


2018

The Right to Creative Illegitimacy: Art and the Fallacy of Proprietary Legitimation

John Baldacchino

Follow this and additional works at: <https://scholarship.law.marquette.edu/iplr>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Law and Society Commons](#)

Repository Citation

John Baldacchino, *The Right to Creative Illegitimacy: Art and the Fallacy of Proprietary Legitimation*, 22 Marq. Intellectual Property L. Rev. 103 (2018).

Available at: <https://scholarship.law.marquette.edu/iplr/vol22/iss1/7>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

INNOVATION IN WISCONSIN: OPEN SOURCING INNOVATION ARTICLES

THE RIGHT TO CREATIVE ILLEGITIMACY: ART AND THE FALLACY OF PROPRIETARY LEGITIMATION

JOHN BALDACCHINO*

I. THE RIGHT TO CREATIVE ILLEGITIMACY: ART AND THE FALLACY OF PROPRIETARY LEGITIMATION	104
II. LEGITIMIZING CONFLICTS	105
III. ART’S TRUTH	107
IV. MAKERS, MAKING, AND THE MADE	109
V. TO EXCUSE, TO JUSTIFY, TO ELEVATE	111
VI. “DOING AN ACT” AND “DOING SOMETHING.”	112
VII. CREATIVE ILLEGITIMACY	115
VIII. MAKER SPACES	119
IX. CONCLUDING REMARKS	122

* Professor and Director, University of Wisconsin–Madison’s Arts Institute. He was faculty in the Universities of Dundee (Scotland), Falmouth (England), Columbia (New York), Robert Gordon (Scotland), and Warwick (England). He is the author of *Post-Marxist Marxism* (1996), *Easels of Utopia* (1998), *Avant-Nostalgia* (2002); *Education Beyond Education* (2009); *Makings of the Sea* (2010); *Art’s Way Out* (2012), *Mediterranean Art Education* (With Raphael Vella, 2013), *Democracy Without Confession* (with Kenneth Wain, 2013), *John Dewey* (2014) and *Kenneth Wain* (with Simone Galea and Duncan Mercieca, 2014). Three books are forthcoming in 2018 including *Art as Unlearning* (Routledge) and a monograph on Ivan Illich (Peter Lang). He is the editor of *Histories and Philosophies*, The Wiley Blackwell’s *Encyclopedia of Art & Design Education*.

I. THE RIGHT TO CREATIVE ILLEGITIMACY: ART AND THE FALLACY OF
 PROPRIETARY LEGITIMATION

“*[T]he values and norms in accordance with which motives are formed have an immanent relation with truth.*”¹

— Jürgen Habermas, *Legitimation Crisis*

“*As ‘truth’ is not a name for a characteristic of assertions, so ‘freedom’ is not a name for a characteristic of actions, but the name of a dimension in which actions are assessed.*”²

— John Langshaw Austin, “A Plea for Excuses”

When we speak of the arts, and more so when one engages with the arts as a practitioner in their various contexts, the questions of legitimacy and legitimation take a very different turn. This spans across a wide horizon, whether it is that of art-making in the studio; of showing in the gallery; of performing in the hall; or of teaching, learning and unlearning in schools, colleges or universities.

To start with, one needs to understand and find a way of differentiating between *legitimacy* and *legitimation*. Legitimacy implies a degree of conformity, whether it is with the law, agreed rules, or a grammar of speech, practice, and procedure.³ Legitimation is the action by which legitimacy is or could be claimed.⁴ In terms of images, by which we mostly make art, the process of being justified and verified, and more so, in terms of a manner by which a process of legitimation comes forth, emerges from that which is *shown* in terms of what it *represents* to groups and individuals who, in being recognized as sources of legitimacy, are then ready to give it.⁵

This raises an immediate question: is legitimacy a gift that is expected from others? In turn, this could imply that as recipients of this gift, human actions only gain the validity of what they represent so as to have a value that is identifiable with forms of legitimation established outside them. Values that immediately come to mind, when the arts are presented within this realm of legitimacy, would include those aesthetic, pedagogical, social, and moral

1. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 95 (T. McCarthy trans., Beacon Press 1975) (1973).

2. JOHN L. AUSTIN, *A Plea for Excuses: The Presidential Address*, 57 *PROC. OF THE ARISTOTELIAN SOC'Y*, NEW SERIES 1, 6 (1956).

3. See, e.g., JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 12 (1970).

4. HABERMAS, *supra* note 1, at 95–96.

5. See LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO PHILOSOPHICUS* § 2.17–2.174 (C.K. Ogden trans., Routledge 1981) (1981).

categories from which one could always glean a political set of assumptions. These are often sustained *and* justified by socio-economic metrics that are now linked to the so-called culture and creative industries.⁶ The latter seems to have completed the circle of legitimacy, where the arts are not simply seen, but expected to justify their existence from perspectives that are tangible, and to which the institutional voice of the arts is increasingly and often actively, giving assent.⁷

II. LEGITIMIZING CONFLICTS

This state of affairs has had a strong impact on the language of artistic legitimization, especially where there has been a significant turn on norms and categories that many accept as being helpful and therefore benign in making a case for the arts.⁸ Making such a case implies a variety of contexts. They span from the case for the arts in education, from primary to tertiary education,⁹ to that of funding the arts in the community, from sources that range between the state and the private sectors.¹⁰

In her inaugural blog of August this year, aptly titled *Advocacy, Community, and Arts Wisconsin*, the Board President of *Arts Wisconsin*, Ann Huntoon, states that “we can all agree on one thing—the arts are indispensable. There’s no doubt that music heals, that making art is a panacea, that experiencing art with others brings us together.”¹¹

This falls in line with a national and more widespread international

6. John Baldacchino, *What Creative Industries? Instrumentalism, Autonomy and the Education of Artists*, 9 INT’L J. OF EDUC. THROUGH ART, 343–56 (2013).

7. See GEORGE DICKIE, *ART AND VALUE* 77–81, 92–95 (2001).

8. See CONFEDERATION OF BRITISH INDUSTRIES, *First steps: A new approach for our schools*. (last visited 27 April 2018)

http://www.cbi.org.uk/index.cfm/_api/render/file/?method=inline&fileID=2138B72B-84FF-4FD7-9AFFC01BED033137 [https://perma.cc/W72Y-UQWU].

9. See KEN ROBINSON, *THE ARTS IN SCHOOLS: PRINCIPLES, PRACTICE AND PROVISION* 4–5 (1982); KEN ROBINSON, *OUT OF OUR MINDS: THE POWER OF BEING CREATIVE* 49–79 (2017).

10. A few examples in Wisconsin include *Arts Wisconsin’s* portal, ARTS WISCONSIN, <http://www.artswisconsin.org> [https://perma.cc/9EPF-K55V] (last visited Oct. 6, 2017), and indeed my own institution, *The Arts Institute*, which is the division of the arts at the University of Wisconsin-Madison, ARTS INSTITUTE, <https://artsinstitute.wisc.edu> [https://perma.cc/R859-5RNM] (last visited Oct. 6, 2017), whose arts portal, *Arts on Campus*, UNIV. OF WISCONSIN-MADISON, <https://arts.wisc.edu> [https://perma.cc/9W4W-69BZ] (last visited Oct. 6, 2017), serves as the unified gateway to the arts in our university and the community. This is just a drop in the ocean, but as institutions that both share the same terrain of interest and to an extent have common interests, they provide a quick illustration of a narrative has become very clearly articulated on specific categories of legitimacy.

11. Ann Huntoon, *Advocacy, Community, and Arts Wisconsin*, ARTS WISCONSIN (Aug. 17, 2017), <http://www.artswisconsin.org/advocacy-community-and-arts-wisconsin/> [https://perma.cc/M4AQ-VDPP] (last visited Oct. 6, 2017).

approach to the arts, and I would own up to partaking in the same debate.¹² More so, I have to accept that whether I would agree or not, I find myself using the same narratives to put my foot in the door of a wider set of constituencies that often need help to understand why the arts matter. Yet I should add, that this is also a source of discomfort, which often leaves me highly critical as well as skeptical over whether we can afford to risk falling foul of the law of unintended consequences, not knowing exactly whether Adam Smith's infamous "invisible hand"¹³ has anything to do with art's polity, not to mention its inherent economy.

Yet one must hastily add that while actors in this scenario tend to engage and use this language, not everyone keeps on the same legitimizing hat throughout one's engagement with the arts. There is a caveat to this narrative, and it is made with some force. This has to do with the apparent contradiction between the arts' intrinsic value and their use, which immediately brings to play one's own existential experience of the arts, what John Dewey calls the "quality of being a whole and of belonging to the larger, all-inclusive whole, which is the universe in which we live."¹⁴

Additionally, this implies a personal sphere, where the arts administrator recalls her own intrinsic relationship with art-making, as Huntoon does when she speaks of her comfort zone, which she felt that she had to exit once she became an arts advocate.¹⁵ "My mother's father was a cattle rancher in Illinois, but spent the winter months in a room in the farmhouse, painting landscapes in oil."¹⁶ Being introduced to the work of Ruth Stolle, an artist from Tripoli, Wisconsin, by her father, Huntoon describes how her family "spent afternoons at [Stolle's] home, amidst her hundreds of sketches, paintings, and stacks of books. We had several of her paintings hanging in our home. The ideals of these experiences *are* my comfort zone, and never imagined that these things weren't a part of everyone's lives."¹⁷

Before adding this personal note, Huntoon states how she "began to understand that the role of being an arts advocate meant that the first requirement was the ability to step way outside of my comfort zone."¹⁸ Here

12. See generally Baldacchino, *supra* note 6; John Baldacchino, *Art's Asymptotic Leadership: Arts leadership, Education and the Loss of Autonomy*, 3 VISUAL INQUIRY 291 (2014).

13. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, BOOK IV, CHAPTER 2, at 30 (New Rochelle NY, Arlington House 1966), available online at 2 LIB. OF ECON. & LIBERTY 30, <http://www.econlib.org/library/Smith/smWN13.html> [<https://perma.cc/5UE6-RBNZ>].

14. JOHN DEWEY, ART AS EXPERIENCE 202 (1958).

15. Huntoon, *supra* note 11.

16. *Id.*

17. *Id.*

18. *Id.*

she highlights a play between two forms of legitimation: an intrinsic, personal if not existential, engagement with art-making, and an extrinsic, verging on the instrumental, sphere of activity by which one becomes an advocate for the arts.¹⁹

Huntoon's words capture these conflicting forms of legitimation, which some may well not regard as such, but which here I want to dwell upon, if only to argue that unless we remain aware of such a conflict, the case for the arts may well be impaired by a degree of confusion that risks slotting the arts into static categories of legitimation. I would add that the detrimental effect of such a rigid categorization would mean two things: (a) the increasing instrumentalization of the arts which results in a detachment between art-making and arts institutions, and (b) paraphrasing Max Horkheimer,²⁰ the total eclipse of the arts' unique forms of action and reasoning, by which in their complex histories, human beings have found ways of retaining their sense of autonomy in both their ways of knowing and more so, those of being.

III. ART'S TRUTH

We broadly agree that our diverse encounters with the arts happen by dint of values that bridge practice with affectation, use with need.²¹ However, externalizing these values from both art's immanence and the existential actuality of arts practice, invariably results in a complete failure to secure any working consensus around the meaning of art.²² Though this comes with the territory of aesthetic understanding and dialogue—which as Huntoon suggests, is a “comfort zone” for those who make and partake in art *qua* art—it is not always the case when another approach to the arts requires that an external sphere comes into play.²³ The “comfort zone” becomes unsatisfactory, if not insufficient, to those legitimating mechanisms and institutional narratives that express the need to categorize the arts by neatly locating them within a taxonomy that ranges from aesthetic affect to institutional use, thus spanning between inherent-immanent and extrinsic-instrumental sets of criteria.²⁴

Let us begin with the relationship between truth and legitimation. Reading the question of arts' legitimacy from the context within which Jürgen Habermas positions values and norms within an accordance sought from specific

19. *Id.*

20. See, for example, his discussion of reason and subjectivity in MAX HORKHEIMER, *ECLIPSE OF REASON* 7–11 (1974).

21. See ERNST FISCHER, *THE NECESSITY OF ART* 23–38 (2010).

22. See BENEDETTO CROCE, *GUIDE TO AESTHETICS*, at xxxi (1995).

23. Huntoon, *supra* note 11.

24. CONFEDERATION OF BRITISH INDUSTRIES, *supra* note 8.

formations of motives that imply an “immanent relation with truth,”²⁵ one would need to clarify the relationship that the arts play with the formation of motives, the nature of their immanence, and what we mean by truth. Borrowing from Piaget’s developmental approach, Habermas attributes motives to norm systems and behavioral controls, which is something that developmental psychologists interested in the arts have often referred to and elaborated in their theories of knowledge²⁶ and learning.²⁷

Given that Habermas’s concern is not art, but political systems and their legitimacy, he relates this to an ordering where the major players include moral and linguistic systems of rationality and legitimation.²⁸ Here we are directed to a systematic aspect of how a moral and empirical ordering relates and competes in the structuring of a motivational formation; which is why Habermas seeks to focus on a context where “only this *systematic aspect* of the truth relation of factually valid norms and values is of interest,”²⁹ and after which he goes on to discuss Max Weber’s concept of legitimate authority.³⁰

While this seems to confirm a gulf between Habermas’s context and that of the arts, I would argue that taking the formation of motives from the immanence of art’s truth would reveal an interesting parallelism, especially when later he dwells on the “relation of legitimation to truth,”³¹ going on to state (again, with reference to socio-economic systems) the following:

This relation to truth must be presumed to exist if one regards as possible a motivation crisis, resulting from a systematic scarcity of the resource of “meaning.” Non-contingent grounds for a disappearance of legitimacy can, that is, be derived only from an “independent”—that is, truth-dependent— evolution of interpretive systems that systematically restricts the adaptive capacity of society.³²

It is broadly agreed that unlike those competing approaches by which one attempts to legitimize equally complex fields such as health or education,³³ in the arts we find a very different scenario. In fact, any attempt to categorize the

25. HABERMAS, *supra* note 1, at 95.

26. *See generally* JEROME BRUNER, ON KNOWING: ESSAYS FOR THE LEFT HAND (1979).

27. *See generally* VIKTOR LOWENFELD, CREATIVE AND MENTAL GROWTH (1957). *See also* HABERMAS, *supra* note 1, at 95.

28. *See* HABERMAS, *supra* note 1, at 95.

29. *Id.*

30. *Id.*

31. *Id.* at 97.

32. *Id.*

33. *See* IVAN ILLICH, DISABLING PROFESSIONS 15–18 (2000); IVAN ILLICH, LIMITS TO MEDICINE: MEDICAL NEMESIS, THE EXPROPRIATION OF HEALTH 40–44 (2000).

arts in forms of legitimation and use, has proven to be elusive.³⁴ Neither an approach of developmental hierarchies as found in the pedagogy or sociology of art, nor a philosophical approach that positions the arts within a polity (even precariously), and less so a network of uncomfortable (yet assertive) forms of advocacy, have managed to comprehensively identify the motivational formation by which art's immanence would legitimize art's truth.³⁵

It appears that there is no last word on how the arts are played in the complex ways of human living. This is not because there is some intent on disinterested arrogation from those who make the arts and who somehow exclude, on purpose, the claim to meaning. Far from it. Arts practitioners will be the first to seek modes of legitimation, particularly when they themselves need to claim the legitimacy of their own existence as artists, which appear external to them. The impossibility to which I am referring has more to do with art's very own immanence, which can neither be reduced to a domain of philosophy,³⁶ nor is it a question settled on a precariously cobbled up hermeneutic ground of relational mechanisms that refuse definition.³⁷

IV. MAKERS, MAKING, AND THE MADE

I would argue that Habermas's interest in how "the values and norms in accordance with which motives are formed have an immanent relation with truth"³⁸ is central to any discussion over the legitimacy of art. If we are to speak of immanence, whether assumed in one instance or in art's claim to a double iteration,³⁹ we are not absolved from its definition, especially when the claim at stake is a legitimation that is posed on art's truth.

A number of questions cannot be avoided. What is art's immanence? What does it portend when we speak of it? What are we exactly making reference to when we claim art's immanence as that which relates to art's truth? Does art's truth only depend on art's immanence? Could art's truth be externally construed? Could it be attributed via non-art?

These questions leave us perplexed. It seems that in trying to understand art's immanence from how it relates to the truth—i.e., its own truth—there is

34. See Baldacchino, *Art's Asymptotic Leadership*, *supra* note 12, at 297.

35. *Id.*

36. See ARTHUR DANTO, *THE PHILOSOPHICAL DISENFRANCHISEMENT OF ART* 5–9 (1986) (critiquing such attempts to do so).

37. See generally NICOLAS BOURRIAUD, *RELATIONAL AESTHETICS* (2002).

38. HABERMAS, *supra* note 1, at 95.

39. After Jacques Rancière's *Malaise dans l'esthétique* (2004), I have discussed at length this suggestion of art's two moments, or indeed forms of immanence in John Baldacchino, *ART ± EDUCATION: The Paradox of the Ventriloquist's Soliloquy*, 3 *SISYPHUS: J. OF EDUC.* 55–71 (2015) and JOHN BALDACCHINO, *ART'S WAY OUT* 91–92 (2012).

nothing gained in sustaining a convincing way of evaluating the arts by their proprietary value. This is because if we are to speak of the *truth* of art, we must ascertain its “location,” though such an argument begins to confuse the role of art as a noun with art as a collective designation of an action: that of poetic making. This truth cannot simply equate with the proprietary value of art, even when often this claim would immediately flag up notions of an integrity gained from identifiable properties that could only belong to that which we call true.

It is still problematic to claim that what legitimizes the integral properties of art is the same as its appropriation. Is the *art* that *makes* things the same as the *things made* by art? Is the making the same as the made? Do they belong, or indeed could they relate, to the truth of art? Are they the truth of art?

To the first question of equivalence, one would be quick to answer in the negative: No, the act of making is not the same as the object that this action made. But then, when one comes to the interior properties that are immanent to the making and the made, could we do without their inherent relationship? Are not we speaking of two forms of immanence, or perhaps an immanence that has two or more facets?⁴⁰

Art as an act of *making* appears as immanent; the work of art as that which is *made* appears as external, though the work of art is a manifestation of the art that made it. When we speak of art as an act of making that helps us feel better, or as a making that is a method which could be borrowed by a businessperson thinking of new strategies, are we still speaking of art?

As in the approach to art’s truth, the work of art remains a relation to art itself. Art inheres in the objects that it makes. It is therefore this inherence that relates art’s immanence to its truth. The norm and value systems that we often impose on art are not exerted on the process of art-making, but on the product, the making, the work of art. Yet a counter-critique comes from what inheres in these works, which is the art that made them and therefore the person or the human drive that motivated the act of making a work of art in the first place.

Forgetting this relational approach between maker, making, and the made will ultimately miss out, forgo, and undermine art’s truth. However, it seems that the agency that is expected to characterize art’s truth in the integrity by which we claim it cannot escape the reflexive and tautological cycle by which art’s own agency and the agency by which art is approached become one and the same thing, or perhaps ultimately have to belong to the same cycle.

It is important to clarify how integrity is iterated at least twice: (i) by means of the integrity of the action of legitimation and (ii) through the integrity of art in terms of its truth. This is to say that to approach art through its own

40. Baldacchino, *ART ± EDUCATION*, *supra* note 39; BALDACCHINO, *ARTS WAY OUT*, *supra* note 39.

proprietary integrity also means that such attributes are reflexive of art's integrity. Put simply, the approach itself must have integrity as it needs to tally with art's truth. This gets close to the tautology that asserts art's truth-value.

V. TO EXCUSE, TO JUSTIFY, TO ELEVATE.

The claim to integrity warrants some elaboration on the proprietary and appropriative characters of art, as they are articulated by the tautological cycle that gives art its truth-value.⁴¹ Resorting to the French word *le propre* (and the Italian *il proprio*) we will find some valuable distinctions, or at the very least we could illustrate how *the proprietary* implies:

(a) that which is proper to, in the sense of how the attributes or truth-values that we assume of art, in this case, belong to art as art and not as something else—whether this something else appears to be a form of aesthetical-affective, social-moral, and formative-cultural legitimation,⁴² but also,

(b) that which asserts the action of art as an event that signals an entelecheic lineage from maker, to making and the made. Here the implication of external sources by which art's truth is *partaken* and returned to art, is also partaking (and appropriating) that remains, (in the remits of legitimacy and truth) within the sphere of action that comes from art by dint of those diverse properties that we attribute to it. We must bear in mind that in this grid of truth values, we find that these diverse properties are the same as art itself; which is different to say that these properties are equivalent to those non-artistic forms of external legitimation, including aesthetical-affective, social-moral and formative-cultural forms of legitimation.⁴³

This distinction needs to be had if we want to elucidate, and even *locate*, where art's immanence in its relation to its truth is found. This also clarifies what we mean by the proprietary aspects that need to be shifted away from identifiable attempts by which art's proprietary legitimation remains external to art itself. To better clarify this, I identify three scenarios where legitimation is confused with an excuse, justification, and elevation of the arts by aesthetical-affective, social-moral and formative-cultural forms of legitimation:

(i) The first is a renewed form of art for art's sake (*art pour l'art*), which is to say that the arts are not autonomous but where some would simply refuse to assume anything but a limited pseudo-aesthetic *excuse* to explain art as a matter that cannot go beyond personal taste.⁴⁴

(ii) Then there is the equally problematic, yet more widely used, attempt to

41. See Baldacchino, *ART ± EDUCATION*, *supra* note 39.

42. See BALDACCHINO, *ART'S WAY OUT*, *supra* note 39.

43. *Id.*

44. See EMMANUEL KANT, *CRITIQUE OF JUDGMENT* 43–45 (Hackett Publishing, 1987).

justify those socio-political claims by which some would insist that the arts are integral to the functions of the city-state.⁴⁵ We know that the banishing of the arts from the city-state was originally prompted by Plato's philosophical assumption that the arts must serve a purpose at the lower end of the hierarchy of truth and its ensuing political taxonomy.⁴⁶ This was a precursor to the assumptions of need, which we still nurture in those educational and socioeconomic hierarchies whose taxonomies are no less indifferent to the arts, and to which we seem to want to hold when we seek to justify the arts against their structural ordering.⁴⁷

(iii) The last in this troika is found at the other end of the spectrum, where some insist on *elevating* the arts on the presumed levels of those high moral-pedagogical formations which, in their contemporary reformulation they are found short of a failed re-enactment of Hegel's cultural formative notion of *Bildung*, by which art somehow flanks other forms of freedom like religion and philosophy.⁴⁸ Apart from distorting, if not precluding, any possibility for art's immanence to relate to its own truth, this attempt leaves matters in the worst possible scenario, especially when the intention is premised on the denial of the contingencies by which, as I will explain below, the arts have successfully resisted all those efforts to stultify their autonomy.⁴⁹

VI. "DOING AN ACT" AND "DOING SOMETHING."

In the attempts to *excuse*, *justify* and *elevate* the arts, a fundamental distinction remains missing. Here I refer to the second epigraph that opens this essay, which I cite from John Langshaw Austin's essay *A Plea for Excuses*.⁵⁰ Insofar as he wants to make a case for the excuse as a philosophical point of worth, Austin reminds us that "truth" is not a name for a characteristic of assertions" just as "freedom" neither is a name nor does it name or characterize a set of actions.⁵¹ Rather, Austin explains, freedom is a "name of a dimension in which actions are assessed."⁵²

Austin's remarks could very well help us understand the meaning of action

45. Here I do not mean the state as a sealed political system, but the assemblage of vested interests that are established across social, corporate and political hegemonies.

46. For example, see the discussion of mimesis and truth in Plato, *The Republic*, in THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS, Book X 603b-604, at 828-29 (Edith Hamilton & Huntington Cairns eds., 1989).

47. See John Baldacchino, *Art's Gaming Lost: Within the Make-Belief of Curricular Certainty*, 2 CURRICULUM STUDIES 333-35 (1994).

48. See generally GEORGE W. HEGEL, PHENOMENOLOGY OF SPIRIT (1977).

49. See *infra* Section VII.

50. AUSTIN, *supra* note 2, at 6.

51. *Id.*

52. *Id.*

itself, though here I am not claiming to be addressing or indeed travelling with Austin's own theory of action as prominently elaborated in his philosophy.⁵³ What interests me is the distinction that Austin makes by which he seeks the dimension of action—in his case that of the excuse—to position an assertion that would, in my case, help me understand or at the very least approximate, my claim to art's right to creative illegitimacy.⁵⁴

Below I will cite instances where, early in his essay, Austin alerts and warns his readers about a number of common misconceptions by which actions are misplaced with the result that the arguments made could well become nonsensical.⁵⁵ In the discussion of art's truth this danger is commonplace. Most of the confusion is found in the way by which those who write about art, tend to forgo, ignore or misunderstand the reality that art-making—perhaps unlike works of art—often confirms the insufficiency of language.

This insufficiency is best exemplified in how art's legitimation is often expressed through the borrowed speech of the philosopher, psychologist, educationalist, or social theorist.⁵⁶ Yet, while such forms of description and argument might have managed to get close to what could be seen as an external approach to art's truth, art's immanence can only be comprehensively understood from the actions by which art inheres in the objects that it makes—what the neo-Scholastic philosopher Etienne Gilson refers to as art's positioning within the “order of factivity”.⁵⁷

Yet to say that immanence can only be understood through the action of art-making presents another set of pitfalls. This is especially the case when artists who see themselves as the makers, simply refuse to engage with those who behold the objects that are made. This is often expressed as a realm where only specialists and connoisseurs are allowed to say or know what is “in” the work of art, with the result that knowledge is distorted into a realm of expertise. In such a rarified location, art's legitimation simply alienates the artist from her art, as well as the audience from the artist, and the work of art from both the artist and the audience. In the realm of expertise, there is only one form of legitimacy, and it emerges as a legislative terrain that has nothing to do with art, let alone its truth-value.⁵⁸

One can see how at the ends of this multidirectional stretch, there emerges a fundamental flaw in how art as action is simply avoided, perhaps in the same

53. *Id.*

54. *Id.*

55. *See id.* at 4.

56. *See* DANTO, *supra* note 36.

57. *See* ETIENNE GILSON, THE ARTS OF THE BEAUTIFUL 18–20 (2000).

58. *See*, for example, Hauser's sociological discussion of mediation and alienation vis-à-vis the art trade in ARNOLD HAUSER, THE SOCIOLOGY OF ART 506–17 (1982).

way that the excuse was simply dismissed as frivolous by philosophers and linguists alike until Austin drew everyone's attention.⁵⁹ To do so, Austin sets the scene for a plea of action by qualifying what we should avoid when talking about action;⁶⁰ which would not be that far from saying that as we speak of art, we need to at least qualify what we mean, if only to set a common ground for a possible conversation.

As it is invariably common for any description of action to fall within an ethical sphere of discussion, Austin remarks that "before we consider what actions are good or bad, right or wrong, it is proper to consider first what is meant by, and what not, and what is included under, and what not, the expression 'doing an action' or 'doing something.'"⁶¹

As we have seen in the distinctions between art-making as an action and the work of art as an object, one begins to understand how art as an action requires a constant examination of what it denotes, especially when the task is to find a reason and meaning for art as a motive by which its immanence is related to its truth. The truth of "an action" is different from the truth of "something." We often use the word "art" to mean the same as an "action" and a "something."⁶² The distinction may not be problematic in certain contexts, especially when we speak of art as that which brings together art's action as inherent in the something that someone makes for someone else. However, when we question "What is the value of this action?", as we have seen already, distinctions need to be had.

In this respect, Austin's warnings have a lot of relevance to how we understand legitimation and where we can locate it.⁶³ However, as we have seen in the pitfalls of the maker insisting on the expertise of his actions, the action itself cannot be assumed as a comforting zone, because this could be reduced to a reification of the act of making itself—as we often find in the futile debates over process and product. Again, the claim of the maker is that this is simply implied, and that an explanation of making would in effect reduce everything to a procedure. While this is extremely valid, it does not mean that the question of immanence is satisfied by the designation of complex processes.

There is indeed a vague and comforting idea in the background that, after all, in the last analysis, doing an action must come down to the making of physical movements with parts of the body; but this is about as true as that saying something must, in the last analysis, come down to making movements

59. AUSTIN, *supra* note 2, at 4.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.*

of the tongue.⁶⁴

The way Austin puts it appears comical, if not absurd, though ultimately to justify or indeed guarantee the relation between an act and its immanence (by its assumed relation to its truth), cannot be satisfied by stating that art-making holds the secret and somehow this is justified by the fact that it happens. Just as one cannot simply explain particular actions (like riding a bike, or swimming) by going through a carefully described procedure, in the complex nature of art's praxis, action and practice require one to be engaged with over a number of mediational and experiential terrains, using a number of elements which directly contribute to how, in this case, legitimation could help us make sense of the intentionality by which art is *directed* towards the world.

Austin takes this from a two-fold approach. The first is to “ask how we decide what is the correct name for ‘the’ action that somebody did—and what, indeed, are the rules for the use of ‘the’ action, ‘an’ action, ‘one’ action, a ‘part’ or ‘phase’ of an action and the like.”⁶⁵

This takes us to how “we need to realize that even the ‘simplest’ named actions are not so simple.”⁶⁶ Austin urges his readers to “ask what more, then, comes in (intentions? conventions?) and what does not (motives?), and what is the detail of the complicated internal machinery we use in ‘acting’—the receipt of intelligence, the appreciation of the situation, the invocation of principles, the planning, the control of execution and the rest.”⁶⁷

Limited space does not permit a detailed treatment of what Austin means by the “machinery of action.”⁶⁸ This would warrant a whole separate paper if one were to attempt to explore its possible relevance to the implications of art as an action and of how the distinctions that this machinery clarifies would help us write and speak much more clearly about art's truth value.

VII. CREATIVE ILLEGITIMACY

As actions are increasingly assessed, the claim for a legitimacy that finds an intersection between meaning and intention becomes a concern. While identifiable parameters by which one understands action in art are necessary for a clearer discourse by which the complexity of this sphere is approached, on the other hand the question of legitimacy remains problematic the closer one gets to such a complex state of affairs. This is especially the case when art continuously brings up the issue of autonomy in both its claim for action—that

64. *Id.*

65. *Id.* at 5.

66. *Id.*

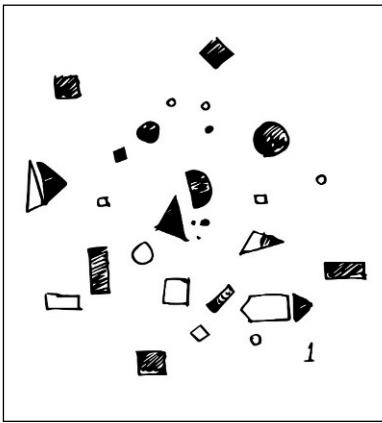
67. *Id.*

68. *See id.* at 19–20.

of making.⁶⁹ More so we need to better understand how the work of art is never beholden to one original intention, the main reason being that the intentions that art's audience brings to the work knows neither end nor finitude.

As one revisits the machinery of action, whose intentions, conventions and motives run its various operations on several levels, any legitimizing procedure that seeks to understand and capture art's immanence in relation to its truth cannot be captured in complete form.⁷⁰ It would mean that one has to bring together the infinite intentions which converge upon the exchange between the infinite intentions that are brought to bear in the art event, whose actors include artists, art-making, works of art, and an audience, which in turn gives rise to further events again, and again, and again . . . *ad infinitum*.

Whatever an art event may be—a painting, installation, play, novel, musical work, video, a choreography, et cetera—the process of action that takes place is mostly characterized by a cycle that moves from contingency to autonomy, heteronomy, and back.⁷¹ Here I am capturing this cycle in three diagrams that offer a very open-ended model of what a snapshot of these forms of action could conceptually look like.⁷²



69. See generally Baldacchino, *Art's Asymptotic Leadership*, *supra* note 12.

70. See AUSTIN, *supra* note 2, at 19.

71. See JOHN BALDACCHINO, INTRODUCTION. HISTORIES AND PHILOSOPHIES. THE WILEY ENCYCLOPEDIA OF ART AND DESIGN EDUCATION (forthcoming 2018).

72. Here I propose to elaborate a similar cycle of actions, which I have discussed in my Introduction at Baldacchino, Introduction. *Id.*

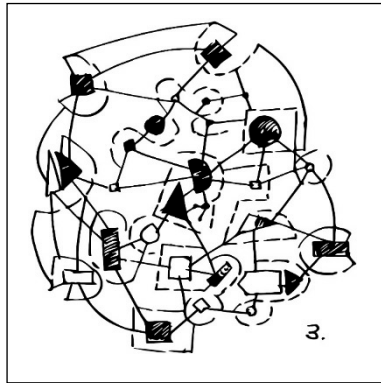


Figure 1. Contingent actions; Figure 2. Autonomous actions; Figure 3. Heteronomous actions

In capturing the flow of this constellation of art events, one begins with contingent action (**Fig. 1**), where random art events appear to take all possible directions, as they appear to each other in simultaneous though random exchange. This characterizes the contingent moments of “doing as an act,” characterized as a highly mutable and inconsistent state of affairs.⁷³

It may or may not be the case that these actions share a common space designated to accommodate art events. Random art events, in their simultaneity, immediately confirm their disposition of “doing something.”⁷⁴ This action is crudely assumed as that moment where art articulates its need to do something as art-making, and where the work of art begins to formulate itself.⁷⁵

One could argue that there is a phenomenological predisposition to the fact that these actions are also placed. In this respect when they appear to be with others by the accident of being there, those who are engaged in the art event tend to look sideways and move on with the distinct awareness that they are not isolated figures, as so often the romantic assumption of the lone artist goes.

Yet as one begins to understand this state of affairs inter-subjectively, it simply means that there are other subjects engaged in an equally contingent manner. They demonstrate no specific need to socialize on a universal horizon. This is thereby sustained as a horizon of particularities, where each and every art event assumes its own universality by dint of its singularity, thus inhabiting a universe of singularities. It is no less paradoxical to add that in the inter-subjective realization of art’s event, artists also realize that their actions prompt

73. *Id.*

74. *Id.*

75. *Id.*

their claim for autonomy. This autonomy is symptomatic of art's inability to sustain its contingent "origin," simply because art is never tied to any singular intention. The sheer reality of others, and the assertion of art's events and being *others-amongst-each-other* warrants autonomous action. (**Fig. 2**).

The art event asserts its autonomous character by dint of the fact that "doing as action" must inhere in the "something" that the action makes.⁷⁶ As we have already argued, art's action inheres in what it makes as its immanence is asserted iteratively in multiple ways.⁷⁷ This pushes back those legitimizing expectations that externalize art's action into an enabler of other actions.⁷⁸

Art's inherence in "the object that it makes" allows us to speak of the immanence art asserts at least twice: (a) as that which is inherent to the making, and (b) as that by which works of art continue to inhere in their open-ended and plural longevity.⁷⁹ But as contingency is asserted by the autonomy of art's action *qua* a universe of singularities, the dispositions that emerge from (b) acquire a plasticity by which those who experience art also partake of art's action together.⁸⁰

Here, art moves into a heteronomous phase of action (**Fig. 3**) where far from being prompted by the need to legitimize its existence, the event of art asserts its heteronomous truth by which it delegitimized the expectancies of heteronomy itself.⁸¹ The paradox that originally moved art from its contingent arrangement of actions to the sphere of autonomous action as a form of heteronomous action, now breaks into the cycle of legitimation by manifesting a new phase of its dialectic: that of rightful illegitimacy.⁸²

In asserting its heteronomy, art lays claim on its right to illegitimacy by which it moves out of the expectations of legitimation to assert its plasticity.⁸³ More importantly, what appears to be an involution where action collapses onto itself.⁸⁴ This collapse empowers art to reject and render irrelevant any instrumentalist imposition on its presumed legitimacy.⁸⁵

If we do not understand how art inheres, and how its immanence relates to its truth by dint of this constant movement of collapse into itself, we will fail to understand how art is that human disposition toward a full understanding of the

76. *Id.*

77. See *supra* Section III.

78. *Id.*

79. See JOHN BALDACCHINO, HISTORIES AND PHILOSOPHIES, *supra* note 71.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

contingent origins of its autonomous nature. The affordance of this paradox becomes possible at the moment of heteronomy, which is also the moment when art's action enters into its own negation and collapses back to its contingent nature.

VIII. MAKER SPACES

While this appears to be idealistic in tenor, readers will recall that this model is not new to both science and philosophy. Starting with the dialectic that Hegel adopts in his *Aesthetics* where he discusses what he identifies as Symbolic, Classical and Romantic forms of art,⁸⁶ this gains pragmatic tangibility in Dewey's philosophy of growth.⁸⁷ The origins of Dewey's approach is Hegelian inasmuch as Dewey's work also became profoundly influenced by scientific inquiry, especially Darwin's,⁸⁸ and more so by Charles Sanders Peirce's semiotics,⁸⁹ and William James's psychology⁹⁰—not to mention European philosophers, such as Dewey's contemporary, Henri Bergson,⁹¹ whose theories of simultaneity, memorial time, and new approaches to creative evolutionary processes ran in parallel with Einstein's revolution in scientific thinking.⁹²

Dewey's philosophy of experimentation, plasticity and growth, continues to remind us of the claim he makes in *Democracy and Education*, where the condition for growth remains persistently predicated on the need of a state of immaturity.⁹³

By way of contextualizing the thinking behind what I have am proposing in this essay, I would cite from what I consider to be one of Dewey's most exciting, if not heretical, essays that he wrote in the last decade of the nineteenth century, *The Superstition of Necessity*.⁹⁴ There, Dewey states clearly and

86. See GEORGE W. HEGEL, *AESTHETICS: LECTURES ON FINE ART*, intro, 75–82, 299–602 (1975).

87. See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1922).

88. See generally JOHN DEWEY, *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS* (1910).

89. See generally Charles Sanders Peirce, *What is a Sign?*, in *THE ESSENTIAL PEIRCE: SELECTED WRITINGS*, VOL 2, 4–10 (Nathan Houser et. al eds., 1992).

90. See generally William James, *Pragmatism*, in *WRITINGS 1902-1910* (Bruce Kuklick ed., 1988); WILLIAM JAMES, *Psychology: Briefer Course* in *WRITINGS 1878-1899* (Gerald Myers ed., 1992).

91. See generally HENRI BERGSON, *CREATIVE EVOLUTION* (1983).

92. *Id.* at 59–86, 272–97.

93. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 41 (1922).

94. John Dewey, *The Superstition of Necessity*, 3 *THE MONIST* 362, 362 (1983).

without flinching or raising a shred of doubt, that “contingent and necessary are . . . the correlative aspects of one and the same fact.”⁹⁵ Even after so many years, this still comes across as an explosive claim, as it means that any assumption that privileges necessity over contingency for the sake of some bigger whole is to be defied. In terms of what we are discussing in this essay, the implication of Dewey’s claim is that any structure of legitimacy that normally hinges on a necessary whole is rendered irrelevant.⁹⁶ There, Dewey is both adamant and clear.⁹⁷

Here we have our choice: we may deny the existence of any organic whole in life and keep chasing in a never-ending series, the *progressus ad infinitum*, after an end valid in itself. In this case we never get beyond a hypothetical necessity—something is necessary *if* we are to have something else, the necessity being relative to the implied doubt. Or, being convinced that life is a whole and not a series merely, we may say there is one comprehensive end which gives its own validity to the lesser ends in so far as they constitute it. While, on the other alternative, we reach only a hypothetical necessity, *on this we reach none at all*.⁹⁸

What are the bearings of legitimacy when the contingent and necessary are seen as correlating to the same fact? As I am here suggesting that art’s action follows a cycle that moves from contingency to heteronomy, only to collapse under the weight of the autonomy that bridges them, are we settling for a *progressus ad infinitum*? Is this simply better than none at all?

I want to conclude this paper, by citing an example drawn from a pedagogical model adopted in the University of Wisconsin–Madison, and which I am pretty sure has parallels in similar setups elsewhere. This Creative Arts Community is named, rather unpretentiously, *The Studio*, and there is a simple reason for it. *The Studio* is a pedagogical model that entirely emerges from the notion of a studio space—what is sometimes called a maker space—which in and of itself allows, rather than determines, the opportunity for a number of freshmen to come together, in a pretty random self-elective way, and engage in arts events of their own creation.

So far this seems like a normal studio in an art school. However, what is different is that here not only these students are not, in the main, arts specialists, but where what brings them together is diversity—understood not only in the legalistic way of minority groups but in the self-election of one’s own existential and in this case artistic identity by which these students opt to find

95. *Id.* at 372.

96. *Id.* at 373.

97. *Id.*

98. *Id.*

themselves placed, rather contingently, within these maker spaces.

The goals set for this program are quite unassuming. Here I cite *verbatim*, from *The Studio*'s website:

- Create an arts and design-centered living-learning experience that encourages interdisciplinary exploration
- Connect with a roster of talented artists and designers, including UW—Madison faculty in a variety of arts departments
- Have access to onsite rehearsal, study, drafting and performance spaces
- Participate in programming that caters to your specific interest.⁹⁹

While one could attempt to process these objectives as legitimizing values whereby the inherence of their categorical assumptions is easily transferred to a truth-value that would in turn justify such a program, this cannot be further from what actually happens.

The Studio's curriculum adopts a structure that is invested in the illegitimacy of art events.¹⁰⁰ Students normally volunteer themselves to articulate what they see as their way to rebut the pressures and expectations by which the normal state of affairs in their studies out there would somehow limit, if not totally frustrate their creative ambitions.

Far from students coming together to do what comes to their mind, the pedagogical structures that emerge in this program are mostly taking an opposite direction. In their various artistic creations, these students assert their autonomy by mostly showing strong signs of unlearning.¹⁰¹ Typical of any studio pedagogy, unlearning is a mainstay of art's illegitimate directions of teaching.¹⁰² However, in *The Studio*, the unlearning that takes place goes even against what is expected in the normal studio in an art, drama, dance or music school.¹⁰³ The type of unlearning here is *active*. It is sought by the student intent on repositioning her life on a trajectory by which she would be able to handle.

The exemplars that one finds in the various archives of *The Studio*¹⁰⁴ show

99. University Housing, *The Studio: Creative Arts Community*, (April 29, 2018, 12:33 PM), <http://www.housing.wisc.edu/residencehalls-lc-thestudio.htm> [<https://perma.cc/Z8JS-DCW8>].

100. *See id.*

101. *Id.*

102. *See* Baldacchino, *ART ± EDUCATION*, *supra* note 41; JOHN BALDACCHINO & GERT BIESTA, *Weak subjects: On Art's Art of Forgetting. An Interview with John Baldacchino, Interviewed by Gert Biesta*, ARTS, ARTISTS AND PEDAGOGY (Chris Naughton et al. (eds.), London Routledge, 2017).

103. University Housing, *supra* note 99.

104. University of Wisconsin-Madison, *The Studio* (April 29, 2018, 12:35 PM), <https://thestudiouw.arts.wisc.edu> [<https://perma.cc/9RTC-HE79>]. There are multiple exemplars and videos in *The Studio* 2017a.

a high degree of success, if one measures success by how these students do not just seek or measure success by the conventions given to them, but in their comprehensive understanding of forms of knowing that would also appreciate the role of what others may well deem to be an “error” or “failure.” In some cases, these are not simply events that happen in the safe space of the studio, but also events that spill out into the very existential forms of coping with a world which most of these students have found to be, if not entirely hostile, quite unfamiliar and foreign—especially in those cases where one is born foreign into one’s own environs for reasons of class, race, ethnicity, gender, sexuality, faith or any other form of human existence.¹⁰⁵

IX. CONCLUDING REMARKS

By way of concluding this essay, I would invite readers to briefly reflect on *The Studio*’s example against the scenario that this paper proposes to set, where art duly claims its right to illegitimacy.

In setups like *The Studio* one must understand that there are two agencies in play. The first has to do with the student’s personal and existential legitimacy, as an explanation to one’s self as to why one needs to attend or indeed join institutions such as a university. This presents fundamental challenges to one’s own experience. This is particularly the case in those populations which universities—rightfully or wrongfully—identify as underrepresented groups, and by which the student is self-identifying her own positioning within institutions that have particular histories and which form part of traditions which, even when it comes to the arts, have not always been welcome. In the second instance, we have the context of art itself, which not unlike the “underrepresented” student is a constellation of disciplines that over many centuries, but more so since the arts entered the legislative spheres of academia, have had their fair share of ambiguity. To date, the arts are still expected to fit in a whole hierarchy of norms and expectations that consistently remind artists that the onus is on them to adapt.¹⁰⁶

105. *Id.*

106. A good example is how the very notion of “arts research” now plays a role in universities, only to be precariously ensconced in contexts that either instrumentalized the arts as those abilities which would attract funding if they are merged with the sciences (the forced evolution from STEM to STEAM being a good example; not to mention the whole myth around the fallacy or the “Right Brain/Left Brain” industry, which is nothing but a folklore that has created a whole cottage industry of legitimacy by itself), but also where when the arts are asserted in their own integrity, this falls into a trap that would either weaken the position of the arts in academia, or at the very best eroticises the arts into a rarefied luxury, which academia wears as a badge of honour. For more information, see John Baldacchino, *Educating Art’s Indescribable Practice: Four theses on the impossibility of art’s research*, 2 DERIVAS: INVESTIGAÇÃO EM EDUCAÇÃO ARTÍSTICA 97–105 (2015); John Baldacchino, *Opening the picture: On the political responsibility of arts-based research*, 10 INT’L J. FOR EDUC. &

Art's right to illegitimacy is far from being a metaphor for dissent. Beyond a simple reaction against the "system," the arts are the result of the ability of human beings to recognize and operate within what Derrida,¹⁰⁷ after Plato,¹⁰⁸ calls the illegitimate, bastard space, of the *khôra* which in the *Timaeus*, Socrates identifies as a third genre by which human beings have survived between two orders: the legalistic realms of the *logos*, and the representational symbolic structures of *mythos*.¹⁰⁹

As the *khôra* refuses to be defined by either the legalese of *logos* or the semiosis of *mythos*¹¹⁰—where mistakenly many would put the arts alongside other forms of human representation—the right to illegitimacy reclaims its rightful place in the *khôra*. By dint of the *khôra*, humans lay claim and assert a third dimension for their free intelligence.¹¹¹ This is a genre that either goes unrecognized—partly due to our tendency to work and think in dualist assumptions—or is rejected as an illegitimate state of affairs.¹¹² Yet in their wisdom, the ancients recognized the need for such a third genre.¹¹³ Socrates walks his students on this illegitimate ground.¹¹⁴

It is not the semiosis of the *mythos*, but the illegality of the *khôra* that has always confirmed what art stands for. Ever since the first known marks were left in caves in Blombos, Altamira and Lascaux, we know that humans have insisted on inhabiting a third genre that rejected the dualisms by which, over history, the hegemony of word and representation has oppressed the many.¹¹⁵

The marks of the *khôra* confirm that in their aesthetic anticipation of events, women and men never stopped expressing a concrete and pragmatic awareness that the contingent and the necessary belong to the same facts of daily living.¹¹⁶ Art anticipates and confirms Dewey's mistrust of the superstition of necessity.¹¹⁷ Consistently, art has shown that humanity needs to grasp uncertainty as its source of freedom. More so, in its simultaneous events, art's action stands as a reminder that the certainties by which humanity has been

THE ARTS I (2009).

107. See generally JACQUES DERRIDA DERRIDA, *KHÔRA* (1993).

108. See generally Plato, *Timaeus*, THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS (Edith Hamilton & Huntington Cairns eds., 1989).

109. See *id.* at 48e–49b, 1176.

110. Derrida, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See BALDACCHINO, *ART'S WAY OUT*, *supra* note 39, at 112.

116. See *id.*

117. See Dewey, *supra* note 94. I would argue that it was Dewey's deep engagement with art that pushed him in the philosophical directions that he took.

superstitiously been trapped must make way for the realization that paradox is the hallmark of our claim to freedom and intelligence.

Does this claim to illegitimacy give way to irrationality and chaos? Certainly not. However, what this opens, is a society that seeks to understand truth from the condition that it often dismisses as its shortcomings, which the arts have continuously enabled us to see, time and again, as the norm of our being in the world, and not the exception to avoid.