often make their requests for authentication directly to an individual expert like a dealer, or to an institution like an authentication board or museum.⁶⁵ Requests for authentication are also made when owners ask an auction house to review artworks for potential consignment, or ask an appraiser to value artwork for tax or insurance purposes.

Auction houses and appraisers are frequently sued for damages caused by their expert opinions—perhaps more than other parties.⁶⁶ However, the majority of these claims are for breach or negligence where the expert has

note 13, at 536. And although it is not discussed in the opinion, Travis apparently showed no indication of publication. *See id.* at 536-37. Ultimately, Travis purchased the painting in question at \$17,000, while Sotheby’s had appraised it as a Tilly Kettle at \$30,000, so Travis suffered no special damages. *Id.* at 536. The court found that it was “highly questionable whether . . . there [was] sufficient evidence to indicate that a false statement was made by the defendants with respect to the authorship of the painting.” *Id.* at 536.

⁶¹ *Id.* at 537 (citing W. BLAKE ODGERS, ODGERS ON LIBEL AND SLANDER 80 (1881)).

⁶² *Id.* (quoting *Travis*).

⁶³ RESTATEMENT (SECOND) OF TORTS § 624 (1977).

⁶⁴ *See* Ronald D. Spencer, *Authentication in Court: Factors Considered and Standards Proposed*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 189, 190 (Ronald D. Spencer ed., 2004). Spencer lists seven circumstances under which art authentication issues arise, including attributions made under French law by those who possess the artist’s *droit moral* or “moral rights.” *Id.*

⁶⁵ *See* DuBoff, *supra* note 13, at 981; Levy, *supra* note 2, at 650.

⁶⁶ *E.g.*, *Estate of Querbach v. A & B Appraisal Serv.*, No. L-089362-85 (N.J. Super. Ct. 1987), *excerpted in* FRANKLIN FELDMAN ET AL., *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS*, § 12.4.8 (Supp. 1993).

under or overvalued a work to the detriment of the buyer or seller.⁶⁷ Disparagement cases rarely arise in the auction house environment because the opportunities for publication are so few.⁶⁸ Sotheby's and Christies, for example, give thousands of free appraisals every year, but they typically deal directly with the owner or the owner's agent.⁶⁹ Even a false, maliciously motivated statement about another's property cannot cause loss in marketability unless it is communicated to a third party.

For the work of some artists, special authentication boards or committees have been established to answer inquiries of authenticity.⁷⁰ Those seeking authentication typically provide a board or committee of experts with the work itself or photographs coupled with information such as the work's size, medium, any publications or exhibitions the work has been included in, and any information or documentation relevant to the work's provenance.⁷¹

Unlike auction houses and private appraisers, authentication committees often publish their findings in some form, making them more vulnerable to disparagement claims.⁷² To protect themselves, boards require applicants to hold them harmless and indemnify them against any resulting claims.⁷³ Applicants must also acknowledge that the board's decision is an "opinion," not a "warranty or guarantee."⁷⁴ The committee may also contract for certain rights, such as the right to publish its opinion with an image of the work, to "permanently mark" the work "to reflect its opinion," to alter its opinion in the future if new information comes to light, or to not issue an opinion at all.⁷⁵

In the past decade, the Pollock-Krasner Authentication Board has been sued several times by individuals whose works were deemed forgeries by the board.⁷⁶ Only one of these cases included a claim for disparagement and

⁶⁷ Levy, *supra* note 2, at 597.

⁶⁸ A notable exception is Kirby v. Wildenstein, 784 F. Supp. 1112 (S.D.N.Y. 1992).

⁶⁹ See Spencer, *supra* note 64, at 193.

⁷⁰ *Id.* at 192.

⁷¹ *Id.* at 192-93. Provenance refers to a work's documented line of ownership. A complete provenance leads from the present owner to the artist's studio. Francis V. O'Connor, *Authenticating the Attribution of Art: Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attributions*, in THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 3, 17-18 (Ronald D. Spencer ed., 2004).

⁷² See Spencer, *supra* note 64, at 192-93.

⁷³ *Id.* at 192.

⁷⁴ *Id.*

⁷⁵ *Id.* at 192-93.

⁷⁶ See Vitale v. Marlborough Gallery, No. 94 Civ. 7068, 1994 U.S. Dist. LEXIS 9006, at *4-5 (S.D.N.Y. Jul. 1, 1994) (plaintiff claimed that the rejection of her painting as an authentic Jackson Pollock by the Pollock-Krasner Authentication Board was an illegal exercise of a monopoly under the Sherman Act); Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 253 (S.D.N.Y. 1995) (plain-

that claim was dismissed after the district court declined to exercise pendant jurisdiction.⁷⁷

b. *Catalogues Raisonnees*

A catalogue raisonné is an authoritative index of an artist's work, covering either the artist's full *oeuvre* or a specific category of his works.⁷⁸ It is an invaluable reference, often containing detailed descriptions, history, and provenance for each work.⁷⁹ Primarily, however it is a list of all known works attributed to the artist.⁸⁰ Therefore, when the authors of a catalogue raisonné omit a work, they cast serious doubt on its authenticity⁸¹ and profoundly affect the work's marketability.⁸² As the attorney for a leading art dealer put it, "if a work isn't going to be included in the catalogue, from a commercial view it's the death of your painting."⁸³

In *Kirby v. Wildenstein*,⁸⁴ Christie, Manson & Woods ("Christie's") agreed to auction the plaintiff's painting, "La Rue de la Paix," by Jean Beraud.⁸⁵ In the consignment agreement Christie's agreed to determine if the painting would be included in a catalogue raisonné on Beraud to be published by l'Institut Wildenstein.⁸⁶ Daniel Wildenstein inspected the painting and concluded that it was either a copy or an original badly damaged by over-cleaning.⁸⁷ After Christie's verified its authenticity by obtaining documents tracing the work to Beraud himself, l'Institut agreed to list the painting as authentic but with a comment on the "abusive restoration."⁸⁸ Christie's offered the painting at auction and advertised in the sale catalog

tiff-art dealer accused the Pollock-Krasner Foundation of conspiracy to increase the value of certain paintings by excluding others from the Pollock-Krasner catalogue raisonné); *Lariviere v. Thaw*, No. 100627/99, 2000 N.Y. Misc. LEXIS 648, at *2-3 (Sup. Ct. June 16, 2000); *see also* discussion *infra* Part II.C.4.

⁷⁷ That case is *Vitale*, 1995 U.S. Dist. LEXIS 9006, at *28.

⁷⁸ *See* Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 63, 64-69 (Ronald D. Spencer ed., 2004); Spencer, *supra* note 64, at 190.

⁷⁹ *See* Kraus, *supra* note 78, at 63.

⁸⁰ Spencer, *supra* note 64, at 64-69.

⁸¹ *Id.* at 191.

⁸² *Id.* at 63-64.

⁸³ *See* Daniel Costello and Ken Bensinger, *Art-Reference Works Turn the Judgments of Experts into Harsh Financial Facts*, WALL ST. J., November 12, 1999, at W10.

⁸⁴ 784 F. Supp. 1112 (S.D.N.Y. 1992).

⁸⁵ 784 F. Supp. at 1113.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1114.

⁸⁸ *Id.*

that the work would be included in the forthcoming catalogue raisonné, making no mention of the condition problem.⁸⁹ Nevertheless, the painting failed to sell with zero bidders.⁹⁰ The owner subsequently sued l'Institut Wildenstein and its expert, Daniel Wildenstein for product disparagement.⁹¹

The court acknowledged that Wildenstein published his negative statements when he shared them with Christie's and three individuals associated with l'Institut Wildenstein.⁹² However, the plaintiff failed to show the requisite causal link between this publication and special damages.⁹³ The court noted that "none of those [third] parties were potential purchasers" and that despite plaintiff's allegations of a "whispering campaign . . . there is no evidence whatsoever that the statements were circulated by defendants or any of their employees."⁹⁴ The *Kirby* case, therefore, illustrates the importance and difficulty of showing that an expert's publication was the cause of the plaintiff's losses.⁹⁵

One key question is whether the author of a catalogue raisonné "publishes" a negative attribution when he chooses not to include a work in the catalogue. The judge in *Kirby* acknowledged that "inclusion of a painting in a catalogue raisonné serves to authenticate the work, while non-inclusion suggests that the work is not genuine."⁹⁶ When a catalogue concludes a work is not unauthentic, they often do not say so directly, but rather inform the applicant that "the work will not appear in the forthcoming catalogue."⁹⁷ Of course, such indirect language does nothing to mask the clear implication of the catalogue's rejection.⁹⁸ Therefore, even when a catalogue does not expressly disclaim a work, as some do,⁹⁹ non-publication can be "publication" for the purpose of art disparagement.

⁸⁹ *Id.* at 1115.

⁹⁰ *Id.*

⁹¹ *Kirby*, F. Supp. at 1115.

⁹² *Id.* at 1118.

⁹³ *Id.*. The plaintiff also failed to show special damages, which was the basis for dismissal. *Id.* at 1116.

⁹⁴ *Id.* at 1118.

⁹⁵ Causation is easy to establish in certain circumstances (e.g., when a work is conspicuously withdrawn from an auction, or where publicity surrounds an authenticity dispute).

⁹⁶ *Kirby*, 784 F. Supp. at 1113.

⁹⁷ Spencer, *supra* note 64, at 191.

⁹⁸ *Id.*

⁹⁹ *Id.* at 190. "A minority of catalogues raisonnés contain a 'false attribution' section which includes works ranging from innocent copies of an artist's style to works created with an intent to deceive (fakes)." *Id.*

c. *Retrospective Exhibitions*

Museums commonly prepare exhibitions that look back at an artist's career.¹⁰⁰ In deciding what works to include in the exhibition, museum curators often make decisions based on, *inter alia*, authenticity.¹⁰¹ Like the exclusion of works from a catalogue raisonné, refusal to include works in an exhibition can lead to litigation. In *Gumowitz v. Wildenstein & Co.*,¹⁰² the plaintiff sued the Metropolitan Museum of Art in New York and one of its curators for disparagement after they refused to include his painting in an exhibition dedicated to Georges Seurat.¹⁰³ The museum's curator actually believed the painting was authentic, but the work was not included because a fellow curator had doubts.¹⁰⁴ After hearing about the paintings exclusion, an art dealer interested in buying the painting "lost interest."¹⁰⁵ The museum had several strong defenses but settled out of court in 1995.¹⁰⁶

d. *Unsolicited Opinions*

The classic case of an unsolicited opinion-gone-wrong, *Hahn v. Duveen*,¹⁰⁷ is also the case that "rocked the art world" by becoming the first disparagement claim against an art expert.¹⁰⁸ In *Hahn*, the Kansas City Museum was negotiating with the plaintiff, Mrs. Hahn, to buy her painting, believed by the parties to be Leonardo da Vinci's "La Belle Ferroniere."¹⁰⁹ The museum immediately lost interest, however, when a well-known art dealer named Sir Joseph Duveen told a New York newspaper that the real "La Belle Ferroniere" was in the Louvre and that "any expert who pronounced it genuine was not an expert."¹¹⁰ Mrs. Hahn sued Duveen for slander of title and, after a long trial and fourteen hours of deliberation the jury

¹⁰⁰ See *id.* at 191.

¹⁰¹ *Id.*

¹⁰² No. 10229-92 (N.Y. Sup. Ct. 1992) (*excerpted in* Spencer, *supra* note 64, at 191-92).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 234 N.Y.S. 185 (Sup. Ct. 1929).

¹⁰⁸ Du Boff, *supra* note 13, at 983; see also Ronald D. Spencer, *A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 217 (Ronald D. Spencer ed., 2004).

¹⁰⁹ *Hahn*, 234 N.Y.S. at 187.

¹¹⁰ *Id.*

could not find unanimously on the threshold issue of truth—whether or not the painting was a da Vinci original.¹¹¹

Had the jury found Duveen's statement to be false, the case would have turned on the issue of malice, since publication was not in dispute and the lost museum sale constituted special damages.¹¹² The judge instructed the jury that "whenever a man unnecessarily intermeddles with the affairs of others, with which he is wholly unconcerned, such officious interference will be deemed malicious."¹¹³ As a legal matter, this is a questionable definition of malice.¹¹⁴ Nevertheless, the instruction probably derives from a popular sentiment that associates intentional interference with malice. This attitude, plus the fact that Duveen paid dearly for his interference,¹¹⁵ has inspired many experts to abstain from unsolicited, negative opinions.¹¹⁶

In Theodore Stebbins' important essay, he suggested that the only "area in which the expert has justifiable fear of being sued is that in which he volunteers his opinion."¹¹⁷ This view was based on the common law theory of *velenti non fit injuria* ("He who consents cannot receive an injury") which is adopted by the Restatement of Torts¹¹⁸ and "recognized in most American jurisdictions."¹¹⁹ However, since the Stebbins essay was published in 1974, cases like *Kirby* and *Vitale* have demonstrated that experts who respond to requests for authentication are also vulnerable to suit.¹²⁰ The reason is that consent is a very limited privilege. When one consents to publication of a potentially negative opinion, one has not consented to malicious falsity and malicious falsity is what the plaintiff is alleging in disparagement.

¹¹¹ *Id.* at 186.

¹¹² In fact, the jury was persuaded nine-to-three that Duveen "maliciously and intentionally wrecked the sale." Levy, *supra* note 2, at 643 (citing LAURIE ADAMS, ART ON TRIAL: FROM WHISTLER TO ROTHKO 109 (1976)).

¹¹³ *Hahn*, 234 N.Y.S. at 188.

¹¹⁴ As discussed above, this definition is not consistent with the malice standard used in most jurisdictions today. See discussion *supra* Part I.B.2.

¹¹⁵ After the jury failed to produce a verdict, the judge denied the defendant's motion to dismiss and ordered a new trial. MERRYMAN & ELSEN, *supra* note 54, at 577. Rather than retry the case, Duveen settled with Hahn for \$60,000. DuBoff, *supra* note 13, at 983.

¹¹⁶ Levy, *supra* note 2, at 643 (citing DuBoff, *supra* note 13, at 981-83).

¹¹⁷ Stebbins, *supra* note 13, at 533.

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 635B cmt. b (1977).

¹¹⁹ Stebbins, *supra* note 13, at 525.

¹²⁰ *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992); *Vitale v. Marlborough Gallery*, No. 94 Civ. 7068, 1994 U.S. Dist. LEXIS 9006 (S.D.N.Y. July, 1 1994).

4. Special Damages

Special damages are pecuniary or economic losses that are the natural and immediate consequence of the defendant's wrongful disparagement.¹²¹ As mentioned above, special damages must be shown in disparagement because without them, the plaintiff has not suffered the injury disparagement corrects—loss of marketability.¹²² As a result, some disparagement cases lose on summary judgment “for failure to allege special damages with the requisite specificity.”¹²³

Kirby was dismissed on summary judgment because the plaintiff failed to meet his burden of production regarding special damages.¹²⁴ The original demand was \$250,000, but the complaint did not specify the basis for this loss.¹²⁵ Of particular importance was the plaintiff's failure to identify any potential purchasers who lost interest because of the alleged disparagement.¹²⁶ Applying New York law, the court distinguished *Charles Atlas, Ltd. v. Time-Life Books, Inc.*,¹²⁷ which questioned whether a plaintiff should be required to identify lost customers in circumstances where it is “virtually impossible to identify those who did not order the plaintiff's product.”¹²⁸ In *Charles Atlas, Ltd.*, the plaintiff sold products by mail order to a “dispersed” and “amorphous market.”¹²⁹ In such a situation, simply showing a decline in sale opportunities may be sufficient, but only if other causes of loss have been excluded.¹³⁰ In *Kirby*, other causes were not ruled out for the failure of plaintiff's painting to sell.¹³¹ For example, it is possible, if not likely, that bidders passed on the painting because it had serious condition problems.¹³²

¹²¹ *Kirby*, 784 F. Supp. at 1116. Special damages may include the expenses necessary to counteract the allegedly wrongful conduct and loss of sales, such as “special advertising expenses” incurred to counteract the alleged product disparagement. *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150, 155 (S.D.N.Y. 1983).

¹²² RESTATEMENT (SECOND) OF TORTS § 624 (1977).

¹²³ *Kirby*, 784 F. Supp. at 1116.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1116-17.

¹²⁷ 570 F. Supp. 150 (S.D.N.Y. 1983).

¹²⁸ 570 F. Supp. at 156.

¹²⁹ *Kirby*, 784 F. Supp. at 1116-17 (characterizing the facts of *Charles Atlas, Ltd.*, 570 F. Supp. 150).

¹³⁰ *Bose Corp. v. Consumers Union*, 529 F. Supp. 357 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd* 466 U.S. 485 (1984).

¹³¹ 784 F. Supp. at 1118.

¹³² *Id.* Although Christie's did not disclose the painting's condition in the sale catalog, the condition report Christie's made available on request detailed the painting's condition issues. *Id.* at 1114-15.

Because disparagement is a tort, the appropriate remedy is compensatory damages, not the contract remedy of expectation damages.¹³³ Therefore, when a work is so tainted that it is unmarketable, like the Calder mobile in *Greenberg Gallery, Inc.*, the successful plaintiff will be awarded his purchase price, not what the work currently would be worth had it not been disparaged.¹³⁴ If the artwork has not become unmarketable, but the plaintiff has lost a specific sale opportunity due to disparagement, the plaintiff is in a good position to establish special damages.¹³⁵ The plaintiff does not need to prove that disparagement was the only factor in losing the sale—only that it was a “substantial factor.”¹³⁶ The actual settlement amount will be based on the sale price negotiated, if any, or a showing of fair market value.¹³⁷ The failure of the plaintiff in *Kirby* to make such a showing contributed to dismissal of the claim.¹³⁸

C. *Opinion Defenses*

Experts, particularly expert bodies such as authentication boards, often require those seeking their services to acknowledge in writing that their determination of authenticity is only an “opinion.”¹³⁹ Experts contract for this acknowledgment to help establish a defense under either the common law privilege of “fair comment,” the First Amendment “freedom of speech,”¹⁴⁰ or state tort laws.

1. Fair Comment

The “fair comment” privilege can be invoked in defense of a good-faith opinion regarding a matter of public interest.¹⁴¹ Although this privilege

¹³³ ROBERT MICHEAL EY, 21 CAUSE OF ACTION 245 § 26 (2004). There are no examples of court awarded damages for art disparagement because, as far as the author knows, all art disparagement cases have been settled or dismissed.

¹³⁴ In *Travis*, for example, the court reasoned that even if the defendant had disparaged the plaintiff’s painting by calling it a Kettle instead of a Reynolds, he had suffered no damages because he paid less than the current value of either a Kettle or a Reynolds. MERRYMAN & ELSEY, *supra* note 54, at 573.

¹³⁵ EY, *supra* note 133, § 9.

¹³⁶ See, e.g., *Bose Corp. v. Consumers Union*, 529 F. Supp. 357 (D. Mass. 1981), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff’d* 466 U.S. 485 (1984); see also RESTATEMENT (SECOND) OF TORTS §32 cmt. c (1977).

¹³⁷ See EY, *supra* note 133, § 9.

¹³⁸ See *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1116 (S.D.N.Y. 1992).

¹³⁹ Spencer, *supra* note 26, at 180-81.

¹⁴⁰ U.S. CONST. amend I.

¹⁴¹ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-14 (1990).

is normally invoked in defamation claims, some have concluded that it would apply to disparagement as well.¹⁴² Assuming this is the case, “fair comment” would only be germane to circumstances in which an expert comments on a work in the public eye (e.g. works displayed in a museum or gallery).¹⁴³ The majority of authentication is performed on works out of the public eye, making fair comment more relevant to art criticism than to art authentication.¹⁴⁴

2. The First Amendment

After the Supreme Court’s decision in *Gertz v. Robert Welch, Inc.*,¹⁴⁵ the First Amendment was widely understood to provide absolute immunity for expressions of opinion.¹⁴⁶ This understanding was based on the Court’s statement in dicta that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”¹⁴⁷ However, sixteen years later, in *Milkovich v. Lorain Journal Co.*,¹⁴⁸ the Court held that the reference in *Gertz* to opinion was not intended as a “wholesale defamation exemption for anything that might be labeled ‘opinion.’”¹⁴⁹ The Court’s “language was merely a reiteration of Justice Holmes’ classic ‘marketplace of ideas’ concept.”¹⁵⁰ In short, the First Amendment does not prevent state law from imposing liability on art experts for their opinions.¹⁵¹

3. State Tort Law

State tort law varies, but many states, including New York, recognize a privilege for “opinion.”¹⁵² Because falsity is a necessary element to both disparagement and defamation and “only ‘facts’ are capable of being

¹⁴² Stebbins, *supra* note 13, at 528. No jurisdiction has yet passed on the applicability of the fair comment privilege to the tort of disparagement. *See id.* at 530.

¹⁴³ *Id.*

¹⁴⁴ *See, e.g.,* Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962), *noted in* Stebbins, *supra* note 13, at 529; Fisher v. The Washington Post Co., 212 A.2d 335 (D.C. 1965).

¹⁴⁵ 418 U.S. 323 (1974).

¹⁴⁶ Levy, *supra* note 2, at 645; *see also* RESTATEMENT (SECOND) OF TORTS §566 cmt. c (1977).

¹⁴⁷ *Gertz*, 418 U.S. at 339-40.

¹⁴⁸ 497 U.S. 1 (1990).

¹⁴⁹ 497 U.S. at 18.

¹⁵⁰ *Id.*

¹⁵¹ If the art expert is commenting as part of the media, he may be treated differently under the First Amendment. *See id.*

¹⁵² *See* Levy, *supra* note 2, at 648-49.

proven false, it follows that only statements alleging facts can properly be the subject of a defamation action.¹⁵³ The central problem, however, is that the line between fact and opinion is difficult to discern.¹⁵⁴ For example, in *Travis*, the expert declared the plaintiff's painting to be a work by Tilly Kettle—not Joshua Reynolds.¹⁵⁵ Is this a statement of fact or an opinion as to a fact? Would it make a difference if the expert had prefaced his statement with “in my opinion”?

In *Milkovich*, the Supreme Court held that statements, whether or not they are couched in terms of “opinion” could be actionable if they contain “a provably false factual connotation.”¹⁵⁶ The Court limited its holding to statements made by the media about a private (non-public) figure involving a matter of public concern.¹⁵⁷ Nevertheless, many states follow the *Milkovich* approach to some degree in order to define “opinion” in general.¹⁵⁸ In a recent analysis of this question, Ronald Spencer concludes that expert statements of authenticity are typically a hybrid of fact and opinion because they “both express the author’s judgment and indicate the existence of specific facts warranting that judgment.”¹⁵⁹ Furthermore, Spencer concludes that courts applying the First Amendment case law will probably not protect expert attributions as opinion.¹⁶⁰

¹⁵³ *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1168 (N.Y. 1993) (citing 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 935 (N.Y. 1992)).

¹⁵⁴ See Levy, *supra* note 2, at 645.

¹⁵⁵ Stebbins, *supra* note 13, at 534.

¹⁵⁶ 497 U.S. at 20.

¹⁵⁷ *Id.* at 21-22.

¹⁵⁸ See Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119, 121 (2002). Maloy explains the approaches taken by different states:

Some courts refuse to follow *Milkovich* because they conclude that their state laws offer greater protection for speech than does the First Amendment. Some courts use authorities other than *Milkovich* in deciding the fact/opinion issue. Some courts do not rely on any precedent, but construct their own reasons for differentiating fact from opinion. Some courts use all three *Milkovich* factors, while others eclectically choose from among the three.

Id. (footnote omitted). New York formulated its own definition of “opinion,” requiring the following inquiry:

(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Gross, 623 N.E.2d at 1167 (alterations and internal quotations marks omitted).

¹⁵⁹ Spencer, *supra* note 26, at 184.

¹⁶⁰ *Id.* at 185. Spencer’s reasoning and conclusion are equally applicable to New York’s definition of opinion articulated in *Gross*. 623 N.E.2d at 1168; see *supra* note 158.

II. ANALYSIS

For over seventy-five years, since *Hahn v. Duveen*, art experts have been afraid to give negative opinions of authenticity because it might open the door to costly litigation.¹⁶¹ Unfortunately, this fear has made some experts reluctant to share information, generating diffuse inefficiency costs. Even so, the tort of disparagement is well-suited to the art market. Under the corrective justice approach to tort law, it is justified and, under the economic approach to tort law, it is efficient.

A. *The Corrective Justice Approach*

The corrective justice approach to tort law defines the principles under which it is justified to shift a loss from one actor to another.¹⁶² Oliver Wendell Holmes argued that “loss from accident must lie where it falls,” even when “a human being is the instrument of misfortune.”¹⁶³ However, Holmes said it is justified to shift the loss from plaintiff to defendant when the defendant chooses to act and when the chosen act creates a foreseeable danger to the plaintiff.¹⁶⁴ The theories of corrective justice that built on this conception of “fault” share a common, rather intuitive principle—that one who wrongfully injures another is responsible for the resulting loss.¹⁶⁵

What is “wrongful” has been defined in various ways. According to some, a wrongful act is the imposition of risk “greater in degree and different in order from those created by the victim.”¹⁶⁶ Others define wrongdoing as the “unjustified or impermissible harming of a legitimate interest.”¹⁶⁷ By either of these standards, art disparagement is a wrongful act. Take, for example, the case of an authenticity board.¹⁶⁸ An individual approaches the board to authenticate his artwork and, in the process, he contractually accepts the risk that the board’s decision might depreciate his property. The board subsequently publishes negative statements about the work, knowing

¹⁶¹ Spencer, *supra* note 108.

¹⁶² Jules Coleman, *Theories of Tort Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/archives/win2003/entries/tort-theories>.

¹⁶³ OLIVER WENDELL HOLMES, THE COMMON LAW 94 (Dover Publishers 1991).

¹⁶⁴ *Id.* at 91.

¹⁶⁵ Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2351 (1980).

¹⁶⁶ George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972). Fletcher refers to this concept as “nonreciprocal risk.” *Id.*

¹⁶⁷ JULES L. COLEMAN, RISKS AND WRONGS 331 (1992).

¹⁶⁸ This scenario is ideal for judging the expert’s act. When the plaintiff is fully aware of the risks, no added wrongdoing is inadvertently imputed to the expert.

that the statements are false or probably false. They also know that these statements will cause the individual financial harm. Clearly, the board has unjustifiably harmed the individual's legitimate property interest. It is therefore justifiable to shift the loss from the individual to the board.

In truth, product disparagement does not present difficult issues for corrective justice. This is so because it has a high standard of fault. That is to say, if there is a spectrum of fault with intentional torts at one extreme and negligence at the other, "actual malice," as defined in disparagement, is very close to intentional tort.¹⁶⁹ Holding intentional tortfeasors accountable for their actions is not controversial.

B. *The Economic Approach*

The economic approach to tort law is fundamentally different from the corrective justice approach.¹⁷⁰ Rather than defining principles of justification, it is concerned with achieving a goal, efficiency.¹⁷¹ This is achieved by creating incentives that induce individuals to minimize both the cost of avoiding injury and the injury itself.¹⁷² Viewed from this perspective, disparagement promotes efficiency in the art market by (1) placing the burden of avoidance on the only party in a position to avoid injury; (2) incentivizing the expert to act in good faith and resist temptations to exploit information asymmetry; and (3) incentivizing the expert to take a cost-justified level of care. The one inefficiency associated with art disparagement, the reluctance of experts to share valuable information, is caused by the universal problem of frivolous claims—not disparagement itself.

1. The Burden Is Rightly on the Expert

Experts in the art market play a unique role—perhaps one that is unparalleled in other markets. Their role is exceptional for two reasons. First, connoisseurship is very specialized and experts in any given specialty are scarce.¹⁷³ Second, although buyers make decisions based on their preferences and price, it is actually the expert that shapes preferences and prices in the art market.¹⁷⁴ As a result, a vast, incurable asymmetry exists between

¹⁶⁹ See Stebbins, *supra* note 13, at 523.

¹⁷⁰ Ernest J. Weinrib, *Understanding Tort Law*, 23 Val. U. L. Rev. 486, 487 (1989).

¹⁷¹ *Id.*

¹⁷² Coleman, *supra* note 162.

¹⁷³ See DuBoff, *supra* note 13, at 980-82.

¹⁷⁴ See MERRYMAN & ELSEN, *supra* note 54, at 569.

the expert and the public. The burden to avoid harm, therefore, is correctly on the expert because only he has the capability to cause harm.¹⁷⁵

Clearly, not everyone has the same capability to harm the market value of another person's property. If a high school student who just got his driver's license says the new Ford Mustang handles like a dump truck, he might influence a few of his classmates, but his statement will not carry enough weight to influence Mustang sales. However, if Dale Earnhardt, Jr. publishes the same statement, it would certainly affect sales. Simply put, the statement of an expert has far greater influence on products within his expertise. Nowhere is this truer than in the art market where so many buyers lack the ability to make an independent conclusion. I can always test-drive the Ford Mustang to formulate my own opinion, but like most people, I lack the necessary skill to independently authenticate a painting.

In most contexts, no one expert opinion is treated as gospel because there are plenty of other experts offering competing opinions in the "marketplace of ideas."¹⁷⁶ In the art market, however, the marketplace of ideas is limited.¹⁷⁷ There is a tendency towards group thought.¹⁷⁸ A highly qualified, though less established expert may find himself "outcast" if he challenges an attribution accepted by "the establishment."¹⁷⁹ Yet, if a highly respected expert challenges a work's authenticity, it may be tainted forever. The Calder mobile in *Greenberg Gallery, Inc.* is a prime example.¹⁸⁰ The mobile had an impeccable provenance, traceable to the artist himself.¹⁸¹ The plaintiff's highly qualified expert said the mobile was authentic and a court of law declared it to be authentic.¹⁸² Nevertheless, as the prominent art dealer, Andre Emmerich, said, "if Klaus Perls says a work is a forgery, it is a forgery in terms of the market. The work is then ipso facto unsalable [sic] and should not be touched by any honorable person."¹⁸³ In other words, some-

¹⁷⁵ This is sometimes referred to as a case of unilateral care. See generally GUIDO CALEBRESI, *THE COST OF ACCIDENTS* (1970). See Singer, *supra* note 55, at 439 and Gerstenblith, *supra* note 51, at 503, for examples of how the asymmetry sometimes works to the disadvantage of consumers.

¹⁷⁶ Justice Holmes coined the "marketplace of ideas" metaphor in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁷⁷ Getting even one opinion can be very difficult. Many institutional experts are prohibited from authenticating works for the public. DuBoff, *supra* note 13, at 981. Sotheby's and Christie's give free consultations, but it is not practical for most art owners to bring their works to New York, where most of their experts are concentrated.

¹⁷⁸ This is even clearer where art experts opine on contemporary artists. See MERRYMAN & ELSÉN, *supra* note 54, at 577.

¹⁷⁹ DuBoff, *supra* note 13, at 982.

¹⁸⁰ 817 F. Supp. 167 (D. D.C. 1993), *aff'd mem.*, 36 F.3d 127 (D.C. Cir. 1994).

¹⁸¹ *Id.* at 173.

¹⁸² *Id.* at 172.

¹⁸³ *Id.* at 174 n.8.

times the art expert's opinion *is* gospel. Today the mobile is wasting away in storage, a "worthless," "bad egg" according to its owner.¹⁸⁴

In most market contexts, the truth will eventually "catch up with the lie." For example, in *Texas Beef Group v. Winfrey*,¹⁸⁵ Oprah Winfrey was sued for disparagement after she made negative remarks on her television show about the safety of U.S. beef products.¹⁸⁶ The comment caused a sharp decline in beef sales, yet sales quickly bounced back, presumably because of competing, positive information.¹⁸⁷ In the art market, it is possible that competing, positive opinions will convince certain collectors of a work's authenticity. Nevertheless, a certain segment of the market is sure to be scared away, injuring the work's marketability in proportion to the drop in demand for the work. When the truth does catch up with the lie, it is usually after many years in a new market, with a new generation of experts and a new generation of collectors.¹⁸⁸

2. The Expert Is Incentivized to Act in Good Faith.

In general, exposure to legal liability can benefit a profession by providing an incentive to maintain high professional standards.¹⁸⁹ This is an "added" incentive because experts are naturally motivated to establish high "reputation value."¹⁹⁰ It stands to reason that as experts become more reputable, this incentive grows proportionally with their desire to maintain high status. Furthermore, the harm an expert can inflict with his opinion grows proportionally with his status. Therefore, one might ask what value is added by exposing experts to legal liability.

One response is that lawsuits function as a much-needed signal in the marketplace. For example, before *Hahn v. Duveen*,¹⁹¹ the public presumably knew very little about Sir Joseph Duveen. Many in the art trade knew him

¹⁸⁴ Judd Tully, *When Is a Calder Not a Calder?*, ART NEWS, Feb. 1997, at 90.

¹⁸⁵ 11 F. Supp. 2d 858 (N.D. Tex. 1998).

¹⁸⁶ 11 F. Supp. 2d 858.

¹⁸⁷ See Reilly Capps, *Ex-Cattleman's Warning Was No Bum Steer; Rancher Raised Flag on Mad Cow Long Ago*, WASH. POST, Jan. 2, 2004, at C1.

¹⁸⁸ "Opinions about authenticity or value that are indisputably correct today may be deemed clearly erroneous tomorrow." Levy, *supra* note 2, at 632. An interesting example is when a new generation of scholars with the Rembrandt Research Project proclaimed 39 "Rembrandts" in the Louvre and elsewhere to be by other artists. Most interestingly, a number of collectors rushed to buy these depreciated paintings in anticipation that scholarship would someday shift again in their favor. *Id.* See generally Sylvia Hochfield, *Rembrandt: The Unvarnished Truth?*, ART NEWS, Dec. 1987, at 102-111.

¹⁸⁹ Levy, *supra* note 2, at 650.

¹⁹⁰ David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253-79.

¹⁹¹ 234 N.Y.S. 185 (Sup. Ct. 1929).

only as an important dealer, specializing in Renaissance paintings.¹⁹² After the suit, however, many people learned of his “proclivity for making disparaging statements,”¹⁹³ and the way he interfered with scholarship to advance his own financial interests.¹⁹⁴ The resolution of a claim can also send a positive signal. For example, *Lariviere v. Thaw* revealed the Pollock-Krasner Authentication Board to be fair, ethical and diligent in performing its duties.¹⁹⁵ Furthermore, these signals do not fall on deaf ears.¹⁹⁶ These cases are widely publicized in major newspapers and trade publications like *Art & Auction*, *Art News*, and *The Art Newspaper*.¹⁹⁷

Additionally, legal liability is a valuable disincentive because many experts have shown a willingness to act unethically, despite the risk to their reputation.¹⁹⁸ As one scholar put it, “the art world is far from immune to the problems of deception and misrepresentation that characterize many commercial transactions.”¹⁹⁹ Because of the vast information asymmetry discussed above, experts have unique opportunities to exploit the ignorance of others.²⁰⁰ Presumably, some experts consider the gains from these opportunities to be greater than the risk of diminished status.²⁰¹ For these individuals, legal liability is especially valuable as a deterrent because it adds a new level of risk—the damage award.²⁰²

¹⁹² See SAMUEL N. BEHRMAN, DUVEEN (1952).

¹⁹³ See Stebbins, *supra* note 13, at 519.

¹⁹⁴ See MERRYMAN & ELSEEN, *supra* note 54, at 573; BEHRMAN, *supra* note 192, at 54; Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS 63, 65 (Ronald D. Spencer ed., 2004).

¹⁹⁵ No. 100627/99, 2000 N.Y. Misc. LEXIS 648 (Sup. Ct. June 16, 2000).

¹⁹⁶ One expert who was sued for a fraudulent act demanded that her name be cleared in a press release in exchange for a large cash settlement. Levy, *supra* note 2, at 636 n.227.

¹⁹⁷ Indeed, many of the cases cited in the literature are unpublished trial court cases that would go unnoticed if not for such publicity.

¹⁹⁸ DuBoff, *supra* note 13, at 981. “Few art experts are available to the public, and some of those who are may not be entirely scrupulous.” *Id.*

¹⁹⁹ Gerstenblith, *supra* note 51, at 502. Most cases of wrongful expert behavior are addressed by the contract theories of fraud and misrepresentation, though some cases are more appropriately addressed by the tort theory of disparagement (e.g., a dealer sabotages the sale of a painting by a rival dealer by spreading false information about its quality, condition or authenticity). *Id.*

²⁰⁰ In a “spectacular example of abuse of this power for personal financial gain,” one of the foremost scholars of Renaissance art conspired with a dealer to write a book promoting the dealer’s plaster statue as a long-lost model used by Michelangelo, worth approximately \$80 million. In return, the scholar was to receive five percent of the statue’s sale price at auction. Levy, *supra* note 2, at 637-638.

²⁰¹ In 1989 an art consultant received a \$85,000 commission for convincing her client, Sylvester Stallone, to purchase what she characterized as a masterpiece. Stallone sued after discovering that the painting had major condition problems and was worth a fraction of the \$1.7 million she advised him to pay. *Stallone Files \$5 Million Suit Against New York Art Consultant*, L.A. TIMES, Dec. 27, 1989, at P8, noted in Levy, *supra* note 2, at 636.

²⁰² DuBoff, *supra* note 13, at 987 n.69.

3. The Expert Is Incentivized to Take Greater Care

The classic economic tort model is of a rational actor adjusting his behavior to the optimal level of care to prevent accidents for which the actor incurs negligence liability.²⁰³ However, disparagement does not fit the negligence model because there is no accident when the standard of fault is “actual malice.” Disparagement liability attaches when the expert says something harmful that he knows is not true or that he knows is unlikely to be true.²⁰⁴ Of course, the expert has an incentive to speak non-recklessly. Perhaps less obvious is the expert’s strong incentive to satisfy an even higher standard of care.

The plaintiff has a very difficult burden to prove liability.²⁰⁵ In fact, as of the time of this writing, no plaintiff has ever won a judgment for art disparagement. Nevertheless, the cost of litigation is so great that large auction houses often settle claims shortly after receiving the complaint.²⁰⁶ In short, the expert cannot afford to wait for a jury to confirm that he acted without “actual malice.” Therefore, by taking great care in the attribution process and by documenting the basis of his conclusions, the expert makes it so hard for the plaintiff to establish malice that the claim is likely to fail on summary judgment.²⁰⁷ In some cases, the plaintiff might even be persuaded to drop his claim before the motion is filed. In any event, malice is the expert’s key to early dismissal because he can control the appearance of (i.e. the evidence for) malice. By contrast, the expert is not in a good position to prove the plaintiff’s lack of special damages, and it is too easy for the plaintiff to create a question of fact with regard to falsity and publication.²⁰⁸

This heightened level of care is beneficial to the art market. For instance, when an expert is asked to authenticate a work, he frequently knows if the painting is “not right” immediately. There is a temptation for some, either because of time constraints or professional pride, to dismiss the work quickly with little or no explanation.²⁰⁹ However, because the expert is wor-

²⁰³ See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

²⁰⁴ In this sense, it is almost an intentional tort.

²⁰⁵ See discussion *infra* Part I.

²⁰⁶ See MERRYMAN & ELSEY, *supra* note 54, at 571; Levy, *supra* note 2, at 650.

²⁰⁷ DuBoff, *supra* note 13, at 987. “Experts would be encouraged to exercise caution when making evaluations, since they might ultimately be forced to justify their actions in court.” *Id.* at 987 n.69.

²⁰⁸ See MERRYMAN & ELSEY, *supra* note 54, at 570.

²⁰⁹ Experts have failed to explain their opinions out of professional pride even when specifically called upon to do so in court. In *Reynolds v. Commissioner*, when the expert was asked to support his conclusions on the value of artworks, he replied “any question as to their value has been amply and honestly answered by an acknowledged expert (myself) in the field, and I am absolutely confident that no knowledgeable person would disagree.” 43 T.C.M. (CCH) 115, 116 n.3 (1981).

ried about appearances, he has the incentive to explain himself.²¹⁰ This is why the College Art Association suggests in its *Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History* that experts include in any publication the basis for their conclusions.²¹¹ For the same reasons, the expert is less likely to overstate his opinions, and when confronted with a work outside his specific expertise, he is more likely to make the appropriate referral.

Documenting the basis of an attribution yields some positive externalities as well. First, the owner of the work benefits from having more information. With the expert's rationale in hand, the owner is more likely to be satisfied than skeptical. He is also more likely to forego the cost of seeking a second opinion or a legal remedy. Alternatively, the owner may be dissatisfied, but the expert's rationale gives him a basis from which to evaluate a second expert's opinion. Second, the expert and others with whom he shares information benefit because many forgeries and misattributed works have been circulating in the art market for years,²¹² so when an expert is confronted with the same problematic work multiple times, he will have the benefit of his earlier observations.²¹³

Because the precautions discussed above originate more from the expert's desire to avoid the cost of frivolous litigation than the cost of actual injury, an analysis of "cost-justified" precautions may be less appropriate than it is with negligence. However, if we merge the cost of defense and the cost of an adverse judgment, as real-life actors surely do, one might ask if the expert's precautions are "cost justified"? From the perspective of economics, precautions are justified whenever their cost is less than the cost of the harm risked, discounted by the probability of the harm's occurrence.²¹⁴ By this measure, it is cost-justified for the expert to elevate his level of care to meet the negligence standard. To do so costs him very little and yet it significantly decreases the probability of harm which is considerable both

²¹⁰ DuBoff goes so far as to say documentation should be required. DuBoff, *supra* note 13, at 987. See also Levy, *supra* note 2, at 615. The judge in *Greenberg Gallery, Inc.* found that the preponderance of the evidence favored the plaintiff because his expert took more time with the mobile in question and better explained the basis of her findings. 817 F. Supp. 167, 170, 172, 174 (D.D.C. 1993), *aff'd mem.*, 36 F.3d 127 (D.C. Cir. 1994).

²¹¹ MERRYMAN & ELSEN, *supra* note 54, at 569-70. Although the code does little to educate experts on the law itself, it offers suggestions that are informed by the basis of liability. The code wisely suggests that experts become acquainted with the law in their state. *Id.* at 570.

²¹² As a former employee of a major auction house, the author has witnessed the same works of dubious authorship visit and revisit in-house experts, typically after ownership has transferred from one optimistic collector to another.

²¹³ See, e.g., *Lariviere v. Thaw*, No. 100627/99, 2000 N.Y. Misc. LEXIS 648, at 2-3 (Sup. Ct. June 26, 2000).

²¹⁴ Coleman, *supra* note 162.

for the injured plaintiff and the defending expert.²¹⁵ If one is analytically unwilling to merge defense costs with the costs shifted to the liable defendant, the question becomes, is the cost of acting without “actual malice” less than the harm a reckless opinion would probably cause? Of course, this is an even easier case for cost-justification because the burden of acting non-recklessly is negligible.

4. The Disincentive to Share Negative Opinions

It cannot be denied that the advent of art disparagement seventy-five years ago had a profound effect on the behavior of art experts. The most risk-adverse expert might avoid litigation by refusing to give his opinion altogether.²¹⁶ Some museums, for example, prohibit their experts from authenticating artworks at the request of individual owners.²¹⁷ A less drastic measure would be for the expert to share his finding only with the owner of the artwork, thereby avoiding “publication.” This approach is advocated by the College Art Association which says scholars are “on safest legal ground” when their opinion is rendered only to the artwork’s owner.²¹⁸ In the same vein, the expert might publish his opinion, but limit the publication in proportion to his perception of risk. For example, if an expert visits a commercial gallery and sees a work he thinks is misattributed, he might express his doubts to a disinterested colleague, but not to a potential buyer who would benefit most from the information.²¹⁹

These practices have opportunity costs. The most efficient way to address forgeries and misattributions in the market is for experts to share their observations on a large scale.²²⁰ As noted above, some catalogues raisonnées have made an effort to do this by illustrating problematic works and works that exemplify the difference between an artist’s work and those who imitate it.²²¹ Such exchanges would enable, and perhaps encourage, experts to reevaluate each other’s assessments, creating a livelier “marketplace of connoisseurship.” Many of the forgeries that plague the market today would come off the market for good, promoting consumer confidence.²²²

²¹⁵ The inherent problem with such analyses is that it is impossible to quantify the variables used.

²¹⁶ MERRYMAN & ELSEN, *supra* note 54, at 571; Stebbins, *supra* note 13, at 517.

²¹⁷ DuBoff, *supra* note 13, at 981; *see* Levy, *supra* note 2, at 650.

²¹⁸ MERRYMAN & ELSEN, *supra* note 54, at 570.

²¹⁹ *Cf. id.* (setting forth practices a scholar should follow in rendering an opinion).

²²⁰ Although sharing information is more efficient overall, sharing the details of how a forgery was spotted would actually aid forgers. Some authentication boards do not reveal the full basis of their finding for this very reason. Spencer, *supra* note 64, at 193.

²²¹ *Id.* at 190-91.

²²² *See* Spencer, *supra* note 108, at 217-18.

The temptation is to blame product disparagement for creating a disincentive to reveal negative opinions.²²³ However, that is not fair because it is abuse of the law, not the law itself that is affecting expert behavior. The threat of abuse is common to all causes of action and there is nothing to suggest disparagement invites more abuse than other laws. To the contrary, most would-be plaintiffs are discouraged by the high prima facie burden. Therefore, product disparagement does not promote this inefficiency.

C. Solutions

If the source of the problem lies outside the tort itself, the core solution must lie outside the tort as well. A number of solutions have been proposed, but each is fatally flawed for either normative or practical reasons.

1. Regulation

One way to protect the expert and the non-expert from each other is to regulate their relationship. The first such regulations were enacted in 1966 when a series of new articles were added to the New York General Business Law, including the Arts and Cultural Affairs Law.²²⁴ It was intended to “supplement” the U.C.C. by addressing issues peculiar to the art market.²²⁵ In reality, these laws added very little to the consumer protection already provided by the U.C.C.²²⁶ For that matter, the U.C.C. added little to the protection already provided by the common law.²²⁷ One of the new regulations New York considered in 1966 was a bill that granted a “qualified privilege” to accredited²²⁸ art experts giving negative opinions of authenticity.²²⁹ The

²²³ See Levy, *supra* note 2, at 650.

²²⁴ N.Y. ARTS & CULT. AFF. LAW §§ 11.01-15.21 (McKinney 1984 & Supp. 1988).

²²⁵ Gerstenblith, *supra* note 51, at 516. The New York law specified that when an “art merchant” attributes a work to an artist in writing, that statement “(a) shall be presumed to be part of the basis of the bargain; and (b) shall create an express warranty for the material facts stated” N.Y. ARTS & CULT. AFF. LAW § 13.01. A similar statute in Michigan provides that the warranty survives even if the art merchant characterizes his attributions as an “opinion.” See MICH. COMP. LAWS ANN. § 442.322(2)(a) (West Supp. 1987) (discussed in Gerstenblith, *supra* note 51, at 516-23).

²²⁶ Leslie Kaufman Akst, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 962 (1977).

²²⁷ Gerstenblith, *supra* note 51, at 523.

²²⁸ There is currently no unified system of accreditation for art experts. Under the proposal, experts would be accredited by a state licensing system. DuBoff, *supra* note 13, at 985-86.

²²⁹ Leonard D. DuBoff notes as follows the law New York considered in 1966:

Print 5734, Intro. 4814, introduced May 11, 1966 by the Committee on Rules as a study bill entitled “An Act To Amend the General Business Law, in relation to providing for the ac-

bill failed, perhaps because, as some suggest, it would have been an unconstitutional denial of due process.²³⁰ The bill was also misguided for normative reasons, as Leonard DuBoff pointed out:

Experts are professionals and should be held to the highest standard of performance. They should be required to document the reasons for their conclusions. Even stylistic experts can verbalize the facts upon which they base their findings. If they are granted greater flexibility with their decisions and immunity from suit, it is likely that their standards will decline.²³¹

2. Insurance

One way an expert can manage his risk is through insurance. Insurance companies offer an array of professional liability policies, some of which are tailored to protect appraisers and auctioneers.²³² Under such policies, the insurer agrees to defend and indemnify the insured expert for errors, omissions and negligence in attributing and valuating works of art.²³³ However, like most professional liability policies, they do not cover fraudulent, malicious, intentional, or other dishonest acts.²³⁴ For example, specialty insurer Fine Arts Risk Management specifically excludes claims of product disparagement.²³⁵

3. Risk Pooling

Another contractual solution is to pool risk with other experts. Art historian Francis O'Conner recently proposed the creation of an umbrella organization that provides expert opinions for a fee²³⁶ and defends its mem-

crediting of fine arts experts, museums, colleges and universities for opinions relating to authenticity of works of fine art, and making an appropriation therefore.”

DuBoff, *supra* note 13, at 984 n.59.

²³⁰ *Id.* at 985.

²³¹ *Id.* at 987.

²³² RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 507 (1989); Levy *supra* note 2, at 651. These policies are essentially E & O (“errors and omissions”) policies.

²³³ Levy, *supra* note 2, at 651.

²³⁴ *Id.*

²³⁵ LERNER & BRESLER, *supra* note 232, at 507.

²³⁶ Francis O'Conner, *Authenticating the Attribution of Art: Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attributions*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 22, 23 (Ronald D. Spencer ed., 2004) (“The panel of relevant experts would review the work. All decisions, which would have to be unanimous would be published.”).

bers against any claims that arise from those opinions.²³⁷ O’Conner envisions a pool of experts, including art historians, auctioneers, appraisers, collectors, dealers, and curators, from which panels would be formed to review works and publish unanimous opinions for use by “[e]states, artists’ foundations, scholars, collectors, auctioneers, dealers, and curators”²³⁸ Members would be approved by an independent advisory committee and standards of analysis would be developed by the organization.²³⁹ The financial feasibility of this proposal is unclear. O’Conner recognizes that heavy transaction costs are involved, yet given the problems facing experts today, he believes it “would be worth it.”²⁴⁰ In terms of cost-justification, it probably is not.

4. Exculpatory Release

The least costly way for an expert to manage his risk is to bargain for an exculpatory release.²⁴¹ Whenever a request for authenticity is requested from an individual collector, the College Art Association suggests that the expert obtain “a written release from all liability and an agreement to indemnify and hold the scholar harmless from any damages, legal fees or other costs resulting from the rendering of the opinion.”²⁴² Museums like the Whitney Museum of American Art require all those seeking their opinion to agree that “neither such opinion nor its communication to any other person will be made the grounds for any suit . . . on any theory whatsoever against the Museum.”²⁴³ In many jurisdictions, covenants of this type have been treated with disfavor and even declared void as a matter of public policy.²⁴⁴ However, the recent case of *Lariviere v. Thaw*²⁴⁵ may signal a shift.²⁴⁶ In *Lariviere*, the plaintiff owned a painting he believed to be by Jackson Pollock so he applied to the Pollock-Krasner Authentication Board to have it reviewed. In the application the plaintiff agreed to the following terms:

²³⁷ *Id.* at 22-23.

²³⁸ *Id.* at 23.

²³⁹ *Id.* at 22-23.

²⁴⁰ *Id.*

²⁴¹ The one-time cost of drawing up a contract is likely to be less than either insurance premiums, the administration costs of a regulatory scheme, or both.

²⁴² See MERRYMAN & ELSEN, *supra* note 54, at 569-70.

²⁴³ Levy, *supra* note 2, at 629.

²⁴⁴ See DuBoff, *supra* note 13, at 985 n.63.

²⁴⁵ No. 100627/99, 2000 N.Y. Misc. LEXIS 648 (Sup. Ct. June 16, 2000).

²⁴⁶ See Spencer, *supra* note 108, at 218.

[H]old the Authentication Board and its Directors and Officers in their respective and individual capacities harmless from any liability towards [the owner] or others because of its rendition of an opinion (or its refusal to render an opinion).²⁴⁷

After the board unanimously concluded that the painting was not a Pollock,²⁴⁸ the plaintiff sued both the board and its members individually for failing “to maintain a standard of care imposed by law.”²⁴⁹ The New York County Supreme Court not only enforced the above exculpatory release, but imposed sanctions on both the plaintiff and his lawyer for their frivolous suit.²⁵⁰ More specifically, the court held that,

[E]xculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party’s own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant’s negligence, the agreement will be enforced. Such an agreement will be viewed as wholly void, however, where it purports to grant exemption from liability for willful or grossly negligent acts.²⁵¹

Lariviere is significant for two reasons. First, it sends a cautionary signal to would-be plaintiffs that frivolous claims in this area will be penalized. Second, the case affirms the expert’s ability to manage risk through contract. Although the board in *Lariviere* was clearly correct in its conclusions,²⁵² the exculpatory agreement would have protected them even if they had made negligent errors.²⁵³ Some are optimistic that *Lariviere* will give experts a new sense of security.²⁵⁴ This may be justified to the extent that many claims against experts are for negligence.²⁵⁵ However, *Lariviere* clearly articulates the principle that one cannot contract away liability for willful or grossly negligent acts.²⁵⁶ Unfortunately for art experts, this would include claims for disparagement.

²⁴⁷ 2000 N.Y. Misc. LEXIS 648, at *6, quoted in Spencer, *supra* note 108, at 218.

²⁴⁸ This painting had been submitted to the board by the previous owner and at that time the board also unanimously rejected it. Spencer, *supra* note 108, at 219.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 221.

²⁵¹ *Lariviere*, 2000 N.Y. Misc. LEXIS 648, at *7.

²⁵² The artist’s “signature” on the back of the canvas was misspelled “Pollack” instead of “Pollock.” *Id.*

²⁵³ *Id.*

²⁵⁴ Spencer, *supra* note 108, at 222.

²⁵⁵ Levy, *supra* note 2, at 597.

²⁵⁶ 2000 N.Y. Misc. LEXIS 648, *8.

CONCLUSION

Disparagement is a cause of action well suited to experts in the art market. It is consistent with the normative principles of corrective justice because when one injures another by using their expertise wrongfully, shifting the loss is justified. Disparagement also promotes the goal of efficiency by creating the proper set of incentives: First, the burden of injury-avoidance is rightly born by the art expert because he is the only party in a position to avoid injury. Second, the expert is incentivized to act in good faith because disparagement suits send a strong signal affecting the expert's reputation value and because damage awards are an effective deterrent. Third, the expert is incentivized to take a high, yet cost-justified level of care because doing so minimizes the risk and cost of litigation. The one inefficiency associated with art disparagement—the reluctance of experts to share valuable information—is caused by the universal problem of frivolous claims, not disparagement itself. Therefore, to remedy this inefficiency we should not reform the law or seek to contract around it. Rather, experts should learn the law governing their profession.²⁵⁷ In doing so, they realize that they can effectively manage their risk simply by performing their duties with diligence and integrity.

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²⁵⁷ See Stebbins, *supra* note 13, at 533. Stebbins argues that experts (at least in New York) are often reluctant to give their opinions because of “exaggerated fears of the law and their misconceptions of the dangers facing them.” *Id.* Merryman and Elsen suggest “the scholar should consult his or her own lawyer to become acquainted with the relevant legal considerations and with the applicable state law.” MERRYMAN & ELSEN, *supra* note 54, at 570.

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