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*Giudizio e normatività*

a cura di Angela Condello e Carlo Grassi

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Tiziana Andina

## CONTEMPORARY ART: JUDGMENTS AND NORMATIVITY

### Abstract

Is judgement still possible in art? The present paper tries to answer this question, exploring the two-main forms of judgement in the domain of art: the ontological-artistic judgement (regarding the identity of works of art) and the aesthetic judgement (regarding their aesthetic properties). Arguing that the most philosophically interesting cases are those in which judgment seems impossible, the article explores the elements necessary for the formulation of the two judgements that make up the domain of art.

Philosophy is very much a matter of judgment. Moral philosophy, for example, deals with moral judgments, that is, ways to distinguish what is morally acceptable from what isn't, based on the definition of moral good; aesthetics, among other things, deals with the judgment of taste, that is, a way to distinguish beauty from ugliness based on the definition of beauty. This happens every time philosophers work on definitions. If instead, as sometimes happens, they choose to work outside of definitory issues, judgment is essentially a way to identify analogies between, say, two similar objects. In this case, judgment is the identification of some properties – like those that distinguish works of art – and the verification of whether something does indeed have such properties. In these terms, the issue seems rather simple. In fact, on the methodological level, the point would be to trace a particular case back to a general one; to identify the shared properties of two similar objects; or to identify the properties of a class of objects – say, artworks – to decide what belongs to that class and what doesn't.

The artist traditionally creates a painting and expects it to be judged beautiful. In a historical phase like our own where beauty in art is not considered necessary, he expects it to be considered an artwork despite its lack of beauty. What does this mean? As a first consideration, one could claim that the artist expects

the agents of the artworld – that is, those with an institutional mandate to act within it – to judge his production as legitimately belonging to the artworld. To do so it is not necessary for them to commit to the existence of a universal – in this case, the artwork – but it is necessary to believe that a certain classification grasps some characteristics that an object must have to be judged an artwork. In this sense, for example, it was long believed that artworks, to be such, had to have some characteristics, including the imitation of reality and beauty. So, the objects created with explicit imitative aims and well made – with nicely matching colours, proportionate shapes, or given stylistic characteristics – were judged as belonging to the domain of artistic production.

This assumption implies the application of a normativity aimed at the formulation of judgment. So that the judgment isn't continuously revised, it is necessary, when possible, that the framework is clear, that the definition is shared, and that the normativity – that is, the set of boundaries regulating the formation of judgment – is agreed upon. In this framework, within philosophical reflection, what is interesting is when for some reason this process doesn't work, that is, it entails problems or even appears impossible. This is indeed the case with contemporary art as, for almost a century now, it has been revising its identity and therefore the artistic judgment of its products.

In the opening lines of *The Transfiguration of the Commonplace* (1981), Arthur Danto illustrates this point very well. As is known, Danto describes a situation in which six paintings, all in the same shade of red, are exposed in an art gallery. This means that seemingly indiscernible objects – red paintings – are classified as artworks (which is far from obvious) and as different from each other. Danto's example aims to delimit the theoretical perimeter of the ontology of art, and to show how opacity on the ontological side can only lead to equal opacity in terms of artistic judgment. To make this point, Danto brings in a fictional character: J. He is a politically engaged artist who, polemizing against the artworld, harshly claims that his painting should be exhibited in the red painting exhibition. What J. claims for his work – which is perceptively indiscernible from the other red paintings of the series – is the ontological recognition as well as the artistic judgment of the other ones. For J., his is an artwork and he wants it acknowledged.

The point raised by Danto is simple and concerns precisely the issue of the legitimacy of the artistic judgment: it has to do with defining the set of properties we use to distinguish an ordinary object from a work of art. Can *any* red painting aspire to be considered art? If it is so, doesn't the same count for other objects that are, or are similar to, red paintings? Is something "art" only insofar as it was made by an artist, as has often been claimed? The situation described by Danto shows that the formulation of the aesthetic judgment, given the set of properties commonly used for such purpose, is rather tricky. This was the early 1980s, and the reference was specifically to visual art. More generally, though, the first issue to be addressed is the following: if the aesthetic judgment is to be

legitimate and valid for a long time, it has to be founded on elements that are as shared and stable as possible. Indeed, this has long been the case: even though modes of expression and styles have changed dramatically, other properties that were considered crucial to determine what was art (like the mimetic function and beauty) have always founded the artistic and aesthetic judgment. Other properties were used to formulate a critical judgment, to establish whether a work was good or not, but these elements were fundamental to formulate the ontological question: "is this object a work of art?". This means that the normativity of the judgment requires some elements that constitute the invariables of the judgment itself.

### 1. *The Possibility of Judgment*

The case studies offered by art are many and have often been discussed in detail by philosophers. As is known, art has a very long tradition, whose perhaps best known narrative tends to trace it back to a single process, which consists – roughly speaking – of changes affecting mainly techniques and styles. This is why we speak of art history: there has been a process of change, not necessarily in terms of progress, affecting the techniques and practices we attribute to art.

The first and perhaps most important theoretical narration of art is that offered by Giorgio Vasari in his *Lives Of The Most Eminent Painters Sculptors And Architects* (1898). Vasari thought that art progressed in terms of technical improvement: the goal of art was essentially taken to be to get as close to reality as possible, improving its mimetic ability. The more an artist could imitate the outside world in a realistic and precise manner, the more he was considered skilled and the more his works were considered canonical – that is, endowed with the paradigmatic function of *exempla*. The idea that the main goal of art was to imitate reality thus functioned as a norm for the judgment, and that norm – despite the many changes that took place in the artistic canon – was long the criterion for critical judgment. Vasari's artistic ideal was that of the imitation of nature, as emerges from his description of Leonardo's works in that, among other things, he notes how they improved the traditionally flat representation of figures: "Leonardo then made a picture of Our Lady, a most excellent work, which was in the possession of Pope Clement VII; and, among other things painted therein, he counterfeited a glass vase full of water, containing some flowers, in which, besides its marvellous naturalness, he had imitated the dew-drops on the flowers, so that it seemed more real than the reality" (Vasari 1898: 59).

In this sense, his description of *Mona Lisa* is paradigmatic:

Leonardo undertook to execute, for Francesco del Giocondo, the portrait of Monna Lisa, his wife; and after toiling over it for four years, he left it unfinished; and the work is now in the collection of King Francis of France, at Fontainebleau. In this head,

whoever wished to see how closely art could imitate nature, was able to comprehend it with ease; for in it were counterfeited all the minutenesses that with subtlety are able to be painted, seeing that the eyes had that lustre and watery sheen which are always seen in life, and around them were all those rosy and pearly tints, as well as the lashes, which cannot be represented without the greatest subtlety. [...] The nose, with its beautiful nostrils, rosy and tender, appeared to be alive. The mouth, with its opening, and with its ends united by the red of the lips to the flesh-tints of the face, seemed, in truth, to be not colours but flesh. [...] He made use, also, of this device: Monna Lisa being very beautiful, he always employed, while he was painting her portrait, persons to play or sing, and jesters, who might make her remain merry, in order to take away that melancholy which painters are often wont to give to the portraits that they paint. (Vasari 1898: 60).

After Leonardo, or rather after Leonardo introduced very significant technical innovations, painting meant painting his way, reaching his technical ability in the imitation of nature and, at the same time, the ability to render this process in personal ways. Vasari thus constructs a rather organic narrative in which concepts such as “work of art”, “beauty”, “imitation”, “portrait”, “likelihood” are enriched and complicated due to the characteristics and specificities of the work of Leonardo. All this, of course, helped give the aesthetic judgment a further dimension, implying, as an indirect consequence, the fact that the aesthetic normativity took on more and better defined characters.

It must also be noted that it is thanks to the continuing expansion of artistic production that Vasari’s narrative, which over time has become the narrative and the normative canon of reference of the art world, could be extended in time up to the threshold of the twentieth century. Vasari’s canon, as well as the normativity that it has produced and strengthened, has worked rather well for a long period of time. In concrete terms this means that the conceptual tools and the theoretical basis provided by the canon have almost always been able to facilitate the people in the artworld to formulate of a judgment, be it expert or amateur, on the way we read, interpret and evaluate a given artwork.

## 2. Hierarchy and Structure of Judgments in the Domain of Art

Therefore the canon makes it possible to formulate a judgment in a simple and almost automatic way, based on the conviction that once the concept of reference has been defined (that is, through necessary and sufficient conditions or through a series of characterizing properties, think of Leonardo’s *Treatise on Painting*) it is possible to include in the canon all the works that can be retraced to the canon itself. The more precisely the canon is defined, the more it can facilitate the formulation of judgments. Now, it is surely interesting to understand the structure and functioning of judgment, but it is even more interesting to see what happens when these mechanisms *do not work*, that is, when the canon

doesn’t allow for the formulation of the ordinary judgment, either because it is too wide or because it is questioned by radical novelty.

This is what happened in the second half of the Twentieth century, when Western artists produced works that would hardly fit in the established canon. Indeed, abstract art had already put Vasari’s canon – that is, the idea that art has a mainly mimetic function – to the test, but the introduction of ready-mades, that is, ordinary objects, into the world of art marked the definitive and complete deconstruction of the traditional idea of art. Seeing as such objects required no artistic technique or practice, the canon clearly couldn’t explain their production. Vasari’s canon had stood a number of variations maintaining its efficacy, but it was now insufficient to formulate aesthetic-artistic judgments. In fact, the production of ready-mades demanded a radical revision of artistic judgment, both by experts and by ordinary folks.

There are some famous examples that illustrate this point, including the US customs officials (AA.VV. 2003) who in 1923 classified Constantin Brâncuși’s *Bird in Space* as a kitchen tool. Similarly, a few years later, the jury who had to assess Marcel Duchamp’s *Fountain* for an artistic competition rejected the young artist’s work for being an object that did not belong to the world of art. These two judgments were formulated respectively by non-experts (the US customs officials) and by experts (the members of the *Society of Independent Artists*), and yet they reached similar conclusions. Different types of subjects were required to make judgments related to different works, and both were faced with the inability of the canon to classify those works of art and, therefore, failed to formulate ontological-artistic and aesthetic judgments as Constantin Brâncuși and Marcel Duchamp would have expected them to be formulated. Hence the rather paradoxical result that both customs officials and the jury of experts disagreed with the artists’ judgment, both in terms of aesthetics and in terms of art and ontology: what was “art” for Brâncuși and Duchamp was just an ordinary object for the other parties.

The impossibility of using the traditional canon to formulate the judgments required by the artworld leads to the practical need to fully reconsider the canon itself. As the philosophy of art of the late Twentieth century shows,<sup>1</sup> the point was no longer to simply adjust Vasari’s canon to justify the inclusion of some specific works, but rather to reformulate the canon completely. What was needed was a theoretical analysis based on the ontology of art that would give a new answer to the question “what is art?”. Therefore, these are cases that have created a break, so that the conditions allowing for the formulation of judgment were no longer valid after them. *Bird in space* is a sculpture devoid of any mimetic character: at most it captures some properties that are typical – albeit secondary – of the represented object. In other words, *Bird in Space*

<sup>1</sup> See Carroll 1999.

formally and visually renders some traits – which aren't immediately obvious at a perceptive level – of the idea of a bird flying through space: lightness recalling weightlessness, and a tapered shape that can cleave the air.

This set of formal and ideal – rather than aesthetic – properties comes into play in the formulation of a judgment that has to be ontological-artistic first (that is, that has to formulate the arguments based on which to recognize the object as a work of art, thereby inserting it in the same class as Donatello's *David*) in order to allow for the aesthetic judgment (through which the quality of the work is judged). Hence the obvious impossibility to formulate, in this case, an ontological-artistic judgment, which has resulted in the impossibility to classify the object as belonging to the sphere its author had assigned it to. This resulted in a short circuit of such magnitude as to involve a fundamental rethinking of the judgments applied to the sphere of art.

### 2.1 The hierarchization of judgments

The visual arts of the twentieth century have brought forward some considerations about the formulation of judgments. These include: (1) the fact that elements influencing judgment have their own specific weight – some are more important than others; (2) that these elements are identified, selected and ordered by subjects who have the authority to organize them (in this case, for example, the agents of the art world are those who, in various ways, deal with different aspects of that world); (3) Finally, that each domain enables a hierarchy in the formulation of judgments. For Contemporary Art, the formulation of the ontological/artistic judgment comes before the formulation of aesthetic judgment, which is entirely different from what occurred in the context of Vasari's tradition.

Let's look at these points in more detail starting from (3), that is, from the hierarchization of judgments. In traditional art, as is known, the identification of a work of art was hardly a matter of discussion: the basic structural characteristics of a painting or a sculpture were not hard to identify. At most, people have debated on the forms of expression that were considered "borderline", like rock paintings or Russian icons, the first being perhaps devoid of artistic intentionality, the latter having been conceived as sacred objects. In relation to contemporary visual arts, the issue is much more complicated. In fact, fictional markers – the things marking the space in which the work exists – are placed on the background or made almost imperceptible. This has allowed artists to play on the weakening of the presence, first at the perceptual level and then at the cognitive level, of the fictional spaces that identify works of art. In all these cases, obviously, the ontological-artistic judgment can only precede the aesthetic judgment. The point is first of all to recognize the works of art, differentiating them from their non-artistic counterparts.

What I have just described is a hierarchical organization of the judgments related to the domain of art that allows for the existence of the domain itself. Once again, it is interesting to look at those cases where artists have complicated the hierarchical organization of the fundamental judgments of the domain of art. Consider those performances that aim at confusing ordinary action and artistic action. The aim is precisely to make us reflect on the domain of actions, forcing us to a twofold task: first, to think about the specific characteristics of artistic action; second, to examine the genuine content of the action that we are observing and that we are called to classify as an artistic action. The most obvious consequence of these practices is that most of the time the formulation of an artistic judgment is made impossible or very difficult, especially without a visible fictional marker. Given that the latter is placed on the background and made imperceptible<sup>2</sup>, the performer works on the reaction of the audience, which varies also depending on whether the spectator can distinguish the artistic action from an ordinary one. Being on all fours to clean a churchyard is a routine action for a cleaner. When this action is performed by a performer, though, without any fictional marker being explicitly used to distinguish the artistic action – that is, reflecting the fact that it is not an ordinary action, but an action that expresses a different content, despite fully taking on the structure of the former – we can be certain that the observers will have great difficulty to correctly classify the action in question.

In such situations, the structure of the spectator's judgment is the same as the one she would use for everyday actions, unrelated to art. An action – or a series of actions – can be usually judged in an ethical, moral or practical sense. It is relatively rare that our judgments on actions would involve aesthetics. So with artistic performances, the absence of a fictional marker – be it a museum, a theatre, or something hinting at the presence of an artwork – deters the spectator from looking for the properties she usually attributes to works of art. Indeed, since the performance is made by representing a certain action through the properties that identify the action as ordinary and, simultaneously, through the lack of any marker that allows the observer to refer, in the ontological-artistic judgment, to the identifying properties of the artistic object, it happens that the observer fails to formulate the ontological judgment and that, at least for a certain period of time, is not able to identify the object in an appropriate manner or, even, that he suspends the ontological judgment. If it is radically impossible to formulate an ontological-artistic judgment, the artist has somehow failed, as no one else will recognize his artwork as such. It is therefore evident that, to avoid this situation, contextual properties are needed in addition to aesthetic ones.

Let me make an example. Public Movement is the name of a group of Israeli performers. In 2015, at the Museum of Modern Art in Tel Aviv, they "staged" a

<sup>2</sup> For a deeper analysis on the role of fictional markers see cfr. Andina 2013.

performance inspired by a historical event: the proclamation of the State of Israel at the Tel Aviv Museum on 14 May 1948. The idea of the Public Movement was to show how the formation of national identity is deeply tied to artistic identity. There are three fictional markers in this case: *a perceptual datum*, as the artists were dressed in white, creating a perceptual thread that unites the members of the group, who were clearly separated from the non-artists present at the performance; *the location*, as it was a museum, namely a space destined to exhibit (also) art; finally, *time*, as the performance was repeated at given times. The same series of actions – a precise and defined set, which still made it possible to include a certain range of variation – was performed at the same hours every day. The performers, dressed in white, accompanied groups of twenty-five people in a sort of guided tour through the museum always at the same hours.

One of the stages of the visit was a reconstruction of the old museum that housed the proclamation of the State of Israel, reproduced so that it was indistinguishable from the original in both the furnishings and the works of art hanging on the walls. There, the performers would stage the proclamation ceremony, quite similar to the original except for one point: instead of singing the national anthem, they sang their own anthem, the anthem of the group. The actions of the performers mingled typical military gestures (for example the ritual movements of a parade) with typically non-military movements and gestures, such as kissing. The result was a spectacular confusion of levels in which viewers were induced to wonder where to draw the line between community and state, with its formal legislative dimension aimed at the organized management of power. It is probably no coincidence that such a performance was conceived by a Israeli artists. In the performance in question, the fictional markers were numerous and fairly obvious, while recourse to collective and participatory actions aimed to create a sort of collective ritual in which people actively participated within a framework that, in general, had been outlined by the performers.

Now, in this case the question of the formulation of an ontological and artistic judgment was resolved for all by the artists and other institutions of the art world, as the museum that housed the performers is in effect an institution with the power to take decisions regarding the ontology and the value of artworks. However, the audience was called on the one hand to formulate an aesthetic judgment about different elements of the performance (the aesthetics of the bodies, the actions and even the performers' clothes), on the other hand to formulate judgments mainly concerning ethics, morality and politics. Those who observe the performance can then choose whether to focus on its appearance, formulating the relative judgments, or whether to engage in what the performance wants to communicate, namely a reflection on the meaning of the word *community*, on the meaning of the words *culture* and *memory* linked to the concept of community, and again on the meaning of the word *power*. In this way, every participant structures the hierarchy of the judgments by which she relates to the work of art.

## 2.2 Who can formulate judgments in the domain of art?

Let us now come to the second point (2), that is, the subjects who choose the elements (properties, characteristics, qualities and so on) which underpin the normativity of judgments in the domain of art. This is clearly a rather delicate question, which often depends on the specific context of art. The fundamental issue is the fact that such judgments are legitimately formulated not only by experts or fully informed subjects in relation to the matter in question. It happens frequently that the opinions of the experts and those of non-experts differ significantly.

Therefore, there are two issues to be addressed. The first relates to the legitimacy of the judgment of non-experts that, in some contexts, can play a very significant role, sometimes showing a close dependence on the market. Think of how often we read strong criticism regarding the quality of a work and see, at the same time, the general public – that is, people who are not trained to be professionally competent in relation to the domain of art – expresses extremely positive judgments, in sharp contrast with those of the experts. After all, in the domain of art, the judgment of non-experts has always contributed significantly to changing the expert judgment, so that the sphere of art is very receptive and open to novelty. The distinction between high art and low art, which for a long time has been a significant part of art theories, has been questioned by movements – think of Pop Art – that intended to facilitate as much as possible the spread of the arts, working on producing works able to please a not overly sophisticated taste.

Significantly, the origin of the term 'Impressionism' goes back to Louis Leroy's critical reading of Claude Monet's *Impression, Soleil Levant* (1872), appeared in the *Charivari*. That highly critical comment, made by an expert, or at least by an actor of the art world, was adopted by the group of artists who defined themselves "impressionist" precisely in defiance of that criticism. Thus, that criticism became the best description of impressionist poetics, decreeing a public and critical success that gave the movement a safe place within the history of art. In this case it would appear that the judgment of the artists decreed the prevailing attitude, reversing the judgment formulated by other players in the art world. In fact, however, this is not always the case nor is it, ultimately, always a good thing. Indeed, we would end up in the same situation described in Danto's example, in which the artist (remember J.?) claims to be entitled to the formulation of the final critical judgment about the value of his own work.

It is evident that in such a context one has to wonder both what subjects can formulate the judgment and what are his basic normative structures. This is particularly clear in the proceedings of the trial *Brâncuși versus United States* where, to clarify the issue of whether *Bird in Space* was or wasn't a work of art, many actors of the artworld were called to testify. Indeed, in fields like the artworld, where the reference domain is vague and rather unstructured, we can

reasonably suppose that consensus and judgment emerge following dynamics that aren't necessary or always foreseeable. Mostly, such dynamics aren't always caused by a single actor, a single type of actors, or a single factor. Maybe what is privileged is beauty, or expressiveness, or else the meaning of the work. All these elements – differently read and used – can determine radically different judgments.

It is therefore plausible to assume that the aesthetic judgment most of the time is determined in a relatively accidental way, emerging rather randomly. The ontological / artistic judgment, conversely, seems more stable: today we are willing to include chairs and urinals in the class of works of art – which has become wider, in that we have included urinals *alongside* paintings – only after a complex re-determination of the ontology underlying artistic production. This type of reconsideration, mainly demanded by the artists themselves, can only happen rarely – otherwise the domain of art would risk disintegrating completely. As a first approximation, therefore, we can say that for aesthetic judgments there are different sources of legitimacy (experts, non-experts, more or less cultivated people and so on); based on little definable variables, they can play a decisive role in the context of the market dynamics that often are influenced by economic factors.

Instead, the formulation of the ontological / artistic judgment seems to fully depend on the artist. After all – considering again the case of ready-mades as a paradigmatic example – Duchamp was the one to decide that, to determine the concept of work of art, some properties (for example the handicraft production, or the aesthetic qualities) were less important than others (for example the serial production). This change of balance, for which some properties have been overshadowed by other ones (it is certainly not beauty that defines *Fountain* as an artwork) is the means by which Duchamp has contributed to create a new, wider concept of art<sup>3</sup> – one able to reveal a part of that domain that was yet to be explored.

### 2.3 The elements in play in judgments

Finally, let us look at point one (1): that is, the specific weight of the elements that affect the formulation of judgment. Not everything is equally important – rather, judgments can be formulated precisely because we are able to hierarchically arrange the elements that make it up. I have already noted that, within the domain of art, there are two kinds of judgment: first the ontological-artistic one, then the aesthetic one. As we have seen, the former makes the latter possible. Now, as for the ontological-artistic judgment (the one that answers the question “what is art?”), the artistic production of the Twentieth century has shown that it is affected by the following properties: the physical properties of

<sup>3</sup> For more on Duchamp's theory cf. Schwarz and Duchamp 1997.

the object, its relational properties (the properties that depend on the relationship between work and artist, work and spectator, artist and audience), and its contextual properties (properties that depend on the historical and cultural context of the work).

As I have shown, artists can choose to expand this set of properties, to vary its relations, and, in any case, to use them in very different ways. The fact that artistic production is in constant evolution, and therefore never completely standardized (Weitz 1950), makes it so that this constant redetermination of what properties affect the ontological-artistic judgment will persist so long as there is art. When variations are not extremely significant and concern marginal modifications within the established paradigm, the artist doesn't have to provide a theoretical justification for his or her choice; on the contrary, when changes are substantial, a theoretical supplement is not only appropriate but often necessary. This theoretical basis is then the normative underpinning allowing for the formulation of judgments in the ontological field.

As for aesthetic judgments (those related to the aesthetic properties of artworks) things are different. As said, the audience – but also art critics, art historians, gallerists and so forth – are probably those best entitled to judge the aesthetic quality of an artwork. They can do so following different criteria, which are all admitted – albeit not explicitly codified – by the artworld. In some cases what will prevail is refined and cultivated taste, in others it will be momentary fashion and the needs of the market, or else the interest in experimentation and aesthetic research. The reasons why the audience has determined the success of a given artwork have changed significantly over time. In relatively recent times, technological progress and mass communication<sup>4</sup> have contributed to profoundly transform the modes of production and experience of art.

In this context it is quite evident that the ontological-artistic judgment is generally better structured and normed than the aesthetic judgment, especially during periods in which the artistic production is relatively stable, or in which artists do not introduce significant changes as part of the so-called “ontology of art”. Aesthetic judgments, conversely, depend firstly on the ways in which human perception is structured, and secondarily on the ways in which culture influences the enjoyment of art – to stick to relatively recent times, Impressionist art is exemplary in this sense. Finally, it depends on the dynamics of the market, which in some cases are able to impose a work of art to collective attention and appreciation. In a word, the formulation of aesthetic judgments is profoundly linked not only to our senses, but also to our value systems (both ethical and economic).

<sup>4</sup> Cf. on these issues the remarks made by Danto (2005, 1997) and Benjamin (1963).

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## Andrea Baldini BEAUTY AND THE BEHEST: DISTINGUISHING LEGAL JUDGMENT AND AESTHETIC JUDGMENT IN THE CONTEXT OF 21<sup>ST</sup> CENTURY STREET ART AND GRAFFITI

### Abstract

Street art and graffiti are on the rise and their problematic relationship with the law is becoming an increasingly pressing issue. This paper considers a series of high profile street art controversies involving famous street artists Banksy and Alice Pasquini as cases studies for illuminating such a relationship. First, by discussing the “Banksy’s Law” – a “law” protecting street artworks in the style of Banksy while condemning graffiti – and its perceived arbitrariness, I investigate what I call the structural differences between aesthetic and legal judgments. While not denying some continuity in reasoning about the law and the arts, I argue that legal judgments possess a degree of formality that cannot be found in their aesthetic counterpart. Second, in expanding my discussion, I also maintain that aesthetic considerations should not function as overriding reasons in legal determinations. By being illegal, many street artworks and graffiti acquire subversive power. If deprived of the possibility of challenging the law because of their aesthetic value, these art forms would lose much of their political value. And, more generally, a world where artworks cannot challenge the law is a world where the arts are rather superficial forms of entertainment.

### 1. Introduction

One of the most peculiar features of Kant’s theory of judgment is that it takes humans’ innate capacity of judging as the central cognitive faculty of the rational mind. For Kant, in effect, the power of judgment – as he calls one’s ability of generating judgments – is the same as the faculty of thinking<sup>1</sup>. Such a capacity constitutes the core of our conscious mental life by providing an ordered synthesis of the manifold of sensations that we perceive. In Kant’s philosophical system, one exercises the power of judgment across the spectrum of the various

<sup>1</sup> Kant 1902: para. A81/B106)