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**THE ART (HISTORY) OF BLEISTEIN**

by REBECCA SCHOFF CURTIN\*

The life of the law has not been logic: it has been experience.

—Oliver Wendell Holmes, Jr.<sup>1</sup>

Experience . . . is simply the name we give our mistakes.

—Oscar Wilde<sup>2</sup>

Fanny Bowditch Dixwell Holmes was an artist — a serious artist whose work was publicly exhibited in Boston and New York and reviewed nationally by critics in publications like *Scribner's Monthly* and *The Nation*.<sup>3</sup> The painter William Morris Hunt once said that Fanny was “the only really creative artist beside himself in America.”<sup>4</sup> Her medium was embroidery, but the source of her fame and distinction was her destruction of the barrier between the decorative arts and the fine arts.<sup>5</sup> Critics were amazed by her use of thread in a painterly way to render landscapes that seemed to move as if in a wind. She was said to have created a new art,<sup>6</sup> but today just a few scraps of her embroidery are known to have survived.<sup>7</sup> Oscar Wilde had the opportunity to see her work when he visited the Holmeses in Boston in 1882 and he called her “that Penelope of New

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<sup>1</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown, & Co. 1881).

<sup>2</sup> OSCAR WILDE, *EPIGRAMS & APHORISMS* 14 (1905).

<sup>3</sup> CHRISTINE W. LAIDLAW, *Painting with Silken Threads: Fanny Dixwell Holmes and Japonism in Nineteenth-Century Boston*, 10 *STUDIES IN THE DECORATIVE ARTS* 42, 54 (2003).

<sup>4</sup> *Id.* The comment was reported in the “Boston Correspondence” column of *THE ART AMATEUR*, in conjunction with a review of an exhibition of ten of Fanny’s pieces at the Museum of Fine Arts. Greta, *Boston Correspondence*, 2 *ART AMATEUR* 119 (1880).

<sup>5</sup> *Id.* at 60.

<sup>6</sup> *Id.* at 44, 65.

<sup>7</sup> Laidlaw notes one piece, entitled *Twilight in Mattapoisett Harbor*, c. 1885, which has survived in the Peabody Essex Museum in Salem, Massachusetts. A handful of other pieces have survived in the form of woodcuts based on drawings that were used to illustrate reviews of her work in *Scribner's Monthly*. *Id.* at 53, 56, 88, 60. There is another scrap of embroidery in the collections of Historic New England, accession number 1929.1766, image available at <https://www.historicnewengland.org/explore/collections-access/gusn/33024>.

England whose silken pictures I found so beautiful.”<sup>8</sup> Wilde was prescient as ever. Just as the Penelope told of in Homer’s *Odyssey* tore up her weaving in the night, Fanny destroyed almost all her pieces when her husband, Oliver Wendell Holmes, was nominated to the U.S. Supreme Court and the couple moved to Washington.<sup>9</sup> Shortly thereafter, Holmes delivered the opinion in *Bleistein v. Donaldson Lithographic Co.*, with its landmark pronouncements about the nature of authorship and the ability of judges to decide the value of art.<sup>10</sup>

Even as the opinion famously invokes the limitations of judicial training in the form of the anti-discrimination principle, it impliedly argues for the relevance of judicial biography. The pitfalls in the influence of experience on jurisprudence are implied by Holmes’s own famous aphorism about the life of the law, quoted as an epigraph above. In *The Common Law*, Holmes calls up the personal experience of judges alongside their perhaps inescapable biases, asserting that “even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.”<sup>11</sup> Oscar Wilde’s quip, that experience is simply the name we give our mistakes, is a useful corrective against romanticizing what Holmes may have brought from life into legal analysis. Nonetheless, this essay gives in to the temptation to rethink *Bleistein* in the context of Holmes’s experience with art, as the spouse of an important artist and a connoisseur in his own right. Though there has already been a wealth of work contextualizing *Bleistein* in legal and intellectual history,<sup>12</sup> the influence of Fanny Dixwell Holmes

<sup>8</sup> The comment is in a letter from Oscar Wilde to Oliver Wendell Holmes, Sr. See MARK DEWOLFE HOWE, *JUSTICE HOLMES: THE PROVING YEARS* 255, n.4 (1963); see also LAIDLAW, *supra* note 3, at 1.

<sup>9</sup> Oliver Wendell Holmes’s biographers do little more than mention this destruction in passing. Howe claims to have been told by Mrs. James B. Ayer, one of Fanny’s friends, that Fanny destroyed her work when the couple moved to Washington. HOWE, *supra* note 8 at 255. At worst, Wendell’s biographers can seem dismissive of Fanny’s motives: “Fanny burned most of her embroideries, keeping only a few of her favorites. *It was pointless to preserve them just so that nieces someday would store them in attics.* Like Holmes, she was putting one life behind her and beginning another” (emphasis added, SHELDON NOVICK, *HONORABLE JUSTICE* 237 (1989)). This statement vastly underestimates the value of her work and, I think, the profundity of its destruction. Her work was and is of museum quality. Even given the loss of so much of her work, Fanny Holmes has been credited with playing “an important role in the revival of American embroidery,” in which a lasting memory of her example continued to influence the course of the medium for decades. LAIDLAW, *supra* note 3 at 65.

<sup>10</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>11</sup> HOLMES, *supra* note 1 at 1.

<sup>12</sup> See, e.g., Barton Beebe, *The Problem of Aesthetic Progress and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017) Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 50 COPY-

on Wendell's understanding of art and artists remains obscure,<sup>13</sup> as does the meaning of an enigmatic series of allusions to works of art not at issue in the case.

Biographers of Oliver Wendell Holmes have sometimes shown relatively little interest in Fanny Dixwell Holmes, though the two had been friends from childhood and enjoyed a marriage that lasted for nearly sixty years, from 1872 until Fanny's death in 1929. I have the sense that Fanny's influence on Wendell has been generally under-appreciated. Holmes valued her creativity. He described her as the kind of person "who could make roses bloom from a broomstick."<sup>14</sup> He claimed that she had taught him "how many poems and pictures are to be seen all about one, if one looks."<sup>15</sup> Her efforts to entertain him were at times nothing short of magical, as in one instance when she arranged a birthday party in which a crowd of the Justice's young proteges lured a surprised Wendell out of his study by "tooting away on bird calls" that she had bought from a street peddler. However, he could be dismissive of her, as indicated by a tale in which he "hurled" a dessert that she had prepared out of the window in front of several dinner guests, including Justice Horace Gray, because he did not care for it.<sup>16</sup> Yet, shortly after she died, Wendell wrote a friend that her death seemed like the beginning of his own.<sup>17</sup> Thus it seems unlikely that we could fully understand Wendell's view of art without taking into consideration what he might have absorbed from the artistic career of his closest partner in life.

The short opinion is packed with four places in which Holmes makes references to specific works of fine art — strange in a case involving the copyrightability of posters advertising a circus. This Essay unpacks what those high art references are doing in the opinion with the help of some biographical context. I have two top line theses: the first is that these references just illustrate Holmes's own limitations as a judge of art. All the

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RIGHT SOC'Y J. 347 (2012); Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Co.: Originality as a Vehicle for Copyright Inclusivity*, in AMERICAN INTELLECTUAL PROPERTY STORIES 77 (Jane C. Ginsburg & Rochelle Dreyfus eds., 2006).

<sup>13</sup> For instance, G. Edward White's biography spends only a few pages focusing on the qualities of the marriage, at 103-08, but devotes almost a full chapter to Wendell's flirtation, primarily via correspondence, with Lady Clare Castledown, at 231-49, summing it up after Lady Castledown's death with the comment, "thus ended Holmes' greatest romance." G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993).

<sup>14</sup> LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 619 (1991).

<sup>15</sup> *Id.* at 12.

<sup>16</sup> For the tales of the hurled dessert and the bird call birthday, see SHELDON NOVICK, *HONORABLE JUSTICE* 233, 317 (1989).

<sup>17</sup> BAKER, *supra* note 15, at 620.

artists held up as examples are men of western European descent, working in the medium of oil painting or etching. Holmes is drawing on a narrow sample of “art”—though there is good reason to think that this is a function of choice, not ignorance. Wendell’s “artistic bent” has been well-documented as ranging much more widely than the subset of artists cited in the opinion.<sup>18</sup> Holmes was a significant collector of Japanese prints, for instance, and he was married to an artist who worked in the comparatively marginalized medium of embroidery, further begging the question, why bring up only these painters and engravers? Maybe it was just a mistake for Holmes to do so. As one of his contemporaries once complained, “the trouble with Wendell is that he likes to play with his mind.”<sup>19</sup> Barton Beebe has persuasively advanced the idea “that Holmes’s reasoning — or more accurately, his swaggering rhetoric, his ‘cryptic peacocking’ — failed to make clear the distinction the opinion sought to draw between its separate analyses of the originality requirement and the progress requirement.”<sup>20</sup> Consequently, subsequent interpretations of the opinion by courts conflated the discussion of authorial personality under the originality requirement with the discussion of economic value in what should have been understood as a separate consideration of the Constitutional standard of “promot[ing] the progress of Science and the useful arts.”<sup>21</sup> The flamboyance of the rhetoric employed by Holmes, then, likely had a cost in obfuscating the legal logic of the opinion.

Also, ironically in an opinion hailed for the inclusivity of its copyright doctrine, Holmes’s deployment of high art references telegraphed a bias in favor of such art, and of white Western male art in particular. Of course, as Linda Nochlin asserted in her iconic essay, *Why Have There Been No Great Women Artists?*: “[i]n the field of art history, the white Western male viewpoint, unconsciously accepted as *the* viewpoint of the art historian, may—and does—prove to be inadequate not merely on moral and ethical grounds, or because it is elitist, but on purely intellectual ones.”<sup>22</sup> In *Bleistein*, Holmes argued that copyright protection should be broadly applied for the sake of artistic genius, because, for instance, “[a] rule cannot be laid down that would excommunicate the paintings of Degas.”<sup>23</sup> It was indeed a kind of intellectual failing to make that argument using a set

<sup>18</sup> Zimmerman, *supra* note 12 at 94. Zimmerman also notes that Holmes had personal experience with copyright litigation due to his role as executor of his father’s estate, his father having been a tremendously successful author. *Id.*

<sup>19</sup> MARK DEWOLFE HOWE, *JUSTICE HOLMES: THE SHAPING YEARS* 255 (1957).

<sup>20</sup> Beebe, *supra* note 12, at 377.

<sup>21</sup> *Id.* at 378-79.

<sup>22</sup> LINDA NOCHLIN, *Why Have There Been No Great Women Artists?*, in *WOMEN, ART AND POWER: AND OTHER ESSAYS* 145, 146 (1988).

<sup>23</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).



of examples that reified a disappointingly narrow picture of what high art looked like to him.

But my second thesis is that Holmes was attracted by the points he could make with these particular artistic examples. Close attention to them softens some of what Barton Beebe has identified as the harmful focus on commercial success as a measure of artistic value in the latter half of the opinion.<sup>24</sup> In answering whether the circus posters could qualify for protection, 1) under the statute as “pictorial illustrations or works connected with the fine arts,” and also, 2) under the Constitutional standard of “promot[ing] the progress of Science and the useful arts,” the references to high art throughout the opinion help Holmes to collapse the categories of high and low and to find progress not just in the creation of art, but also in its dissemination and consumption. From this perspective, the opinion leavens its preference for “high art” with the acknowledgement that the hierarchy of art is fluid. Artists, like his wife, can cross those boundaries with genius, and the price of a copyright doctrine that cannot follow them would be too high.

#### I. REPRESENTATIVE PORTRAITS BY VELÁZQUEZ AND WHISTLER

It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things . . . Even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. (*Bleistein*, 188 U.S. 239, 249)

The first time Justice Holmes reached for an artistic reference, it was to help him explain that the copyright eligibility of any artwork is not reduced by the representativeness of the art. That is, if the “pictures represent actual groups — visible things,” “that fact would not deprive them of protection.” To assure readers that this is the right outcome, he asserts that “the opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face.” Both Diego Velázquez and James McNeill Whistler were praised for creating living likenesses. Consider as an example Velázquez's *Portrait of Juan de Pareja* (1650), below, left, shown against Whistler's *Arrangement in Grey and Black, No. 1* (1871):

<sup>24</sup> Beebe, *supra* note 12 at 378-79.



We know from a seventeenth-century account that in its own time, this portrait caused astonishment for the quality of its likeness. When the sitter, who was an assistant of Velázquez, stood next to the painting, the audience reacted “with admiration and amazement,” “not knowing as they looked at the portrait and its model whom to address or where the answer would come from.”<sup>25</sup> Velázquez’s ability to create such accurate living likenesses was the central pillar of his fame.

It is not surprising that Holmes paired Velázquez with Whistler. In the late nineteenth-century, art critics praised Whistler’s work explicitly in comparison with Velázquez’s portraits. In fact, scholars have observed that “Whistler’s name became linked with Velázquez’s in press criticism from 1860 onwards.”<sup>26</sup> Art historian Margaret McDonald has argued that “association with Velázquez helped to validate Whistler’s work, setting him in the context of a particular portraiture tradition.”<sup>27</sup> There is a story that a woman once attempted to compliment Whistler by telling him, “There are only two great painters — you and Velázquez.” He is said to have replied, “Madam, why drag in Velázquez?”<sup>28</sup> For Holmes’s purposes, Whistler appears alongside of Velázquez, as if a peer, as an exemplar of American art that was elevated to European acclaim. In 1891, *Arrangement in Grey and Black, No. 1*, better known as *Whistler’s Mother*, was purchased by the French government — the first American work to

<sup>25</sup> Theodore Rousseau, *Juan de Pareja by Diego Velázquez: An Appreciation of the Portrait*, 29 METROPOLITAN MUSEUM OF ART BULL. 449 (1971).

<sup>26</sup> Arabella Teniswood-Harvey, *Art about art: Whistler’s Portrait of Pablo de Sarasate*, 153 THE BURLINGTON MAG. 36, 40 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> Suzanne L. Stratton-Pruitt, *Response: ‘Why Drag in Velázquez?’*, 92 ART BULL. 52, 53 (2010).

earn that distinction.<sup>29</sup> Fanny and Wendell had seen Whistler's first one-man exhibition together in London during their wedding trip in 1874. Fanny's diary notes that her favorite of Whistler's portraits was *Arrangement in Black* (depicting Frederick R. Leyland) and that she wished Whistler could paint Wendell.<sup>30</sup> The influence of Whistler's "subtle shading" has been traced in Fanny's own work.<sup>31</sup>

The ability to represent a subject with lively accuracy was an important rung on the ladder that Whistler ascended to European heights. It was also one of the bases on which Fanny Holmes's work won acclaim. In 1881, the art critic Mariana Griswold Van Rensselaer wrote that

Mrs. Holmes uses motives drawn from nature, and uses them—not. . . merely to *suggest* natural effects—but to actually reproduce those effects in a kindred way to the way in which they are reproduced by pictorial art. It is a difficult enterprise, of course, and one not to be lightly undertaken by a person possessed to less exquisite taste, and less accomplished drawing, and a less pleasing sense of color than are possessed by Mrs. Holmes.<sup>32</sup>

The fragment of Fanny's work pictured below<sup>33</sup> conveys some sense of the painterly technique Van Rensselaer describes, as the threads reproduce varying texture in the leaves and even a sense of floating movement in the milkweed seeds shown aloft:



<sup>29</sup> Peter Schjeldahl, *Mom's Home: The Mysteries of 'Whistler's Mother,'* NEW YORKER, Aug. 24, 2015, <https://www.newyorker.com/magazine/2015/08/31/moms-home>.

<sup>30</sup> LAIDLAW, *supra* note 3, at 45.

<sup>31</sup> *Id.*

<sup>32</sup> HOWE, *supra* note 8, at 254-55.

<sup>33</sup> Historic New England, accession number 1929.1766, image <https://www.historicnewengland.org/explore/collections-access/gusn/33024>.

In the work of Velázquez, Whistler, and Fanny Holmes, the ability to represent nature is critically recognized as a hallmark of value. These are reasons it would have seemed self-evident to Holmes that the copyrightability of any artwork could not be challenged merely on the basis that it was representative.

The pairing of Whistler with Velázquez allows Holmes to invoke more than the mere pursuit of accurate representation, however. In the late-nineteenth century, Velázquez's work was also emulated in terms of its choice of subject. Whistler himself made trips to Europe "not only to see Velázquez' pictures, but also to find and paint a suitably Spanish genre or landscape subject."<sup>34</sup> In Holmes's turn of phrase, Whistler "cop[ied] the original" by seeking out the same subject matter that Velázquez treated. The allure of Velázquez's subjects remained a durable quality of his art. In 1960, Salvador Dali, for instance, did "try his hand at the face" of Juan de Pareja, producing an arresting portrait that was dramatically different from Velázquez's, as seen below:



It is of course an example that Holmes could never have known, but one that powerfully illustrates his point that a "copy is the personal reaction of an individual upon nature." The range of possible expressions of the subject of Juan de Pareja, from that of Velázquez to Dali, shows the extent to which "personality always contains something unique," even when reacting to the same subject.

This time, it was Holmes who anticipated a point that would later be made by Oscar Wilde: "every portrait that is painted with feeling is a por-

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<sup>34</sup> Robin Spencer, *Whistler, Manet, and the Tradition of the Avant-Garde*, 19 *STUDIES IN THE HISTORY OF ART* 47, 52 (1987).

trait of the artist, not of the sitter.”<sup>35</sup> Whistler, too, would undoubtedly have agreed. Whistler was insistent that it should not matter to observers that *Arrangement in Grey and Black, No. 1* was a portrait of his mother. His object was to create a composition of color, a display of his own skill and art, rather than to portray her. And now we understand why Oscar Wilde once bemoaned that “Whistler spells art with a capital I.”<sup>36</sup> So, in bringing up Whistler, Holmes made a good choice for an exemplar of a portraitist who portrays his “personal reaction upon nature” even when drawing from life.

The problem with the point Holmes is making here is that conceiving of art as the individual’s “personal reaction” elides the cultural and institutional frameworks that undergird the production of art. Linda Nochlin has described the idea “that art is direct, personal expression of individual emotional experience” as “naïve.”<sup>37</sup> Rather, “the total situation of art making, both in terms of the development of the art maker and in the nature and quality of the work of art itself, occur in a social situation, are integral elements of this social structure, and are mediated and determined by specific and definable social institutions, be they art academies, systems of patronage, mythologies of the divine creator, artist as he-man or social outcast.”<sup>38</sup> Importantly, “the making of art involves a self-consistent language of form, more or less dependent upon, or free from, given temporally defined conventions, schemata, or systems of notation, which have to be learned or worked out . . .”<sup>39</sup> Limited access to the means of learning the language of art, she argues, historically made “things. . . in the arts as in a hundred other areas. . . stultifying, oppressive, and discouraging to all those, women among them, who did not have the good fortune to be born white, preferably middle class, and above all, male.”<sup>40</sup> It is a critical misunderstanding of the nature of art that in part explains Holmes’s blind spots. Imagining that art is primarily a function of innate genius that inevitably surfaces where it exists might explain why he appeared not to think of the need to protect and support artists across a broader spectrum than his own preferences for a particular kind of high art, and why there appears to be no evidence that he attempted to preserve his wife’s artistic legacy or encourage a continuance of her art after they moved to Washington.

Holmes was perhaps wrong about one more thing, with respect to copying the copy. There are circumstances under which we are “free to

<sup>35</sup> OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 12 (1908).

<sup>36</sup> Schjeldahl, *supra* note 29.

<sup>37</sup> NOCHLIN, *supra* note 22, at 149.

<sup>38</sup> *Id.* at 158.

<sup>39</sup> *Id.* at 149.

<sup>40</sup> *Id.* at 150.

copy the copy” — with permission, after the copyright term has expired, with reference to unprotected elements such as ideas or scenes à faire, or as a fair use. It was common for artists in the nineteenth century to train themselves by making literal copies of Old Masters.<sup>41</sup> Even in the creation of original paintings, Whistler would frequently “quote” from the work of Velázquez, borrowing from the composition in the arrangement of the sitter or copying palettes of color. It is a condition of the creation of art that sometimes the “copy” (the work of art portraying the “original” live subject) becomes itself the “original,” that a work of art becomes the subject of new art. Whistler enjoyed engaging in this kind of play, returning to his own canvases and making the arrangement of one painting the subject of a new one. Consider below Whistler’s own remix of the portrait of his mother, *Arrangement in Grey and Black, No. 2*, on the left, which recreates the lines of his mother’s skirts on a male subject via the draping of a coat, substituting the white frosting of her lace cap with the graying of his beard:



Aline Smithson’s *Arrangement in Green and Black No. 3*,<sup>42</sup> on the right above, extends that play with Whistler’s Mother into the absurd, a recognizable “copy of the copy” that nonetheless “contains something unique.” Smithson’s “personal reaction” on the copy is discernible in the shocks of blue and acidic green introduced into the arrangement, the swimming cap and floatie invoking the seascape on the wall while clashing with the sitter’s emulation of the impassive pose in the original. The work is more

<sup>41</sup> Both Whistler and Manet did this. Spencer, *supra* note 34, at 50.

<sup>42</sup> Aline Smithson, *Arrangement in Green and Black, Portraits of the Photographer’s Mother*, ALINE SMITHSON, <http://alinesmithson.com/portfolios/arrangement-in-green-and-black>.

than a “personal reaction,” however. Also discernible is Smithson’s fluency with a shared language, her ability to converse with Whistler’s work in that “consistent language of form” cited above by Nochlin, even in different mediums. Looking at Smithson’s photograph makes me ask for the first time what Whistler’s mother might have been thinking of, what’s in the picture on her wall, did she want to visit the place pictured in that frame? What might that say about our iconic image of a mother? Martha Tedeschi has commented that Whistler’s *Mother* is one of a few paintings that have “achieved something that most paintings — regardless of their art historical importance, beauty, or monetary value—have not: they communicate a specific meaning almost immediately to almost every viewer. These few works have successfully made the transition from the elite realm of the museum visitor to the enormous venue of popular culture.”<sup>43</sup> On the one hand, at this point in the opinion, Holmes appears to have a blind spot with respect to how art that becomes the subject of art can grow into a much more widely available touchstone for meaning. But on the other hand, that blurring of the lines between the elite and the popular is what Holmes was practicing in bringing forward the work of Velázquez and Whistler alongside the circus poster and calling them all “pictures” that “represent. . . visible things.”

## II. ETCHINGS AS “PICTORIAL ILLUSTRATIONS”

The word “illustrations” does not mean that they must illustrate the text of a book and that the etchings of Rembrandt or [Müller]’s engraving of the Madonna di San Sisto could not be protected today if any man were able to produce them. Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. (*Bleistein*, 188 U.S. 239, 251)

Holmes first manifested his love for etchings while still a student at the school run by Fanny Dixwell’s father, when a young Wendell bought his own etching tools.<sup>44</sup> The reference to Rembrandt as an etcher instead of as a painter signals the importance of the medium to Wendell, though it might ordinarily be thought of as a form subordinate to oil painting. Rembrandt was well-known for elevating the medium of etching. According to *Bryan’s Dictionary of Painters and Engravers*, first published in 1816 and updated regularly through the early twentieth century, Rembrandt “took up an art, that of etching, which before his time had been humble and insignificant, and set it upon a pedestal round which artists have been crowding, in hopeless emulation, ever since.”<sup>45</sup> The idea that a gifted art-

<sup>43</sup> Martha Tedeschi, *Whistler’s Mother and Popular Culture*, in *WHISTLER’S MOTHER: AN AMERICAN ICON* 121 (2003).

<sup>44</sup> LAIDLAW, *supra* note 3, at 43.

<sup>45</sup> *Rembrandt*, in 4 *BRYAN’S DICTIONARY*, *supra* note 5, at 409.



ist could transcend the hierarchy in forms of art is important to the argument that Holmes is trying to make with regard to interpreting the statute, that a label like “illustration” cannot fairly be used to sort the art by its value.

This transcending of medium was also an idea that would have been familiar to Holmes from reviews of his wife’s work. Critics similarly praised Fanny Holmes for elevating the medium of embroidery out of the decorative arts. A critic for the *Boston Daily Advertiser* called her work “the most remarkable needlework ever done,” because she “is an artist; but instead of using paints and canvas, she makes her pictures with silk and satin, using her needle with masterly freedom, and producing tender or bold effects with the same ease that an accomplished painter does.”<sup>46</sup> With explicit sexism, another critic raved that “she painted pictures with her needle that opened the doors of the artist guild to her as cordially as if she hadn’t been a woman.”<sup>47</sup> That a critic would compare her work in embroidery to paint on canvas was especially remarkable because the lower-class status of the decorative arts was enshrined in the law. In a case interpreting the Tariff Act, the Supreme Court held in 1892 that “for most practical purposes, works of art may be divided into four classes.”<sup>48</sup> In the highest class of “fine arts,” only “paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze” were called out. Embroidery is referenced in the third class as “tapestry.” The Court remarks that “no special favor is extended by Congress to either of these [other] classes except the first, which is alone recognized as belonging to the domain of high art.”<sup>49</sup>

Fanny’s work simultaneously resisted this hierarchy of arts and its gendered valance. Victorian women were pressured to engage in many forms of embroidery as a past-time. Judith Flanders notes that “suggestions for hobbies included dozens of types of needlework (embroidery, knitting, crocheting, tatting, woolwork of all sorts, petit point and other

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<sup>46</sup> LAIDLAW, *supra* note 3, at 54.

<sup>47</sup> *Id.* at 53.

<sup>48</sup> *United States v. Perry*, 146 U.S. 71, 74-75 (1892).

<sup>49</sup> *Id.* at 75. A similar hierarchy of the arts can be found in *United States v. Olivotti*, 7 Ct. Cust. 46 (1916), this time explicitly gendered: “The potter, the glass-maker, the goldsmith, the weaver, the *needlewoman*, the lace maker, the woodworker, the jeweler, all produce things which are both artistic and beautiful. It can hardly be seriously contended, however, that it was the legislative purpose to include such things, beautiful and artistic though they may be, in a provision which . . . , was intended to favor that particular kind of art of which painting and sculpture are the types.” *Id.* at 48 (emphasis added). I am grateful to Prof. Amy Adler for these citations.



forms of tapestry-making) . . . .”<sup>50</sup> The pursuit of decorative arts in the home is characterized as “intensive, laborious time-wasting.”<sup>51</sup> Victorian English novelist Dinah Mulock Craik described women at home in the following way: “Their whole energies are devoted to the massacre of old Time. They prick him to death with crochet and embroidery needles. . . .”<sup>52</sup> In that context it is interesting to note that an art critic for the *Boston Correspondence* emphasized that Fanny’s work did not appear laborious, that it was both lively and communicative: “For Mrs. Holmes’s panels are pictures indeed—not mere curiosities of ingenious labor. There is no labor about them apparently—nothing like a ‘stitch.’ . . . They are pictures in the sense of reproducing completely and vividly scenes and states of nature, and conveying the appropriate sentiment in the liveliest manner.”<sup>53</sup> A critic for the *Nation* argued that “one [of her works] alone would give Mrs. Holmes a place among her artist fellow-countrymen, very few of whom show so much feeling for what is delicately poetic.”<sup>54</sup> In the eyes of contemporary critics, Fanny’s work had lifted its genre from the level of women’s busywork to the level of the fine art painting done by her “artist fellow-countrymen.”

Holmes has a further point to make in linking the genre-lifting etchings of Rembrandt with art reproductions by Müller. Again, there is this idea of collapsing boundaries between low and high, but now Holmes has added also the function of making that high art more accessible. In a world where color photographs were still relatively rare as art reproductions, etchings were how Americans who could not afford a Grand Tour accessed the canonical art of Europe. They were literally “pictorial illustrations,” illustrations of pictures. With consideration of art reproductions, Holmes has finally gotten around to the idea that art can be the subject of art. In recognizing the skill and artistry in the etching of Raphael’s *Madonna di San Sisto*, Holmes implies that the “copy of the copy” can have tremendous value of its own while also communicating something about the underlying work.

But, why reference Müller’s rendition of Raphael’s *Madonna di San Sisto* in particular? Ironically, the Court Reporter mistakenly replaced Müller’s name in the published version of the opinion with that of Moritz Steinla, who also did an engraving of the *Madonna di San Sisto*.<sup>55</sup> By a strange coincidence, Moritz Steinla’s birth name was actually Müller. He

<sup>50</sup> JUDITH FLANDERS, *INSIDE THE VICTORIAN HOME: A PORTRAIT OF DOMESTIC LIFE IN VICTORIAN ENGLAND* 197 (2003).

<sup>51</sup> *Id.*

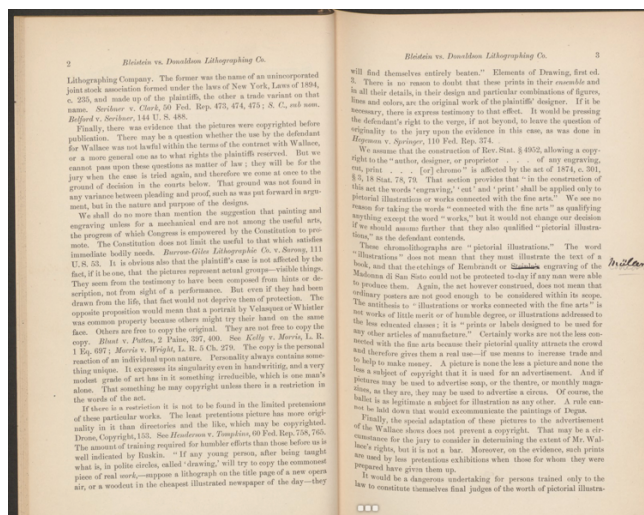
<sup>52</sup> *Id.* at 198.

<sup>53</sup> LAIDLAW, *supra* note 3, at 54.

<sup>54</sup> *Id.* at 55.

<sup>55</sup> Beebe, *supra* note 12 at 332, n55.

was from the village of Steinla, however, and adopted that name as a more distinctive one than Müller,<sup>56</sup> perhaps causing the Supreme Court Reporter's confusion. Holmes cared so much about the distinction that he corrected his personal copy of the opinion by hand, striking the word "Steinla's" and replacing it in the margin with "Müller's":



Barton Beebe suggests that Holmes's preference for Müller might have something to do with the story of how Müller exhausted himself in the final decade of his life working on this single etching.<sup>57</sup> In recounting that story, *Bryan's Dictionary* goes so far as to say that Müller's "existence seems to have been almost wrapped up in its execution," such that he died when the plate was complete, but before ever viewing a print from it.<sup>58</sup> This image of the artist as one with his creation harkens back to Holmes's invocation of personality in the copy, but here, that personality is shining through in a "copy of the copy."

The imagining of the artist's life coming to an end when the artwork is finished also recalls Fanny's decision to destroy her own artwork on the eve of beginning a new life in Washington, D.C. It is said that, if a guest took notice of the one piece of her embroidery that hung in their Washington, D.C., home, Fanny would attribute the work to "Wendell's first wife," as if that person was someone other than herself.<sup>59</sup> She seemed to view

<sup>56</sup> 5 BRYAN'S DICTIONARY OF PAINTERS AND ENGRAVERS 123 (1905) [hereinafter BRYAN'S DICTIONARY].

<sup>57</sup> Beebe, *supra* note 12, at 332.

<sup>58</sup> 3 BRYAN'S DICTIONARY, *supra* note 56, at 381.

<sup>59</sup> NOVICK, *supra* note 16 at 265.

their life together in Washington D.C. as a new life, separate and apart from the life she led as an artist in Boston.

There is one other reason why Holmes may have wanted to cite Müller in particular. Consider below the etchings of Steinla and Müller side by side. Steinla is on the left, Müller is on the right:



Arguably, Müller's work is a finer translation of the painting into the light and shadow of engraving. There is more depth and detail in the folds of the robes worn by the figures and the shading of the clouds is more complex. It was also possibly a print that Holmes knew personally. The image on the right reproduces a print of Müller's engraving that has been in the Harvard College collection since donated by William Gray in 1857, which was Holmes's freshman year at Harvard College. Holmes knew members of the Gray family well, in particular John Chipman Gray, who was a cousin of William Gray. So, Holmes may have wanted to cite Müller because it was Müller's engraving that gave him his own first taste of Raphael's work, before he was able to travel to Europe himself. If there is a place in the *Bleistein* opinion that recognizes the value of art to the observer, that sees dissemination as a part of progress, then it is here. Holmes's reference to the print is a subtle homage to the form of pictorial illustration that could have given him access to a world of art before he escaped the confines of Brahmin Boston.

### III. DEGAS, DÉCOLLETÉS, AND FAT-LEGGED BALLET GIRLS

And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustrations as any other. A rule cannot be laid down that would excommunicate the paintings of Degas. (*Bleistein*, 188 U.S. 239, 251)

In the comment regarding “pictures [that] may be used to advertise soap,” there is a hidden allusion to a work of high art. As Diane Zimmerman has noted, “the plaintiffs pointed out in their brief to the Supreme Court. . . that the painter Sir John Millais was paid \$10,000 to produce ‘The Boy and the Soap Bubble’ to be used on posters for Pear’s, a soap manufacturer.” The painting (shown below at left) was a representative portrait with many qualities of the work of Velázquez or Whistler as a matter of form or technique. Nor was Millais’s work separable from formal oil paintings because of its subject matter, there being a tradition going back to the sixteenth century of symbolizing the fragility of life with soap bubbles in Vanitas still-lives and portraits.<sup>60</sup> The Dutch Baroque painting, *A Boy Blowing Bubbles*, by Bartholomeus Van Der Helst, one example of this tradition, is shown below at right:<sup>61</sup>



<sup>60</sup> Michele Emmer, *Soap Bubbles in Art and Science: From the Past to the Future of Math Art*, 20 *LEONARDO* 327, 328-29 (1987).

<sup>61</sup> For more examples of the tradition, see *Bubble Painting in Vanitas*, BLOG OF AN ART ADMIRER, <http://www.artistsandart.org/2010/06/bubble-painting-in-vanitas-homo-bulla.html>.

There is no principled basis on which to designate one of these pictures a “pictorial illustration” (whether or not also “a work connected with the fine arts”) under the statute without also sweeping in the other. Holmes’s point in invoking Millais’s work seems to be to say that attempting to draw the copyright eligibility line at pictures that advertise the circus makes no more sense than it would to strip Millais of what turned out to be a commercially valuable copyright because of the use of his fine art oil painting to advertise soap. When Holmes says that “pictures may be used to advertise . . .”, he means that they may be so used without jeopardizing their copyright eligibility.

In this context, the reference to Degas then merely backstops the same point. Holmes leverages Degas’s bona fides as a fine artist to demonstrate that you cannot judge art by its subject alone, because “a rule cannot be laid down that would excommunicate the paintings of Degas.” But there is one twist. The Defendants had claimed that the circus posters, including one depicting a ballet act (below), could not be protected as something “immoral in its tendency,” as “a print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes.”<sup>62</sup> The copy of the ballet poster in the Library of Congress is damaged, but here is an image of the remaining fragment:



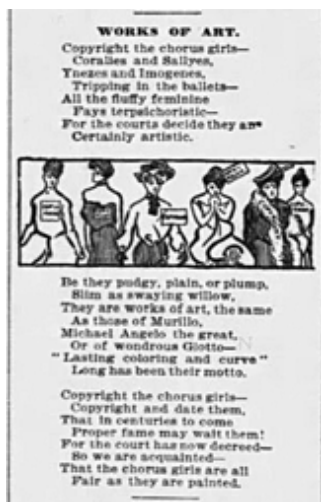
In comparison, Holmes might have had in mind a work of Degas like the one below, *The Dance Class* (1874). Here Holmes seems to say that sometimes a ballet is just a ballet, or, even if it’s more than that, such displays of the art of the body need not be vulgar per se:

<sup>62</sup> Brief for the Defendant in Error, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 247-48.





Surely Holmes must be right here, that subject matter itself should be not a basis on which to decide what art gets protection. Yet, inevitably, there were jokes about the unexpected support that “low art” featuring scantily-clad ladies got from the majority opinion. Cartoons appeared in the newspapers, lampooning the Justices for coming out on the side of “copyright[ing] the chorus girls” (see below left),<sup>63</sup> and depicting Holmes in particular as if gesturing in support of hastily sketched dancing girls (see below right).<sup>64</sup> Fanny Holmes pasted the latter cartoon into a new scrapbook, “the first of many.”<sup>65</sup>



<sup>63</sup> CHICAGO TRIB., Feb 4, 1903. I am indebted to Prof. Brian Frye for bringing this poem to my attention.

<sup>64</sup> CHICAGO RECORD-HERALD, Feb 3, 1903.

<sup>65</sup> NOVICK, *supra* note 13 at 254.

Holmes himself would later joke:

I fired off a decision upholding the cause of low art and deciding that a poster for a circus representing décolletés and fat legged ballet girls could be copyrighted. Harlan, that stout old Kentuckian, not exactly an esthete, dissented for high art.<sup>66</sup>

The engine for that joke is the irony that “upholding the cause of low art,” and going in for the “fat legged ballet girls,” was the best way to protect high art — something Harlan (“not exactly an esthete”) apparently did not perceive. The dismissive, belittling characterization of the posters in Holmes’s letter merely makes clear that Holmes did not pursue the anti-discrimination principle out of a genuine desire to protect low art, but rather to protect high art from prudish or pin-headed bright-line rules of the type that might attempt to reject protection for art based on its “unchaste” content.

#### IV. “WORKS OF GENIUS” BY GOYA AND MANET

It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . It may be more than doubted for instance whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. (*Bleistein*, 188 U.S. 239, 252-52)

The final reference to works of fine art occurs in the last paragraph of the opinion, in the context of the articulation of the anti-discrimination principle, that it would be dangerous for judges to undertake decisions about “the worth of pictorial illustrations.” Particularly at risk, Holmes says, are new “works of genius,” because “their very novelty would make them repulsive until the public had learned the new language in which their author spoke.” Curiously, this phrasing, about authors speaking in a new language, recalls words from a letter Wendell wrote about Fanny during their courtship. Wendell is discussing whether her eyesight will allow her to take up painting as she expected to and he remarks, “I wish she may, if only for her own sake to find a voice for something within her.”<sup>67</sup>

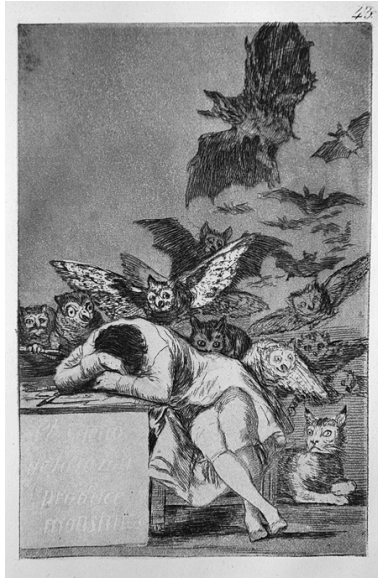
As examples of artists whose works spoke in new “languages,” Holmes cites the etchings of Goya and the paintings of Manet. In a sense these are intelligible examples. Like Velázquez for Whistler, Goya was an inspiration for Manet, both in terms of composition and subject matter.<sup>68</sup> According to *Bryan’s Dictionary*, “the *Caprices* are the most surprising [of

<sup>66</sup> *Id.*

<sup>67</sup> NOVICK, *supra* note 9, at 119.

<sup>68</sup> Daniel Catton Rich, *The Spanish Background for Manet’s Early Work*, 4 *PAR-NASSUS* 1, (1932).

Goya's etchings], showing humanity in all the stages of brutality and ugliness, with a mélange of beauty and demonology quite unexampled."<sup>69</sup> Below is an example from the *Caprices*, entitled *The sleep of reason produces monsters*, which can give a sense of the daring subject matter of the works:



Goya was challenging because he blurred the Romantic line between the beautiful and the sublime. The reception of the *Caprices* in nineteenth-century England did indeed evolve, as it took some time for English audiences to accept his work.<sup>70</sup> William Bell Scott, writing in the 1870's, remarked: "In the opinion of the writer, however startling may be the assertion, Goya is exactly the most interesting genius Spain has produced in art, although he has no value in history. . . . Goya was an inventor, a thinker in the modern manner, and gives us the most vivid and novel sensations, although he serves us with vinegar as well as wine."<sup>71</sup>

Goya was also perhaps an odd choice to be at the top of Holmes's mind because most of his work was produced in the late eighteenth century, more than a hundred years before *Bleistein* was decided. Though, as Prof. Amy Adler has pointed out to me, Goya's series of etchings now known as *The Disasters of War* are a poignant example of works deemed by the artist to be before their time. Goya chose not to have them printed

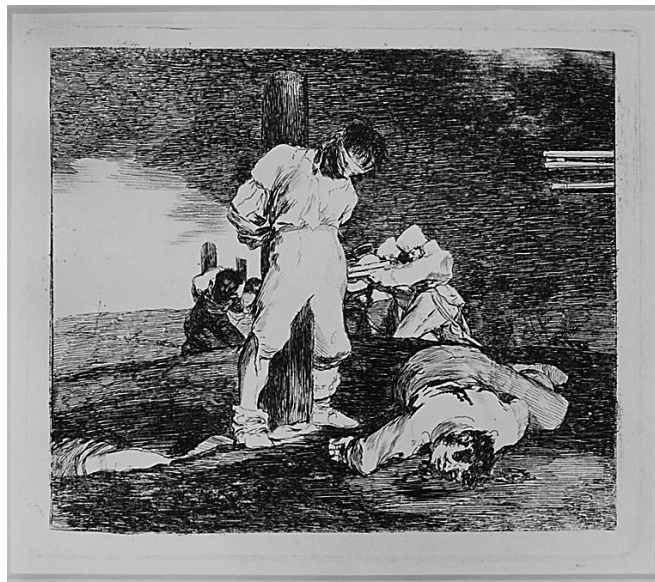
<sup>69</sup> 2 BRYAN'S DICTIONARY, *supra* note 5, at 265.

<sup>70</sup> Nigel Glendinning, *Goya and England in the Nineteenth Century*, 106 BURLINGTON MAG. 4, 13 (1964).

<sup>71</sup> *Id.*



during his life. His primary concern seems to have been that the subject matter depicting the Peninsular War was too politically sensitive, given his own position as a court painter, but there were also challenges in style and form of the etchings. As an example, consider the raw depiction of soldiers executing prisoners of war in plate 15, captioned “And there is no help”:



In this etching, Goya is said to have “condensed. . . three moments to advance the unfolding of the bound victim’s death by firing squad, a story narrated in the present tense,” while “[t]he intruding rifles create the impression of incidental observation.”<sup>72</sup> The first edition was printed in 1863, thirty-five years after Goya’s death.<sup>73</sup> At that time, the United States was in the midst of its own Civil War and Holmes himself was witnessing its horrors. If Holmes knew *The Disasters of War*, they would have been an arresting example of art that took time to accept.

Similarly, Manet was certainly an innovator in his time. In 1885, the critic Theodore Duret labeled as “avant-garde” concepts that Manet had

<sup>72</sup> Plate 15 from “*The Disasters of War*” (*Los Desastres de la Guerra*): ‘And there is no help.’ (*Y no hai remedio.*), THE MET, <https://www.metmuseum.org/art/collection/search/333977>.

<sup>73</sup> Javier López-Alós, *Alternative Forms of Historical Writing: Concepts and Facts in Goya’s Disasters of War* in *THEORIES OF HISTORY: HISTORY READ ACROSS THE HUMANITIES* 159, 162 (Michael J. Kelly & Arthur Rose eds., 2018).

helped to develop.<sup>74</sup> Curiously, a painting that Manet based on a Goya portrait was among his most daring and initially most criticized works. Consider, side by side below, Manet's *The Balcony* on the right, and Goya's *Majas on a Balcony* on the left:<sup>75</sup>



In *The Balcony*, Manet is said to have “taken up” “Goya’s innovative composition in which balcony and picture plane overlap.”<sup>76</sup> The bold colors and bucking of conventional interaction between the figures initially drew sharp criticism. One critic lampooned the portrait by quipping, “Close the shutters!”<sup>77</sup> Tellingly, Manet was thought to have “lowered” himself with “this gross art.”<sup>78</sup> Berthe Merisot, the model for the seated figure in the painting and also a witness to the portrait’s first showing, wrote in a letter afterwards that “poor Manet is sad. His exhibits are, as usual, not to the taste of the public—a perpetual source of surprise to him.”<sup>79</sup> Today, *The Balcony* is considered among the best of his paint-

<sup>74</sup> Spencer, *supra* note 34 at 48.

<sup>75</sup> I am indebted again to Prof. Amy Adler for the suggestion to consider these works.

<sup>76</sup> *Majas on a Balcony*, ca. 1800–1810, <https://www.metmuseum.org/art/collection/search/436548>.

<sup>77</sup> *The Balcony*, Edouard Manet, 1868–1869, <https://artsandculture.google.com/asset/the-balcony/ggFK0UGXAd7OCA?hl=EN>.

<sup>78</sup> *Id.*

<sup>79</sup> *The Balcony* (1868–9) by Edouard Manet, in *ENCYCLOPEDIA OF ART EDUCATION*, <http://www.visual-arts-cork.com/paintings-analysis/balcony-manet.htm>.

ings,<sup>80</sup> an instructive example of an artist whose language was not at first appreciated by the critics, though it came to be highly valued.

But Holmes may have chosen Manet for another reason. In their brief, Plaintiffs had cited a book, Charles Hiatt's *Picture Posters*, arguing that "the ideal picture-poster [is] a special and peculiar branch of pictorial art, and one into which many gifted artists, highly successful in other fields, have ventured with greater or less success."<sup>81</sup> That book features the work of Manet, who was one of those gifted artists. Hiatt asserts that "[i]t is very generally admitted that the name of Edouard Manet is one of the greatest in the history of modern painting. It would indeed be difficult to over-estimate the extent of his influence on the pictorial art of the day. The poster reproduced in these pages is not unworthy [of] his great talent".<sup>82</sup>



So, in choosing Manet as a challenging artist, whose new language may be difficult to understand, Holmes chose an artist who had crossed over from picture posters to paintings, from low art to high, just as Fanny Holmes did, pointedly challenging the law to find a basis on which to deny protection to one work, but not the other.

As for whether Fanny Holmes's experience as an artist might have helped to inform Wendell's thinking here in these last paragraphs of the opinion, there is one last characteristic that her work had in common with the circus posters. Her work was commercially successful. A critic in *The Art Amateur* gushed in 1880, "I am not much surprised to be informed that the gifted artist . . . has received a standing order for all that she can pro-

<sup>80</sup> *Id.*

<sup>81</sup> 188 U.S. 239, 243 (1903).

<sup>82</sup> CHARLES HIATT, *PICTURE POSTERS* (London, George Bell & Sons 1896), <https://www.gutenberg.org/files/45555/45555-h/45555-h.htm>.

duce at \$500 apiece. This ensures the lady pocket money at the rate of \$1,000 a month, for she has only to settle upon a subject and the picture is completed very rapidly.”<sup>83</sup> If this information was accurate, Fanny’s work was capable of generating an enviable income. Wendell’s annual salary has been estimated at only \$2,000 when they were first married in 1872. By that estimation, each work Fanny sold would increase their household income by 25%. Accounting for inflation, she could bring in more than \$25,000 each month by completing two works. It is hard to believe that this would not have garnered her husband’s attention. For Fanny, it must have offered some level of proof against the doubt of success. After all, not all of her reviews were glowing. Professional embroiderers in particular did not understand what she was trying to do. They “complained that she did not use traditional stitches and that her stitches were too long for her works to be used for functional things such as cushion covers.”<sup>84</sup> In the face of that reduction of her work, it must have been comforting to know that it was not only her “nieces” who would have liked to own one of her pieces.<sup>85</sup>

When Holmes ends the opinion by approvingly introducing the concept of commercial value, it rings as a partial corrective to the problem of how to recognize new genius: “yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.”<sup>86</sup> Critics may disagree, but if a public is willing to pay for a work, then someone sees the value in it, and Holmes recognizes, that value may even be aesthetic or educational, or at least “it would be bold to say” that it was not.

It seems clear that Holmes was exposed to several lessons he could have learned from Fanny’s artistic career, that the hierarchy of art is fluid, that the value of art cannot be judged by its subject, though shared subjects form inspirational bonds across time and media. He might have observed from her work that genres can be lifted by genius, and genius recognized by publics other than his own. But what do we make of his follow-on quip? He wrote that the “taste of any public is not to be treated with contempt,” but that “is an ultimate fact for the moment, whatever may be our hopes for a change.” While Holmes pragmatically recognized that the hierarchy of art could evolve, he did not particularly wish it to.

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<sup>83</sup> Greta, *supra* note 4, at 119.

<sup>84</sup> LAIDLAW, *supra* note 3, at 60.

<sup>85</sup> It is known that Cornelius Vanderbilt II was among those who collected her work, at one time owning three of her pieces, but these, too, seem to have been lost. *Id.* at 61.

<sup>86</sup> 188 U.S. 239, 251 (1903).

What does it mean that he could learn those lessons and then write an opinion that reflected back the masculine, Euro-centric elitism of the status quo? He could assert that the elite of his own class should not use the statutory or the constitutional standard in copyright law to impose their aesthetic values on others, even if he himself regarded their values as superior.<sup>87</sup> He could internalize the lesson that high art would not always be judged as it was in 1903, without actually embracing for himself the perspectives that would make art anew. He did not welcome broader participation in the privilege of taste-making. And yet, he did acknowledge the fact that the world could change and that copyright law, at least, should not stand in its way. For that I think we have Fanny Bowditch Dixwell Holmes, at least in part, to thank.

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<sup>87</sup> It is interesting to compare this sentiment with Holmes's dissent in *Lochner*, written within two years of the *Bleistein* opinion: "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Lochner v. New York*, 198 U.S. 45, 49 (1905) (J. Holmes, dissenting). There are echoes here of the idea that the Constitutional standard of the copyright clause does not embody a particular aesthetic theory, and the accident of a judge finding art natural or familiar or novel or shocking should not answer the question whether the statute granting exclusive rights to that art conflicts with the Constitution.