

THE WORK OF ART OR THE ART OF WORK? A COMMENTARY ON HENRY LYDIATE’S ‘VISUAL ARTISTS BRUSHING WITH THE LAW’

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INTRODUCTION

When I was asked to comment on Henry Lydiate’s insightful paper, *Visual Artists Brushing with the Law: International Legal Dimensions of Professional Practice* (“the Paper”), I had the same thought as Wayne Campbell, the lead character in the Mike Myers’ film *Wayne’s World*:¹ “I’m not worthy!”

After all, Henry is one of the world’s leading practitioners of Art Law. Art Law is a field that he practically invented. He seems to know everybody in the art world. This includes not only the lawyers and scholars but also the collectors, critics, and curators. Henry knows the journalists and patrons and sponsors. And of course, he knows so many of the artists themselves.

Once, while teaching in our London Summer Program, I struck up a conversation with Henry during a break between his International Art Law class, which had just ended, and my International Sports Law class, which was about to begin.

“Henry, I visited the Tate Modern over the weekend. I saw Richard Serra’s *Trip Hammer*. It was amazing! Those humongous slabs of steel! When you think about it, it was silly to travel 3,000 miles to see the work of an American artist whose stuff I could find at home.”

“Chris, that’s marvelous!” Henry replied. And, without missing a beat, he added, “Of course, I’ve known Richard for years! I used to be

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¹ See Penelope Spheeris, *WAYNE’S WORLD* (Paramount Pictures Corp. 1992).

his lawyer! Then his brother went to law school and I've been out of a job ever since."

It took me a second to appreciate that Henry had just dropped two names with one line. Naturally, he was on a first-name basis with one of the planet's most famous large-scale metal sculptors. But when I understood that the unnamed brother who went to law school was none other than Tony Serra, the flamboyant criminal defense lawyer, I knew he had me.

Apparently, Henry really *does* know everybody.

Which is why my first reaction was *I'm not worthy* to comment on Henry's scholarship. What do I know about Art Law? And then I read the Paper – and realized that we are in the same business: the study of the law affecting working people.

In Henry's case, the working people happen to be visual artists. In my case, the working people happen to be everyone, whether artists or not. The former is a subgroup of the latter. Their legal troubles may arise in different workplaces, but they are related nevertheless. Like all working people, visual artists struggle to be paid a living wage, to make one's voice heard, and to be treated with dignity and respect.

In my scholarship and teaching, I take the position that most legal regimes affecting the rights to be paid a living wage, to make one's voice heard, and to be treated with dignity and respect can be categorized as falling into one or more of the following models of workplace governance: Individualism, Co-Determination, Government Regulation, and Alternative or Best Practices. Elsewhere, I have described these models in more detail;² here, I summarize them.

I. FOUR MODELS OF WORKPLACE GOVERNANCE

Under the Individualism Model, the prevailing philosophy of workplace governance is that wages, hours, and other terms and conditions of employment should be left unregulated; instead, employment terms should be set by the forces of the free market. In theory, a worker gets – or fails to get – whatever pay and benefits that her individual bargaining power permits her to negotiate. In practice, except for certain elites, the worker gets whatever the employer is willing to offer, usually on a take-it-or-leave-it basis. The hallmark of the Individualism Model is state contracts law, including its signature legal principle: the at-will rule. The at-will rule permits the employer to act unilaterally; it holds that a contract for employment of indefinite duration is presumed to be terminable at the will of either employer or employee, for a good reason, a bad reason, or no reason at all.³ Of course, there are exceptions to this rule, but the burden of proving any such exception falls on the employee who must bring her claim for wrongful discharge in a court of law or, more commonly these days, in employment arbitration, a forum that has been unilaterally imposed by the employer.

² See Christopher David Ruiz Cameron, *All Over But the Shouting? Some Thoughts on Amending the NLRA by Adjudication Rather than Legislation*, 26 BERKELEY J. EMP. & LAB. L. 275, 284-91 (2005).

³ See, e.g., Cal. Lab. Code § 2922.

Under the Co-Determination Model, the prevailing philosophy of workplace governance is that employment terms should be negotiated between equal partners in a free market modified by the workers' now having a single voice representing them: their freely-chosen union. The hallmarks of the Co-Determination Model are the just cause principle and the employer's duty to bargain in good faith. As to just cause, the employer can no longer discipline or discharge arbitrarily; they must have a good reason, and the burden of proving such good reason falls on the employer – typically in labor arbitration, a forum that has been negotiated at the bargaining table. As to the duty to bargain, the employer is forbidden to make unilateral changes in wages, hours, or working conditions without first bargaining in good faith to agreement or impasse. A charge filed with an administrative agency, such as the National Labor Relations Board (“NLRB”), or a grievance filed in arbitration, are forums in which the union may vindicate workers' rights.

Under the Government Regulation Model, the prevailing philosophy of workplace governance is that the negotiation of employment terms must be regulated by the setting of certain non-negotiable floors and ceilings, which apply whether or not employment terms are otherwise established under the Individual and/or Co-Determination Model. The hallmarks of the Government Regulation Model are statutes imposing minimum or maximum conditions: anti-discrimination laws outlawing employment decisions based on the employee's membership in a protected classification; occupational health and safety laws; wage and hour laws; and the like. A charge filed with an administrative agency and/or a lawsuit filed in a court of law are typical forums in which workers' rights may be vindicated.

Finally, under the Alternative or Best Practices Model, the prevailing philosophy of workplace governance is that the other three models are insufficient to establish robust workers' rights. Something new and out-of-the-box is needed. The key example of the Alternative Model or Best Practices Model that comes to mind in the context of Professor Lydiate's paper is the regime of International Labor Standards (“ILS”) articulated by conventions of the International Labor Organization (“ILO”). The four ILS rights considered to be “core” or fundamental rights are freedom of association, including the rights to organize unions and engage in collective bargaining;⁴ no forced labor;⁵ no child labor;⁶ and non-discrimination and equal pay, irrespective of the worker's sex and/or membership in other protected classifications.⁷ The hallmark of the ILS regime and other regimes that I would associate with the Alternative or Best Practices Model is that certain employment terms are universal but aspirational; they transcend the individual worker's particular situation, including her country, industry, or status as employee versus independent contractor, but compliance is mostly voluntary and hard to compel. In this respect, workers' rights are

⁴ ILO Nos. 87 & 98.

⁵ ILO Nos. 29 & 105.

⁶ ILO Nos. 138 & 182.

⁷ ILO Nos. 100 & 111.

human rights.⁸ They are enforced not in the courts of law or by agencies of the administrative state, but in the court of public opinion and through diplomacy.

II. DISCUSSION

Which brings me back to the Paper. So many of the shortcomings that Professor Lydiate identifies in the law affecting the rights of visual artists are the same shortcomings, sometimes writ larger, in the law affecting the rights of all workers.

A. Individualism Model

Like other workers governed by the Individualism Model, visual artists are buffeted by the unforgiving winds of the free market. They have little or no control over the “motley crew of influencers” whose subjective opinions establish the value of their work.⁹ Unlike banking, fishing, pharmaceuticals, shipping, transportation, and so many other international industries, visual art is governed by no particular regulatory framework. Professor Lydiate likens this chaotic situation to that of “the old Wild West.”¹⁰

To ask the Paper’s central question, “Why are artists poor?”¹¹ is to ask why any worker is poor. According to Jesus Christ, “The poor you will always have with you.”¹² The data have proved Him to be correct. In 2021, on a list of the 37 industrialized countries having the most poverty,¹³ the world’s richest country, the United States, ranked No. 10. This was behind No. 1 Costa Rica and No. 2 Bulgaria, but about even with No. 11 Turkey and No. 12 Estonia.¹⁴ With about 15 percent of our population living in poverty, the U.S. compares unfavorably with two countries whose economies are only a fraction the size of America’s.

The U.S. is a country in which even people who work full-time are allowed to be poor.¹⁵ The legal reasons for this are not hard to identify. For example, the federal minimum wage for nonexempt employees has

⁸ See, e.g., WORKERS’ RIGHTS AS HUMAN RIGHTS (James A. Gross, ed., 2005); see also, e.g., HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES (James A. Gross & Lance Compa, eds., 2009).

⁹ Henry Lydiate, *Visual Artists Brushing with the Law: International Legal Dimensions of Professional Practice*, 30 SW. J. INT’L L. 42, 44 (2024).

¹⁰ *Id.* at 45.

¹¹ *Id.* at 44.

¹² *Matthew* 26:11.

¹³ Industrialized countries refers to countries affiliated with and/or studied by the Organization for Economic Cooperation and Development (“OECD”), which is referred by some commentators to as a “club of rich countries.” See What is the OECD?, THE ECONOMIST, Jul. 6, 2017, available at <https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd>.

¹⁴ Poverty Rates in OECD Countries as of 2021 (downloaded Mar. 8, 2024), available at <https://www.statista.com/statistics/233910/poverty-rates-in-oecd-countries/>.

¹⁵ See, e.g., ELLEN DANNIN, TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 2 (2006) (“In the richest country on each, many of us live on the edge, always having to tell the kids there is not enough money, never able to make ends meet, housed in ugly and dangerous buildings and neighborhoods, and with hope for the future beaten out of us.”).

stubbornly remained for nearly two decades at just \$7.25 per hour.¹⁶ At that rate, someone who works a 40-hour week for 50 weeks per year would earn only \$14,500, which is well below the federal poverty line of \$25,750 for a family of four. Even in California, where the state's living wage law for nonexempt employees sets a floor of \$15.50 per hour,¹⁷ someone who works full-time would earn just \$31,000, which is barely above the federal poverty line for a family of four.

So, it is no wonder that artists, who have neither minimum nor living wage protection, are poor. According to the Paper, one of the many reasons for this is the lack of a short, written agreement memorializing the terms of a sale. This "reluctance to commit to writing . . . has to some extent enabled the eccentricities of the market to abound."¹⁸

Of course, the oral contract or handshake deal is part and parcel of the Anglo-American legal system. Most employment contracts of hourly wage workers are not reduced to writing in the U.S. or the U.K. But it is unclear whether switching to a Franco-style, civil law approach requiring such writings would help visual artists. After all, in the U.S., employers commonly write up and unilaterally impose the employee handbook, which is a sort of non-contract that sets forth all the things the employer is *not* promising to do, such as granting employee status or just cause protection or even agreeing to litigate employment disputes in the courts (as opposed to arbitration). What would prevent the buyer of an artist's work from doing something similar?

B. Co-Determination Model

In contravention to the aim of the Co-Determination Model, visual artists tend to lack access to the institution of collective bargaining. As the Paper puts it, "[M]ost living artists throughout the world continue to have little or no bargaining power."¹⁹ This makes it all but impossible to exercise the right of freedom of association in dealing with the "gatekeepers," including buyers and exhibitors, who set the price of – and therefore, the compensation for – artwork. The Paper adds:

Visual artists operate today in a global art ecosystem devoid of internationally harmonized art and artist's laws and industry standards regulating artists' interaction with much-needed gatekeepers. Moreover, unlike most authors and performers in leading creative industries (music, sound recording, film, and video) who have customarily formed collective associations to negotiate basic business standards with their collective industry gatekeepers, most visual artists are lone practitioners.²⁰

¹⁶ See U.S. Dep't of Labor, Minimum Wage (downloaded Oct. 15, 2023), available at <https://www.dol.gov/general/topic/wages/minimumwage#:~:text=The%20federal%20minimum%20wage%20for,of%20the%20two%20minimum%20wages>.

¹⁷ State of Calif. Dep't of Indus. Rel., Minimum Wage (downloaded Oct. 15, 2023), available at https://www.dir.ca.gov/dlse/minimum_wage.htm#:~:text=The%20minimum%20wage%20in%20California,California%20maintained%20by%20UC%20Berkeley.

¹⁸ Lydiate, *supra* note 9, at 46.

¹⁹ See Lydiate, *supra* note 9, at 43.

²⁰ *Id.*

In the eyes of American labor law, most artists would be classified as independent contractors rather than payroll employees.²¹ Therefore, in the eyes of American antitrust law, they would be forbidden to form a “collective association” – that is, a labor union – on the ground that to do so would constitute an illegal contract, combination, or conspiracy to restrain trade in violation of the Sherman Antitrust Act.²²

It is unnecessary to use the phony label of “independent contractor” to deny artists access to the institution of collective bargaining. In fact, as I have argued elsewhere, it may violate ILS to do so.²³

C. Government Regulation Model

In contravention to the aim of the Government Regulation Model, visual artists are sometimes left unprotected by the very legislation – I’m thinking of the copyright laws – that is supposed to ensure their right to control and be compensated for unauthorized use of their work. This state of affairs recalls the many federal and state anti-discrimination statutes that protect the worker’s right to be evaluated based on the merits of her performance rather than some harmful stereotype attached to her membership in a protected classification. On paper, these statutes seem to grant workers sweeping protections; in practice, they are denied to workers misclassified as non-employees.

Take the growing use of artificial intelligence (“AI”) to generate new artwork from existing artworks. Such use of AI remains largely unregulated, with the notable exception of the copyright laws, including those of the U.S. and the U.K. I do not pretend to be an expert in either. But Professor Lydiate knows something about them. In the Paper, he poses the question whether the U.K.’s special computer-generated copyright provisions “are at odds with copyright law’s paramount requirement”: that an artistic work be the original expression of a “human mind.”²⁴ (Apparently, copyright laws in the U.S. and most other countries adhere to this “human mind” doctrine.) The answer to the question posed is not necessarily helpful to the artist. In 1988, the U.K.’s Copyright Designs and Patents Act included then-unique provisions dealing with four categories of work: “in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken . . . the work is generated by computer in circumstances such that there is no human author of the work.” Accordingly, the author-come-first copyright owner of a computer-generated artistic work under U.K. law is the undertaker of “the arrangements necessary for the creation of the work” – terminology that Professor Lydiate describes as “precisely the same as

²¹ See, e.g., KENNETH G. DAU-SCHMIDT, ROBERTO CORRADA, CHRISTOPHER DAVID RUIZ CAMERON, CÉSAR F. ROSADO MARZÁN, MICHAEL M. OSWALT & RAFAEL GELY, *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 246-50 (4th ed. 2024).

²² See *id.* at 1266-68.

²³ See generally Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 *USF L. REV.* 431 (2009).

²⁴ Lydiate, *supra* note 9, at 66-67.

the Act uses to define a 'producer' in the context of determining an author/copyright owner of a film or sound recording."²⁵ In other words, the visual artist may be written out of the law and her rights to control and be compensated for her original work vested instead in some non-artist "producer" who has manipulated that work, all thanks to the magic of AI.

If true, this development would recall Kurt Vonnegut's observation, "The paintings by dead men who were poor most of their lives are the most valuable pieces in my collection. And if the artist really wants to jack up the prices of his creations, may I suggest this: suicide."²⁶ To which I might add: digitize those creations to make sure they're easier for some AI program to digest and recalibrate in some altered state.

D. Alternative or Best Practices Model

Finally, in contravention to the aims of the Alternative or Best Practices Model – or for that matter, any of the other models of workplace governance – visual artists are usually excluded from the conversation about ILS in the workplace.

For example, the nearly 50 million people around the world who suffer from modern forms of slavery, of whom nearly 5 million are women and girls who are trafficked into sex work,²⁷ are the understandable objects of public hand-wringing by the human rights community. Children and adults who work in the supply chains of industries producing foods such as spices, tea, coffee, cocoa, as well as cotton and tobacco, are at particularly high-risk of forced labor and rightly receive their share of concern.²⁸

By contrast, the well-known, almost cliché plight of artists in general and visual artists in particular rarely registers on the public human rights agenda. One of the few exceptions I could find was a report about the exploitation of visual effects artists in Hollywood, 75 percent of whom reported working uncompensated overtime or meals breaks.²⁹ Perhaps that is because their exploitation is not as severe as that of modern slaves. But Henry makes the case that it is real nonetheless.

As discussed above, the hallmark of the ILS regime and other regimes that I would associate with the Alternative or Best Practices Model is that certain employment rights are universal but aspirational;

²⁵ *Id.* at 66.

²⁶ *Id.* at 45.

²⁷ See International Labour Organization, Forced Labour, Modern Slavery and Human Trafficking (downloaded Mar. 8, 2024), available at <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>.

²⁸ See VinciWorks Group, Which Industries Are Most At Risk of Modern Slavery? (downloaded Mar. 8, 2024), <https://vinciworks.com/blog/which-industries-are-most-at-risk-of-modern-slavery/#:~:text=The%20Consumer%20Sector,-The%20consumer%20sector&text=Particularly%20high%20risk%20goods%20include,internationally%20from%20high%20risk%20countries>.

²⁹ See International Alliance of Theatrical and Stage Employees, 2022 VFX Workers Survey: Know Your Worth (downloaded Mar. 7, 2024), <https://vfxunion.org/2022-survey-results/#:~:text=On%20average%2C%2070%25%20of%20VFX,and%20rest%20periods%20without%20compensation>.

they transcend the individual worker's particular situation, including her country, industry, or status as employee versus independent contractor. Compliance with these rights is hard to compel; they are enforced not in the courts of law or by agencies of the administrative state, but in the court of public opinion.

But isn't that the point of Henry's paper – that the working conditions, if not the legacy and reputation, of visual artists are already determined in the court of public opinion? And that public opinion ought to press into service to address their exploitation?

After all, the fortunes of visual artists, like other workers governed mainly by the Individualism Model, are buffeted by the unforgiving winds of the free market. They have little or no control over Henry's "motley crew of influencers" whose subjective opinions establish the value of their work.³⁰ That is, they are governed by the chaos of what Henry refers to as "the old Wild West."³¹

So, I suggest a modest proposal: to tame at least part of "the old Wild West" by finding ways to apply ILS more generously to everyone. A great place to start would be to address the misclassification of artists, who like many workers are deemed to be independent contractors rather than employees. Because in the U.S., what all four workplace governance models have in common is that the worker must be classified as an "employee" in order to gain any rights.

If an artist is misclassified as an independent contractor, then she doesn't get to play the game. She is stuck in the Individualism Model with its unequal bargaining power favoring the employer. She is forbidden access to either the Co-Determination or Government Regulation models. She is not permitted to form or join a union, sue for employment discrimination, or exercise other rights reserved to "employees."

For good or bad, this is the enduring legacy of the Anglo-American system of jurisprudence as it affects the workplace: in theory, the law of the workplace is a game awarding the players all manner of rights to fair treatment; in practice, the rules are altered to prevent certain players from even playing the game.

The point I want to make is that it doesn't have to be this way. On the international stage, under the ILS regime, visual artists, like workers generally, are not classified as "employees." In fact, they are not classified at all. They are treated as "workers" or just "persons."

In an article I published some years ago,³² I explored this idea. I studied eighteen separate international instruments governing the law of the workplace, including:

- Human rights instruments developed by the United Nations and related organizations
- Conventions and other documents elaborated by negotiations among worker, employer, and government representatives at the ILO

³⁰ Lydiate, *supra* note 9, at 45.

³¹ *Id.* at 45.

³² Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented to Organize Under United States and International Labor Standards*, 44 USF L. REV. 31 (2009).

- Human rights instruments created by regional government bodies
- Labor rights clauses in international trade agreements
- Certain governing documents of the European Union

The U.S. has accepted obligations under some, but not all, of these instruments. Nonetheless, by virtue of our membership in the ILO, this nation, like the U.K. and other member nations, is bound by the fundamental labor principles codified in the cited ILO instruments, which are similar in spirit if not letter to labor principles codified in the other cited instruments.³³

What I learned is that the term “employee” is not found in any of the foregoing instruments. Instead, the broader terms “everyone,” “[e]very person,” or “worker []” are used. Except for one U.N. resolution,³⁴ the eighteen instruments make no explicit attempt to differentiate between workers based on status as a payroll employee versus independent contractor – or for that matter, as male versus female, transgender versus cis-gendered, documented versus undocumented or regular versus irregular status.

Among other things, this means that the four ILS rights considered to be “core” or fundamental rights are guaranteed to *everybody*, including visual artists. That is because the rights to freedom of association, to no forced labor, to no child labor, and to non-discrimination and equal pay are recognized and set forth without limitation.

CONCLUSION

In the end, I may not have been worthy to comment on all of Henry Lydiate’s insightful Paper. But it has been my privilege to comment on the parts of it addressing the business that we are both in: the study of the law affecting working people, visual artists and non-visual artists alike.

³³ See ILO Declaration of Fundamental Principles and Rights at Work (“DFPRW”) (adopted 1998).

³⁴ See Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, U.N. Gen. Assembly Res. No. 40/144 (adopted 1985).