

# SHOULD WE TREAT ARTWORKS AS MERIT GOODS FOR TAX PURPOSES?

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## Abstract

Artworks are often preferentially taxed. France, for example, which has a tradition of promoting artists' interests, excluded artworks from its wealth tax, levies a special low rate of value-added tax on direct sales by artists, and provides for a capital gains tax ('CGT') exemption for artworks. In contrast, Australia does not treat artworks as merit goods for goods and services tax or CGT purposes. This differential treatment may be seen as a manifestation of philistinism on the part of Australian policymakers but, like France and other European countries, Australia privileges artists over other producers of things by operating an artists' resale right (ARR). (Economists typically consider an ARR to be a quasi-tax.) Even New Zealand, which has shied away from an ARR and has a values-free GST system, excludes artworks when means testing for certain benefits. The fact of preferential tax treatment of artworks is evident; this paper engages with normative issues to inquire whether we should treat artworks as merit goods for tax purposes.

## I INTRODUCTION

This paper is about taxation and artworks but does not attempt to solve 'one of the most elusive of the traditional problems of human culture: the nature of art'.<sup>1</sup> In George Dickie's commonly encountered institutional theory: 'A work of art ... is (1) an artifact (2) a set of aspects of which has had conferred upon the status of candidate for appreciation by some person or persons acting on behalf of a certain institution (the artworld).'<sup>2</sup> In other words, 'anything is art if it is found in an art gallery',<sup>3</sup> such as paintings, sculptures, drawings, engravings, photographs, and

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<sup>1</sup> Richard Wollheim, *Art and Its Objects* (Cambridge University Press, 2<sup>nd</sup> ed, 1980) 1.

<sup>2</sup> George Dickie, *Art and the Aesthetic: An Institutional Analysis* (Cornell University Press, 1974) 464. For a critique of institutional theory, see Wollheim, above n 1, 157-66.

<sup>3</sup> Start Culver, 'Whistler v. Ruskin: The Courts, the Public and Modern Art' in Richard Burt (ed), *Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere* (University of Minnesota Press, 1994) 149, 151.

artisanal works that manifest artistic quality. These things constitute artistic works under copyright law.<sup>4</sup> Section 7 of the *Resale Right for Visual Artists Act 2009* (Cth) provides a non-exhaustive definition of ‘artwork’ that is based on the copyright definition but specifically includes batiks and weavings, Indigenous artefacts that might be excluded from a traditional Western definition of artworks.<sup>5</sup> This definition adequately identifies what an artwork is for the purposes of this paper.

Various taxes, including net wealth taxes, inheritance taxes, capital gains taxes, and value-added taxes, treat artworks preferentially. Furthermore, artists’ income may attract tax privileges in some jurisdictions. These preferences and privileges, which are outlined in Part II, indicate that, as matter of fact, artworks are treated as merit goods in many jurisdictions. The remainder of the paper seeks to explain these preferences and consider whether they could be justified in an Australasian context. In Part III, the concept of merit goods considered, along with the counter principle of consumer sovereignty. Drawing on objective theories of the good, long-term perspective is adopted, and the relatively recent and, perhaps, ephemeral doctrine of consumer sovereignty is rejected in respect of artworks. Our approach is Western-oriented but Indigenous cultures can also provide guidance. In Indigenous cultures, stewardship of the culture is led by learned elders; in contemporary Western culture, expertise-led policies may be dismissed as unacceptable paternalism. Part IV considers whether artworks should be treated as merit goods for tax purposes. Conclusions are then drawn.

## II TAX PREFERENCES FOR ARTWORKS AND ARTISTS

This part of the paper outlines how artworks and, occasionally, artists themselves are preferentially taxed in various ways in many jurisdictions.<sup>6</sup>

### A *Net Wealth Taxes*

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<sup>4</sup> *Copyright Act 1968* (Cth) s 10 definition of ‘artistic work’; *Copyright Act 1994* (NZ) s 2 definition of ‘artistic work’.

<sup>5</sup> See, for example, R G Collingwood, *The Principle of Art* (Oxford University Press, 1938).

<sup>6</sup> See, generally, Deloitte, *Fine Art – Direct and indirect taxation aspects, A masterwork of complexity* (2016) <<https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artfinance-taxmatrix-16092013.pdf>>.

Net wealth taxes have declined in popularity among Organisation of Economic and Cooperation (‘OECD’) members;<sup>7</sup> but the few jurisdictions that continue to tax net wealth tend to offer concessions for artworks. France’s *impôt de solidarité sur la fortune* (solidarity tax on wealth), which was levied between 1988-2017,<sup>8</sup> excluded artworks from its base.<sup>9</sup> Spain excludes from its *impuesto sobre el patrimonio* (wealth tax) ‘objects of art and antiques that have been ceded to museums for at least three years’.<sup>10</sup> If a person can prove their artworks are for personal use, rather than an investment, they are not subject to canton-level, Swiss wealth taxes.<sup>11</sup> Italy does not levy a net wealth tax but does exclude artworks from its IVAFE (wealth tax on investments held abroad),<sup>12</sup> although strict reporting requirements apply.<sup>13</sup>

## B *Inheritance Taxes*

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<sup>7</sup> The number of OECD countries levying individual net wealth taxes fell from 12 in 1990 to four in 2017 (France, Norway, Spain and Switzerland): see OECD, *The Role and Design of Net Wealth Taxes in the OECD*, *OECD Tax Policy Studies*, No 26 (OECD Publishing, 2018) <<https://doi.org/10.1787/9789264290303-en>>.

<sup>8</sup> With effect from 1 January 2018, *l’impôt de solidarité sur la fortune* was replaced by an annual real estate wealth tax, *l’impôt sur la fortune immobilière* (tax on real property wealth). See ‘The new French wealth tax: understanding the perimeters of the Impôt sur la Fortune Immobilière’ (25 March 2018) *Riviera-Press* <<http://www.riviera-press.fr/insider/content/new-french-wealth-tax-understanding-perimeters-impôt-sur-la-fortune-immobilière>>.

<sup>9</sup> Annabelle Gauberti, ‘Taxation of acquisition and sale of art works: auctions and private sales’ *Crefovi* | <<http://crefovi.com/articles/taxation-of-acquisition-and-sale-of-art-works-auctions-and-private-sales-art-tax-law/>>.

<sup>10</sup> Carlos Gabarró, ‘Spain’s Wealth Tax and 10 Legitimate Ways to Reduce It’ (2 April 2018) *Tax Notes International* 239, 241.

<sup>11</sup> *Works of art: taxed or not taxed?* Taxadvice (2015) <[http://www.taxadvice.ch/m/mandanten/242/download/Leman\\_Fair\\_2015.pdf](http://www.taxadvice.ch/m/mandanten/242/download/Leman_Fair_2015.pdf)>.

<sup>12</sup> In Italian: *Imposta sul valore delle attività finanziarie detenute all’estero*.

<sup>13</sup> ‘Italy – Income Tax’ (2 January 2018) *KPMG* <<https://home.kpmg.com/xx/en/home/insights/2011/12/italy-income-tax.html>>.

Some European jurisdictions exempt works of art from inheritance tax.<sup>14</sup> Furthermore, the United Kingdom, among other countries, permits a taxpayer to settle their tax debt by transferring a culturally important artefact to the state. The Arts Council England operates the Acceptance in Lieu scheme, with a panel of experts determining whether an object is sufficiently ‘pre-eminent’ to be accepted in lieu of monetary settlement of inheritance tax.<sup>15</sup>

### C Capital Gains Taxes

Artworks are commonly exempt from capital gains tax (‘CGT’), provided they are considered private assets.<sup>16</sup> This concession relates to private assets, rather than artworks as such. In France, however, ‘sales of art works or collecting items are exempted from capital gain tax when the sale price of the art work is not above 5,000 euros’ (about A\$8 000).<sup>17</sup> Under United Kingdom law, artworks may attract the favourable treatment accorded to plant with wasting value.<sup>18</sup>

Under Australian law, personal use assets acquired for less than \$10 000 are disregarded for CGT purposes. Personal use assets include boats; furniture; electrical goods; household items but exclude collectables. Collectables include paintings, sculptures, drawings, engravings or

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<sup>14</sup> See EY Private Client Services, *Worldwide Estate and Inheritance Guide 2017* <<https://www.eycom.ch/en/Publications/20170929-Worldwide-Estate-and-Inheritance-Tax-Guide-2017/download>>.

<sup>15</sup> Arts Council England, *Acceptance in Lieu* <<https://www.artscouncil.org.uk/tax-incentives/acceptance-lieu>>. Appropriately, the Acceptance in Lieu annual reports are in themselves aesthetically appealing artefacts. See, for example, Arts Council England, *Cultural Gifts Scheme & Acceptance in Lieu Report 2017* <<https://www.artscouncil.org.uk/sites/default/files/download-file/AIL-CSG%20201617%20Digital%20Annual%20Report.pdf>>.

<sup>16</sup> See Deloitte, above n 6 on Austria, Belgium, Germany, Italy, Switzerland, and the United Kingdom.

<sup>17</sup> Gauberti, above n 9.

<sup>18</sup> In *HMRC v The Executors of Lord Howard of Henderskelfe* [2014] EWCA 278, the Court of Appeal held that Sir Joshua Reynolds, *Portrait of Omai* (1776) was plant and was therefore deemed by section 44 of the *Taxation of Chargeable Gains Act 1992* (UK) to be a ‘wasting asset with a predictable life not exceeding 50 years’. While it may seem unusual that a 200-year old painting should be considered a wasting asset, it was used to enhance Castle Howard, a commercial venture.

photographs.<sup>19</sup> Gains on collectables acquired for less than \$500 are excluded. Presumably, personal assets are considered wasting assets, whereas collectables are not.

#### D *Value-Added Taxes*

In the United Kingdom, goods and services that are exempted from value added tax ('VAT') include: admission charges by public authorities or eligible cultural bodies to certain cultural events such as visits to museums, art exhibitions; antiques, works of art or similar (as assets of historic houses) sold by private treaty to public collections or used to settle a tax or estate duty debt.<sup>20</sup> Furthermore, imported works of art are taxed at an effective rate of five per cent,<sup>21</sup> rather than the standard rate of 20 per cent. Imported works of art are therefore preferentially taxed, along with, perhaps more obviously deserving items, such as children's car seats, but are not exempt, as, for example, children's clothes are.

Elizabeth Lash observes:

While in some limited instances, the European Union continues to provide a more favorable regime for the independent artist, the trend towards an ultimately higher value-added tax ("VAT") on the sale, import and export of artwork, particularly with respect to art sold by galleries and in the resale market, may discourage the growth of an EU-wide commercial art market in comparison with more favorable tax regimes outside the EU.<sup>22</sup>

Chapter 3 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) establishes the tax-preferred goods and services under the Australian GST system. These do not include artworks

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<sup>19</sup> See Income Tax Administration Act 1997 (Cth) subdivs 108-B and 108-C; Australian Taxation Office, *CGT assets and exemptions* (16 March 2018) <[https://www.ato.gov.au/general/capital-gains-tax/cgt-assets-and-exemptions/#Personal\\_use\\_assets](https://www.ato.gov.au/general/capital-gains-tax/cgt-assets-and-exemptions/#Personal_use_assets)>.

<sup>20</sup> *Value Added Tax Act 1994* (UK), s 31(1); sch 9, Groups 11 and 13.

<sup>21</sup> In terms of section 21(4) of the *Value Added Tax Act*, only 25 per cent of the value is taxable. The term 'work of art' is extensively defined in section 21(6). Compare with the definition of 'artwork' given in *Income Tax Administration Act*, s 995.1.

<sup>22</sup> Elizabeth R Lash, 'The European VAT: Good for Tax Revenue, Bad for the Commercial Art Market?' (4 March 2015) *Center for Art Law* <[https://itsartlaw.com/2015/03/04/el\\_vat/](https://itsartlaw.com/2015/03/04/el_vat/)>. Lash refers to a European Commission report that was unexpectedly hostile to preferential VAT treatment of artworks. See European Commission, 'European Commission Adopts Report on VAT' (28 April 1999) <[europa.eu/rapid/press-release\\_IP-99-274\\_en.pdf](http://europa.eu/rapid/press-release_IP-99-274_en.pdf)>.

or artistic services. The *Goods and Services Tax Act 1985* (NZ) seeks to tax all goods and services unless it impracticable to do so.

### E Charities

Tax systems invariably extend significant concessions to charities and their donors.<sup>23</sup> Section 12(1)(e) of the *Charities Act 2013* (Cth) includes ‘the purpose of advancing culture’ as a ‘charitable purpose’. New Zealand legislation does not define ‘charitable purpose’. Under the common law,<sup>24</sup> a charity must be for the public benefit and have the purpose of relieving poverty, advancing education, advancing religion, or benefiting the community. Promotion of the arts has been found to satisfy that essential criterion. In *Royal Choral Society v Inland Revenue Commissioners*,<sup>25</sup> Lord Greene MR observed ‘the education of artistic taste is one of the most important things in the development of a civilised human being’.<sup>26</sup> Furthering the arts in this way is included in the well-established category of education, but the general promotion of art has also been deemed to be a charitable purpose,<sup>27</sup> and gifts to art galleries have been found to be charitable in nature.<sup>28</sup>

### G Miscellaneous Tax Measures

Numerous other miscellaneous tax preferences apply to artworks.<sup>29</sup> Louisiana, for example, exempts sales of unique artworks, within a designated cultural district, from state and local

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<sup>23</sup> See, for example, *Income Tax Act 2007* (NZ) ss CW 41, CW 42, CW 43. Section CW 41 exempts the non-business income of charities. Section CW 42 exempts the business income of charities, but only to the extent that income is applied for charitable purposes within New Zealand. Subject to a minimum donation of NZ\$5, individuals may claim a tax credit of 33½ per cent of their aggregate annual donations. See *Income Tax Act 2007* ss LD 1–LD 3. The total gifts that qualify for the tax credit may not exceed the individual’s taxable income: *Tax Administration Act 1994* (NZ) s 41A(3).

<sup>24</sup> See *Commissioner of Income Tax v Pemsel* [1891] AC 531.

<sup>25</sup> [1943] 2 All ER 101.

<sup>26</sup> Ibid 105.

<sup>27</sup> *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132.

<sup>28</sup> Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, 2013) 221.

<sup>29</sup> See, generally, Antoine Cadeo de Iturbide, *Art and Taxation for the Global Collector* (A & F Markets, 2014).

taxes.<sup>30</sup> Jurisdictions, including Singapore, Switzerland and New York state, provide for freeports in which artworks may be bought and sold without incurring VAT or customs duties.<sup>31</sup>

## H *Benefit Means Testing*

In terms of clause 10 of the Social Security (Long-term Residential Care) Regulations 2005 made under the *Social Security Act 1964* (NZ), ‘exempt assets’ for the purpose of the residential care subsidy include:<sup>32</sup> ‘household furniture and effects’;<sup>33</sup> (b) ‘personal belongings such as clothing and jewellery’;<sup>34</sup> and (c) ‘personal collectables or family treasures or taonga such as artworks, books, stamps, and antiques’.<sup>35</sup> Although regulations may prescribe value limits for types of excluded property,<sup>36</sup> none currently apply to the assets listed above. Furthermore, no relation-back provisions appear to prevent converting non-excluded assets into excluded assets, such as artworks.<sup>37</sup>

## I *Artists as Tax-Privileged Producers of Things*

The tax preferences identified so far relate to artworks, rather than artists. But tax privileges may, occasionally, directly address artists. France, for example, provides special VAT

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<sup>30</sup> Anna Hill, Antoine Cadeo de Iturbide and Pierre Naquin, *11 Tax Secrets Every Art Collector Needs to Know* (14 April 2015) Artsy <<https://www.artsy.net/article/artsy-editorial-11-tax-secrets-every-art-collector-needs-to>>.

<sup>31</sup> Ibid. See also Atossa Araxia Abrahamian, ‘Inside the New “Fortress” in New York City That’s Housing Millions of Dollars of Art’ *Artsy* (29 May 2018) <<https://www.artsy.net/>>.

<sup>32</sup> See clause 4 of Part 2 of Schedule 27 of the *Social Security Act 1964* (NZ).

<sup>33</sup> Social Security (Long-term Residential Care) Regulations 2005, cl 10(1)(a).

<sup>34</sup> Ibid cl 10(1)(b).

<sup>35</sup> Ibid cl 10(1)(c).

<sup>36</sup> See *Social Security Act 1964* (NZ), s 155(1)(h).

<sup>37</sup> Under the anti-income deprivation provision, investment in a non-income producing asset can lead to income being deemed to have been received by the applicant. See Social Security (Long-term Residential Care) Regulations 2005, cl 9B(f).

concessions for artists.<sup>38</sup> Nevertheless, that privilege pales into insignificance in the face of the Irish Artists Tax Exemption, which permits up to €50 000 (approximately A\$80 000) of an artist's annual income to be exempted from income tax.<sup>39</sup> Québec also provides generous income tax concessions for artists.<sup>40</sup> Australia allows artists to average their income.<sup>41</sup>

While the Irish income tax privilege is unique, *droit de suite* or the artist's resale royalty right ('ARR') is commonplace.<sup>42</sup> An ARR ensures artists receive a percentage of the sale price of a work when it is resold.<sup>43</sup> It is moot whether ARR schemes are taxes,<sup>44</sup> but, when the state mandates collection of some money from one person, for redistribution to another,<sup>45</sup> economists are likely to see a tax. Clare McAndrew, a leading art economist, for example, refers to the EU Directive on the artists' resale right<sup>46</sup> as the 'EU art tax'.<sup>47</sup>

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<sup>38</sup> *The VAT regime applicable to works of art in France* (2017) <<https://www.cabinet-roche.com/en/works-of-art/>>. Article 98 A II of Annex 3 to the CGI; article 278-0 bis of the French tax code.

<sup>39</sup> See *Taxes Consolidation Act 1997* (Ireland) s 195.

<sup>40</sup> *Deduction for Copyright Income* Revenu Québec, <<https://www.revenuquebec.ca/en/citizens/your-situation/artists/deduction-for-copyright-income/>>.

<sup>41</sup> *Income Averaging for Special Professionals 2018* Australian Taxation Office (2018) <<https://www.ato.gov.au/Forms/Income-averaging-for-special-professionals-2018/>>. I am grateful to Lisa Marriott for this observation.

<sup>42</sup> See Sam Ricketson, *Proposed international treaty on droit de suite/resale royalty right for visual artists* (CISAC, 2015) <<http://www.cisac.org/Newsroom/Articles/New-Academic-Study-Proposes-a-Framework-for-a-New-Treaty-on-the-Visual-Artists-Resale-Right>>.

<sup>43</sup> Catherine Jewell, 'About the artist's resale right' *WIPO Magazine* (June 2017) <[http://www.wipo.int/wipo\\_magazine/en/2017/03/article\\_0001.html](http://www.wipo.int/wipo_magazine/en/2017/03/article_0001.html)>.

<sup>44</sup> See Monroe E Price, 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' (1968) 77(7) *Yale Law Journal* 1333.

<sup>45</sup> See Brian L Frye, 'Equitable Resale Royalties' (2017) 24(2) *Journal of Intellectual Property Law* 1.

<sup>46</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

<sup>47</sup> Quoted in Daniel Grant, "'Droit de Suite" Debate Heats Up' *Artnews* (11 January 2012) <<http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/>>.



Subsidies or tax concessions for artists are usually justified on the grounds of market failure. Bruno Frey identifies five forms of market failure in relation to reward for artists,<sup>48</sup> whereas William Grampp denies any such failure.<sup>49</sup> This debate is noted but this paper focuses on artworks (as a synecdoche for cultural outputs), rather than the people who create them.

Having established the facticity of tax preference for artworks, in part III, we consider normative bases for that preference.

### III CONSUMER SOVEREIGNTY AND MERIT GOODS

Fred Ridley recognises Mark Blaug's claim that the 'intellectual imperialism of economics is one of the phenomena of our time',<sup>50</sup> but dismisses the relevance of classical economics to cultural debate, saying '[t]he monetarists of our time show how easy it is to operate in the field of economics without understanding people. A reading of cultural economics leads one to wonder whether its practitioners fully understand either democracy or art.'<sup>51</sup> While our arguments are grounded in philosophies of objective good, rather than economics, we do not have the luxury of dismissing hegemonic economic arguments in the way that Ridley does. In this part of the paper we therefore discuss consumer sovereignty, the underpinning principle of neoliberalism, and merit goods, an exception to consumer sovereignty proposed by Richard Musgrave.

#### A *Consumer Sovereignty*

The principle of consumer sovereignty was first asserted in the economic literature by William Hutt in the late 1930s.<sup>52</sup> According to John Black and his co-lexicographers, 'consumer sovereignty' is

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<sup>48</sup> Bruno S Frey, *Art & Economics: Analysis & Cultural Policy* (Springer, 2<sup>nd</sup> ed, 2003) 112.

<sup>49</sup> William Grampp, 'Should the Arts Support Themselves' (1986) 7(2) *Economic Affairs* 41.

<sup>50</sup> M Blaug, 'Introduction: What is the Economics of the Arts About' in Mark Blaug (ed) *The Economics of the Arts* (Martin Robertson, 1976) 13, 13.

<sup>51</sup> F F Ridley, 'Cultural Economics and the Culture of Economists' (1983) 7(1) *Journal of Cultural Economics* 1, 17.

<sup>52</sup> W H Hutt, *Economists and the Public* (Jonathan Cape, 1936); William Hutt, 'The Concept of Consumers' Sovereignty' (1940) 50 *Economic Journal* 66.

The proposition that consumers are the best judges of their own interest. This is the basis for leaving consumption patterns to be decided by the market; consumers face fixed prices of goods and services, which reflect the costs of production, and are left to maximize their own utilities by choosing whatever combinations of goods and services suit them best. As a positive statement, it describes what consumers are permitted; as a normative statement, it prescribes what consumers should be permitted.<sup>53</sup>

Duncan Reekie recounts how some classical economists objected to Hutt's assertion of consumer sovereignty.<sup>54</sup> Quaint as the proposition may appear to the contemporary reader, in the 1930s leading commentators opposed consumer sovereignty on the grounds that central planning was more efficient than the market in meeting consumer demand.<sup>55</sup> Even with today's information technology, few would argue that central government could be a more efficient distributor of consumer goods than the market. And so, in a liberal democracy, it seems axiomatic that the market should be the default distribution mechanism for consumer goods and services, although the distinction between private, and public goods and services may be difficult to draw.

Consumer sovereignty has three underpinning assumptions:

First, consumers are rational in the sense that they attempt to make rational choices given their preferential structures. Second, consumers are informed in the sense that they have enough knowledge to make optimal choices. Finally, consumers are able to purchase goods in a competitive marketplace.<sup>56</sup>

While Jason Saving 'examines recent critiques of consumer sovereignty and concludes that consumer sovereignty is alive and well in the modern era',<sup>57</sup> the ever increasing body of

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<sup>53</sup> John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (Oxford University Press, 5<sup>th</sup> ed online, 2017).

<sup>54</sup> W Duncan Reekie, 'Consumers' Sovereignty Revisited' (1988) 9 *Managerial and Decision Economics* 17, 17.

<sup>55</sup> Oskar Lange, *On the Economic Theory of Socialism* (University of Minnesota Press, 1938) cited by Jason L Saving, 'Consumer Sovereignty in the Modern Global Era' (2006) 22(1) *Journal of Private Enterprise* 107, 108-09.

<sup>56</sup> Saving, above n 55, 107.

<sup>57</sup> Ibid 115.

behavioural economics literature rejects the model of the rational *homo economicus*.<sup>58</sup> Jerome Tobacyk and Dheeraj Sharma dismiss consumer sovereignty as an unattainable myth,<sup>59</sup> whereas Adrian Kuenzler argues it is attainable but currently denied by lax competition laws.<sup>60</sup> We consider two criticisms of consumer sovereignty. The first is that modern marketing techniques manipulate consumer choice so as to make the proposition of consumer sovereignty illusory. The second is that Hutt's arguments have been taken out of context.

## 1 Manipulation of Consumer Choice

For Musgrave, '[T]he idea of consumer sovereignty and the reality of consumer choice in high-pressure markets may be quite different things'.<sup>61</sup> As early as 1936, James Meade 'had been inveighing against "high-pressure salesman": it was, he complained, debasing "real quality" into want-created and "irrational consumers' preference'.<sup>62</sup> Writing in the *Mad Men* heyday of Madison Avenue, John Kenneth Galbraith observed 'the producing firm reaches forward to control its markets and on beyond to manage the market behaviour and shape the social attitudes of those, ostensibly, that it serves.'<sup>63</sup> Galbraith also argued:

Every corner of the public psyche is canvassed by some of the nation's most talented citizens to see if the desire for some merchantable product can be cultivated. No similar process operates on behalf of the non-merchantable services of the state. Indeed, while we take the cultivation of new private wants for granted we would be measurably shocked to see it applied to public service.<sup>64</sup>

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<sup>58</sup> On the contribution of Daniel Kahneman and Amos Tversky to a better understanding of economic actors' behaviour, see Hersh Shefrin and Meir Statman, 'The Contributions of Daniel Kahneman and Amos Tversky' 2010 4(2) *Journal of Behavioral Finance* 54.

<sup>59</sup> Jerome J Tobacyk and Dheeraj Sharma, 'The Myth of Consumer Sovereignty: An Exploratory Study' (2015) 15(2) *Marketing Review* 221.

<sup>60</sup> Adrian Kuenzler, *Restoring Consumer Sovereignty: How Markets Manipulate Us and What the Law Can Do About It* (Oxford University Press, 2017).

<sup>61</sup> Richard A Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw Hill, 1959) 14.

<sup>62</sup> Cited by David Reisman, *James Edward Meade* (Palgrave Macmillan, 2018) 206.

<sup>63</sup> John Kenneth Galbraith, *The New Industrial State* (Pelican Books, 1967) 217.

<sup>64</sup> John Kenneth Galbraith, *The Affluent Society* (Pelican Books, 1962) 213-14.

Galbraith's analysis may have been accurate in the 1960s, but is less plausible today. Notwithstanding the pervasiveness of corporate brands,<sup>65</sup> the contemporary relationship between producers and consumers is more likely to be discursive and reciprocal,<sup>66</sup> rather than unilateral, either in the way that Galbraith or, conversely, consumer sovereignty advocates claim. Furthermore, governments extensively use commercial methods of persuasion to engage in social marketing,<sup>67</sup> and commonly seek to nudge citizens into desired patterns of behaviour.<sup>68</sup>

Claims for consumer sovereignty should be approached sceptically, but as Reekie observes, '[o]nly the market system with consumers' sovereignty provides the information necessary (prices) and the incentives (profits) to permit a system of non-coercive co-operation where producers can exercise discretion in how they meet the demands of consumers.'<sup>69</sup> The market is the most plausible way of distributing consumer goods and services, but not all products of human activity are consumer goods.

## 2 Hutt out of Context

Reekie contextualises Hutt's assertion of consumer sovereignty in a time when forms of collective governance – socialism, communism, fascism, and the New Deal – were normal. Hutt's concerns did not lie with protecting seemingly facile choices about, say, the latest running shoes, but with individual freedom in the face of its collective denial – benign or malign.

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<sup>65</sup> See, generally, Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Picador, 1999).

<sup>66</sup> Contemporary businesses become successful when they build relationships with their customers, rather than when they seek to impose business models on them. See Chris Riley, 'The Cultural Influence of Brands: In Defense of Advertising' in Steven Heller and Véronique Vienne (eds), *Citizen Designer: Perspectives on Design Responsibility* (Allworth Press, 2003) 70, 73.

<sup>67</sup> 'Social Marketing seeks to develop and integrate marketing concepts with other approaches to influence behaviours that benefit individuals and communities for the greater social good.' *The iSMA, ESMA and AASMI Consensus Definition of Social Marketing* (2013) <[https://www.i-socialmarketing.org/assets/social\\_marketing\\_definition.pdf](https://www.i-socialmarketing.org/assets/social_marketing_definition.pdf)>.

<sup>68</sup> See Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin, rev ed, 2009).

<sup>69</sup> Reekie, above n 54, 24.

Consumer sovereignty and its subject, the sovereign consumer, have become foundational presumptions of neoliberalism,<sup>70</sup> and its goal of reconfiguring society on market lines.<sup>71</sup> but, as Joseph Persky notes:

Hutt emphasized, a defense of consumer sovereignty based on its relation to liberty, tolerance and social stability requires serious efforts to establish equal opportunity. Far from a general endorsement of laissez-faire, Hutt's consumer sovereignty requires state action to guarantee the active participation of all citizens in the economy on as equal a footing as possible.<sup>72</sup>

And so, despite the embrace of his idea by laissez faire libertarians, notably members of the Austrian School,<sup>73</sup> Hutt's concerns aligned with the interventionist, social liberalism of Thomas Hill Green,<sup>74</sup> which, more recently, was expounded by, among others, Galbraith,<sup>75</sup> and John Rawls.<sup>76</sup> Musgrave's concept of merit good is consistent with these viewpoints.

## B *Merit Wants and Merit Goods*

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<sup>70</sup> See, generally, Niklas Olsen, *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (Springer, 2018).

<sup>71</sup> See Pierre Bourdieu, *Acts of Resistance: Against the Tyranny of the Market* (Richard Nice trans, The New Press, 1998) 96 [trans of: *Contre-feux* (first published 1998)].

<sup>72</sup> Joseph Persky, 'Retrospectives: Consumer Sovereignty' (1993) 7(1) *Journal of Economic Perspectives* 183, 190.

<sup>73</sup> On Friedrich Hayek's adoption of consumer sovereignty, see David Lowery, 'Consumer Sovereignty and Quasi-Market Failure' (1998) 8(2) *Journal of Public Administration Research and Theory* 137. On Ludwig von Mises' extreme version of consumer sovereignty, see F Knox, 'The Doctrine of Consumers' Sovereignty' (2005) 63(3) *Review of Social Economy* 383, 383.

<sup>74</sup> Avital Simhony, 'A Liberalism of the Common Good: Some Recent Studies of T. H. Green's Moral and Political Theory' (2005) 7(1) *British Journal of Politics and International Relations* 126.

<sup>75</sup> See Stephen Dunn and Andrew Mearman, 'The Realist Approach of John Kenneth Galbraith' (2006) 49(4) *Challenge* 7.

<sup>76</sup> See John Rawls, *A Theory of Justice* (Rev ed, Belknap Press of Harvard University Press, 1999).

Musgrave distinguishes private from public wants, and the latter category between social wants ('wants [that] cannot be satisfied through the mechanism of the market because their enjoyment cannot be made subject to price payment') and merit wants.<sup>77</sup> Merit wants

are met by services subject to the exclusion principle and are satisfied by the market within the limits of effective demand. They become public wants if considered so meritorious that their satisfaction is provided for through the public budget, over and above what is provided for through the market and paid for by private buyers.<sup>78</sup>

According to Black et al, 'merit goods or services' are:

Goods or services whose consumption is believed to confer benefits on society as a whole greater than those reflected in consumers' own preferences for them. A good may be classed as a merit good if it causes positive externalities. Education is typically cited as an example. In the absence of government intervention individual choice will lead to under-consumption of a good causing a positive externality. Such merit goods are therefore sometimes subsidized or directly provided by the government.<sup>79</sup>

Musgrave provides the examples of flood control and the judicial system as social goods and services, and subsidised low-cost housing and free education as merit goods and services, but recognises that the boundaries between the different types of wants and their corresponding means of satisfaction are porous: 'wants that appear to be merit wants may involve substantial elements of social wants'.<sup>80</sup> According to Musgrave, 'the satisfaction of merit wants, by its very nature, involves interference with consumer preferences'.<sup>81</sup> He notes that '[a] position of extreme individualism could demand that all merit wants be disallowed' but dismisses that as not being 'a sensible view'.<sup>82</sup>

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<sup>77</sup> Musgrave, above n 61, 9.

<sup>78</sup> Ibid 13.

For a justification of merit goods derived from Kantian philosophy, see Wilfried Ver Eecke, *Ethical Dimensions of the Economy: Making Use of Hegel and the Concepts of Public and Merit Goods* (Springer, 2008) 98-100.

<sup>79</sup> Black et al, above n 53.

<sup>80</sup> Musgrave, above n 61, 13.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

Musgrave’s assertion of the existence of merit wants and goods implies objective theories of the good, notably Aristotle’s extolling of *eudaimonia* – a way of living ‘that is well-favored by a god’.<sup>83</sup> Mark White observes, ‘advocates of merit goods openly embrace objective theories of the good as an alternative norm of consumer sovereignty’.<sup>84</sup> But, rather than an alternative to the market, merit may be seen as a protected niche carved out of the market. As Musgrave notes, ‘while consumer sovereignty is the general rule, situations may arise, within the context of a democratic community where an informed group is justified in imposing its decisions upon other’.<sup>85</sup> Health, education and, we submit, sustaining art ‘are matters of learning and leadership which are an essential part of democracy reasonably defined and which justify the satisfaction of certain merit wants within a normative model’.<sup>86</sup>

### C *Merit and Autonomy*

According to Black et al, ‘[a] good can also be classed as a merit good through paternalism: the government decides that it is better informed than consumers about what is good for them, and chooses to override consumer sovereignty to ensure consumption.’<sup>87</sup> Gerald Dworkin defines ‘paternalism’ as ‘the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm’.<sup>88</sup>

Paternalism is not inconsistent with liberal democracy. Children must be nurtured and guided into autonomous adulthood, and the state should play the backstop role of John Dewey’s ‘wise

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<sup>83</sup> For a discussion of ‘eudaimonism’, see Mark LeBar, ‘Eudaimonism’ in Nancy E Snow (ed), *The Oxford Handbook of Virtue* (Oxford University Press, 2018 online ed).

<sup>84</sup> Mark D White, ‘Nudging Merit Goods: Conceptual, Normative, and Practical Connections’ (2016) *Forum for Social Economics* 1, 13 DOI: 10.1080/07360932.2016.1196594

<sup>85</sup> Musgrave, above n 61, 14.

<sup>86</sup> Ibid.

<sup>87</sup> Black et al, above n 53.

<sup>88</sup> Gerald Dworkin, ‘Paternalism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2017 ed) <<https://plato.stanford.edu/archives/win2017/entries/paternalism/>>.

parent’.<sup>89</sup> Even for adults, paternalism is an appropriate response in certain circumstances.<sup>90</sup> And, as proponents of nudging, notably Cass Sunstein and Richard Thaler, argue, bright lines may not separate libertarianism and paternalism.<sup>91</sup> In a liberal democracy, it is, then, reasonable to follow John Stuart Mill’s prescription ‘that the burden of proof is different depending on who is being treated paternalistically. If it is a child then the assumption is that, other things being equal, the burden of proof is on those who resist paternalism. If it is an adult of sound mind the presumption is reversed.’<sup>92</sup> The precise way in which this burden of proof may be discharged need not concern us currently, but, in broad terms, the state must be able to justify its interference in adults’ autonomous choices.

#### D *Concluding Comments*

In this part of the paper, we have established that the exercise of consumer sovereignty in the market is the appropriate way, in principle, of distributing consumer goods and services in a liberal democracy. However, Hutt, the first proponent of consumer sovereignty, recognised that government intervention is necessary to promote equality of opportunity for citizens. Musgrave goes further to assert that some wants are sufficiently meritorious so as to require protection from market forces, and observes that decisions about merit are commonly and necessarily made by leaders within democratic societies. This approach implies paternalism. While paternalism can be appropriate in a liberal democracy, it must be justifiable. In the next part, we will consider these ideas further in relation to artworks.

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<sup>89</sup> ‘What the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy.’ John Dewey, *The School and Society* (University of Chicago Press, 1907) 19.

<sup>90</sup> See, for example, the highest rungs of the Nuffield Council of Bioethics ‘ladder of intervention’. Nuffield Council of Bioethics, *Public Health: Ethical Issues* (Nuffield Council of Bioethics, 2007).

<sup>91</sup> See Richard H Thaler and Cass R Sunstein, ‘Libertarian Paternalism Is Not an Oxymoron’ (University of Chicago Public Law & Legal Theory Working Paper No 3, 2003) <[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1184&context=public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1184&context=public_law_and_legal_theory)>.

<sup>92</sup> Dworkin, above n 88.



## IV ARTWORKS AS MERIT GOODS

In this part of the paper we apply the principle of merit goods to artworks. We consider the relevance of consumer sovereignty to artworks. Then, we then discuss autonomy, and seek to engage with the proposition that subsidy of an activity constitutes manipulation of free choice. After that, we seek to establish art as an element of an objectively good life that is inherently worthy of preservation across generations.

### A *Art and Consumer Sovereignty*

Don Fullerton sets up the argument, which we support, that ‘art represents a “merit good” with inherent qualities that ought to be provided or subsidized by government for the good of society’, then knocks it down, saying ‘[f]undamentally, this type of argument is paternalistic. By denying consumer sovereignty, it denies the premise of the free-enterprise model that markets are better than government at determining value’.<sup>93</sup> (We consider the question of paternalism below.) To reiterate, an assertion of merit goods is an exception to the market mechanism, not a wholesale alternative. Few economists would argue that markets are perfect, and consumer sovereignty should determine all aspects of our lives – Hutt, certainly did not think so.

Fullerton further argues ‘[t]he poor do not want someone else to decide what is good for them’.<sup>94</sup> Of course, every adult should be able to exercise their autonomy but poverty often prevents people from making real choices. ‘The poor’ may not want to someone else to decide what is good for them, but everyone surely wants to be in a position to be able to decide for themselves? Children, whether they are from rich or poor families, should have the opportunity to share the experiences that privileged members of society are fortunate enough to enjoy. For

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<sup>93</sup> Don Fullerton, ‘On Justifications for Public Support of the Arts’ (1991) 15(2) *Journal of Cultural Economics* 67, 73.

<sup>94</sup> Ibid. This is an egregiously patronising and wrongheaded statement. Libertarian-paternalists would also recognise that Fuller is making a presumption about what ‘the poor’ do not want, namely, subsidised art. Along similar lines, Camille Paglia suggests that pornography is the equivalent of gallery nudes for the working class. See Camille Paglia, *Vamps & Tramps* (Viking, 1995). Her argument is wrong facing. Exhibition in a gallery may have protected titillating artworks from charges of pornography, but working people (especially the Italian-Americans she claims to speak for) include the most of skilled craft-persons, producers of folk art, and venerators of religious art.

this reason, we have compulsory secondary education (as opposed to just primary education which makes people economically useful) and significantly subsidise tertiary education, which should allow young people to become critical citizens. Art is a component of the education that everyone should be able to access.<sup>95</sup>

## B *Interference with Consumer Preferences*

Musgrave says ‘the satisfaction of merit wants, by its very nature, involves interference with consumer preferences’.<sup>96</sup> Is this paternalism? Certainly, laws, such as those requiring adults to wear cycle helmets, are paternalistic because they coerce adults, some of whom would otherwise behave differently, to take measures in their own interests (as determined by leaders in society). Alessandro Balestino observes, such measures correct a consumer’s ‘cognitive mistake’ about their wellbeing.<sup>97</sup> Does a government subsidy of a public art gallery similarly interfere with the consumer preferences of a person (A) who has no interest in the arts, and whose wants are satisfied playing poker in a casino? This cannot plausibly be considered a manifestation of paternalism. Government is not ensuring ‘consumption’ of artworks, it is merely providing an opportunity for people to engage with them. A’s enjoyment of poker, while not encouraged by government, is not prohibited, and A is not forced to go the gallery.<sup>98</sup> However, some paternalism-like interference with autonomy seems to occur if government

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<sup>95</sup> The so-called moral economists, R H Tawney, Karl Polanyi and E P Thompson, were all involved in adult education initiatives for working-class adults in the United Kingdom. See Katrina Navickas, ‘What’s Missing’, *London Review of Books* (11 October 2108) 35.

<sup>96</sup> Musgrave, above n 61, 13.

<sup>97</sup> Alessandro Balestrino, ‘Richard Musgrave and His Band of Merit Goods’ (2008) 16(3) *History of Economic Ideas* 17, 18.

<sup>98</sup> Indeed, A may recognise and respect subsidised public art galleries as a community value or preference. Musgrave says:

As distinct from the rule of fashion, consider a setting where individuals, as members of the community, accept certain community values or preferences, even though their personal preferences might differ. Concern for maintenance of historical sites, respect for national holidays, regard for environment or for learning and the arts are cases in point. Such acceptance in turn may affect one’s choice of private goods or lead to budgetary support of public goods even though own preferences speak otherwise.

See Richard A Musgrave, ‘Merit Goods’ in *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 3<sup>rd</sup> ed online, 2018).

subsidises B's enjoyment of art but not A's poker-playing, since both A and B pay the taxes which permit the subsidy. As with paternalism, any such interference must be justified.

According to Joseph Raz, coercion is an invasion of individual autonomy that

diminishes a person's options ... It reduces the coerced person's options below adequacy. But it need not. One may be coerced not to pursue one option while being left with plenty of others to choose from ... Manipulation, unlike coercion, does not interfere with a person's options. Instead it perverts that the way that person reaches decisions, forms preferences of adopts goals. It too is an illusion of autonomy ...<sup>99</sup>

Interpreting Raz, Stephen Mulhall and Adam Smith argue that state subsidies for the arts constitute a form of manipulation.<sup>100</sup> Furthermore, because government subsidies come from compulsory taxation, 'the state's encouragement of artistic pursuits does involve coercion, even though, of course, nobody is forced to go to the theatre'.<sup>101</sup> And so, preferential taxation or subsidy of the arts can only be justified if coercion in this context is justifiable.

Raz's concern lies with the free exercise of options, but autonomy can only be enjoyed if people have equal access to a full range of choices, including access to the fruits of a society's culture.

Long before Hutt's assertion of consumer sovereignty, Jeremy Bentham argued that push-pin, a popular but trivial game of the time, was no less worthy a choice of activity than poetry.<sup>102</sup> But, if Bentham's push-pin player never had the opportunity to learn to read, to access a public library or attend poetry readings, how could they have genuinely chosen push-pin over poetry? Mulhall and Smith observe '[i]f some forms of art must be available to people for them to be autonomous, they must be readily available. Not just present somewhere in society at prohibitive cost.'<sup>103</sup> This is essentially a matter of promoting genuine equality of opportunity.

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<sup>99</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 377-78.

<sup>100</sup> Stephen Mulhall and Adam Smith, *Liberals & Communitarians* (Blackwell, 1992) 265.

<sup>101</sup> Ibid 266.

<sup>102</sup> See Peter Kivy, *De Gustibus: Arguing About Taste and Why We Do It* (Oxford University Press, 2015) 73-81. We continue to revere Bentham's contemporary poets, including William Blake, William Wordsworth, Samuel Taylor Coleridge, Percy Bysshe Shelley, Lord Byron, and John Keats, but who was the equivalent bright star of push-pin?

<sup>103</sup> Mulhall and Smith, above n 100, 278.

Economists recognise three basic grounds for government subsidising unprofitable activities, namely, inequality of opportunity; education of minors; provision of public goods.<sup>104</sup> Preferentially taxing or subsidising artworks meets all these requirements. According to William Baumol and William Bowen

Government must provide funds only where the market has no way to charge for all the benefits offered by an activity. When such a case arises, failure of the government to provide funds may constitute a very false economy – a misallocation of the community’s resources, and a failure to implement the desires of the public. In such circumstances, government outlays are no manifestation of boondoggling bureaucracy, no evidence of creeping socialism, but a response to the needs of the society at large.<sup>105</sup>

Furthermore, according to Thomas Moore

The most common arguments for subsidization are based on educational advantages: social benefits exceed private benefits ... A second argument is based on the proposition that there is an economic benefit to be derived from more art; for example, additional business will be attracted to the area ... The final argument deals with the benefits from innovation. Since great art, by some people’s definition, must be innovative art and since the benefits (from innovating) to society exceed those to the innovator, subsidies are called for.<sup>106</sup>

### C *Eudaimonia Revisited*

In response to Bentham’s assertion of moral equivalence of push-pin and poetry, Thomas Carlyle accused the apparently vacuous hedonism of utilitarianism as being ‘worthy of swine’.<sup>107</sup> John Stuart Mill sought to recover utilitarianism for an educated Victorian audience by distinguishing between higher and lower forms of pleasure. For Mill, ‘[h]igher pleasures include pleasures of the human mind: pleasures of the intellect, imagination, appreciation of beauty, and others ... these higher pleasures are vastly superior to lower pleasures of the body

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<sup>104</sup> W J Baumol and W G Bowen, ‘Arguments for Public Support of the Performing Arts’ in Mark Blaug (ed), *The Economics of the Arts* (Martin Robertson, 1976) 42, 49-52.

<sup>105</sup> Ibid 55.

<sup>106</sup> T Moore, ‘Reasons for Subsidizing American Theatre’ in Mark Blaug (ed), *The Economics of the Arts* (Martin Robertson, 1976) 25, 32.

<sup>107</sup> Daniel Jacobson, ‘J. S. Mill and the Diversity of Utilitarianism’ (2003) 3(2) *Philosophers’ Imprint* 4 <[www.philosophersimprint.org/003002/](http://www.philosophersimprint.org/003002/)>.

or “mere sensations.” They are different in quality, not just quantity.’<sup>108</sup> Echoing Aristotelian virtue ethics,<sup>109</sup> Dewey argued that, in Mill’s version of utilitarianism, ‘true happiness consists in the satisfaction of those powers of the self which are of a higher quality’.<sup>110</sup> A eudaimonic life does not exclude hedonic experiences, but long-term contemplation tells us that the arts are an essential element of a good life: poetry is superior to push-pin.

The maxim *de gustibus non est disputandum* (taste is not a matter for debate) is commonly asserted in the poetry/push-pin debate but the issue is not whether, say, classical musical is superior to rap, but whether, among human activities, we especially value creative endeavour. Assertion of the importance of art – to reiterate we use ‘art’ as a synecdoche for human creativity – does not imply elitism, a preference for ‘high’ culture; folk art is equally important in constituting society.<sup>111</sup> And, in postcolonial and multicultural societies, all cultures are equally deserving of consideration. Indeed, the critical importance of cultural preservation to Indigenous peoples holds lessons for Western policymakers. It would be inconceivable for, say, an elder of an Australian First Nation or a *kaumatua* of a Māori iwi that the fate of their cultural artefacts should be determined by the market. Artworks are some of the objects ‘that are constitutive of a community’.<sup>112</sup>

#### D *Intergenerational Obligations*

According to David Heyd, ‘[m]ost cultures see themselves as extending far into the future and have concrete stakes in the conditions of their self-perpetuation.’<sup>113</sup> ‘The generations share responsibility for maintaining the institutions and practices that enable transgenerational

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<sup>108</sup> ‘Utilitarianism’, *New World Encyclopedia* <<http://www.newworldencyclopedia.org/entry/Utilitarianism>>.

<sup>109</sup> See Alastair MacIntyre, *After Virtue: A Study in Moral Theory* (Bloomsbury Academic, 3<sup>rd</sup> ed, 2011).

<sup>110</sup> *John Dewey: Ultimate Collection – 40+ Works on Psychology, Education, Philosophy & Politics* (Musaicum Books, 2017) unpagged.

<sup>111</sup> When Bob Dylan has been anointed a Nobel laureate for literature, all distinctions between ‘high’ and ‘popular’ culture have surely been fudged?

<sup>112</sup> Joseph L Sax, *Playing Darts With a Rembrandt: Private and Public Rights in Cultural Treasures* (University of Michigan Press, 2001) 187.

<sup>113</sup> David Heyd, ‘A Value or an Obligation? Rawls on Justice to Future Generations’ in Axel Gosseries and Lukas H Meyer (eds), *Intergenerational Justice* (Oxford University Press, 2009) 168, 178.

demands to be satisfied and successors to receive their inheritance.’<sup>114</sup> For the conservative, Edmund Burke, the state

is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.<sup>115</sup>

Jennifer Herdt observes:

Burke argued that we need to appreciate our indebtedness to those who have gone before us and our responsibility to those who come after. These are not bargains that we have chosen to strike up; we have not haggled over terms in order to make them favorable to ourselves. Rather, we come to consciousness of ourselves as defined by unchosen relationships and identities and obligations, and it is our task to negotiate these with integrity.<sup>116</sup>

From a liberal perspective, Rawls likewise portrays the relationship between generations in contractual terms.<sup>117</sup> While ‘the contract’ is a political metaphor, not a legal doctrine, a problem faced for its plausibility is the absence of reciprocity. Klaus Mathis observes:

A contract-theory justification of intergenerational justice is confronted by the following question: why should existing generations take on any obligations towards future generations? What can future generations offer us – other than their undying gratitude, or fond remembrance of us – in return for fulfilling any obligations that we undertake on their account?<sup>118</sup>

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<sup>114</sup> Janna Thompson, ‘Identity and Obligation in a Transgenerational Polity’ in Axel Gosseries and Lukas H Meyer (eds), *Intergenerational Justice* (Oxford University Press, 2009) 25, 33.

<sup>115</sup> Edmund Burke, *Reflections on the Revolution in France* (Yale University Press, 2003, first published 1790) 82.

<sup>116</sup> Jennifer A Herdt, ‘Beyond the Intergenerational Social Contract’ *Reflections* (Fall 2013) <<https://reflections.yale.edu/article/test-time-art-aging/beyond-intergenerational-social-contract>>.

<sup>117</sup> Rawls, above n 76, 251-58.

<sup>118</sup> Klaus Mathis, ‘Future Generations in John Rawls’ Theory of Justice’ (2009) 95(1) *ARSP: Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 49, 49.

A communitarian justification for intergenerational cultural sustainability faces no such difficulty. As Janna Thompson notes,

members of a community share a common good, and that it is this good, above all, that defines their relationships and obligations. Since a community is transgenerational, individuals who are embedded in it, who take the communal good to be their good, will as a matter of course regard themselves as having obligations from the past that extend into the future. Communitarians are able to give relationships between generations a central place in their view of community, and thus are well placed to provide a more satisfactory understanding of obligations in a transgenerational polity. For them obligations arise out of relationships of cooperation in a community based on a common idea of the good, and are thus truly transgenerational.<sup>119</sup>

For communitarians, sustaining the community's culture is axiomatic. Daniel Bell says

communities of memory ... carry a moral tradition that helps to provide the narrative unity of our lives, which entails an obligation to sustain and promote the ideals and aspirations embedded in their history through memory and hope, linking our destiny to that of our ancestors, contemporaries and descendants.<sup>120</sup>

But Rawls likewise observes the 'capital' that must be preserved between generations 'is not only factories and machines, and so on, but also the knowledge and culture, as well as the techniques and skills, that make possible just institutions and the fair value of liberty'.<sup>121</sup>

## E *Concluding Comments*

We have argued that artworks are merit goods that should be preserved for future generations, but, as David Cwi observes, acceptance of this principle 'provide[s] little practical policy guidance'.<sup>122</sup> Our aim has been to establish the principle of merit. It should be left to democratic processes to work out the details, subject to the quasi-constitutional condition that decisions should be expert-led. But, having noted tax preferences in part II, we will briefly revisit them.

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<sup>119</sup> Thompson, above n 114, 28.

<sup>120</sup> Daniel Bell, *Communitarianism and Its Critics* (Clarendon Press, 1993) 126.

<sup>121</sup> Rawls, above n 76, 256.

<sup>122</sup> David Cwi, 'Public Support of the Arts: Three Arguments Examined' (1980) 4(2) *Journal of Cultural Economics* 39, 43.

Given the absence of wealth or capital transfer taxes in Australasia, the most significant fiscal issue for the arts is subsidy.<sup>123</sup> With regard to taxes, we believe the New Zealand approach to GST is advisable, and suggest that Australia does not further adulterate its GST system by extending concessions to artworks. We do, however, recommend that Australia follows the European jurisdictions mentioned in treating collectables as personal assets for CGT purposes. A \$10 000 item of furniture is no more a wasting asset than a \$10 000 painting. Conversely, beyond a personal assets threshold, we see no reason why artworks should be excluded from means testing. It seems unlikely that tax preferences are the most effective way of promoting cultural goals, as opposed to, say, targeted government expenditure. Furthermore, budget reallocation is more easily achieved than a change to tax laws.

## V CONCLUSION

This paper has established the facticity of tax preferences for artworks in various ways, in numerous jurisdictions. The normativity of those preferences was then examined. It is concluded that Musgrave's proposition of merit goods, as an exception to the generally accepted principle of consumer sovereignty, provides a normative basis for special treatment. The paper disputes a contention that a preference for the arts is paternalistic, and demonstrate that, even if it is 'manipulative' in Raz's terminology, it is justifiable on equal opportunity grounds, in particular. The imperative of preserving culture across generations, which is essential for Indigenous peoples and Western communitarians, enhances that argument. However, we are agnostic on whether tax preference is an effective way of promoting artworks as merit goods; that possibility requires further research. Without anticipating that research, it

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<sup>123</sup> See, generally, David Throsby, *Art, Politics, Money: Revisiting Australia's cultural policy* (Platform Paper No 55, May 2018). Subsidies are normally justified on grounds of external benefits or inherent merits. Lambert Zuidervaart presents a more complex argument, namely:

... certain intersections among economy, polity, and civil society where significant contribution and pressures arise. They arise there because of the societally important aesthetic worth of arts that have a specific form of economic organizations and perform a specific type of political role.

See Lambert Zuidervaart, *Art in Public Politics, Economics, and a Democratic Culture* (Cambridge University Press, 2010) 46.



is suggested that subsidies for the arts are likely to be the most effective way of satisfying those merit wants.

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