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of Law & Human Dignity

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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**THE ART OF HUMAN DIGNITY AND THE HUMAN DIGNITY OF ART:
EDITORIAL**

Write what you dare not say; dance as if no one is watching; sing like you are in the shower — art lets us express ourselves in ways we cannot otherwise do. With that said, we must ask ourselves, do we truly have the right to freedom of expression? What are the boundaries of this right, and how do these boundaries impact our human dignity as creative beings?

This Issue focuses on the intersection between art and the law. Our *Journal* aims to publish articles that give a voice to those who have been silenced, disenfranchised, or marginalised. It is for this reason we publish academic articles and narratives alike. With this in mind the mission statement for this Special Art Issue is:

Art is integral to being human. Art gives us meaning and challenges us. For some, art is so confronting that they seek to ban or destroy it. In this Special Issue we want to contest the bounds and legality of art to emphasise the human dignity of art and in turn challenge the art of human dignity. What does the regulation of art really say about us as humans?

When we chose the topic of art we soon realised that the scope of the Issue was almost endless. The challenges artists face are not only transnational but also common. In one of our Editors' meetings an editor brought up a recent case where an artist was charged for unauthorised street art. While the topic seemed quite passive at the time I began to notice the volume of news articles and stories where artists were being charged for what appeared to be an overstepping of political power.

It became clear that artists from every background (whether that be street artists, dancers or singers) all experience a similar feeling — oppression. When fostering opportunities for artistic freedom and artistic expression we in turn open the possibility to challenge societal norms. Art can inspire and provoke, it can challenge and motivate. So why then, in a culture that can encourage change

and galvanise communities, is the law oppressing those who can actually make a difference?

I ask myself; why is it that when an artist uses a child in artwork they are charged with possession of child pornography?¹ How is it possible that singing about political opposition can see you thrown in jail?² In what world can the Attorney General commandeer art funding for political control?³ The law is facilitating artistic oppression. The disconnect between art and property rights along with censorship law and obscenity restrictions (to name a few) are handcuffing our art.

This Issue begins with an Australian street artist, Anthony Lister, who recently faced the court system by challenging Queensland's somewhat confusing graffiti laws. Lister's article gives us an introduction of what street art means to him as an artist. He goes on to question that as public people should we not be afforded the right to use our public spaces?

We then hear from a hip hopper who has faced challenges to his human dignity as a lyrical artist through identity misconceptions. L-FRESH the LION, an Australian rapper explains that while hip-hop was established though a climate of oppression and discrimination, that those in the industry itself are some of the worst perpetrators when it comes to conforming to identity standards. Although his identity has been challenged, questioned and at times discouraged he has not bowed down to the pressure of the industry.

Bruce Baer Arnold and Wendy Bonython then ask us to consider the dignity of those depicted in paintings and artistic representations. They make the point that as viewers we owe an ethical duty to those within the painting. Rather than

¹ In Australia, Paul Yore was charged with possession of child pornography. See eg, ABC Arts, 'Pornography Charges Against Paul Yore Dismissed' *ABC News* (online), 7 October 2014 <<http://www.abc.net.au/arts/blog/arts-desk/Artist-Paul-Yore-acquitted-of-pornography-charges-141001/default.htm>>.

² Members from the Russian punk rock band *Pussy Riot* have been jailed for hooliganism. See eg, Sarah Joseph, 'Pussy Riot: A New Chapter in Art Verses Power' on *The Conversation* (31 July 2012) <<http://theconversation.com/pussy-riot-a-new-chapter-in-art-versus-power-8563>>.

³ The 2015 Australian budget suggests George Brandis (Attorney-General) is creating his own art fund to distribute funds as he pleases. See Ben Eltham, 'Budget 2015: George Brandis' Extraordinary Raid of the Australia Council' *The Drum* (online), 13 May 2015 <<http://www.abc.net.au/news/2015-05-13/eltham-brandis-extraordinary-raid-of-the-australia-council/6467534>>.

just lines on a canvas Arnold and Bonython suggest that the representation itself be afforded the respect and reflection it deserves.

Matthew Christian a subway-performing advocate takes us through the last 30 years of legal ambiguity in the New York City transport system. Christian explores the possible risks and opportunities that street performers face when expressing themselves in the tunnels of New York City. He suggests that the current program, Music Underground New York is perhaps a hindrance rather than helpful for those who choose to perform.

Next, Jarrod Wheatley looks at the social advantages to creating artistic programs for community benefit. As the founder and coordinator of Street Art Murals Australia, Wheatley suggests that we shift the debate of street art and graffiti from a legal paradigm to a broader debate about the role and place of public art.

Jay Sanderson and Leanne Wiseman use the case of *William v Bridgeport Music Inc No 13-06004* (CD Cal, 2013) — the District Court decision on copyright infringement for the song Blurred Lines — to illustrate the somewhat “blurred lines” of copyright law in America. The article focuses on subconscious copying as being both illicit and impressive at the same time. It touches on legal doctrine as well as theoretical perspectives that consider the artist’s dignity in claiming subconscious copying.

Next, Crisp an international street artist who has chosen to reside in Bogota, Columbia because of the lenient graffiti laws, shares his different experiences of painting worldwide. He argues that while complete legalisation of street art will not likely fix the problem that Bogota’s approach has provided the graffiti community with a suitable middle ground.

Adam Jardine takes us into the world of gaming by questioning how computer games, as an interactive medium, make players complicit in gendered violence. Jardine takes a reflective and very personal approach to the article in describing his personal discomfort as a player with how women and girls are represented in these games.

The Issue finishes with an article that leaves us questioning, who should have the right to determine what goes on our public spaces? Karen Crawley argues that a zero-tolerance approach and harsh legal remedies are counterproductive in addressing the so called “graffiti problem”. She explains how street artists and graffiti writers have a different relationship with cities than that of the traditional property owner. This article (and further this Issue) leave us thinking perhaps we have something to learn from these artists — perhaps we can learn how art teaches us something different about otherwise naturalised and accepted forms of social behaviour.

While each author draws from their own personal experience and has their own personal argument, there is one predominant theme that is shared among each article. That is — art is a part of our personality and a part of our human experience, our author’s all share the view that while art liberates; the law restricts. Not one of our authors wrote with enmity or reprisal but rather with a tone of hope. Hope that perhaps we can open the discussion to government, advocates, academics and artists alike. Hope that one day the law can reflect that art is a part of our human dignity and that our human dignity is a part of art.

FELICIA LAL

EDITOR IN CHIEF

PUBLIC SPACES: PUBLIC PEOPLE

ANTHONY LISTER*

City councils and the police villainise street art, convincing the community that it is dirty, unproductive, and antisocial. Street art is the opposite — it is visual and creative freedom. Uncommissioned public art is the true mark of a community that wishes to be involved with itself. Public spaces are built so that the people can use them. Thus, the legal system's harsh prosecution of creativity lacks an understanding of the dynamics of contemporary society and is in need of a drastic revision.

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* Anthony Lister is an Australian painter and installation artist who helped pioneer the Australian street art movement. He has held sold out exhibitions in capital cities around the world.

I INTRODUCTION

The problem with being a public painter, street artist or graffiti artist is that there is basically nowhere to legally practice, let alone be permitted adequate time to make work that is any good. Australian City Councils and the police have villainised my craft. They convince the community that it is a dirty, unproductive and antisocial plight on the urban environment, when it is actually the opposite. When I see tags and uncommissioned public art in a particular area, I get a feeling of hope — a hope that people may finally be learning to live with my kind. I believe that public spaces were built to be used by public people. I am a public person.

II FREEDOM THROUGH CREATIVITY

The way I describe myself in regards to being an activist is that of a freedom fighter — fighting for the freedom of visual speech. Visual speech is everything we see in our immediate world that communicates with us on an aesthetic level. When a homeowner builds a fence between their yard and their neighbours, it would be ridiculous to propose that they had the right to decide the colour of the fence on both sides. In the same vein, it is within reason that a similar approach be considered when it comes to property in the public realm. The fact that most property and respective paint jobs will not be in existence as they are now in the next 20 years begs the question, why do we care at all? Any current paint job is just an undercoat for more paint.

When asked about uncommissioned public art, people usually comment positively about colourful, detailed images of pictures, and negatively about bland, simple, text-based work. The majority of people that take offence to street art and graffiti have not been properly educated on the matter. The best way to describe the fundamental difference between street art and graffiti is that street art is a picture made up of shapes that have not yet become letters while graffiti is letters that are made up of shapes that have not yet become pictures.

III PUBLIC AUTHORITY AND PUBLIC CONTROL

The public has been desensitised by television and advertising to the extent that they have become consumption-obsessed and creatively dulled. This has made them friendly to product-endorsed visual pollution. Somehow a billboard advertising a poisonous fizzy

drink is less offensive than a brick wall in a tunnel with a colourful image selling nothing — that is when you know the world is in a mess.

The problem with the state of our public visual landscape is that there is nowhere to be free. We are told that this is a free country and that we should be thankful for our human rights being respected, yet we cannot even write a “Rest in Peace” or a “Get Well” note on a wall without it being removed (and this is the worst part) by unqualified public curators dressed as cleaners. I liken the condition of the community of Queensland street artists and graffitiists to that of an endangered species. We have been facing the extermination of creativity in Queensland for more than 30 years. It was not until I had been commissioned by the Brisbane City Council to paint electrical boxes that I started making public installations of my paintings. It was not until I left university two years later that I realised I was addicted to public exposure and had, in fact, contracted the “graffiti disease”. This gave me the ability, hunger, and audacity to activate public space.

IV THE BATTLE BETWEEN DESTRUCTIVE AND CREATIVE FORCES

When considering painting actively protects most surfaces from wear and tear, it is ridiculous to think that cleaning it off a seat or a train serves the objects’ functionality. It is, in fact, more likely to cause the surface harm. Every cleaner should know the long term negative effects that repetitive cleaning has on any surface. Cleaners who are targeting peaceful acts of communication in the public realm are put in control of editing everything that we, as the people, may never see by the wake of their sterilised brush. The financial costs that councils and police project to the public in regards to cleaning off graffiti and uncommissioned public art are outrageous and exaggerated, to say the least.¹

Bloggers, such as the Don’t Think Team have implied that the common misinformation and billing of graffiti removal is an inflation of the real cost, and that futile preventative measures are actually a black-hole trapdoor used by corrupt politicians to embezzle and provoke the community’s anger towards public creatives.² They spend huge amounts of

¹ Kim Stephens, ‘Brisbane’s \$3m Graffiti Bill’ *Brisbane Times* (online) 3 March 2014
<<http://www.brisbanetimes.com.au/queensland/brisbanes-3m-graffiti-bill-20140303-340oe.html>>.

² Don’t Think Graffiti, ‘ASKEW ONE’ on *ASKEW ONE* (9 November 2010)
<<http://cyprusgraff.blogspot.com.au/2010/11/askew-one.html>>.

money on campaigns to discourage public awareness of our ability to communicate with each other in the public realm and campaign against the peaceful acts of public mark-making. Meanwhile these same politicians and government bodies accept and encourage corporate advertisers by funding billboard space to exhibit their public slogans and imagery. The double standards are outrageous.

V THE BENEFITS OF PUBLIC ART IN PUBLIC SPACES

When I was a youth, I would look forward to catching the train to school or the city on the weekend. What I enjoyed most was seeing all the great artwork flash past me from the fences and walls of the discarded track lines. These days, the same walls are painted a plain, boring nothing. The taxpayer can be assured that they are paying for this induced boredom. Now that I am a taxpayer, I do not want to be bored on the train or in traffic, so I paint walls. It is an ongoing battle between those who want to destroy and those who want to create. The confusion lies between how we define creation and how we define destruction. Frustration lies within the cleaners believing that they are creating a clean environment, when in fact they are destroying the public's own artwork. Artists are being blamed for destroying public property when they are just trying to communicate creatively with each other through beautiful marks and designs.

People say to me, 'I like the art but hate the tags.' They do not realise that the tags are an informative part in the art of graffiti and, in turn, street art. The natural process is that after tags are laid and it is clear that they are not being removed, a larger, more detailed painting is produced over the tag and so on. The example that I like to use to illustrate this undiscovered beauty is to compare tags to the details on a gilded frame or the signature of a sports star. These are similar gestural expressions of mark-making that are sometimes more easily understood by the public.

I have said you cannot grow a garden of flowers without water. Would you rather a garden of dirt or a garden of weeds? Creativity is the water that feeds us all. One man's weed is another man's flower, just as one man's mess is another man's message.

VI CONCLUSION

If it were not for ancient creative pioneers like the Indigenous Australians who marked the rocks and caves of this great land, we would not be as aware of the stories they

possessed and passed on. Without the innate human desire to scratch into and onto the surfaces by which we are surrounded, we would be without the hieroglyphics of ancient Egyptians and without a fundamental visual understanding of our history. These markings have been the way our ancient ancestors have communicated to us throughout time. I see graffiti and street art as a form of time travel in that 'wherever you are — there you are', but as a graffiti or street artist 'wherever you have been — there you are'. There is a special feeling that goes along with this type of existence, a feeling of belonging to and being at one with your environment and those who interact with it. If an in-depth anthropological and psychoanalytical study were to be conducted on the effects of areas of a society set free to express visual speech, I am sure that society's sense of community would dramatically improve.

The broken window theory is true to a degree, however it also works in the opposite way. This means that if a great piece of art is built, then an even greater piece of art is installed to compliment it and so on. The famous New York graffiti artist LEE wrote in 1972, 'Graffiti is an art, and if art is a crime, let god forgive all.'³ This is a bold, but honest and enlightening statement. Surely the sheer number of men and women jailed for acts of creativity did not do so for the system to continue wrecking the lives of others just like them. When I tell people there are artists like myself imprisoned for having done the same amount of mindful beautification in similar spaces, they are shocked at the realisation. In the bewilderment surrounding the imprisonment of creatives, it becomes clear that the justice system's harsh prosecution of creatives lacks a modern, dynamic understanding and is in need of an immediate, drastic revision.

³ Caroline Gabrielli, 'Exhibitions: Graffiti Art MCNY' on Mixed Media Archives (16 August 2014) <<http://www.mixed-media-archives.com/blog/2014/8/23/exhibition-review-city-as-canvas>>.

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WHY BLEND IN WHEN YOU WERE BORN TO STAND OUT: A STORY OF RAP, RELIGION, AND RIGHTS

SUKHDEEP SINGH A.K.A L-FRESH THE LION*

This narrative explores the experiences of an Australian Hip Hop artist and the religious and cultural discrimination he has faced in the music industry. The narrative identifies some telling double standards experienced by Sikhs in Hip Hop, and reflects on the irony of oppression occurring in a musical genre founded on rejecting conformity and encouraging originality. Above all, this narrative speaks to the importance of recognising the humanity behind both our artistic and personal choices and urges readers to celebrate their individual creativity.

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* L-FRESH The LION is a rapper and is renowned for his powerful presence, inspiring live shows and thought-provoking hip hop lyrics.

I INTRODUCTION: MY EXPERIENCE

Very early on I made myself a promise — never sacrifice my sense of self for anybody or for any opportunity.

After I sent them my set of press photos to help promote the shows they told me I couldn't be on the tour anymore. They said I needed to change my look if I wanted to stay on. My turban and beard are more than just defining visual features. They have nothing to do with fashion. To me they are the continuance of a rich and inspiring legacy. They are gifts that keep me grounded and focused; they reflect my personal, inner spiritual journey.

I told them I would not compromise my identity for anyone, that I would not disrespect myself, my family, community, or ancestors, and that I would prefer to miss out on this tour than sell myself short. After a few days of discussion between my team and theirs, everything was eventually sorted. I didn't need to retake any photos. They were going to use the ones I sent them. It was all-good — a hiccup on what ended up being such a valuable tour experience.

This was during the very early stages of my music career. I had been offered the biggest tour opportunity of my life. I was going to be traveling with some notable names in the Hip Hop scene. I was nervous and excited. I never thought I'd be challenged in this way. Well, I take that back. I had been preparing for a challenge like that since I started on my path as a practicing artist and I've been continuing my preparations ever since. That's the harsh reality of the music industry — it can be very fickle.

II I AM A HIP HOP ARTIST

I am a Hip Hop artist who happens to be Sikh. I knew going into it there would be moments in my journey that would ask me to choose between an opportunity and my faith. I knew my appearance would be challenged many times along the way. So well before any of those experiences actually happened, I prepared myself mentally.

Although this particular experience left me with a feeling of disappointment and frustration, what I found more upsetting was that I needed to prepare for more. Artists face rejection on a regular basis. They become accustomed to it. They accept it and push even harder towards their goals. It is easier, although still quite tough, to accept

rejection that is based on feedback relating to creative ideas. But what about rejection based on an individual's personal choice of religion? When did that become something that an external third party felt like they could have a say in?

On reflection, what I also found disappointing about this particular experience was the fact that it happened on a Hip Hop tour. Hip Hop is a culture that was manifested in a climate of racism, oppression, discrimination, and segregation by a community of people who were marginalised. They created their own way of being when society did not want them to be. Early Hip Hop practitioners created and redefined themselves and their surroundings in order to uplift themselves and their communities. It rejected conformity and encouraged originality. "Hip Hoppas" strive to stand out.

This is why Hip Hop resonates with me so deeply. I felt the other artists on the tour would cringe if they knew what I was being asked to do. It goes against the core of what Hip Hop is about. But that just goes to show that sometimes those working behind the scenes to put on tours, whilst being fans of Hip Hop music, have no interest in applying the principles of Hip Hop culture to their every day lives. Nor do they treat their tours with that level of cultural understanding and respect — to them it is a business and they need to sell tickets.

III BEING A SIKH IN THE HIP HOP INDUSTRY

I don't mind answering questions about my faith when they are genuine, sincere and respectful. In doing so, I feel I'm helping my community. Sikhs have a history of standing firm in our beliefs — upholding the defining features of our physical appearance in the face of imperial oppression. When forced to choose between death and religious conversion, we refused to cut a single strand of hair and compromise our way of living. Instead of removing our turbans, we chose to battle oppressive regimes and remove them from seats of power in order to protect universal human rights.

So, you can understand why I was so firm in my response to that tour promoter, and why I can get frustrated when I repeatedly get asked at a show if people can touch my beard or if they can see the hair beneath my turban. Furthermore, whilst a majority of other artists are able to pursue their careers without a single question being raised about their personal faith and inner spirituality, it's often the first question that I get

asked. Many times, it's the first box I get put into when journalists try to describe me to their readers or viewers.

Every now and then I find myself wondering whether my appearance has been at the centre of conversation when people in positions of power are making decisions as to whether to include me or not in any given opportunity. Maybe it doesn't get brought up at all. Maybe it does. I don't know. I remind myself that it's not a very useful thing to sit there thinking about but sometimes I can't help it — I am not a novelty, I am a human being.

IV LESSONS?

Having said all this, don't be misled. I am not an angry person. I find myself laughing about these experiences all the time. But occasionally I wonder if my laughter serves to hide my frustration so that I don't offend anybody with it despite me being the one whose dignity has been offended by having my personal, life-long, spiritual journey trivialised. I often sit and think about my role in Hip Hop. Not just locally, on a national level, but also at an international level. What impact can I have? Can I be a positive force in the world? If so, how can I do that? What do I need to build? And what can I do on an everyday basis to work towards that goal?

My personal spiritual journey definitely plays a role in shaping who I am as an individual and that inevitably comes out in my music, just like it does for any other artist. I suppose the difference between me and many other artists is how visually obvious my spiritual journey is. It's there. It can't be hidden. And I'm okay with that. When challenges such as the one on that tour present themselves, I view them as opportunities to further build my core values.

There's a saying I've found I live by, which is appropriate to share in this instance. I use it as a constant reminder as new tests emerge: 'Why blend in when you were born to stand out?'¹

¹ A sentiment often attributed to Dr Seuss.

SEEING THROUGH THE IMAGE: ART, DIGNITY, AND RESPONSIBILITY

BRUCE ARNOLD* & WENDY BONYTHON**

Within the artistic world, many have argued that a respect for dignity and human rights stems from debates concerning artistic freedom. However, when considering human rights and dignity, one must step out of conventional discussions and consider the recipients of the art to identify legal and ethical inequities concerning the contexts and subjects artistically expressed. This article argues that art imposes an obligation upon the viewers' engagement where the embodiment of human forms are depicted. It argues for an ethic of responsibility.

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I INTRODUCTION

Respect for dignity, and thus for human rights, requires a responsiveness on the part of people who view images, rather than merely their creators, censors and curators. This article steps beyond conventional debates about artistic freedom and copyright, and considers the obligations – both ethical and legal – on recipients of artistic expression involving the actual human form. It suggests that human rights are fostered by an ethic of responsibility in our engagement with images, that range from Géricault's *Raft of the Medusa* and Warhol's *Car Crash* series, to illustrations in the *Pernkopf Atlas*, Korda's *Che Guevara* and Ut's *Napalm Girl*. In essence, if we are concerned with dignity, we need to recognise that the images we see on t-shirts, campaign posters, textbooks and gallery walls are more than abstractions — they are representations of people. We need to recognise that wariness about reducing personhood to an abstraction is more broadly relevant in human rights theory and legal practice, where plaintiffs and defendants should be respected as people, rather than embodiments of legal principles and procedural conflicts.

II ART AS A COMMODITY?

It is conventional to conceptualise the visual arts in terms of a commodity — dollars crystalised in a frame on a wall — or as a subject of contestation between creativity and repression, something that invokes questions about offence, censorship, copyright, personality rights and freedoms.¹ Philosophers such as Kant have emphasised art's autonomy, a value that — like dignity — is transcendent and independent of use or the market.² It is also conventional to differentiate between art as something that is collectable — valorised by curatorial institutions and fine arts academics and utilitarian representations that appear as illustrations on clothing, bags, bus shelters, anatomy

¹ See generally René Gimpel, 'Art As Commodity, Art as Economic Power' (2000) 14(51) *Third Text* 51; William Goetzmann, 'Accounting for Taste: Art and the Financial Markets Over Three Centuries' (1993) 83(5) *The American Economic Review* 1370; Robert Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Publications, 1998); Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011); Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (University of North Carolina Press, 1991).

² See Casey Haskins, 'Kant and the Autonomy of Art' (1989) 47(1) *The Journal of Aesthetics and Art Criticism* 43; Joseph Margolis, *What, After All, Is a Work of Art?: Lectures in the Philosophy of Art* (Pennsylvania State Press, 2010); Pierre Bourdieu, *The Rules of Art* (Susan Emanuel trans, Stanford University Press, 1996) [trans of: *Les Règles de l'art* (first published 1992)].

textbooks, in the mass media or on social media sites such as Facebook, Tumblr and Pinterest.³

In contrast, this article contends that the visual arts — high and low, fine or decorative — involve representation and need not be balkanised on the basis of price tag, epoch, authorship, medium or genre. Considering reception of that representation, in what prominent Professor William Mitchell characterised as the pictorial turn, potentially tells us something about dignity.⁴ It also offers a grasp on potentially intractable tensions in freedom of expression, involving balances between the human rights of the creator, the viewer, the creator's subjects and people or institutions who consider that they have a duty to shape what is viewed and how it is viewed.⁵

III THE DIGNITY OF ART

Dignity — recognition as a person, irrespective of age, gender, sexual affinity, religious affiliation, nationality, education or wealth — is a foundation of human rights and thus of justice in a liberal democratic state that is informed by values of fairness,⁶ and flourishing.⁷ It is a matter of personhood, something that is innate to all humans and always to be respected, rather than dependent on deportment.⁸ It involves recognition

³ Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Illuminations* (Harry Zohn trans, Schocken, 1969) 214 [trans of: 'Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit' (first published 1936)]; Arthur Danto, *What Art Is* (Yale University Press, 2013).

⁴ William Mitchell, *What Do Pictures Want?: The Lives and Loves of Images* (University of Chicago Press, 2005); See especially W. J. T. Mitchell, *Picture Theory: Essays on Verbal and Visual Representation* (University of Chicago Press, 1995); see also Agnes Heller, 'Autonomy of Art or the Dignity of the Artwork' (2008) 9(2) *Critical Horizons* 139.

⁵ For points of entry to the Australian and international literature regarding such tensions, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007); Martha Nussbaum, 'Exactly and Responsibly: A Defense of Ethical Criticism' (1998) 22(2) *Philosophy and Literature* 343; Katharine Gelber, 'Distracting the Masses: Art, Local Government and Freedom of Political Speech in Australia' (2006) 10 *Law Text Culture* 195; Kate MacNeill, 'When Subject Becomes Object: Nakedness, Art and the Public Sphere' (2010) 135 *Media International Australia Incorporating Culture & Policy* 82; Michael Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37(1) *Federal Law Review* 133.

⁶ John Rawls, 'The Sense of Justice' in Samuel Freeman (ed) *John Rawls: Collected Papers* (Harvard University Press, 1999) 115.

⁷ See Alan Gewirth, *Self-Fulfillment* (Princeton University Press, 1998); Alan Gewirth, *The Community of Rights* (University of Chicago Press, 1996); and Martha Nussbaum, *Cultivating Humanity* (Harvard University Press, 1998).

⁸ George Kateb, *Human Dignity* (Belknap Press, 2011); Andrew Brennan and Y S Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds) *Perspectives on Human*

that people are individuals, rather than manifestations of a particular attribute, such as ethnicity. This results in an abhorrence of treating people as a means to an end.⁹

That recognition may be expressed through statute and case law — enforceable rules that valorise some identities, signal that abuses of rights are impermissible and invoke duties. Recognition may, however, be manifested through small acts of kindness and respect that are not determined by statutes.¹⁰ It involves an ethic of personal responsibility that is discernable in classical philosophy, and in contemporary rights theory.¹¹

The ethic is one of human rights. It requires awareness on the part of the observer – an engagement by the *viewer* of visual arts rather than merely the creator, distributor, curator or regulator of images. In essence, respect for dignity is not something that is necessarily left to those actors who provide dissemination or curation of images. It is not readily addressed in terms of law regarding obscenity, offensiveness and intellectual property,¹² or in terms of law fostering political communication,¹³ and the broader exchange of ideas that may affront some members of a pluralist liberal democratic society.¹⁴

If we are concerned with what makes us human and with fostering the flourishing of all people, as observers we thus need to look beyond the canvas and pigment, the pixels in a

Dignity (Springer, 2010) 43; Martha Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (The President's Council on Bioethics, 2008) 351, 357.

⁹ Immanuel Kant, 'Groundwork of the Metaphysics of Morals', in Mary Gregor (ed) *Practical Philosophy* (Mary Gregor trans, Cambridge University Press (The Cambridge Edition of the Works of Immanuel Kant), 1999) 43, 79 [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); see also *Disability Discrimination Act 1992* (Cth); *Privacy Act 1988* (Cth); *Racial Discrimination Act 1975* (Cth).

¹¹ Martha Nussbaum, "'Finely Aware and Richly Responsible": Moral Attention and the Moral Task of Literature' (1985) 82(10) *The Journal of Philosophy* 516.

¹² See, eg *Copyright Act 1968* (Cth); *Summary Offences Act* (NT) s53(1); *Classification of Theatrical Performances Act 1978* (SA) s12; *Criminal Code Act 1899* (Qld) s 228.

¹³ Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; See also Bede Harris, 'Pell v. Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be a Crime?: The "Piss Christ" Case and Freedom of Expression' (1998) 22(1) *Melbourne University Law Review* 217.

¹⁴ Larry Alexander, *Is there a Right of Freedom of Expression?* (Cambridge University Press, 2005) 140; and Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) *Oxford Journal of Legal Studies* 303; But see Guy Carmi, 'Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2007) 9(4) *University of Pennsylvania Journal of Constitutional Law* 958; Cass Sunstein, 'Pornography and the First Amendment' (1986) 4 *Duke Law Journal* 589.

digital display, the scholarship in a catalogue raisonné, or the million dollar figures in an auction report.

IV THE EXPLOITATION OF BODIES

Consider Andy Warhol's *Car Crash* series of screenprints, appropriations from tabloid photographs of fatal car accidents. If you are an investor, the prints are both a useful hedge against inflation and a demonstration of the purchaser's membership of a cultural elite, someone whose tastes in art are more edgy than those with a Warhol *Flowers* or *Liz Taylor* print on the wall.¹⁵ An observer who looks beyond Warhol's fluorescent colours might recognise, however, that each image features the mangled bodies of real persons — individuals who had connections to parents, colleagues, friends,¹⁶ and were not wholly fictive, such as Rembrandt's *Ganymede* being hauled aloft by a paedophilic Zeus, or Botticelli's *Birth of Venus*.¹⁷

It is an art of exploitation, based on disregard for those in each crash and their survivors. It sits along contemporary gawker images by professional and citizen journalists that exploit the spectacle of accidents and natural disasters for the purposes of infotainment (and mass media revenue) and that are weakly condemned by regulators, such as the Australian Communications & Media Authority for breaching community standards that are attributable to human rights.¹⁸ Warhol for example produced a similar series of prints featuring the electric chair.¹⁹ Perversely, while we might condemn tabloid publishers and broadcasters or more effectively exercise our responsibility by denying them our patronage, images in curatorial institutions and upmarket art books rarely attract the same averted gaze.

¹⁵ *Green Car Crash* sold for US\$72 million in 2007. *Silver Car Crash* sold for US\$105 million in 2013; BBC News, 'Andy Warhol Auction Record Shattered' *BBC News* (online), 14 November 2013 <<http://www.bbc.com/news/entertainment-arts-24937683>>.

¹⁶ Gilbert Meilaender, *Neither Beast Nor God: The Dignity of the Human Person* (Encounter Books, 2009) 5.

¹⁷ Margarita Russell, 'The Iconography of Rembrandt's "Rape of Ganymede"' (1977) 9(1) *Simiolus: Netherlands Quarterly for the History of Art* 5; Leonard Barkan, *Transuming Passion: Ganymede and the Erotics of Humanism* (Stanford University Press, 1991); Charles Mack, 'Botticelli's Venus: Antique Allusions and Medicean Propaganda' (2002) 28(2) *Explorations in Renaissance Culture* 207.

¹⁸ See eg *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s11; *Broadcasting Services Act 1992* (Cth) Sch 5; *Privacy Act 1988* (Cth) s7B.

¹⁹ Bennett Capers, 'On Andy Warhol's "Electric Chair"' (2006) 94(1) *California Law Review* 243; Michael Golec, 'Media Aesthetics, Sense Perception, and Andy Warhol's Blue Electric Chair' (2009) 4(1) *The Senses and Society* 23.

Likewise, Alberto Korda's *Guerrillero Heroico*, that is, the photograph of Che Guevara that has been relentlessly reproduced on posters, bags and t-shirts,²⁰ functions as a low-cost signifier of the bearer's hipness, potentially as an indicator of a leftist affinity in which association with the like-minded is a substitute for activism founded on a recognition of personal responsibility. As an embodiment of what Thomas Frank dubbed 'cool', it is at odds with consideration of human rights abuses by regimes of the Left and Right in Latin America, including killings by Guevara, and the social conditions that fuelled those abuses.²¹

Fewer consumers have used Nick Ut's 1962 photograph *Napalm Girl* as decoration.²² We might wonder, however, whether some people have come to regard Kim Phuc, depicted naked and screaming as she ran from bombing in the Vietnam War, as emblematic rather than a real person — a symbol of bad policies (and worse technologies) rather than someone who had a previous and subsequent life, or someone who was a person rather than an icon. Is Ut's image different to that of Eddie Adams' 1968 photograph *General Nguyen Ngoc Loan Executing a Viet Cong Prisoner in Saigon*, which is just as iconic, just as unsettling and as scholars such as Andrew Friedman have argued, somewhat more complicated than a homicide.²³

Phuc's dignity is recognised through attribution. That is, we know her name. This is more than can be said for the humans whose remains appear in Eduard Pernkopf's *Topographische Anatomie des Menschen* (Anatomical Atlas). It is a comprehensive authoritative reference of work that is a medical and artistic masterpiece. It is also a successor of landmark works such as Vesalius' 1543 *De Humani Corporis Fabrica Libri Septem*, and profoundly troubling and emblematic of tensions within the law.²⁴ Editions of Pernkopf, until recently, featured Nazi symbols – a reminder that distinguished

²⁰ Michael Casey, *Che's Afterlife: The Legacy of an Image* (Vintage, 2009); See generally Thomas Frank, *The Conquest of Cool: Business Culture, Counterculture, and the Rise of Hip Consumerism* (University of Chicago Press, 1997).

²¹ Winifred Tate, *Counting the Dead: The Culture and Politics of Human Rights Activism in Colombia* (University of California Press, 2007); Thomas Wright, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Rowman & Littlefield Publishers, 2006); Mayra Gómez, *Human rights in Cuba, El Salvador and Nicaragua: A Sociological Perspective on Human Rights Abuse* (Routledge, 2003).

²² Denise Chong, *The Girl in the Picture: The Story of Kim Phuc, the Photograph, and the Vietnam War* (Penguin, 2001); Nancy Miller, 'The Girl in the Photograph: The Vietnam War and the Making of National Memory' (2004) 24(2) *JAC* 261.

²³ Andrew Friedman, *Covert Capital: Landscapes of Denial and the Making of U.S. Empire in the Suburbs of Northern Virginia* (University of California Press, 2013) 196.

²⁴ Charles O'Malley, *Andreas Vesalius of Brussels, 1514-1564* (University of California Press, 1964).

clinicians, philosophers and lawyers disregarded their duty to humanity by actively embracing a system of belief that denied human rights. More disquietingly, Pernkopf and his illustrators appear to have used concentration camp inmates as their subjects, with controversy over the past two decades, including suggestions that some of the people who appear in the Atlas were killed to order.²⁵

We do not know the names of all of the people who were dissected and illustrated by Pernkopf's team. They are inadequately memorialised as victims of a regime in which humans — contrary to Kant's ethic of respect — were regarded as a means to an end and others not recognised as actual people.²⁶ Can we comfortably use such fruit from a poisonous tree? Is the Atlas something akin to Warhol's casualty images? Is it sufficiently abstract that it should not be regarded by the viewer with distaste and that is wholly outside frames of reference, such as personality rights?²⁷

V US AS VIEWERS

One response is that in reading the Pernkopf Atlas, we should take a moment to contemplate the source of the illustrations and indeed wonder about how other people came to be on the slab and thence in the illustrations in independent anatomical works. There are no easy answers and privacy scholars are, for example, in disagreement about the identification of people whose photographs appear in more recent anatomical or diagnostic texts.²⁸ Is anonymity antithetical to dignity? Should we, as an indicator of

²⁵ Pieter Carstens, 'Revisiting the Infamous Pernkopf Anatomy Atlas: Historical Lessons for Medical Law and Ethics' (2012) 18(2) *Fundamina: A Journal of Legal History* 23; Richard Panush, 'Nazi Origins of an Anatomy Text: The Pernkopf Atlas' (1996) 276(20) *JAMA* 1633; Chris Hubbard, 'Eduard Pernkopf's Atlas of Topographical and Applied Human Anatomy: The Continuing Ethical Controversy' (2001) 265(5) *The Anatomical Record* 207; William Seidelman, 'The Legacy of Academic Medicine and Human Exploitation in the Third Reich' (2000) 43(3) *Perspectives in Biology and Medicine* 325.

²⁶ Sabine Hildebrandt, 'Research on Bodies of the Executed in German Anatomy: An Accepted Method that Changed During the Third Reich. Study of Anatomical Journals from 1924 to 1951' (2013) 26(3) *Clinical Anatomy* 304; See also Sabine Hildebrandt, 'The Women on Stieve's List: Victims of National Socialism Whose Bodies Were Used for Anatomical Research' (2013) 26(1) *Clinical Anatomy* 3.

²⁷ Hannes Rösler, 'Dignitarian Posthumous Personality Rights: An Analysis of US and German Constitutional and Tort Law' (2008) 26(1) *Berkeley Journal of International Law* 153; Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2006); Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press, 2008).

²⁸ Bruce Baer Arnold, 'Death and Indignity' (2011) 7(10) *Privacy Law Bulletin* 134; Samuel Terilli and Sigman Spichal, 'Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions' (2005) 10(3) *Communication Law and Policy* 313; Clay Calvert, 'The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture' (2006) 26 *Loyola Los Angeles Entertainment Law Review* 133.

respect, be acknowledging the names and other identifying details of those people, or rely on anonymity as a means of minimising distress to their survivors?

What happens if people have volunteered their bodies for plastination in an exhibition by anatomical entrepreneur Gunther von Hagens?²⁹ Are visitors to what one critic described as a contemporary freak show complicit in a disregard of dignity, particularly given controversy over the entrepreneur's sourcing of bodies from China? What of the *Visible Person Project*, in which a US death row prisoner was digitised post-mortem after being carefully sliced into 1 871 one-millimetre sections with the resultant files being released on the internet?³⁰ We know the name of the prisoner (Joseph Paul Jernigan), so he is not anonymous, but there are ethical questions about the validity of his consent and about the appropriateness of using a prisoner as the basis for a data file or indeed for any research.³¹

Géricault's 1819 *Raft of the Medusa*³² pictures a group of desperate, desolate people adrift on the high seas after administrative failure, cowardice, murder and cannibalism. His contemporary Jules Michelet described the work as:

France herself, our whole society is on that raft ... a portrait so cruelly true that the original refused to recognise herself. People drew back before this terrible picture; they passed it quickly; they tried not to see it, not to understand it. 'This picture is too sad, there are too many dead people; could he not have made a gayer shipwreck?'³³

²⁹ Lawrence Burns, 'Gunther von Hagens' Body Worlds: Selling Beautiful Education' (2007) 7(4) *The American Journal of Bioethics* 12; T. Christine Jespersen, Alicita Rodríguez and Joseph Starr (eds) *The Anatomy of Body Worlds: Critical Essays on the Plastinated Cadavers of Gunther von Hagens* (McFarland, 2008); Yechiel Michael Barilan, 'Bodyworlds and the Ethics of Using Human Remains: A Preliminary Discussion' (2006) 20(5) *Bioethics* 233.

³⁰ José Van Dijck, 'Digital Cadavers: The visible human project as anatomical theatre' (2000) 31(2) *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences* 271; Catherine Waldby, 'Revenants: The Visible Human Project and the Digital Uncanny' (1997) 3(1) *Body and Society* 1.

³¹ Sabine Hildebrandt, 'Capital Punishment and Anatomy: History and Ethics of an Ongoing Association' (2008) 21(1) *Clinical Anatomy* 5; Catherine Waldby, *The Visible Human Project: Informatic Bodies and Posthuman Medicine* (Psychology Press, 2000); Grant Kester, 'Aesthetics After the End of Art: An Interview With Susan Buck-Morss' (1997) 56(1) *Art Journal* 38; Meredith Wadman, 'Ethics Worries of Execution Twist to Internet's 'Visible Man'' (1996) 382(6593) *Nature* 657.

³² Christopher Murray, 'Raft of the Medusa' Christopher Murray (ed) *Encyclopedia of the Romantic Era 1760-1850* (Routledge, 2004) 923; Jonathan Miles, *Medusa: The Shipwreck, The Scandal, The Masterpiece* (Pimlico, 2014); Albert Alhadeff, *The Raft of the Medusa: Géricault, Art, and Race* (Prestel, 2002).

³³ For the text of one version of Michelet's 1848 lecture, see Francis Klingender, 'Géricault as Seen in 1848' (1942) 81(475) *The Burlington Magazine* 254, 255.

From a human rights perspective we can see the *Raft* as a striking (albeit through the passage of time now illegible) condemnation of institutional and personal failure. The ethic of individual responsibility espoused by Nussbaum and Rawls cannot force people to look at art or derive a particular meaning from images. Much of the literature about the *Raft* accordingly centres on academic debate about genre, artistic traditions and aesthetic values.

In contemplating the *Raft*, *Car Crash*, *Guerillero* and other works, we might acknowledge that human rights law has its limits. Responsibility sits alongside, rather than being wholly determined, by law. It requires an engagement with questions about free expression. The real challenge for observers encountering images is to be responsive, to be sufficiently self-aware and imaginative, in order to look beyond the surface and be empathetic to people who are depicted in those images or whose beliefs motivated those images. A respect for dignity would, for example, encompass an awareness, however limited, of what it might be like to be in danger on an 1819 raft or a 2015 refugee vessel off the coast of North Australia. More startlingly, it would encompass a sense of why people make what we regard as ethically repugnant decisions.

VI CONCLUSION

This responsiveness is a duty of anyone in a liberal democratic state. It is of importance for anyone who teaches, writes about or practices law. The previous paragraphs have cautioned about the abstraction evident in many images, the disregard by Warhol for example, of the dignity of people whose deaths were convenient and profitable topics for artistic expression. From a law reform and human rights perspective, it is important to recognise that the abstraction evident in much engagement with the visual arts is also apparent in legal teaching. That teaching is concerned with abstractions, principles, exemplars and modes of ‘thinking like a lawyer’. Distance from the subjects of law insulates students and practitioners from realities that they find painful and confronting. We might ask whether a closer engagement with questions about dignity — an awareness of flesh and blood, pain and happiness, will result in a more humane legal

system, alongside an acknowledgement of art's power as both an affirmation of dignity and exhortation against abuse?³⁴

³⁴ See, eg, Goya's 1810-1820 *Los Desastres de la Guerra* (an echo of Callot's 1633 *Les Grandes Misères de la guerre*), where it can be viewed as a value-free illustration, as a comforting demonstration that 'we' are different or as an encouragement – like sites such as Auschwitz and Hiroshima – to prevent future atrocity, beginning with empathy for the people whose suffering was depicted by those artists.

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NOTES FROM UNDERGROUND: ARTISTIC RISK AND POTENTIAL IN THE NEW YORK SUBWAY

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New York City lives by public transit and for thirty years its underground commutes have been illuminated with spontaneous, round-the-clock, freelance artistic performance. That public right to perform, granted by a forward-looking court decision in 1985, has thrilled New Yorkers and defined the subway for visitors. Despite this, the legal status of performance has remained unclear to many city residents, engendering official harassment of many performers. Sadly the astounding success of New York City's tolerant performance regulations has garnered little concern or attention among transit authorities and urban planners to date.

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I INTRODUCTION

On the occasion of the 30th anniversary of the legalisation of subway performance, this article will examine the causes of common misunderstandings of New York City's subway performance culture, with a particular focus on the tension between freelance performers and the Metropolitan Transportation Authorities ('MTA') performance program, Music Under New York ('MUNY'). Ultimately, it will examine the future of subway performance, asserting that permissive public performance policies — like those of New York City — are likely to gain popularity and may deeply impact the visibility of art and music in urban space.

II REVIEWING 30 YEARS

It is predictable that in a space with such enticing acoustics, music found a home in New York City's subway tunnels.¹ The early documentation of this musical history — a smattering of written references, official prohibitions, and occasional pop cultural references — hints at, rather than establishes, the scope and popularity of pre-legal performance.²

By the early 1980s, the social and economic conditions were fertile for subway performance to become the rule rather than the exception. Stephen Witt, a guitarist who began performing two years before the legalisation in 1983, observes that he was not alone and that public appreciation made his work good business.³ It was clear by the early 1980s, there were sufficient performers and public support to move from illicit to approved status.

The beginning of constitutional protection came in the spring of 1985. Roger Manning, a guitarist and anti-folk musician, received a summons for “entertaining passengers”. With the support of the New York Civil Liberties Union, he contested the charge on First

¹ See Susie J Tanenbaum, *Underground Harmonies* (Cornell University Press, 1st ed, 1995) 40-47.

² In an unusually prominent role, subway performance is featured on the cover of Simon and Garfunkel's 1964 album *Wednesday Morning, 3 AM*; Simon & Garfunkel, *Wednesday Morning, 3 A.M* (Columbia Records, Tom Wilson 1964).

³ Email from Stephen Witt to Matthew Christian, 14 March 2015.

Amendment grounds. The court found in his favour, establishing that acoustic freelance music was constitutionally protected on transit authority property.⁴

This constitutional protection led the MTA — largely thanks to the efforts of guitarist Lloyd Carew-Reid and his advocacy group Subway Troubadours Against Repression⁵ — to permanently revise its rules to permit artistic performance.⁶ Since that revision in 1985, no permit or official approval is required to perform.

Since 1985, artistic performance has become one of the most positively viewed aspects of subway ridership in New York. Even on-train performances — unlike platform performances, on-train are specifically prohibited by MTA rules — exceeded 50 per cent approval ratings.⁷ Behind the statistics remain millions of personal stories and a daily total of an estimated US\$15 000 in donations.⁸

Ultimately, the great experiment of legal, permit-free public performance came out in favour. Images of subway performers have defined advertising,⁹ television,¹⁰ and film,¹¹ and contributed warmly to public regard for the subway. Most significantly, perhaps, these performances have offered every New Yorker the chance to hear world-class music of a broad range of styles, all for an admission price of a single fare.

III CURRENT CONDITIONS

Despite both the firmly established legal protection and the public popularity of subway performance, the musicians themselves remain at risk. Even those who follow MTA

⁴ *People v Manning* (NY Ct Crim App, No 5N038025V, 1985).

⁵ Matthew Christian, '1985-1995: Forgotten History of Activism' on Matthew Christian, BuskNY (31 March 2015) < <http://buskny.com/2015/03/31/1985-95-forgotten-history-of-activism/>>.

⁶ See *Official Compilation of Codes, Rules and Regulations of the State of New York*, Admin Code, 1050.6(c) (1989).

⁷ The New York Times 'On Subway Performers, The Straphangers Have Spoken', *The New York Times* (New York) 10 February 2012.

⁸ Conservatively, this figure assumes roughly 300 performances per day, or six in each of roughly 50 core performance locations or "spots". Typically, each performance might last 2-3 hours and see an average earnings rate of US\$20.

⁹ *Different Drummer* (Directed by Spike Lee, Baker Street Advertising, 1991).

¹⁰ *Louie: Subway/Pamela* (Directed by Louis C.K, 3 Arts Entertainment, 2011).

¹¹ *The Visitor* (Directed by Thomas McCarthy, Participant Media, 2007).

regulations to the letter are periodically ejected from stations by police, given expensive tickets and fines or even arrested.¹²

According to many observers, this harassment is a result of inadequate training of police and station agents. Illustrating the aggressive policing practices in New York City and across the United States, a video of the wrongful arrest of one subway performer, Andrew Kalleen, reached over 1.5 million online views in October 2014.¹³

Another factor contributing to harassment of subway performers is the ambiguity created by the MTA's subway performance program, Music Under New York. Shortly after *People v Manning*,¹⁴ MUNY began auditioning performers on a yearly basis. Those who are chosen are provided with a promotional banner, and are scheduled for specific time slots in high traffic stations. While MUNY membership does not grant any legal right, in the public eye MUNY is often perceived as a required permit, freelance performers are often assumed to be illicit or, at best, unofficially sanctioned.

This belief is a major cause in the arrests of freelance performers. In 1991, Susie Tanenbaum found during a survey of prospective MUNY members at the annual audition, that '10 of 12 candidates said they wanted to join MUNY at least in part to escape the police harassment that is directed against freelancers'.¹⁵ More recently, media coverage of MUNY's annual audition has often erroneously implied MUNY membership to be a legal requirement.¹⁶ Inaccurate reporting has led many New Yorkers to believe that some form of MTA permit is required. During a recent symposium on art and urban space at Fordham University's Urban Law Centre, I asked conference attendees for a show of hands on their beliefs regarding the permit requirement. An overwhelming majority affirmed the incorrect belief that a permit is required, with only a handful

¹² See, eg, Email from Natalia Paruz to Matthew Christian, 9 February 2012; Anne Craig, 'Subway Idol Arrested' on The Eastwind Online, *NYC Fox 5* <<http://www.theoeastwind.com/video/freedomExpression.html>>; Lauren Evans, 'Man Arrested for Playing Violin in Subway Station' on *Gothamist* (27 July 2013) <http://gothamist.com/2013/07/27/violinist_arrested_for_playing_viol.php>; Cady Drell, 'Why Was This Subway Musician Arrested For Playing Guitar?', *Rolling Stone* (online) 20 November 2014 <<http://www.rollingstone.com/music/features/subway-musicians-arrested-20141120>>.

¹³ BuskNY, 7/27/13 *Wrongful Arrest for Violin Playing, Full Footage* (25 July 2013) BuskNY <<https://www.youtube.com/watch?v=TgeMApMUJTk>>.

¹⁴ (NY Ct Crim App, No 5N038025V, 1985).

¹⁵ Tanenbaum, above n 1, 143.

¹⁶ Kate Hinds, 'Would-Be Subway Musicians Vie for Right to Be Legit', *WNYC* (online), 16 May 2012 <<http://www.wnyc.org/story/209897-would-be-subway-musicians-audition-right-be-legit/>>.

correctly asserting that members of the public can perform, inevitably this has resulted in wrongful arrests of freelance performers.¹⁷

MUNY has been criticised for contributing to, or even creating, the misconception that freelance performance is illegal. A key criticism is that MUNY serves the MTA's interests more than the public's. Susie Tanenbaum writes that the MTA created MUNY with more than beautification in mind, Tanenbaum goes on to say that it appears to displace and, in turn suppress freelance subway music.¹⁸ Freelance subway performers who protested the 2015 MUNY audition,¹⁹ note that despite ongoing harassment of legal freelancers, the MUNY website makes no mention to the legality of freelance performance.²⁰

IV NEXT STOPS: FREELANCE OR AUDITIONED? OVERCROWDING AND BEYOND

As the 30th anniversary of New York City's great experiment in permitting freelance performance, 2015 offers a moment to reflect on the future of subway performance, and of public performance in urban spaces more generally. This section will address several concerns faced by performers, including the negative effects of MUNY and of overcrowding. It will also draw larger conclusions for other cities and transit systems and will reflect on the role that subway performance may have in a music industry.²¹

The first question is whether promotional programs such as MUNY contribute to or detract from the quality of public art in subway space. To be sure, arguments can be made for MUNY — it facilitates the entry of well-established performers into subway space by ensuring them a certain amount of publicity and a scheduled place to perform.²²

Still, the scope of MUNY's contribution is limited. According to its own promotional materials, MUNY organises 'over 7500 annual performances at 30 locations',²³ or on a daily basis, some-21-odd performances. In a subway system with some 468 stations

¹⁷ Musician arrested for singing in the subway, BuskNY, above n 13.

¹⁸ Tanenbaum, above n 1, 133.

¹⁹ Steve Witt, 'MUNY Audition and Informational Protest' on *Kings County Politics* (19 May 2015) <<http://www.kingscountypolitics.com/bklyn-lawmakers-on-the-move-may-19/>>.

²⁰ MTA, *Facts About the Program*, Metropolitan Transit Authority <<http://web.mta.info/mta/aft/muny/factsheet.html>>.

²¹ Simon Frith, 'Live Music Matters' (2007) 1(1) *Scottish Music Review*, 2.

²² See Tanenbaum, above n 1, 145.

²³ MTA, above n 21.

open around the clock, MUNY members account for a tiny percentage of the total number of performers.²⁴

Consequently, the vast majority of performances are by freelancers. Freelance musicians suffer negative implications from MUNY by both lowering the status of freelancers relative to MUNY members, and by placing freelancers at risk for wrongful tickets, ejections, and arrests by police who believe a MUNY “permit” to be required.

In addition to the performers themselves, performance quality is negatively affected by MUNY — by way of domino effect the quality of freelance performance declines in the face of costs imposed by wrongful harassment. As Susie Tanenbaum writes, ‘official performance frames ... are reducing the amount and variety of music underground’.²⁵ Consequently, MUNY no longer contributes positively enough to subway performance to justify its existence in New York City. Its elimination would serve to promote the safety, equality, and musical quality of subway performance as a whole.

Another significant concern faced by subway performers in the near future is overcrowding. This has long been a point of concern. As early as 1983, Stephen Witt expressed appreciation for the limited number of competing performers, since they freed up better performance locations, informally known as “spots”.²⁶ As legalisation increased the number of active performances, , spots have required increasing amounts of search time.

Importantly, overcrowding affects performance quality as well as performers. If competition increases greatly in highly desired spots, as some observers have suggested, it will raise the externality costs ‘in the form of search costs and foregone tips’,²⁷ perhaps sufficiently to disincentivise more talented musicians. Plausibly, this competition could discourage talented musicians from seeking spots at all. Still more practically, competition can lead to strife between performers over perceived monopolisation of preferred spots, leading performers to focus more on competition than on music-making.

²⁴ See, New York Times, above n 7, the conservative estimate of 300 daily performances.

²⁵ Tanenbaum, above n 1, 219.

²⁶ Witt, above n 3.

²⁷ James Graham Lake, ‘Demsatz Underground: Busking Regulation and the Formation of Property Rights’ (2012) 87(4) *New York University Law Review* 1121.

Still, there are factors working against overcrowding as well. Rapid growth in subway ridership does not only increase traffic in central stations, but also raises ridership (and affluence) in stations previously too “slow” for performers to consider.²⁸ This new financial viability generates performance in stations where, as little as a decade ago, live music was unheard of.

Despite the risk of continued competition for main stations, the general outlook for performers is positive. Of the MTA's 468 stations, few are currently used regularly by performers. Consequently, there is significant room for new performance locations as ridership continues to grow.

V FINAL THOUGHTS

Subway musicians have attracted increasing explicit attention and support from their audiences. In addition to notable viral videos created within,²⁹ and without³⁰ the performing community, performers have benefit from institutional publicity through performance series such as Subway Sets and Buskerball apps like Buskr, and independent media coverage. All of these future initiatives — largely unheard of a decade ago, point to a sustainable popularity. The quantity and quality of subway music thus seems likely to grow in New York City and perhaps to elicit imitation in other transit systems around the world.

The model of unrestricted public performance encountered in the New York City subway may do even more than influence other transit systems. If the subway, as the public urban space *par excellence*, provides a platform for performers to find revenue, a fan base, and a constant audience, it may well be the model of a new, more deeply sustainable role for artists and musicians in society at large. If independent artists have found millions of fans in the subway alone, which results in art, civic engagement, and community it may also result in a city where every street and sidewalk provides a new stage for performers.

²⁸ *2013 Ridership Reaches 65-Year High* (24 March 2014) Metropolitan Transit Authority <<http://www.mta.info/news-subway-ridership-l-r-g-b-d-4-7/2014/03/24/2013-ridership-reaches-65-year-high>>.

²⁹ *Coyote and Crow at Bedford Ave* (4 December 2014) Jukin Media Verified <<https://www.youtube.com/watch?v=g1tVbD2aQ7E>>.

³⁰ Christopher Bucktin, ‘U2's Latest Gig: Bono and the Boys Gisguise Themselves to Go Busking on the New York Subway’, *The Mirror* (online) 6 May 2015 <<http://www.mirror.co.uk/tv/tv-news/u2s-latest-gig-bono-boys-5648823>>.

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THE WRITING IS ON THE WALL: AN ASSET-BASED APPROACH TO STREET ART

JARROD LINKSTON WHEATLEY *

This paper is written from the perspective of Street Art Murals Australia ('SAMA'), a social enterprise which takes an asset-based and community development approach to street art. SAMA fosters a creative outlet for youth and encourages community involvement through the development of legal avenues of street art. SAMA also recognises the importance of a vibrant street art culture to a more inclusive society, urban renewal and beautification, and creative economies. The current legal and regulatory measures concerning street art, taken by local and state governments in Australia, could be replaced with an approach which recognises the benefits of a self-regulating street art culture and community public art intervention. Society has much to gain by placing street art in the public art domain rather than relying purely on punitive measures. Young street artists deserve to be able to express their artistic and creative freedom in public spaces.

* Jarrod Wheatley has worked in the social sector since 2005, running a youth centre and working internationally with refugees. He is the founder and Coordinator of Street Art Murals Australia and is also establishing a new model of out-of-home care in Australia.

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I INTRODUCTION: WHAT IS SAMA?

Street Art Murals Australia ('SAMA') is a social enterprise. We act as a link between talented street artists and the wider community, with the broad aim of building a more inclusive society. SAMA offers three services: murals, education programs, and graffiti management consultancy. We believe in the legitimacy of street art, and see it as benefiting the whole community. SAMA has grown out of *Blue Mountains Street Art Collaborative*, working with young people in the Blue Mountains of New South Wales. Through the development of legal avenues for aerosol art, SAMA validates the place of young people in our society, increases professional work opportunities for street artists, and breaks down barriers between often marginalised young people and the dominant community.

II THE LEGAL CONTEXT IN WHICH SAMA OPERATES

Creating legally sound street art in Australia is generally difficult. A complex maze of laws and regulations make legal public aerosol art almost completely inaccessible to young people. Imagine for a moment you are a talented 17 year old street artist living in New South Wales and you want to paint legally. The first issues you are likely to encounter are around the purchase and transportation of aerosol cans. Under section 8 of the *Graffiti Control Act 2008* (NSW), it is illegal for people to sell you cans unless they believe, on reasonable grounds, that you have a defined lawful purpose to use them. Similarly, you cannot have them in your possession on public land unless you have a lawful purpose. The burden of proof for the latter lies with you, making any activity not organised by an adult exceedingly difficult. If you manage to convince a local business

owner or resident to consent to having their wall painted, which is no small task, it is highly likely that the artwork also needs to be approved by local council if it is visible from public land. This usually means submitting a Development Application, which entails a considerable amount of waiting time, money and ability to understand how to document and fulfil the legal requirements. This step often proves too difficult for emerging and established aerosol artists alike.

Given the lack of legal opportunities, choosing to paint illegally can have very severe consequences. In New South Wales ('NSW') if a young person is caught painting or possessing a graffiti implement, they are sent directly to the court system. Under the *Graffiti Control Act 2008* (NSW) police no longer have the option of issuing a warning, caution or youth conference as they previously could under the *Young Offenders Act 1997* (NSW). The court can hand down punishments including fines, community service orders, driving license orders and incarceration.¹

This narrative serves as an example of how our society responds to graffiti and street art. The juxtaposition between our response to young people painting illegally, and our response to youth physical violence (which is still dealt with under the *Young Offenders Act 1997* (NSW)) is culturally illuminating. Graffiti, as a visible property crime, is dealt with in a disproportionately severe manner.

What is the result of this draconian approach to graffiti and street art? It costs taxpayers vast amounts of money. It has been estimated that graffiti costs the NSW Government 100 million dollars a year.² Taxpayers would be right to ask what the return on this annual investment has been. Firstly, the harsh legal response increases the criminalisation and marginalisation of young people. Secondly, the 'long and futile war on graffiti' has not been won.³ While there has been a slight decline in incidents reported

¹ New South Wales Government - Justice, *Graffiti and the Law* (9 January 2015) <http://www.crimeprevention.nsw.gov.au/Pages/cpd/protectcommunity/graffitivandalism/the_laws_relatating_to_graffiti.aspx>.

² Rachel Callinan, 'Dealing with Graffiti in New South Wales' (Briefing Paper No 8/02, Parliamentary Library, Parliament of New South Wales, 2002) 9.

³ Kurt Iveson, 'War is Over (If You Want It): Rethinking the Graffiti Problem' (2009) 46(4) *Australian Planner* 24.

to the police,⁴ it can be argued that fewer reports to police may only indicate more community acceptance of graffiti rather than a meaningful reduction in quantity.

Finally, this approach reduces the quality of the graffiti and street art we see. Due to surveillance, artists may not have the time to create complex pieces of art. Nor do they have the incentive, as they know it is likely to be quickly removed regardless of its quality. Artists continue to paint, but with more simple “tags” and “throw-ups”, resulting in less complex art for young graffiti artists to aspire to.⁵ This peer motivation amongst artists should not be underestimated as it is a powerful force dictating the quality of the art we see in public spaces. Zero tolerance policies have a great influence on the quality of the street art, not the quantity. The current approach is financially and culturally costly.

It is in this context that SAMA provides the legal infrastructure to allow emerging and established artists to paint legally. We support the artists with our Copyright Agreement, Public Liability Insurance, Can Control Policy, as well as negotiating consent, processing payments, and development applications to make sure the process is legally sound.

III CHANGING COMMUNITY PERCEPTIONS AND BREAKING DOWN BARRIERS

People often fear what they do not understand. This is also true with graffiti and street artists. However, it is SAMA’s experience that with education and personal contact, the community as a whole supports creating legal avenues for aerosol art. This has taken place during every mural or education program SAMA has conducted.

This happens for a number of reasons. Firstly, the issue is humanised — the business owner or resident meets active aerosol artists. The subject now has a “face” for them, and as a result unfounded assumptions are often dispelled. Secondly, they see the skill involved in painting and are generally amazed. Thirdly, they see value in the product which has been created. This may be on aesthetic grounds or for financial reasons, such as improved business image or graffiti management benefits. Ultimately, coming into

⁴ Between 2009 and 2013, reports to NSW Police of malicious damage to property fell by 7per cent; Derek Goh and Jessie Holmes, *New South Wales Recorded Crime Statistics 2013 (2014)* NSW Bureau of Crime Statistics and Research <<http://www.bocsar.nsw.gov.au/Documents/rcs2013.pdf>> 14.

⁵ Iveson, above n 3, 25.

contact with aerosol art culture results in people rethinking the issue. They realise there is something to be gained by a multi-faceted, community friendly approach, rather than a one-dimensional zero tolerance response.

Similarly, painting legal projects can be a catalyst for change amongst aerosol artists. While illegal painting gains recognition within the subculture, the process of painting legally, being appreciated, and often being paid, has the potential to change the perceptions street artists have of themselves. This validation contributes to them seeing themselves as recognised artists, not only in the eyes of their subculture, but in the wider community. Moreover it highlights their contribution to our society's creative culture and economies — potentially increasing self-esteem and self-worth — and ultimately contributing to mental wellbeing and participation in society. SAMA believes that all street artists should have the opportunity to be legal practitioners of their art form.

SAMA has grown out of a grass roots project where we fostered legal pathways for individual artists. As our scope grew we saw the opportunity to facilitate change on a broader scale, and to promote the legitimacy of street art to the community at large. This shift in community perceptions will make it easier for young street artists to gain validation for their art. Just like individuals, organisations and companies change their perception through contact.

SAMA have worked with groups like Sydney Trains, ING Direct, Pfizer, Kmart, Chambers of Commerce and local and state governments. For example, after running an engagement program that delivered strong cultural outcomes along with considerable savings to their graffiti management budget, a local government recognised the value in supporting legal street art. Similarly, after SAMA has worked with a high school on an education program, their teachers are far more likely to be supportive of their students pursuing aerosol art in the future. SAMA is now approached by a wide variety of groups looking to benefit from legal street art. This may be for financial reasons, to support creative economies and urban renewal, or to improve the quality of life for their staff or citizens.

As more people realise there is nothing to fear from street artists and their art, the debate moves out of the legal paradigm to a broader debate about the role and place of

public art. This is by far the more relevant debate for issues surrounding street art and graffiti. If art is ‘a creative activity, especially painting and drawing resulting in visual representation’,⁶ then it is clear that street art is a form of art. This is true even of the simplest forms of graffiti. While one can debate how aesthetically pleasing a “tag” is, it would be difficult to claim it is less artistic (using the above definition) than calligraphy, with its technical skills of can/marker control and font creation. A visual representation is art, whether it is created with acrylic paint or enamel spray paint, whether it is hung in a gallery or on an external wall.

In this sense vandalism can be art: If someone paints an artistic work on government property without permission it is both vandalism and art.⁷ The question is not when does vandalism become art, or when does graffiti become street art, it is instead: where do we want this art? In this context the discussion is about whether young people deserve the dignity of having their voice and art in the public space. It is about how organisations can effectively work with street art, rather than spending substantial time discussing its legitimacy. SAMA’s work reframes the discussion as a public art debate rather than a legal one.

IV BALANCING CULTURE

All SAMA’s operations rely on our ability to act as the link between aerosol artists and the greater community. We can only bridge the gap between these two groups if we understand both cultures and their paradigms.

SAMA looks to exceed the community’s expectations on both legal and ethical fronts. We do this by operating within a local area’s legal framework, and by making sure all of our operations clearly draw the distinction between legal and illegal art. For example, we have taught Aerosol Art as a term-long class in public high schools in conjunction with the NSW Police. This is only possible because all partners understand that we are not

⁶ Bruce Moore (ed), *The Australian Oxford Dictionary* (Oxford University Press, 2nd ed, 2004).

⁷ Whether street art and graffiti are art or not has been widely debated, and many authors have outlined various definitions; see, eg, Kim Dovey, Simon Wolland and Ian Woodcock, ‘Placing Graffiti: Creating and Contesting Character in Inner-city Melbourne’ (2012) 17(1) *Journal of Urban Design* 21, 22; Jessica Irons, *Spray Away: Making the Case for Legal Graffiti as a Legitimate Form of Public Art in the City of Sydney* (Thesis, University of New South Wales, 2009) 15-16; Cameron McAuliffe and Kurt Iveson, ‘Art and Crime (and Other Things Besides ...): Conceptualising Graffiti in the City’ (2011) 5(3) *Geography Compass* 128,130-133; Matthew Lunn, *Street Art Uncut* (Craftsman House, 2006) 3-5.

promoting unlawful acts. Rather, we are teaching an emerging form of art that is appealing to young people who should have the opportunity to pursue it legally.

This, however, would be meaningless if we only understood the community's expectations and had no understanding of how graffiti and street art culture operates outside our project. Without understanding artists' needs and how to respond appropriately to them, we would not be able to maintain their interest and participation. Many community organisations lack the cultural understanding required — they might only give eradication and enforcement information in education programs — or only commission non-street art related designs.

It is restrictive and disrespectful of their artistic style and creativity to ask aerosol art practitioners to paint only historical murals or native bush landscapes, while not seeking a geographical, legal and cultural space for them to pursue their own art and expression. SAMA understands what aerosol artists seek to gain from legal projects, including gaining exposure, creative freedom, financial gain, beautification of their environment, challenging authority, and making a social statement.⁸ It is only once we understand this subculture that we can hope to work effectively with it.

It is this understanding that also enables us to implement graffiti specific 'Crime Prevention through Environmental Design Principles'. Artworks can be designed and placed to reduce vandalism in specific areas. As a result, after painting more than 150 artworks, we are only aware of two which have been painted over in the last seven years.

V THE FUTURE OF AUSTRALIAN STREET ART

While SAMA and other groups have experienced success in changing the perceptions of specific institutions, the overwhelming narrative from local and state governments continues to revolve around eradication and enforcement rather than education, engagement, urban renewal and creative economies. For instance, of the 16 local council submissions to the NSW inquiry into graffiti and public infrastructure, all referred to the

⁸ Jarrod Linkston Wheatley and Peter Adams, *Zero Tolerance: the Street Artists of the Blue Mountains* (Blue Mountains Street Art Collaborative, Lettuce Spray Productions, 2011).

amount spent on eradication rather than positive programs of engagement or the contribution of street art to creative economies and urban renewal.⁹

The government's approach appears to be based only on the assumption that graffiti and street art is detrimental to the community — that it is widely 'perceived as transgressive personal acts of expression signifying social decay and a loss of authorised control.'¹⁰ Many governments in Australia believe this zero tolerance approach will make them look tough on visible crime. These governments, along with companies that have a vested interest in the graffiti eradication industry, continue to perpetuate an image of graffiti as 'an infectious presence of dirt, disease and contagion'.¹¹ Graffiti writers are constructed as 'vandals and thugs roaming the streets out of control'.¹² The language of war and militarism is often used when referring to graffiti policies.¹³

However, this is not the future of Australia's relationship with street art. It is not prudent to continue to spend vast amounts of money on strategies that are not working and fail to capitalise on street art's strengths. An asset-based approach is the future. SAMA is an example of this — we see individuals, particularly young people, who are interested in the creative activity of art as a positive opportunity for engagement and the development of healthy communities. We see street art as a powerful force for inclusion, urban beautification, renewal and regeneration, as well as making a substantial contribution to creative economies.¹⁴ We are a social venture and we receive no government funding to achieve our social mission. All the money to pay for our community work is raised through selling products to individuals and companies who see value in them. Our existence is proof that there is community demand for legal street art.

⁹ Cameron McAuliffe, 'Graffiti or Street Art? Negotiating the Moral Geographies of the Creative City' (2012) 34(2) *Journal of Urban Affairs* 189, 203.

¹⁰ Dovey et al, above n 7, 35.

¹¹ Cameron McAuliffe, 'Legal Walls and Professional Paths: the Mobilities of Graffiti Writers in Sydney' (2013) 50(3) *Urban Studies* 518, 522.

¹² Ibid.

¹³ Kurt Iveson, 'The Wars on Graffiti and the New Military Urbanism' (2010) 14(1-2) *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* 115; Terri Moreau and Derek H Alderman, 'Graffiti Hurts and the Eradication of Alternative Landscape Expression' (2011) 101(1) *The Geographical Review* 106.

¹⁴ Zukin and Braslow have argued that 'despite predominant motifs of grittiness and transgression', the consequences of unplanned and naturally occurring artists' districts are 'higher housing prices, more intensive capital investment, and eventual ... gentrification'. Sharon Zukin and Laura Braslow, 'The Life Cycle of New York's Creative Districts: Reflections on the Unanticipated Consequences of Unplanned Cultural Zones' (2011) 2(1) *City, Culture and Society* 131.

While SAMA promotes and fosters legal avenues for street art, as part of our asset-based approach we also recognise the benefits of a healthy, vibrant graffiti culture — a culture which is currently illegal. For example, we recognise the important role “senior” graffiti writers play within the subculture. Younger writers aspire to the quality of their work. They are respected and shape subculture rules, fostering self-regulation. Both of these factors result in an increase in the overall quality and vibrancy of illegal and legal art alike. Current laws and policies do not work with this aspect of graffiti culture but rather hinder it.¹⁵ In this way we have much to gain from a healthy, legal and illegal, graffiti culture.

Community perceptions of art and creativity, especially in cities, are changing.¹⁶ There is demand for street art products in the dominant culture. Graffiti is viewed by some as art’s creative edge. Austin sees illegal graffiti as ‘a step forward for modern art’ and as an ‘enhancement to contemporary urban living, a welcome growth in the living city’.¹⁷ SAMA is currently working with the University of Western Sydney to test people’s perceptions of street art. Survey results, yet to be published, indicate that the majority of individuals enjoy street art and feel inspired by it. These results build on conclusions by Austin and Sanders that we cannot generalise about graffiti making people feel unsafe.¹⁸ Context and quality play the dominant role in people’s perceptions.

What would our society look like if we took a different approach to graffiti? Could our urban spaces include outdoor galleries that contribute positively to people’s wellbeing? Decriminalisation does not necessarily equal chaos. Iveson and Young have both proposed alternative models of graffiti management.¹⁹ Melbourne’s vibrant laneways provide a limited example. Young outlines the policy struggle in Melbourne to achieve a Graffiti Management Plan which encompasses the dichotomous reality of Victoria’s restrictive *Graffiti Prevention Act 2007*, and the widely recognised economic and social

¹⁵ McAuliffe, above n 9.

¹⁶ See Dovey, above n 7; McAuliffe and Iveson, above n 7, 143.

¹⁷ Joe Austin, ‘More to See Than a Canvas in a White Cube: For an Art in the Streets’ (2010) 14(1-2) *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* 33, 42.

¹⁸ Mark D Austin and Claudia Sanders ‘Graffiti and Perceptions of Safety: A Pilot Study Using Photographs and Survey Data’ (2007) 14(4) *Journal of Criminal Justice and Popular Culture* 292, 316.

¹⁹ Iveson, above n 3; Alison Young, ‘Negotiated Consent or Zero Tolerance? Responding to Graffiti and Street Art in Melbourne’ (2010) 14(1-2) *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* 99, 114.

benefits of laneways filled with an ever-changing array of vibrant art. She argues for a policy which is 'inclusive, balanced, informed and equitable.'²⁰

In its current Graffiti Management Plan, the City of Melbourne has articulated a more collaborative approach for a few selected areas of the City, which involves street artists, residents, and businesses in the decision-making processes.²¹ The ideas of zoning and meaningful collaboration with artists and the community provide real opportunities for this visual culture to be valued. More insights could be gained from research into responses to street art in other cities. The combination of a self-regulating street art culture and community public art interventions could combine to create vibrant urban public spaces.

Our society faces a choice: to continue to criminalise and stigmatise aerosol artists, or to include them in society by placing the debate in the public art domain. Providing people with an avenue for creative expression is a powerful catalyst for positive growth. Social inclusion contributes to the validation of these artists and allows us all to enjoy the benefits of high quality art on our streets.

²⁰ Alison Young, 'Negotiated Consent or Zero Tolerance? Responding to Graffiti and Street Art in Melbourne' (2010) 14(1-2) *City: Analysis of Urban Trends, Culture, Theory, Policy, Action*, 101.

²¹ City of Melbourne, *Graffiti Management Plan 2014-2018* (May 2014)

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ARE MUSICIANS FULL OF IT? THE METAPHORICAL AND FIGURATIVE POWER OF SUBCONSCIOUS COPYING IN COPYRIGHT INFRINGEMENT CASES

JAY SANDERSON* & LEANNE WISEMAN**

Subconscious copying is copyright infringement. In this paper, however, we argue that claims of subconscious copying in copyright infringement cases have significance beyond legal doctrine. Using the recent United States District Court decision involving Pharrell Williams and Robin Thicke’s worldwide hit Blurred Lines as a starting point, we argue that subconscious copying claims have a metaphorical and figurative value that has various dimensions. In this way, claims of subconscious copying draw attention to the creativity, brilliance and genius of musicians. They reinforce the ethereal nature of music creation. They also portray music creation as a burden and a sacrifice, and that only a select few are capable of drawing on their subconscious to create and share music. Perhaps, then, evoking subconscious copying allows musicians to mitigate the harm to their reputation and seek dignity and self-respect; even when they are liable for copyright infringement.

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I INTRODUCTION

On 10 March 2015, a United States District Court jury found that the hit song *Blurred Lines* infringed copyright in Marvin Gaye's song *Got to Give It Up*.¹ The jury awarded Gaye's children over \$US7 million of the profits earned by *Blurred Lines*, which was the biggest hit single in 2013, selling over 6 million digital copies in the United States alone.² While the United States District Court decision has been appealed,³ the copyright infringement case involving Pharrell Williams and Robin Thicke raises a number of general questions around copyright infringement of musical works that do not depend on the specific outcome of the appeal. Firstly, it raises questions about the idea/expression dichotomy, the determination of substantial part, co-ownership, and the culture of "borrowing" in music.⁴ Secondly, it raises questions about the unpredictable and practical consequences of bringing copyright infringement cases before the courts. The Williams and Thicke dispute, for example, helped renew interest in both songs. In the first week of the trial, *Blurred Lines* sold an estimated 6000 digital copies and was streamed nearly 2 million times, and *Got to Give It Up* sold approximately 1300 digital copies.⁵

While these questions deserve closer consideration, they are not the focus of this paper. Instead, our goal is to consider another issue raised by the case — the role played by subconscious copying claims in copyright infringement cases. Pharrell Williams, for

¹ The case was initiated in August 2013 by Williams, Thicke and Clifford Harris Jnr (aka T.I.) to seek a declaration of non-infringement; *Pharrell Williams et al v Bridgeport Music Inc et al, No 13-06004* (CD Cal, 2013). The other defendants in the case, Clifford Harris Jnr (also known as T.I.) and the record label were not liable for copyright infringement.

² Keith Caulfield, 'Justin Timberlake's "20/20" 2013s Best Selling Album, "Blurred Lines" Top Song', *Billboard* (online), 2 January 2014 <<http://www.billboard.com/articles/news/5855151/justin-timberlakes-2020-2013s-best-selling-album-blurred-lines-top-song>>.

³ An appeal was lodged in the United States District Court Central District of California, Western Division on 1 May 2015. One key ground of appeal was the fact that the jury could only consider the sheet music and was not allowed to hear the songs in dispute. The appeal seeks a range of orders including judgement, declaration or a new trial; see Ben Challis, 'Mind The Gap: Songwriters Unsettled as "Uptown Funk" gets Five More Writers', on *The 1709 Blog* (2 May 2015) <<http://the1709blog.blogspot.com.au/2015/05/mind-gap-uptown-funk-gets-five-more.html>>.

⁴ For a discussion of some of these issues, see Charlotte A Tschider, 'Automating Music Similarity Analysis in "Sound-Alike" Copyright Infringement Cases' (2014) 25(2) *New York State Bar Association Entertainment, Arts and Sports Law Journal* 60; Margit Livingston and Joseph Urbinato, 'Copyright Infringement of Music Cases: Determining Whether What Sounds Alike is Alike' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 2012.

⁵ See Victoria Kim, 'Marvin Gaye Children Ask Judge to Bar Sales, Performance of "Blurred Lines"', *Los Angeles Times* (online), 18 March 2015 <<http://www.latimes.com/local/lanow/la-me-ln-blurred-lines-injunction-20150318-story.html>>; Tim Kenneally, "'Blurred Lines" Trial Nearly Doubles Sales of Disputed Marvin Gaye Song', *The Wrap* (online), 9 March 2015 <<http://www.thewrap.com/blurred-lines-lawsuit-nearly-doubles-sales-of-disputed-marvin-gaye-song/>>.

example, told the California United States District Court that he had no intention of copying Marvin Gaye, and that ‘music is magic’ and the song *Blurred Lines* was ‘feel. Not infringement’.⁶ In this article we argue that, while it is no defence for a defendant to claim they did not know they were copying (as neither intent nor knowledge are required for copyright infringement to be established), claims of subconscious copying in copyright infringement cases have a metaphorical and figurative power that has various dimensions.⁷ One dimension of the subconscious copying claim brings with it associations of creativity, brilliance and genius. Another dimension of the subconscious copying claim evokes the burden and sacrifice that artists must bear, and that only limited people are capable of turning their subconscious into a hit song.

In order to make the argument that subconscious copying claims have a metaphorical and figurative power. The first part of the paper briefly sets out the relevant law, and shows how subconscious copying is not an excuse for copyright infringement. The second part of the paper sketches some of the history and thinking around the subconscious mind in psychology, philosophy and art. In so doing, we highlight the perception of the subconscious as magical, mythical, authentic and instinctive. The subconscious copying claim, therefore, has metaphorical and figurative value. Claiming subconscious copying draws attention to the creativity, brilliance and genius of musicians. It reinforces the ethereal nature of music creation. It also portrays music creation as a burden and sacrifice that only a few talented people can bear. In conclusion the third part of the paper suggests that claiming subconscious copying allows musicians to not only mitigate harm to their reputation, but also to seek dignity and self-respect, even when they are liable for copyright infringement.

II SUBCONSCIOUS COPYING IS COPYRIGHT INFRINGEMENT

There are generally two requirements that need to be satisfied in order to establish copyright infringement. First, there must be copying of the copyright work. Without direct evidence of copying, courts will consider indirect or circumstantial evidence of copying. One of the ways that courts determine whether indirect copying has occurred is

⁶ Pamela Chelin, ‘Pharrell Williams Takes the Stand at “Blurred Lines” Trial: “This is the Last Place I Want to Be”’, *The Wrap* (online), 4 March 2015 <<http://www.thewrap.com/pharrell-williams-takes-the-stand-at-blurred-lines-trial-this-is-the-last-place-i-want-to-be/>>.

⁷ See, eg, Patricia Louise Loughlan, ‘Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property’ (2006) 28(2) *Sydney Law Review* 211.

by considering access to the plaintiff's copyright work. Determining whether the defendant had access to the copyright work is a question of fact and requires consideration of numerous factors including the reach or dissemination of the plaintiff's work (for example, through sales and performances), the defendant's background, and dealings with other artists, publishers and record companies.⁸ Secondly, for there to be copyright infringement there must be 'substantial reproduction' of (in Australia) or 'substantial similarity' to (in the United States) the plaintiff's copyright work. In terms of musical works, a range of factors — including sharing elements such as rhythm, pitch, lyrics, cadence and the verse-chorus relationship — will be assessed to determine whether there has been a 'substantial reproduction' or there is 'substantial similarity'.⁹

While copying and substantial similarity/reproduction are needed to establish copyright infringement, intent or knowledge is not.¹⁰ This means that it is no defence to copyright infringement for the defendant to claim that they did not know they were copying, and copyright infringement can arise from subconscious copying.¹¹ Indeed, subconscious copying has been held to be copyright infringement in a number of countries. In the United States, in *Fred Fisher Inc v Dillingham*,¹² the composer of an opera (Mr Kern) was accused of infringing copyright in a piece called *Dardanella*. In finding that the defendant's piece, *Ka-lu-a*, had infringed Fisher's *Dardanella*, Judge Hand accepted that infringement was likely due to subconscious copying. On this point, Judge Hand concluded:

Everything registers somewhere in our memories, and no-one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain 'Kalua', Mr Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before ... Once it appears that another has in fact used the copyright as the source of his production, he

⁸ See, eg, *Three Boys Music Corp v Bolton* 212 F 3d 477 (9th Cir, 2000).

⁹ *Ibid.*

¹⁰ For a discussion of intent and subconscious copying, see Dane S Ciolino and Erin A Donelon, 'Questioning Strict Liability in Copyright' (2001) 54 *Rutgers Law Review* 351; Peter Hastie, 'The Concept of Subconscious Copying: Substantive Law and an Evidentiary Notion' (1995) 6 *Australian Intellectual Property Journal* 16.

¹¹ See Robin Cooper Feldman, 'The Role of the Subconsciousness in Intellectual Property Law' (2010) 2 *Hastings Science & Technology Law Journal* 1; Carissa L Alden, 'A Proposal to Replace the Subconscious Copying Doctrine' (2007) 29 *Cardozo Law Review* 1729; Joel S Hollingsworth, 'Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine' (2000) 23 *Hastings Communication & Entertainment Law Journal* 457.

¹² 298, F 145 (SD NY, 1924). See also *Bright Tunes Music Corp v Harrisongs Music Ltd*, 420 F Supp 177 (SD NY, 1976); *Three Boys Music Corp v Bolton* 212 F 3d 477 (9th Cir, 2000).

has invaded the author's rights. It is no excuse that in doing so his memory has played a trick on him.¹³

In the United Kingdom, it was the case of *Francis Day & Hunter Ltd v Bron*¹⁴ that confirmed that subconscious copying could amount to infringement. In *Francis Day*, the Court of Appeal was asked to consider whether the defendant's song, *Why*, published in 1959, had infringed the copyright in the plaintiff's song *In A Little Spanish Town*, published in 1926. Counsel acting for the plaintiff argued quite forcibly about the need to prevent subconscious copying of musical works, arguing that it was 'necessary to protect the author of the original work, for otherwise (so it was argued) any infringer could escape the consequences of plagiarism by denying that he had done so'.¹⁵ The Court of Appeal made it clear that copyright infringement could occur through subconscious copying.¹⁶ In concluding that there was no evidence of subconscious copying by the defendant in *Francis Day*, the Court of Appeal stressed that whether subconscious copying took place is a question of fact, and thus depends on the circumstances of the case. Furthermore, due to the possibility of the independent creation of similar musical works, strong evidence of subconscious copying is required. Upjohn LJ stated:

To my mind, the possibility that the defendant had heard it, or even played it in his early youth, is a quite insufficient ground upon which it would be proper to draw the inference of unconscious copying. It may be that in the future medical evidence will be available to guide us upon this point, but in the absence of acceptable and probative medical evidence I think it requires quite strong evidence, in a case such as this — where, as I have already pointed out, independent composition is a real practical possibility — to establish, as a matter of probability, that de Angelis's subconscious ego guided his hand.¹⁷

While there are no cases that deal directly with subconscious copying and copyright infringement in Australia, the Full Federal Court of Australia alluded to it in *EMI Songs*

¹³ *Fred Fisher Inc v Dillingham* 298 F 145, 147-148 (SD NY, 1924).

¹⁴ [1963] Ch 587. See also *Poznanski v London Film Production* [1936-45] MacG Cop Cas 107.

¹⁵ *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 617 (Upjohn LJ).

¹⁶ *Ibid* 614 (Willmer LJ).

¹⁷ *Ibid* 620-621 (Upjohn LJ).

Australia Pty Ltd v Larrikin Music Publishing Pty Ltd.¹⁸ When referring to the need for a causal connection, Jagot J stated:

Subconscious copying may infringe copyright. Provided the test of causal connection is satisfied, an intention to take advantage of the labour of another is not required in order for an action for copyright infringement to be sustained.¹⁹

The idea of subconscious copying was considered more fully in *Talbot v General Television Corp Pty Ltd*,²⁰ a case involving confidential information rather than copyright. In late 1976 and early 1977, Talbot disclosed the concept of a television program, to be called *To Make A Million*, and submitted a pilot script to Channel 9. Talbot did not receive a response from Channel 9, however, in April 1977, he became aware that Channel 9 were promoting a segment to be aired on the *A Current Affair* program. The promoted segment had a similar name, content, and format to that presented by Talbot. Talbot alleged that Channel 9 had made use of unauthorised confidential information. In response Channel 9 argued that they did not use Talbot's ideas, and that its segment had been independently conceived and developed. In finding that Channel 9 did in fact make unauthorised use of confidential information the Supreme Court of Victoria made it clear that it did not matter if this had been done subconsciously. Harris J stated:

That a person may come out with a suggestion which he honestly believes to be a novel suggestion of his own, but which can properly be attributed to his mind having subconsciously used information which he had been given in the past and of which he has no conscious recollection.²¹

In summary, subconscious copying is no excuse for copyright infringement. Nonetheless, it is still raised in copyright infringement disputes. There are a number of possible reasons for this. One of the reasons for making a claim of subconscious copying is that it may reduce the amount of damages payable if the defendant is found liable for copyright infringement.²² Another reason for claiming subconscious copying is to mitigate damage to reputation, and to seek dignity and respect in the face of copyright infringement. More

¹⁸ (2011) 276 ALR 35.

¹⁹ Ibid 89-90 [221] (Jagot J).

²⁰ [1980] VR 224. See also *S W Hart & Co Pty Ltd v Edwards Hot Water System* (1984) 159 CLR 466, 472.

²¹ *Talbot v General Television Corp Pty Ltd* [1980] VR 224, 242.

²² *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 625 (Diplock LJ).

specifically, as we will show in the next section, a claim to subconscious copying has a certain metaphorical and figurative value that might embolden defendants to make such a claim.

III THE SUBCONSCIOUS GENIUS

To seek a definition of the subconscious is not within the scope of this paper. Moreover, it would be futile to even try to define and delineate the subconscious. It is however, helpful to make some broad statements about the subconscious. There is little agreement or consensus on the definition or delimitation of the subconscious. Furthermore, the terms unconscious and subconscious are often used interchangeably. Importantly, however, the challenges associated with relying on the notion of subconscious is not lost on the courts. Lord Diplock, in *Francis Day*, pointed out the difficulty of proving subconscious copying and lamented the absence of medical support for such claims:

We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember, not a mere isolated phrase, but a 'substantial' part of the remembered work without remembering that one is remembering.²³

What is the value of eliciting the subconscious? In psychology, the subconscious mind is generally thought to be the part of the mind that we are not fully aware of. While Sigmund Freud tends to be associated with the discovery of the subconscious, the word itself is a variation of the French *subconscient* developed by the French psychologist Pierre Janet (1859–1947). Janet argued that beneath the layers of thoughtful and analytical conscious mind lay an awareness that he called the *subconscient* mind.²⁴ Going even further back in history, Claxton argues that while it was not talked about in the same way (and was given different names) the subconscious has been identified and valued in many cultures and societies — from ancient descriptions of the “underworld”, to “invisible puppets” and theories of neuroscience.²⁵

²³ Ibid 263 (Diplock LJ).

²⁴ Henri F Ellenberger, *The Discovery of the Unconscious: The History and Evolution of Dynamic Psychiatry* (Basic Books, 2008).

²⁵ Guy Claxton, *The Wayward Mind: An Intimate History of the Unconscious* (Little, Brown, 2005).

In the early 20th century, artists picked up the idea of the subconscious. The surrealist movement, for example, borrowed some of the ideas, language, and techniques that focused on the subconscious mind.²⁶ For surrealist artists such as Breton, Ernst, and Dali, creativity was about feeling, not cognition. Indeed, surrealists believed that creativity that came from the subconscious mind was more powerful and authentic than anything produced from the conscious mind. In this way the subconscious was viewed positively, and for almost a century the subconscious mind has held a certain metaphorical and figurative power. The subconscious epitomises instinct and authenticity, and represents a way of creating that is unknowable and inaccessible to most people. The subconscious is: Magical. Powerful. Authentic. Sublime. Instinctive.²⁷ Many artists, therefore, are not fully aware of how they create, or what elements may be contemplated or integrated in their art. Moreover, art is the composition of everything that the artist hears and experiences, whether they are aware of it or not.

Let us return to subconscious copying claims in copyright infringement disputes. The metaphorical and figurative power of the subconscious means that if music emerges from subconscious copying, rather than conscious copying, the musician is hardly to blame. More specifically the metaphorical and figurative power of claiming subconscious copying helps musicians portray themselves as mythical and magical beings. Music is created by the musician, but the musician may not be aware of where the music came from or what was incorporated into it.²⁸ Musicians are merely the outlet or conduit for their creative feelings, experiences and instincts. Further, the music is always there in the musician — partly formed and ready to be shared with an audience. According to Schopenhauer the subconscious is the 'blind driving force' of the universe.²⁹ Notably, the driving force of the subconscious and its role in musical creation has been recognised in copyright infringement disputes. Such beliefs are reflected in comments by Pharrell

²⁶ Gerard Durozoi and Alison Anderson (trans), *History of the Surrealist Movement* (University of Chicago Press, 2004).

²⁷ See generally Claxton, above n 25.

²⁸ J Michael Keyes, 'Musical Musings: The Case for Rethinking Music Copyright Protection' (2004) 10(2) *Michigan Telecommunications and Technology Law Review* 407; Michael W Carroll, 'Whose Music is it Anyway? How We Came to View Music as a Form of Property' (2004) 72(4) *The University of Cincinnati Law Review* 1405.

²⁹ Arthur Schopenhauer, *The World as Will and Representation* (E F J Payne trans, Dover Publications Inc New York, 1966).

Williams and his attorneys,³⁰ who claimed that ‘music is magic’, the creation of *Blurred Lines* was ‘feel. Not infringement’,³¹ and that Pharrell Williams has a ‘brilliant mind’.³² In 1976 former Beatle, George Harrison’s song *My Sweet Lord* which was released in 1971 was found to have infringed the copyright of the 1962 song *He’s So Fine*.³³ In concluding that the two songs were essentially the same, District Court Judge Owen accepted that George Harrison had subconsciously copied the earlier song. In so doing Judge Owen described how a musician might subconsciously copy existing works:

As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success.³⁴

Another dimension to subconscious copying claims is that it evokes the idea that music creation is a burden and a sacrifice, and that only a select few are capable of such a feat. This points to the image (or cliché) of a musician as someone that suffers for their art. In this way, by claiming subconscious copying musicians draw attention to the more challenging and undesirable aspects of creating music. This is a burden and challenge reflected in Jorge Luis Borge’s story, *Shakespeare’s Memory*.³⁵ The main character in Borge’s story, Hermann Sörgel, is given Shakespeare’s memory by a man he meets in a bar. Rather than being the inspiration and benefit that he expected, it is a burden that overwhelms him and is one that he is, ultimately, unable to endure. Drawing analogies to Borge’s Hermann Sörgel, the subconscious copying claim, therefore, is a way for musicians to assert that creating music is both a gift and a burden, and not accessible to

³⁰ Robin Thicke adopted a very different approach — admitting that Williams wrote the song, and that he was ‘high on Vicodin and alcohol’ at the time. Thicke also backtracked from the comments he made about copying Marvin Gaye’s *Got To Give It Up* in a previous interview; Stelios Phili, ‘Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film’, *GQ* (online), 19 May 2013 <<http://www.gq.com/blogs/the-feed/2013/05/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy.html>>.

³¹ Chelin above n 6.

³² Ibid.

³³ *Bright Tunes Music Corp v Harrisongs Music Ltd*, 420 F Supp 177 (SD NY, 1976).

³⁴ Ibid 181.

³⁵ Jorge Luis Borge, *The Book of Sand and Shakespeare’s Memory* (Andrew Hurley trans, Penguin Classics, 2007) [trans of: *La Memoria de Shakespeare* (first published 1983)].

everyone. While many people listen to and experience music it is only brilliant minds that can create hit songs with that experience and knowledge. Musicians have vast knowledge and experience of music, musical techniques and genres. Their burden and sacrifice is to turn these traits, experiences and emotions into *new* music. Non-artists (for example, judges, lawyers and juries) could not produce a hit song, nor do they understand what it is like to have a developed and productive subconscious mind.

IV CONCLUSION

Subconscious copying is copyright infringement. In this article, however, we have argued that subconscious copying claims in copyright infringement disputes have significance beyond legal doctrine. Indeed, the claim to subconscious copying has metaphorical and figurative value. It draws attention to the creativity, brilliance and genius of musicians. It reinforces the ethereal nature of music creation. It also portrays music creation as a burden and a sacrifice that only a few are capable of turning into hit songs. Claiming subconscious copying allows musicians to mitigate damage to their reputation and seek dignity and self-respect; even when they are liable for copyright infringement. You may, of course, disagree. There are other reasons why subconscious copying claims may persist in copyright infringement cases. It is possible that claims to subconscious copying suggest a pretentious and conceited musician (rather than a brilliant, instinctive and genius one). And claims to subconscious copying may point to the fact that musicians are not full of subconscious but something altogether different.

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ONE PERSON'S VANDALISM IS ANOTHER'S MASTERPIECE

CRISP*

The way we perceive and react to urban art depends mostly on where it takes place as well as our preconditioned ideas about what constitutes art or vandalism. Art is very subjective and unfortunately, in most cities around the world, it is politicians and law enforcement who are deciding what should or should not be in our streets. I am a street artist who has been painting for over six years in urban spaces around the world. I have experienced vastly different reactions depending on which country's walls I am painting on. Ironically, I have found that you get a higher proportion of better quality and more appreciated works in cities such as Bogota, Colombia, where the laws are more liberal. Compared to cities where street art is highly illegal, it actually encourages a higher proportion of lesser quality, quickly completed tags and pieces. I found criminalising urban art does more damage to individual lives and society. The fact is, graffiti writing and street art can never be stopped, therefore, society and cities need to make informed, positive decisions regarding its laws and their implications for artists. I feel both artists and government officials can win through dialogue and compromise.

* Crisp is an Australian street artist currently based in Bogota, Colombia. He spreads his thought-provoking socio-political, and at times, purely aesthetic pieces, on the streets of cities throughout the world, such as Bogota, Miami, Sydney, New York, Los Angeles, Winnipeg, Mexico City, Atlanta, Sayulita, and Canberra. He uses a variety of techniques and materials to create his illegal and legal urban art pieces through spray painting stencils, slapping up stickers, gluing paste-ups and sticking up street sculptures.

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I INTRODUCTION

Why is it that a human is not allowed to change the colour of one surface compared to another due to its physical position? Lets face it, urban art has its roots in being an illegal and subversive act, a way for a subculture in society to scream out and say, *here I am*. Not only does it give this silenced group a voice but it is also a lot of fun, doing something that is considered “wrong”, gives an adrenaline rush that can be addictive. Ultimately though, like the war on drugs and terror, the criminalisation of public art creates more problems than it solves.

Part of the problem is how we are all conditioned in society to perceive certain urban art as vandalism when compared to more established and acceptable artwork. When you think about it, why is a blank concrete wall or a buffed white wall “better” or more aesthetically pleasing to society than a brightly tagged graffiti writing wall? Why is it that we let council members, police, and politicians tell us what should be part of our urban environment? The last time I looked, not many of the people in these positions are artists or have even studied art. Everyone’s tastes and opinions of art are very different and subjective — one person’s vandalism is another’s masterpiece.

II MY STORY

I am an Australian street artist who has lived in the United Kingdom for 10 years and am now based in Bogota, Colombia. I have painted the streets legally and illegally in over seven countries. My experiences have varied greatly depending on the country, or

sometimes even different cities within the same country. Essentially, it did not matter how illegal it was, I would still find ways to get my work up. It is impossible to stop urban art. Making it more illegal just pushes it more underground. It creates more damage through incriminating artists, which can have devastating effects on them and their families. I have found that strict councils often end up losing control of the type of graffiti and street art that goes up on their streets. You will find in places where it is highly illegal to do graffiti, you actually get a higher proportion of tagging and the type of graffiti most of the general public see as vandalism or ugly.

III BOGOTA AND STREET ART

This is especially evident in Bogota, Colombia, where I currently live and paint. From my knowledge, Bogota has some of the most lax laws on urban art in the world. It is technically not illegal to paint walls in this city, even if you do not have permission and are painting public property. You cannot be arrested, detained, prosecuted, or receive a criminal record. The worst that can happen is you get an on-the-spot fine — almost like getting a parking ticket. This can be seen as a double-edged sword; while it is not technically illegal, you can still find yourself in trouble with the police.

In Bogota police are renowned for corruption, so you could be paying a fine that is going straight into their own pockets rather than paying to repaint the wall you just hit. Also, there is a history of police brutality here and beatings are commonplace. In 2011, a young *grafitero* (graffiti artist) lost his life when he was shot dead by police after he was caught painting, ran away and failed to stop.¹ The police even covered themselves by fabricating a story that these kids had robbed a bus, hence why the kids were apprehended, and that they thought the spray can was a gun, hence why they shot him. It took months of public pressure for the government to carry out an independent investigation. The officer responsible was finally tried for murder, but the higher officials that covered it up are yet to face justice.

The current mayor of Bogota, Gustavo Petro, a previous active member of the guerrilla group M-19, has expressed that he feels graffiti and street art are an important voice for

¹ Simon Edwards, 'UN Condemns Police Shooting of Colombian Graffiti Artist', *Colombia Reports* (online), 31 October 2011 <<http://colombiareports.co/un-condemns-police-shooting-of-colombian-graffiti-artist/>>.

the youth culture and needs to be valued. Petro believes that valuable police time and money can be concentrated on more serious crimes. The government has started funding multiple new large walls in many areas of the city to be painted by local artists. In actual fact, the prolific street art and graffiti writing covered walls of Calle 26 — which joins the airport to the central part of the city — are the first thing that visitors see when they get off the plane. From my experience of talking to people that visit this city, their first impression is very positive. There is even a very popular graffiti street art tour that runs every day and has been voted one of the best tourist activities to do in Bogota on TripAdvisor.

Personally, I have never been fined for painting prohibited walls in Bogota. The worst that has happened is I have been politely asked if I had permission by the police, and to move on if I did not. I have even had one of the younger officers ask me to stop but to, ‘please come back after 6pm to finish the mural’ because he really liked it and wanted to see it finished but would get in trouble from his senior if he let me continue.

IV STREET ART INTERNATIONALLY

Places like Sydney, London, and New York, are very different in the way the law and police deal with *grafiteros* or street artists. Artists face spending the evening in a police cell while they are processed; they go to court where they are prosecuted for property damage, which usually involves hefty fines and a criminal record. This in itself can create financial hardships not only because of the fine, but also loss of work or inability to get work due to a criminal record. Charged artists can also find it difficult to get travel visas while holding a record. In extreme cases, you can actually receive prison time. All this for changing the appearance of a wall — keeping in mind no one has actually been physically or emotionally harmed. I even read that in Germany, rail companies have bought Israeli surveillance drones to protect its train carriages from graffiti.²

Some may argue this is justified as they are damaging private or corporate property. As a street artist, I feel a wall of a building, despite being private, public, or corporate property, is part of everyone’s urban environment. Therefore, everyone should be able

² Agence France Presse, ‘German Graffiti Drones: Germany’s Railways to use Aerial Vehicles to Stop Defacement’, *The World Post* (online), 27 May 2013
<http://www.huffingtonpost.com/2013/05/27/german-graffiti-drones_n_3343120.html>.

to influence how our urban environment is aesthetically represented, despite whether you own property or not. The appearance of public spaces cannot just be the domain of the wealthy and powerful. The fact that places like Bogota, East London, 5 Pointz, Bushwick, and Williamsburg in New York, have become world renowned urban art tourist destinations and valued places to live in, shows how urban art can positively improve our communities and city spaces.

V CONCLUSION

Urban art has always been, and always will be, done in an illegal fashion no matter what laws are in place. People always want to push the boundaries and do things in places they are not meant to. The question is: how is society going to react and deal with this practice? I feel Bogota's council has found a workable middle ground between property owners and *grafiteros*. With more education programs in schools and cultural youth centres to promote respect for historical buildings, monuments, religious spaces, and statues, this will reduce the defacing of these structures, and therefore help to reduce the general community's dislike of tagging and graffiti.

Council-funded programs that help bring property owners and street artists together so murals and public art can be produced in a more cooperative fashion would create a win-win situation for both artists and property owners alike. The artists get walls upon which they can express themselves through quality pieces of art, while property owners can save time and money spent on removing graffiti.

Is giving youths big fines, criminal records, and even jail time, stopping the practice or doing more harm to society than the graffiti itself? Is having a more lenient approach beneficial to the city as a whole? Could we provide more creative activities for our youth to partake in our urban environments where recreational spaces are reducing? Does having colourful, bright, vibrant, thought provoking and somewhat disorganised walls on our streets actually create a negative or positive perception? These are all questions we need to look at logically and practically for the sake of our communities, freedom of art, speech, and most of all our human dignity.

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**WOLVES AMONG US: SOME BRIEF REFLECTIONS ON THE “BONA FIDES” OF
GENDERED VIOLENCE IN COMPUTER GAME ART**

ADAM JARDINE *

The classification of computer games in Australia is a subject of expert discourse, but is not, itself, an expert function. It is carried out by community representatives (the classifiers), speaking for the community of reasonable people and applying their standards, while assessing the “impact” of classifiable elements on both reasonable people and the especially vulnerable. It is an inherently personal analysis, but the personal is an imagined space (the “reasonable person” or “reasonable adult”). This blog or reflection-type article brings the personal back to a real space, of flesh and blood: the author’s. It starts from the author’s experience of discomfort playing three computer games featuring violence against women or girls: The Wolf Among Us, The Walking Dead: Season Two, and The Last of Us. It breaks down the author’s response to understand why he reacted the way he did, focusing, in particular, on his assessment of whether the violence was justified. It then offers some brief suggestions on how such a response could influence classification, given the existing rules: at least if the author’s experience is identifiable with the, or a, reasonable person’s.

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I THE PERSONAL IS ANALYTICAL

This article starts from personal reflections. Specifically, it starts from three experiences of discomfort. They came from three very different scenes: though as I am speaking of an interactive medium, computer games, it would be better to say three very different *plays*.

1. At a major plot point in a detective story, I/my character finds a woman's severed head waiting for me/him on his doorstep. The head appears to be that of his love interest.
2. Partway through the first chapter of a zombie survival tale, my character — this time a young girl — has been bitten by a dog, and must tend to the wound. I/we do so by pouring peroxide into the bite, then suturing the flesh with fishing line.
3. In another zombie survival tale, I again take on the role of a young girl. We are thrown into a deadly struggle with a cannibal, kidnapper and potential rapist (all in one). I am not quick enough on the buttons: he impales me/her with a machete.

On the face of it, a personal experience of discomfort proves little to lawmakers, policy makers, decision makers or academics about how computer games should be regulated. Shock, disappointment and “ick” are thin ice from which to generalise. In truth, though, that is how classification proceeds. The Australian classification scheme gives the classifiers three options for a computer game: censor it (classify it RC — ‘Refused

Classification'), regulate it to encourage age-appropriate use (classify it R 18+ — 'Restricted' or MA 15+ — 'Mature Accompanied'), or give it an advisory rating (classify it M, PG or G — 'Mature', 'Parental Guidance' or 'General').¹ The decision is based on the 'impact'² of 'classifiable elements' (themes, violence, sex, language, drug use, and nudity),³ and potentially ick-based standards like morality, decency and propriety.⁴ Objectivity is supplied by the classifiers (the Classification Board and its Review Board) occupying the imagined space of the reasonable person.⁵ They speak not for themselves, but it: thus, the community of reasonable people (of whom they should be 'broadly representative').⁶ However, they are not (necessarily) social scientists. They have limited inroads into that imagined space, and limited insight. Their most intuitive point of access would be juror's logic. 'The standard I apply is reasonable doubt; I am a reasonable person; if I have doubt, reasonable doubt exists' becomes: 'The standard I apply is the reasonable person's reaction; I am a reasonable person; my reactions are the reasonable person's' (thus, the community's).⁷

In this article, I will analyse my experiences of discomfort as a gamer sensitive to gendered violence, and how such reactions could influence a classifier applying the *Classification Act* and its accompanying rules.⁸

II UNCOMFORTABLE GAMES

Incident one comes from *The Wolf Among Us*, a "hard-boiled" detective story set in the world of Bill Willingham's *Fables* comics. It is populated by gritty versions of fairy tale and nursery rhyme characters, such as Georgie Porgie, Beauty and the Beast, and the Little Mermaid. The player's role is that of Bigby Wolf (the Big Bad Wolf), Fabletown's

¹ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7(3) ('*Classification Act*'); *Guidelines for the Classification of Computer Games 2012* (Cth) ('*Game Guidelines*') 10.

² *Game Guidelines* 5.

³ *Ibid* 7.

⁴ *Classification Act* s 11(a).

⁵ *Ibid* (speaking of 'the standards of morality, decency and propriety generally accepted by reasonable adults').

⁶ *Classification Act* s 48(2): 'In appointing members, regard is to be had to the desirability of ensuring that the membership of the [Classification] Board is broadly representative of the Australian community.' See also s 74(2) regarding the Review Board.

⁷ In contrast, the *Guidelines for the Classification of Publications 2005* (Cth) ('*Publications Guidelines*') describe a 'reasonable adult' as one '[p]ossessing common sense and an open mind', and 'able to balance personal opinion with generally accepted community standards' (at 18), but do not indicate *how* the balance should be struck or what a well-balanced decision looks like.

⁸ *National Classification Code 2005* (Cth) ('*Classification Code*'); *Game Guidelines*. See *Classification Act* ss 9, 12.

sheriff. He works alongside Snow White, the assistant to the deputy mayor and his partner in a lukewarm romantic subplot,⁹ to investigate the murder of a sex worker. The scene occurs at the climax of chapter one. Bigby is distraught at the thought Snow has been decapitated, but discovers that the victim is actually a troll prostitute magically “glamoured” to look like her. Most episodes are rated ‘MA’ for ‘Strong violence, coarse language and sexual references’.¹⁰

Incident two is from *The Walking Dead: Season Two* (based on Robert Kirkman’s comics). The protagonist is Clementine. In season one, the player, stepping into the shoes of an adult male (and ex-convict) named Lee, escorts Clementine through a zombie apocalypse. Lee dies in the final chapter. In season two, there is no proxy; the player “protects” Clementine by making her decisions directly. All its episodes are rated ‘R’ for ‘high impact violence’.

Incident three is from *The Last of Us*, a survival/stealth game. The player adopts the role of grizzled survivor Joel, who lost his daughter when the world succumbed to hordes of “Infected” (essentially, zombies created by an odd fungus). He escorts Ellie, a teenage girl, to a rendezvous with the rebel Fireflies, who may be able to synthesise a cure from her remarkable immunity. It is also rated ‘R’ for ‘high impact violence’.

III UNCOMFORTABLE GAMING

My response to Snow’s severed head differed substantially from Bigby’s. It was mostly disappointment. I was (and am) a fan of the *Fables* universe. I liked walking in it. I liked seeing the interpretation the developers had placed on each of the characters, and the stories they could create with them. The head felt cheap, dirty: even lazy. It was a tired trope (sometimes called ‘Women in Refrigerators’): the murder and mutilation of a potential lover, giving the male protagonist motivation and the male player stakes.¹¹ It

⁹ In the “canon” of the comics, they become lovers, spouses, and parents: but the game is set at an earlier point.

¹⁰ There is a searchable database of classification decisions on the Australian Government’s classification website: Australian Government, *Welcome to Australian Classification*, Australian Classification <<http://www.classification.gov.au/Pages/Home.aspx>>.

¹¹ An excellent breakdown of this trope is available as a vlog or transcript on Anita Sarkeesian’s *Feminist Frequency* site: *Damsel in Distress (Part 2): Tropes vs Women* (28 May 2013) *Feminist Frequency: Conversations with Pop Culture* <<http://www.feministfrequency.com/2013/05/damsel-in-distress-part-2-tropes-vs-women/#more-7505>>. “The term “Women in Refrigerators” was coined in the late 1990s by comic book writer Gail Simone to describe the trend of female comic book characters who are routinely brutalized or killed-off as a plot device designed to move the male character’s story arc forward. The

was not even the trope's first appearance: I had already found the head of a visibly battered prostitute I saved from an abuser in the opening scene and gave some cash to (so she could pay off her pimp). I was, to engage the scheme's definition of offensive,¹² disgusted, but not really outraged. I was too weary for that.

Clementine's "first aid" had a different effect. I poured hydrogen peroxide into an open wound and sutured it up, stitch by stitch, as a girl shrieked, sobbed and almost passed out. I found that profoundly disturbing. Part of it was a simple empathic response to pain. Part of it, though, was that I was causing pain to a young girl for my own entertainment. Games are interactive: the player is inherently complicit to some degree (one reason they are thought, generically, to be of higher impact than films, and of greater concern to the community).¹³ I did not intentionally play the game in such a way that I would have to do it, and I had no option for avoiding it if I wanted to advance the story. I was, however, the one who clicked: thus, the one who stitched.

Ellie's impaling provided the most impact of the three, because it was both unexpected and graphic. I did not respond to the graphic nature of the scene per se, though. The game is filled with blasts of equal savagery, especially if one is not particularly good at it. (The penalty for not fighting off Infected is watching the protagonist be eaten.) The distinction is that most of it is either dished out by Joel or directed at him. Violence against a male protagonist is the norm in violent computer games. I have played through many such sequences, in many such games, without flinching. *The Last of Us* has the player take control of Ellie for a substantial stretch, and watching a teenage girl be brutalised is difficult. It was not much easier watching her be cannibalised when my performance was not up to scratch, though at least I could see that coming.

IV THE BONA FIDES OF GENDERED VIOLENCE

'Bona fide' art, that which has 'artistic merit', and that which is justified by purpose or context, is classified leniently.¹⁴ 'Gratuitous' material is not.¹⁵ Gratuitous means beyond

trope name comes from *Green Lantern* issue #54, in which the superhero returns home to find his girlfriend murdered and stuffed inside his refrigerator.'

¹² *Game Guidelines* 14.

¹³ Ibid 6. '[T]here are differences in what some sections of the community condone in relation to passive viewing or the effects passive viewing may have on the viewer (as may occur in a film) compared to actively controlling outcomes by making choices to take or not take action.'

¹⁴ *Classification Act* s 11(b); *Game Guidelines* 5, 7, 14 (definition of 'exploitative').

what is necessary, and *necessary* must be judged relative to a purpose.¹⁶ The *Game Guidelines*, like their equivalent for films¹⁷ but unlike their equivalent for publications,¹⁸ do not speak of “bona fide art” expressly, which could be a telling omission. Artistic merit is still relevant to their classification on the scheme’s face, though, so games can, at least, have an artistic *purpose*.¹⁹

The context justification is construed liberally. For example, violence may be justified where an ‘alien themed first-person shooter’ needs it; the boards do not consider whether the community needs alien themed first-person shooters.²⁰ The scheme’s target seems to be either illicit purposes (like promoting violence),²¹ or ick included for its own sake: elements that are, in essence, masturbatory, engaging no “higher” faculties and having no point beyond titillation (broadly interpreted).

What unified my response to the disturbing sequences was that at no point did I believe the creators were being deliberately misogynistic. Violence against females was not packaged as an acceptable way to respond to them (what they “had coming”), or an effective way to control them. Nor did I interpret the violence as gratuitous, in the sense

¹⁵ *Game Guidelines* 10, 12–13.

¹⁶ It is defined for the purpose of classifying publications in terms of ‘[m]aterial which is unwarranted or uncalled for, and included without the justification of a defensible story-line or artistic merit’: *Publications Guidelines* 17.

¹⁷ *Guidelines for the Classification of Films 2012* (Cth).

¹⁸ *Publications Guidelines* 5, 7, 16–17.

¹⁹ Whether games are “art” in a broad, non-legal sense is beyond the scope of this article, but it does raise some interesting points on both sides. See Jonathan Jones, ‘Santa Bought Me a PlayStation. But It’s Still Not Art’ on Jonathan Jones, *Jonathan Jones on Art (Guardian)* (7 January 2014) <<http://www.theguardian.com/artanddesign/jonathanjonesblog/2014/jan/07/playstation-video-games-art>>; Keith Stuart, ‘Video Games and Art: Why Does the Media Get It So Wrong?’ on Keith Stuart, *Games Blog (Guardian)* (9 January 2014) <<http://www.theguardian.com/technology/gamesblog/2014/jan/08/video-games-art-and-the-shock-of-the-new>>.

²⁰ Classification Review Board, *Decision — Alien Rage* (18 November 2013) 4. See also Classification Review Board, *Decision — God Mode* (19 November 2013) 4 (violence ‘justified by the fantasy context of escaping a range of beasts in the Maze of Hades’); Classification Review Board, *Decision — House of the Dead: Overkill Extended Cut* (26 September 2011) 4 (violence justified by ‘the fantasy zombie horror, “rail shooter” context’); Classification Review Board, *Decision — Killer is Dead* (18 November 2013) 5 (violence justified by context in ‘a hack and slash game featuring cyborg humans’); Classification Review Board, *Decision — Mortal Kombat* (14 March 2011) 7 (majority concludes that violence is *not* justified by a stylised fantasy context, but note that this decision predates the introduction of an ‘R 18+’ category for games); Classification Review Board, *Decision — The Walking Dead* (19 November 2013) 5 (violence justified in a ‘zombie horror game’: specifically, the first season of *The Walking Dead* games referred to in the main text); Classification Review Board, *Decision — The Walking Dead: Survival Instinct* (2 December 2013) 4 (violence justified by the ‘zombie horror genre’; this game has little to do with the other *Walking Dead* titles mentioned here, and is based on the television show rather than the comics); Classification Review Board, *Decision — Tom Clancy’s Splinter Cell: Blacklist* (12 December 2013) 5 (violence ‘justified by the context of the theme of eliminating terrorist adversaries’).

²¹ See, *Classification Code* cl 1(d)(i).

that it existed for no other purpose than sensation or gut impact. In *The Wolf Among Us* and *The Last of Us*, it is about stakes. The player must understand that violence against women and girls is horrendous to invest in the stakes the developer sets up (and thus continue with the next chapter or develop the skill not to fail), as in the notorious *Tomb Raider* reboot (where the range of challenges experienced by a more vulnerable Lara Croft extended to fending off attempted rape).²² The flesh-sewing in *The Walking Dead* is *sensational*, but it is not erotic, or *just* there for a thrill. It is not masturbatory in that way. It is part of the survival horror narrative: *this* is how bad things have gotten, and *this* is what you must do to survive.

What I *felt* was that violence against females was being spent cheaply. Violence is a large, and gendered, problem in Australia. Approximately 34 per cent of women have suffered physical violence, and 19 per cent have suffered sexual violence, since age 15, based on the ABS's 2012 *Personal Safety Survey*.²³ Men are more likely to have experienced the first type (48 per cent), but only 4.5 per cent have experienced the second.²⁴ They are much more likely to be the perpetrators, whether the target be a man or a woman.²⁵ Misogynistic violence is also increasingly recognised as a problem in the international gaming community. Women are made victims both inside and outside game worlds, by developers and gamers respectively. The recent "Gamergate" controversy — sparked by a disgruntled ex-boyfriend's (probably spurious)²⁶ implication that developer Zoe Quinn traded sex for favourable reviews — brought this into sharp relief with the torrent of threats (including rape threats) she and other prominent women in gaming circles (like feminist blogger Anita Sarkeesian) received.²⁷

²² See Jason Schreier, 'You'll "Want to Protect" the New, Less Curvy Lara Croft' on *Kotaku* (11 June 2012) <<http://kotaku.com/5917400/youll-want-to-protect-the-new-less-curvy-lara-croft>>. After an outcry, the creators disputed the "rape" characterisation and blamed it on poor phrasing: see Jason Schreier, 'Tomb Raider Creators Say "Rape" Is Not a Word in Their Vocabulary' on *Kotaku* (29 June 2012) <<http://kotaku.com/5922228/tomb-raider-creators-say-rape-is-not-a-word-in-their-vocabulary>>.

²³ Australian Bureau of Statistics, 4906.0 — *Personal Safety, Australia, 2012: Measuring the Prevalence of Violence* (31 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter2002012>>. 'Violence' for these purposes includes threats.

²⁴ *Ibid.*

²⁵ Australian Bureau of Statistics, 4906.0 — *Personal Safety, Australia, 2012: Perpetrators of Violence* (31 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter3002012>>; Australian Bureau of Statistics, 4906.0 — *Personal Safety, Australia, 2012: Data Cubes* (31 July 2014) table 6 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4906.02012>>.

²⁶ Stephen Totilo, 'In Recent Days I've Been Asked Several Times about a Possible Breach of Ethics Involving One of Our Reporters' on *Kotaku* (20 August 2014) <<http://kotaku.com/in-recent-days-ive-been-asked-several-times-about-a-pos-1624707346>>.

²⁷ See Nate Rott, '#Gamergate Controversy Fuels Debate on Women and Video Games' on *All Tech Considered* (*npr*) (24 September 2014)

Violence against women is an issue with weight. To use it as a cheap plot device or contrivance strikes a sour note.

Art — even purportedly “low art” like computer games — can be used to address social problems. (Indeed, Quinn attempted to do just that with her “indie” title *Depression Quest*.) That might make people uncomfortable: and people might *need* to be made uncomfortable for the point to come across. I do not believe any of the material I have addressed was trying to make a point about gendered violence, though. It did not offer any insight (at least not intentionally). The games relied on it for narrative purposes, or to strike the audience in the gut, but did not say much about what lies beneath. If the material was there for an artistic purpose, it was, I suggest, neither a novel nor a valuable one.

V IMPLICATIONS FOR CLASSIFICATION AND CENSORSHIP

Selling gendered violence cheaply or without good cause could not be reason enough to ban or harshly restrict a game, except in extreme cases. Too much would have to fall with the one. The *Classification Code* accepts that adults should be able to ‘read, hear, see and play what they want’;²⁸ it does not ask them expressly to justify why they want it (even if that is the overall effect of the scheme).

However, the classifiers can account for a cheap sell in various ways, of which the following are just some brief suggestions. First, when assessing the impact or effect an element has on a reasonable person, they can account for the fact violence against women is a community problem. Thus, the community is sensitive to unwarranted gendered violence in art (and not just condoning of or inciting to sexual violence, already targeted by the Code).²⁹ Second, they may need to assess the impact or effect of an element on a particular *segment* of the community: in particular, the intended or likely audience.³⁰ A woman or a reasonable woman may have a stronger negative reaction to unwarranted gendered violence, as a potential victim, than a man, as a potential perpetrator. If a violent representation does cross into the realm of

<<http://www.npr.org/blogs/alltechconsidered/2014/09/24/349835297/-gamergate-controversy-fuels-debate-on-women-and-video-games>>.

²⁸ *Classification Code* cl 1(a); Explanatory Statement, *Guidelines for the Classification of Computer Games 2012* (Cth) 7.

²⁹ *Classification Code* cl 1(d)(i).

³⁰ *Classification Act* s 11(d).

masturbation — is “titillating” in a broad or narrow sense — it may have a powerful influence on young boys, primed to respond to it by a mediascape littered with gendered violence packaged as entertainment. Third, in assessing artistic merit, what challenges assumptions or shines light on an issue might be of greater merit than tropes. One unit of dissent/dissonance contributes more to dialogue, by virtue of its scarcity, than one unit of consensus/resonance. Fourth, classified texts bear consumer advice to warn audiences of harmful or disturbing material: and gendered violence deserves a place in the mix. It seems odd to caution consumers about something as benign as an errant “shit” or “fuck”, and not touch upon the specifically gendered nature of a punch, or torture, or a killing.

The games I have addressed are not outliers in modern gaming. Each is easily available, via download or in hard copy, for multiple systems (such as PC, Xbox consoles and Playstation consoles).³¹ Each was well-received.³² (Indeed, *The Last of Us* is touted as among the best games ever produced for the PS3.)³³ Each of them has a lot to offer, and I enjoyed each through to completion. But to borrow Anita Sarkeesian’s disclaimer from her *Tropes versus Women* vlogs,³⁴ it is entirely possible to love something while pointing out its flaws. A patriot shows love for their country by trying to fix what is wrong, not by blinding themselves to it. It is in that spirit I offer this piece.

³¹ *The Last of Us* is only available for Playstation consoles (3 and 4).

³² For example, on IGN, episode one of *The Wolf Among Us* received a rating of 9/10; episode one of *The Walking Dead, Season Two* received 8/10; *The Last of Us* received a perfect 10. See Marty Sliva, *The Wolf Among Us Episode 1: Faith Review, ‘The Fairest of Them All’* (10 October 2013) IGN <<http://au.ign.com/articles/2013/10/10/the-wolf-among-us-episode-1-faith-review>>; Mitch Dyer, *The Walking Dead: Season 2, Episode 1 Review, ‘Girl, Interrupted’* (17 December 2013) IGN <<http://au.ign.com/articles/2013/12/17/the-walking-dead-season-2-episode-1-review>>; Colin Moriarty, *The Last of Us Review, ‘Survival of the Fittest’* (5 June 2013) IGN <<http://au.ign.com/articles/2013/06/05/the-last-of-us-review>>.

³³ It was described in Colin Moriarty’s IGN review as ‘a masterpiece, PlayStation 3’s best exclusive and an absolute must-play’: Moriarty, above n 32.

³⁴ Available from *Feminist Frequency: Home*, Feminist Frequency: Conversations with Pop Culture <<http://www.feministfrequency.com>>.

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BEYOND THE WAR ON GRAFFITI: THE RIGHT TO VISUAL EXPRESSION IN URBAN SPACES

KAREN CRAWLEY *

This article draws on the work of urban scholars, activists, graffiti writers and street artists to explore alternative ways of thinking about visual expression in urban space, with a particular focus on Brisbane, Australia. The article first explores the limitations of criminalisation, arguing that a zero-tolerance approach is counterproductive. Next, the author explores the costly policy of rapid removal, arguing that despite the law's apparent commitment to upholding property rights, the authorities are ultimately more concerned with maintaining control over the visual appearance of public space. Part four argues that graffiti writers and street artists articulate a different relationship to the city based on being a citizen rather than a property owner. The article concludes by suggesting that harm minimisation is better policy than zero tolerance, and that we need to remain open to the possibilities of illegal visual expression in urban spaces.

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I INTRODUCTION

For over 20 years, urban authorities in Australia have waged a long and futile war on graffiti, with no ceasefire in sight. Declaring it a threat to property values, a scourge on our environment, a disease, an ‘ugly stain,’¹ and ‘one of the most visible and ugliest forms of crime’,² state governments and local councils have constantly sought new solutions to the “graffiti problem”— rapid removal, harsher penalties, reduced access to spray paint, crime prevention through environmental design such as surveillance, lighting, textured and graffiti-proof surfaces, and more powers for police. Brisbane currently has a full-time team of police and council workers — the *Taskforce Against Graffiti* (“TAG”), established in 2008 by then-Lord Mayor Campbell Newman as an election commitment — tracking graffiti activity. Reforms to the *Criminal Code* (Qld) in 2013 raised the maximum penalty for any kind of graffiti from five to seven years imprisonment, the toughest regime in Australia (equivalent to the maximum penalty for assault occasioning bodily harm).³ While this amendment may be more symbolic than

¹ Lord Mayor Graham Quirk, cited in Minister for Police and Community Safety The Honourable Jack Dempsey, ‘The Writing’s on the Wall for Graffiti Offenders’ (Media Statement, 28 May 2012) <<http://statements.qld.gov.au/Statement/Id/79360>>.

² Attorney-General and Minister for Justice The Honourable Jarrod Bleijie, ‘Vandals Clean Up Their Act’ (Media Statement, 3 August 2014) <<http://statements.qld.gov.au/Statement/2014/8/3/vandals-clean-up-their-act>>.

³ *Criminal Law and Other Legislation Amendment Act 2013* (Qld). The maximum penalty for the same offence in New South Wales is five years, while in Victoria and Western Australia vandalism carries a maximum jail sentence of two years. In South Australia offenders face up to six months’ jail-time, while in Tasmania perpetrators may face a fine or community service order. See *Graffiti Prevention Act 2007* (Vic); *Summary Offences Act 1966* (Vic) ss 9 and 10; *Graffiti Control Act 2008* (NSW); *Graffiti Control Amendment Act 2014* (NSW); *Graffiti Control Act 2001* (SA); *Police Offences Act 1935* (Tas); *Criminal Code* (WA) (as amended by the *Criminal Code Amendment (Graffiti) Act 2009* (WA)).

real, given that the maximum penalty has never been sought in practice — and indeed, the majority of graffiti convictions result in community service orders or fines rather than imprisonment⁴ — its message is significant: graffiti should be regarded as a serious crime.

Considering that marking graffiti is merely the act of painting a wall, the scale of public resources devoted to eradicating it, and the vitriolic fervor with which its practitioners are denounced by politicians and pursued by the criminal law, is nothing short of remarkable. The graffiti writer is depicted as a threat to the urban fabric, a member of an incorrigible criminal underclass against which no legal action is too harsh. Policymakers and the media almost uniformly refer to writers as “vandals” who have forfeited their place in the community by refusing to obey the law and respect other people’s property or ‘community assets,’⁵ thus harming the financial wellbeing of ‘Australian families’⁶ forced to ‘clean up’⁷ their mess.

This rhetoric has engineered a crisis completely unrelated to the dimensions of the problem. After all, the worst thing you can really say of graffiti is that it ‘can impact the amenity and beauty of our environment’⁸ — but then so can smog, traffic, high-rise apartment buildings, and advertising, and none of these is typically subject to the criminal law. Contrary to the premise of most public discourse on graffiti, I will suggest that we do not have a “graffiti problem”. All things considered, there is a limit to how much havoc you can wreak through the application of paint. To borrow a turn of phrase from Desmond Manderson, we have a “graffiti problem” problem.⁹ The crisis lies in how we frame and talk about graffiti; it is a problem, therefore, of language and perception.

This article draws on the work of urban scholars, activists, graffiti writers and street artists to explore alternative ways of thinking about visual expression in urban space,

⁴ From August 2013 to April 2014, 47 individuals were sentenced to a term of imprisonment for graffiti offences. The majority of offenders sentenced — 502 in the same period — were sentenced to community service and/or monetary orders. Question on Notice to Attorney-General, No. 493, 5 June 2014, Queensland Parliament.

⁵ Katherine Feeney, ‘Brisbane Gets Graffiti Busting Boost’, *Brisbane Times* (online), 5 November 2012 <<http://www.brisbanetimes.com.au/queensland/brisbane-gets-graffiti-busting-boost-20121105-28tr2.html>>.

⁶ Attorney-General and Minister for Justice, above n 2.

⁷ Ibid.

⁸ Department of Transport and Main Roads, *Queensland Government Graffiti Management Policy 2008–2011* (2009) <[http://www.tmr.qld.gov.au/~media/aboutus/rti/Pdf_graffiti_management_policy.pdf](http://www.tmr.qld.gov.au/~/media/aboutus/rti/Pdf_graffiti_management_policy.pdf)>.

⁹ Desmond Manderson, ‘Groundhog Day: Why the Asylum Seeker Problem is Like the Drug Problem’ (2013) 41 *Griffith Review* 84.

with a particular focus on Brisbane, in Queensland, Australia. Part two explores the limitations of criminalisation, arguing that a zero-tolerance approach is counterproductive, and that we can and should pursue policies that distinguish between different kinds of graffiti and respond to community preferences. Part three explores the costly policy of rapid removal, arguing that despite the law's apparent commitment to upholding property rights, the authorities are ultimately more concerned with maintaining control over the visual appearance of public space. Part four argues that graffiti writers and street artists articulate a different relationship to the city based on being a citizen rather than a property owner, and exercise a right to visual expression that arises not through possession, but movement, proximity, and use. The article concludes by suggesting that we should aim for harm minimisation rather than zero-tolerance, but that ultimately we must also learn to live with illegal visual expression — and in fact, that it has a lot to teach us.

II THE LIMITS OF REPRESSION

When people think of graffiti, they usually think of tagging, an aesthetic practice which originated in American cities in the 1970s, in which a name is 'adopted by a writer and repeated in a variety of forms including the large murals known as pieces, the bubble style letters of a throw-up, and the tag itself, completed with a marker or aerosol'.¹⁰ This kind of graffiti has long been rhetorically associated with dirt and crime, threatening to the uninitiated because of its cryptic illegibility.¹¹ Since the late 1990s a newer genre of illicit visual expression called "street art" has emerged, employing a wider variety of techniques, including stencils, sculpture, stickers, paste-ups, textiles, and transformations of existing spaces or surfaces, such as signs or billboards.¹² Like graffiti, street art is usually unauthorised — it takes place on private property without the owner's permission. Unlike graffiti, which has largely been regarded negatively and with suspicion by those outside of its subculture, street art often appeals to a wider audience,

¹⁰ Alison Young, 'Cities in the City: Street Art, Enchantment, and the Urban Commons' (2014) 26(2) *Law and Literature* 145, 147.

¹¹ Susan Stewart, *Crimes of Writing: Problems in the Containment of Representation* (Oxford University Press, 1991) 219; Alison Young, *Judging the Image: Art, Value, Law* (Routledge, 2005) 73.

¹² See generally Nicholas Ganz, *Graffiti World: Street Art from Five Continents* (Thames & Hudson, 2004); Tristan Manco, *Stencil Graffiti* (Thames and Hudson, 2002); Tristan Manco, *Street Logos* (Thames and Hudson, 2004); Jake Smallman and Carl Nyman, *Stencil Graffiti Capital: Melbourne* (Tower Books, 2005); Christine Dew, *Uncommissioned Art: The A to Z of Australian Graffiti* (Melbourne University Publishing, 2007); Alison Young, Ghostpatrol, Miso & Timba, *Street/Studio: The Place of Street Art in Melbourne* (Thames & Hudson, 2010).

and is usually viewed more positively even when it involves the same illicit activities.¹³ The international popularity of street art makes it ripe for co-optation by postindustrial cities seeking to find a way to value their creative economies. Cities such as Melbourne have even used illegal street art to promote tourism.¹⁴

Despite these differences in medium, technique, and audience, it is important not to overstate the distinction between graffiti and street art. Many street artists begin as taggers or hone their skills doing illegal work, while others draw inspiration from other forms of visual art or wider protest movements. Tagging and “hip-hop” graffiti is not simply proto-street art, but has its own styles and levels of expertise.¹⁵ Most importantly, graffiti writers and street artists each do what they do under the threat of criminal sanction. The criminal law is not interested in the writer’s style, technique or intention, nor in community preferences about which kinds of graffiti are more desirable than others. It does not distinguish between tags that are indecipherable to the general public, etched graffiti on the window of a train, and murals and pieces that are the work of skilled artists. All that matters is whether the marking is authorised by a commission or consent of the property owner.

Each Australian jurisdiction deals with graffiti slightly differently, but all view it as a crime against property. In the *Criminal Code* (Qld) (‘the *Code*’) graffiti is a “special case” of the offence of wilful damage, which applies where a person willfully and unlawfully destroys or damages property.¹⁶ It is clear, however, that graffiti is a rather unusual case of property damage. Unlike, for instance, the act of destroying a sea wall and causing flooding (another of the “special cases” in the *Code*), graffiti does not interfere with the functionality of a surface — a wall, or tunnel, or fence, or train still functions as a wall, or tunnel, or fence, or train regardless of whether or not it is painted. Unlike arson or breakage, graffiti is only “damage” if it is *unauthorised*. It is thus inherently ambiguous to call it property damage.

The damage involved in graffiti is symbolic. Its criminalisation is premised on the claim that graffiti degrades the urban environment by introducing an intolerable level of

¹³ Tristan Manco, *Street Logos* (Thames and Hudson, 2004) 8.

¹⁴ See Alison Young, ‘Negotiated Consent or Zero Tolerance? Responding to Graffiti and Street Art in Melbourne’ (2010) 14(1–2) *City* 99, 110.

¹⁵ See further Alison Young, ‘Criminal Images: The Affective Judgment of Graffiti and Street Art’ (2012) 8(3) *Crime, Media, Culture* 297, 298.

¹⁶ *Criminal Code 1899* (Qld) s 469; *The Crimes Act 1958* (Vic) s 197(1); *Crimes Act 1900* (NSW) s 195.

aesthetic disorder that unsettles the community. Legislators and media commentators frequently draw upon the so-called “broken windows”¹⁷ theory, which states that if a window in a building is broken and left unrepaired, other windows will soon be broken; i.e. by breaking the codes of order we invite further disorder to occur. The *Queensland Graffiti Management Policy 2008—2011* reflects this reasoning, citing research to the effect that ‘residents are more fearful of crime in areas with graffiti’, that ‘graffiti may encourage offenders to commit further crimes in that area’, that ‘residents may feel less safe in their own homes and graffiti may be perceived as a sign of “social decline”’.¹⁸

Many criminologists have disputed these assertions, finding no evidence that graffiti writers are likely to commit other crimes, or that the presence of graffiti has any discernible impact upon the crime rate in a particular area.¹⁹ The problem is one of perception; representations of graffiti as a sign of disorder do not necessarily reflect reality. The CEO of Crime Stoppers drew explicitly on perceived emotions when he suggested that ‘people often feel unsafe walking through areas where graffiti is prevalent’²⁰ because ‘it could have a grungy, dark feeling around the graffiti’.²¹ As urban geographer Kurt Iveson explains, ‘a harmful feedback loop has been created. Because graffiti is constantly represented as indicative of the possibility of more serious crime, the appearance of graffiti is perceived by many observers as a signal of disorder which makes a place feel unsafe’.²²

In 2013, the Queensland state government removed the distinction in sentencing between basic graffiti and obscene or indecent graffiti, claiming that there was no justification for the distinction, since the essence of the crime is ‘the damage caused to

¹⁷ Brisbane City Council’s website explicitly references the ‘broken windows theory’: See Brisbane City Council, *Controlling Graffiti*, 4 September 2014 <<http://www.brisbane.qld.gov.au/laws-permits/complaints-fines/graffiti/controlling-graffiti>>.

¹⁸ Department of Transport and Main Roads, above n 8.

¹⁹ See Cameron McAuliffe and Kurt Iveson, ‘Art and Crime (and Other Things Besides...): Conceptualising Graffiti in the City’ (2011) 5(3) *Geography Compass* 128, 131.

²⁰ Giulio Saggin, ‘Graffiti Clean-up Costs in Brisbane’s West End Highlighted with Pop-up Event’ *ABC News* (online), 7 May 2014 <<http://www.abc.net.au/news/2014-05-06/price-tag-pop-up-event-shows-graffiti-clean-up-costs/5433140>>.

²¹ Gabrielle Lyons, ‘Fight Against Graffiti Hits the Street’ *QUT News* (online), 8 May 2014 <<http://www.qutnews.com/2014/05/08/fight-against-graffiti-hits-the-street/#.VV2nyOchxz0>>.

²² Kurt Iveson, ‘War is Over (If You Want It): Rethinking the Graffiti Problem’ (2009) 46(4) *Australian Planner* 24, 27.

property', which is the same regardless of the representational nature of the graffiti.²³ This amendment effectively denies the representational nature of graffiti, along with the idea that certain representations are more problematic than others. This is an unfortunate erasure. Obscene graffiti is a crime in which the damage is not to individual property rights, but to collective cultural values of decency and respect (rather like the crime of damaging or destroying cemeteries, gravestones, war memorials and places of religious worship, another "special case" under the *Code*). To treat an obscene — or hateful — act of graffiti the same as a well-intentioned artistic endeavor elevates the inviolability of property boundaries above all other cultural values and obscures meaningful distinctions between the different kinds of harm the state is meant to protect us from.

As the war on graffiti has intensified over the past decade, each Australian state has enacted a range of specific offences prohibiting the activities associated with graffiti and street art, such as carrying graffiti implements, selling aerosol paint to young people, and recording and disseminating images of graffiti.²⁴ The ways in which these laws are impacting young people is not yet fully understood, but youth justice advocates have raised concerns about increased police harassment, the too-wide definition of a graffiti implement (which has seen young people stopped for having highlighter pens), and the supervision of youths carrying out mandatory cleaning orders.²⁵ These hard-nosed graffiti laws form part of a package of legislative initiatives, including the controversial "move on" provisions that allow police greater control over the behaviour and movements of young people in public spaces.

The Queensland government justified these initiatives on the basis that 'community concern about youth offending has been escalating', even as studies show that youth

²³ Katherine Feeney, 'New Laws to Jail Graffiti Vandals for Seven Years', *Brisbane Times* (online), 10 April 2013 <<http://www.brisbanetimes.com.au/queensland/new-laws-to-jail-graffiti-vandals-for-seven-years-20130409-2hje7.html>>.

²⁴ The *Summary Offences Act 2005* (Qld) contains an offence of possessing a graffiti instrument that is reasonably suspected of having been used for graffiti, or is being used. See also *Graffiti Prevention Act 2007* (Vic); *Summary Offences Act 1966* (Vic) ss 9 and 10; *Graffiti Control Act 2008* (NSW); *Graffiti Control Amendment Act 2014* (NSW); *Graffiti Control Act 2001* (SA); *Police Offences Act 1935* (Tas); *Criminal Code* (WA) (as amended by the *Criminal Code Amendment (Graffiti) Act 2009* (WA)).

²⁵ See eg, Alex Dickinson, 'Graffiti Artists Take Aim at the Lord Mayor Campbell Newman' *Courier Mail* (online), 5 March 2010 <<http://www.couriermail.com.au/news/graffiti-artists-take-aim-at-the-lord-mayor-campbell-newman/story-e6freon6-1225837511082>>; Interview with Peter Breen, Director of Jugglers Space Inc. (Brisbane, 27 March 2015); Interview with Janet Wight, Director of Youth Advocacy Centre Inc. (Brisbane, 9 April 2015).

offending has actually been *decreasing*.²⁶ Our cultural demonisation of youths as signifiers of disorder goes hand-in-hand with the shrinkage of public space available to them. Most legitimate activities cost money, and it is a lack of money that accounts for many young people's entanglements with criminal law.²⁷

Based on the notion that graffiti writers are anti-social, law and policy makers have largely been absolved of responsibility to engage with them. Instead, they have taken the easy route of vilification and condemnation, arguing that graffiti writers are simply vandals who cannot be reasoned with. Yet researchers who have engaged with members of the graffiti community have revealed a diverse range of motivations for what they do. Some seek recognition from other writers, some are bored or wish to be rebellious, and others wish to contribute to the cityscape by creating an interesting experience for the spectator.²⁸

Mark Halsey and Alison Young's interviews with graffiti writers in Melbourne and Adelaide found that writers rarely cited the thrill of breaking the law as their primary motivation, and did not conceive their activities as destructive, rebellious or spiteful. The pleasure they took in writing graffiti revolved around 'themes of respect, expression, design, and quality of the image'.²⁹ Writers frequently made considered aesthetic choices about placement and design that reflect the norms of graffiti culture, preferring the walls of commercial premises or public assets to residential homes, churches, cemeteries, or trees, and leaving the work of more experienced artists, elaborate pieces and commissioned works untouched.³⁰

²⁶ Jodie O'Leary, 'Out of Step and Out of Touch: Queensland's 2014 Youth Justice Amendments' (2014) 26(2) *Current Issues in Criminal Justice* 159; Terry Hutchinson and Kelly Richards, 'Scared Straight: Boot Camps for Queensland' (2013) 38(4) *Alternative Law Journal* 229.

²⁷ Graffiti offences represent a relatively small proportion of young people's entanglements with the criminal justice system, lagging significantly behind shoplifting, stealing, fare evasion, and drug possession. Queensland Youth Advocacy Centre, *Annual Report (2013-2014)* <<http://www.yac.net.au/wp-content/uploads/2014/10/YAC-2014-Annual-Report-single-page-spread.pdf>>.

²⁸ Young, above n 15, 309.

²⁹ Mark Halsey and Alison Young, "'Our Desires are Ungovernable": Writing Graffiti in Urban Space' (2006) 10 *Theoretical Criminology* 275, 292.

³⁰ Mark Halsey and Alison Young, 'The Meanings of Graffiti and Municipal Administration' (2002) 35(2) *Australian and New Zealand Journal of Criminology* 165; Halsey and Young, above n 28, 297; Kurt Iveson, 'Policing the City' in Mark Davidson and Deborah Martin (eds), *Urban Politics: Critical Approaches* (Sage Publishing, 2015) 94.

The current policy of criminalisation drives norms underground, meaning that young people do not become sufficiently exposed to graffiti culture and are not educated by more experienced writers.³¹ Making it riskier to write graffiti only encourages the growth of forms that can be rapidly executed (etching, tags, stickers), rather than more considered pieces, which take longer, and are commonly regarded as more desirable by members of the wider community.³²

Like most councils, Brisbane City Council engages in some “welfarist”³³ approaches to the “graffiti problem” that seek to recognise and redirect the energies of writers and street artists away from illegal activity towards legitimate artistic ventures such as public murals. These approaches could be taken much further, but will not eliminate illegal graffiti. The underlying assumption of harsh enforcement measures, like with any zero-tolerance approach, is that if the penalty is severe enough, people will change their behaviours and the problem will be stamped out. But graffiti writers will always desire sociality, recognition and pleasure, and although the form of their work may change in response to the accessibility of surfaces and the availability of materials, it has shown it will persist. The law is achieving nothing by being blind to the features of the culture it is trying to influence.

Official responses to graffiti should not be based on blanket condemnation, but take into account the intentions of its practitioners, the specificities of local context and the nuances of people’s attitudes towards graffiti in their area. An example of such an approach was the proposal developed by two consultants for Melbourne City Council to designate certain inner-city laneways famous for their graffiti as “high tolerance” zones. Meanwhile, other high-traffic commercial areas and areas where residents were more concerned about graffiti were to become “low tolerance” zones, subject to the policy of rapid removal.³⁴ Despite extensive community consultation and support among both graffiti artists and the wider public, the proposal was scuppered at the last minute, as the Victorian state government and police preferred a hardline approach. Such

³¹ Halsey and Young, above n 30, 173.

³² Iveson, above n 22, 25.

³³ Halsey and Young, above n 30, 175–177.

³⁴ See Young, above n 14.

alternative approaches bring with them their own challenges of propriety and negotiation, but these are preferable to a counterproductive policy of criminalisation.

III REMOVAL AND AUTHORISATION

Politicians frequently quote the financial costs of graffiti to the tax-paying public. Brisbane City Council's 2014 Cost of Crime campaign attached large visible price tags to picnic tables, bus stops and outdoor seats, with the aim of 'building awareness about the cost of vandalism'³⁵ and thereby exhorting members of the public to do in graffiti writers. From 2012–2015, members of the public were encouraged to message the location of graffiti (along with photos) to a special hotline run by CrimeStoppers.³⁶ Council would send a graffiti removal team to buff the spot and restore the supposedly pristine surface of the city, usually within 48 hours.

As opposed to other types of vandalism that physically damage or render public or private property unusable, graffiti writing itself does incur a cost either to the owner or public. The costs lie in the *removal* of graffiti. The policy of rapid removal is designed to discourage graffiti by making it more ephemeral, in the hope that this will deny graffiti writers the rewards of publicity and exposure that is said to fuel their desires, and 'increase the perception of community safety'.³⁷ Apart from the fact that this policy sets up perverse incentives for graffiti writers (why put in effort when all work will be treated the same?), it assumes that graffiti is something that *must be removed*, and ignores any potential for aesthetic value. It also consumes a vast amount of public resources. Between Council's TAG initiative, and the state government's supplementary funding, more than \$13.5 million was allocated to fight graffiti in Brisbane from 2012–2016.³⁸ The policy effectively commits public funds to a bottomless merry-go-round of cleaning and re-cleaning, blind to the possibility that community interests are not best served by committing such vast resources to rapid removal.³⁹

³⁵ Brisbane City Council, *Cost of Crime Campaign Puts a Price on Vandalism*, <<http://www.grahamquirk.com.au/cost-of-crime-campaign-puts-a-price-on-vandalism/>>.

³⁶ Queensland Government Department of Infrastructure, Local Government and Planning, *Previous Funding Programs* <<http://www.dilgp.qld.gov.au/local-government/grants/previous-funding-programs.html>>. This service was terminated by the Labor Government on 30 June 2015.

³⁷ Queensland Police, *Graffiti Removal Powers: Summary Offences Act 2005: A Guide to Legislation and Procedures 3* <<https://www.police.qld.gov.au/programs/youth/Documents/GraffitiRemovalPowersGuide.pdf>>.

³⁸ Feeney, above n 5.

³⁹ Iveson, above n 22, 31.

Such a stance on eradication may appear to be an extension of the legal rights enjoyed by public and private property owners. Yet the way in which the objective of graffiti removal is pursued is not always consistent with the law's commitment to protecting private property. In many Australian jurisdictions, public authorities grant themselves permission to remove graffiti from private property if the owners do not take action themselves. For example, the *Summary Offences (Graffiti Removal Powers) Amendment Act 2008* (Qld) gives state and local governments the power to designate graffiti removal officers who can remove graffiti which is in, or can readily be seen from, a public place. They can do so without the prior consent of property owners if the officer does not need to enter the property to access the graffiti (for instance, if it is on a wall or fence, or can be accessed by leaning or reaching over a wall or fence). In these situations, the property owners must advise council that the work has been commissioned or is authorised — otherwise, it is liable to be quickly removed.

In a high-profile incident in 2010, Brisbane council workers buffed a piece by contemporary aerosol artist Anthony Lister on the side of a private building accessible from a vacant lot in Fortitude Valley, less than 48 hours after he had completed it.⁴⁰ Then-City Councilman David Hinchliffe, a longtime supporter of the arts who had consulted with Lister on the project, accused the removal team of heavy-handed tactics. In response, then-Lord Mayor Campbell Newman stated: 'The Graffiti Reduction Unit is very supportive of artwork but received no notification from the building owner, the local councillor or artist that work was being carried out for a mural.' He made it clear that the onus was on the building owner to notify Council, '[i]f Commissioner Hinchliffe had come to council with the property owner and said ... I am commissioning a piece of urban art ... and I give my full permission for it to happen ... I would have no problem with that.'⁴¹ Newman said: 'There is a definite line between graffiti and art but when it is on private property and it hasn't been approved it is graffiti'.⁴² Brisbane's Lord Mayor echoed this

⁴⁰ Alex Dickinson, 'Graffiti Artwork by Anthony Lister Commissioned by Property Owner Rubbed out by Brisbane City Council', *Courier Mail* (online), 14 September 2010 <<http://www.couriermail.com.au/news/queensland/graffiti-artwork-by-anthony-lister-rubbed-out-by-brisbane-city-council/story-e6freoof-1225921335596>>.

⁴¹ Sarah Horsley, Interview with Campbell Newman, Lord Mayor of Brisbane (Television Interview, 14 September 2010) <<https://www.youtube.com/watch?v=EtB8YNjGr7o>>.

⁴² 'Graffiti Plus Paperwork Equals Art in Brisbane' *ABC News* (online), 15 September 2010 <<http://www.abc.net.au/news/stories/2010/09/15/3012035.htm?site=brisbane>>.

terminology when recently unveiling new art on the pillars under Coronation Drive: ‘This is authorised art, this is the sort of stuff we love brightening up our infrastructure’.⁴³

Although Newman indicates a difference between (good) street art and (bad) graffiti, the distinction he makes is based on authorisation rather than artistic merit or value. Moreover, since the property owner in this case *had* given permission for the work, the approval Newman sees as lacking could only have been granted by the council itself. His comment reveals that what is at stake for the council is not the protection of its citizen’s private property rights — including the citizen’s right to visual expression on the surface of property — but the maintenance of control over public space and the norms of image production in the cityscape.

Prior authorisation is meant to be determinative, but it can be altered by an arbitrary exercise of public power. In 2013, Lister and fellow artist Sofles collaborated with council on the Milton Road mural (figure 1). Lister buffed part of the mural, and added the figure of a member of a “buff” crew, clad in high visibility gear, as though the mural was being painted over (figure 2). Within 48 hours, Council workers had buffed over this part of his work (figure 3).



Figure 1: Mural by Sofles and Lister on Milton Road, Brisbane Australia (Photo taken by Karen Crawley, 2015).

⁴³ Eveline Fielding, ‘Brisbane Cirque du Soleil-Inspired Street Art Project Unveiled by Lord Mayor Graham’ *ABC News* (online), 6 May 2015 <<http://www.abc.net.au/news/2015-05-06/brisbane-cirque-du-soleil-inspired-street-art-project-unveiled/6449274>>.



Figure 2: Mural by Lister on Milton Road, Brisbane Australia (Photo taken by Anthony Lister, 2013).



Figure 3: Buffed by council workers (Photo taken by Lister, 2013).

Lister had permission to make art on this particular wall, and so the graffiti removal officers had no jurisdiction there. When those officers buffed over their own likeness, they showed that their objection to Lister's art was not about its placement, but rather its content. Lister's art had drawn attention to their exercise of public power and control of public space, so they erased his commentary on the constrained and coercive conditions in which his act of visual expression took place.

Brisbane City authorities are not yet done with Lister. In November 2014, a week before the G20, he was arrested on twelve charges of wilful damage related to pieces dating back to 2009, and is currently awaiting a hearing (as of July 2015). With these criminal charges hanging over his head, Lister executed *Hometown Ballerina* (figure 4) as a "gift"⁴⁴ to the City on a wall donated by a private supporter — whom the police then questioned.

⁴⁴ Natalie Bochenski, 'Council Destroys Lister Works Worth Thousands' *Brisbane Times* (online), 20 May 2014 <<http://www.brisbanetimes.com.au/queensland/council-destroys-lister-works-worth-thousands-20140520-zrhpp>>.



Figure 4: Hometown Ballerina by Lister (Photo taken by Crawley, 2015).

IV FROM OWNERSHIP TO CITIZENSHIP

The fact that authorised street art is often the subject of official praise,⁴⁵ and unauthorised street art is a criminal offence, shows the extent to which our interaction with the streets, walls, surfaces and common places of our cities is dominated by the paradigm of property ownership. Those who try to repress graffiti entirely, and those who seek to accommodate it within authorised or designated spaces, both accept and work within this logic of ownership that grants to the individual owner or public authority the right to enjoy one's space, to develop it, and to prevent others from using it. As Iveson writes, efforts to repress graffiti by criminalisation and eradication, or to redirect it towards authorised places, are 'attempts to naturalise property relations in the city, insisting that surfaces are inviolable because they are publicly or privately owned, and denying or restricting graffiti writers access to those surfaces'.⁴⁶

What might it mean to think of urban public space in a different way? Cities are more than conglomerations of owned land — they are lived, embodied and representational spaces of movements and flows, rhythms, and the circulation of bodies and things, constructed within a multiplicity of discourses and networks. This insight necessitates looking beyond the physical dimensions of the city and asking how its users are brought

⁴⁵ Fielding, above n 43.

⁴⁶ Iveson, above n 30, 96.

together and sustained by and through shared representations. Space as psychologically lived in, or what Henri Lefebvre called representational space, is implicated in the very production of space itself.⁴⁷ How we imagine a place, space, street, or city in large part creates the conditions of possibility for how we act, which itself creates the contours of that very space.

In recent years, a number of scholars and activists have been inspired by graffiti and street art to explore other ways of understanding how we inhabit, move through, interact with, and lay claim to our cities. Graffiti writers and street artists view the city as an assemblage or network of spaces and surfaces, each of which offers different aesthetic potential according to its texture, visibility and accessibility.⁴⁸ When the artist who executed the stencil (figure 5) saw the metal railing, originally intended as a boundary-marker, she or he imagined, and created, a young man jumping over it with fluid athleticism, thus generating a moment of unexpected encounter for the passing spectator.



Figure 5: Stencil art, Artist unknown, in West End Brisbane, Australia (Photo taken by Crawley, 2015).

⁴⁷ Henri Lefebvre, *Production of Space* (D Nicholson Smith trans Blackwell, 1991) 39 [trans of: *La production de l'espace* (first published 1974)].

⁴⁸ Halsey and Young, above n 29, 296.

Criminologist Alison Young argues that street artists' entitlement to do what they do 'arises through proximity to a surface and through aesthetic reaction to what is already there'.⁴⁹ She and others refer to the notion of "the commons", pieces of land that existed for shared use, such as animal-grazing or water-access, and which find their contemporary equivalent in parks, squares, and other places where individuals come together to communally enjoy urban resources.⁵⁰ The commons is not simply what is left after individual property holders have gobbled up tracts of urban space, but rather constitutes a different logic based on adapting and experiencing spaces, rather than using and possessing them.

The struggle over graffiti is thus part of a broader struggle over authority, expression, and belonging in capitalist cities — a struggle over who claims the right to determine the identity and possibility of urban places. Our modern cities are 'urban media landscapes'.⁵¹ Their many surfaces are put to work as spaces of communication and expression by a variety of actors posting advertisements, signs, notifications, political slogans, and artistic works. The authorities exercise control through imposing a particular urban visual order in which some forms of expression — advertising, signage, authorised political posters — are fine, and others are not. Graffiti writers and street artists are often keenly aware of their exclusion from this order. As Canadian street artist Roadsworth pointed out, '[w]e aggressively pursue graffiti writers for scrawling their names on a wall across from a massive backlit billboard advertising Big Macs'.⁵²

Graffiti writers and street artists insist on using the city as a medium of visual expression, without the kind of legitimacy obtained through property ownership or bureaucratic planning approval. They rewrite the urban environment by marking places not intended to act as a communication medium — walls, trains, fences, roads, signal boxes, park benches, infrastructure, and interstitial places. They pursue what Lefebvre

⁴⁹ Young, above n 10, 156; Alison Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Routledge, 2013) 54.

⁵⁰ Mark Halsey and Ben Pederick, 'The Game of Fame: Mural, Graffiti, Erasure' (2010) 14(1–2) *City* 82, 97; Young, above n 10; Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City* (Routledge, 2015); Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (Routledge, 2016).

⁵¹ Iveson, above n 30, 88.

⁵² Roadsworth, cited in Laura Boudreau, 'A Divided Highway' (2005) *Spacing* <<http://spacing.ca/art-roadsworth.htm>>.

famously called a 'right to the city: the right to claim presence in the city, to wrest the use of the city from privileged new masters and democratise its spaces'.⁵³

For spectators, the affective experience of viewing graffiti or street art is inseparable from the knowledge that they are viewing something that was placed there illicitly or without permission. The same image or work placed in an art gallery would constitute a radically different affective experience for the viewer: one less immersive, more marked by contemplative distance. The political clout of graffiti or street art — its ability to comment on or act as a critique on existing structures of power — is largely a measure of its illegality. It is the trace of a furtive, outlawed event. It is immediate, unexpected, unplanned, and ungovernable, changing the way we experience the routine of everyday life. Every act of graffiti or street art gestures towards a right to visual expression that arises just through *being* in the city — a right that can be curtailed but not erased.

V CONCLUSION

The war on graffiti is a policy failure. At the very least, a different regulatory approach is needed, a harm minimisation approach that views "the graffiti problem" as an issue of planning rather than policing. The current policy of eradication and criminalisation is counterproductive and costly, based on flawed assumptions about the links between graffiti and crime, and willful blindness to the cultural dynamics and motivations of its practitioners. There is much scope for building on existing community partnerships in order to take graffiti writers seriously as stakeholders in the city, working with members of the community to identify high tolerance areas and legal walls, to provide hoardings, and to support those members of the graffiti community who can mentor others. The excessive money and effort currently devoted to graffiti's rapid removal could be limited to removal only on certain proscribed surfaces — those linked to values of decency and respect shared by many graffiti writers — and reallocated towards alleviating the pressures of homelessness, unemployment, and other factors that alienate people, and particularly young people, from their urban environments.

⁵³ Henri Lefebvre, 'The Right to the City' in Eleonore Kofman and Elizabeth Lebas (trans and eds), *Writings on Cities* (London: Blackwell, 1996) 151 [trans of: *Le Droit à la ville* (first published 1968)].

Beyond these diversionary regulatory measures, we need to accept that some illegal graffiti will happen, and learn to live with it. Taking a democratic approach to our cities means entertaining the idea that the contents of our urban media landscape should not be determined exclusively by the individuals, corporations or state authorities that own publicly accessible land. This means relinquishing the fantasy of absolute control where everything remains in its assigned place, and accepting a certain level of disorder and aesthetic diversity. This does not necessitate a free-for-all for graffiti writers and street artists. As Iveson points out, to celebrate all graffiti or street art uncritically is the flipside of denouncing it all equally — both approaches ‘ignore questions of style, quality and credibility that its practitioners have debated for years’, and ‘belittle the talents and dedication of those who have spent years developing their craft, not to mention the risks many of them have taken and the price many of them have paid’.⁵⁴

It does mean, however, recognising and acknowledging the contribution that graffiti writers and street artists make to our cityscapes, and thinking of certain parts of the city as being available for creative intervention or “remixing”.⁵⁵ To insist on remaining open to the possibility of unauthorised graffiti is to insist that graffiti writers and street artists are a part of the city, even if they’re denied authority (or corporate sponsorship). To move beyond the war on graffiti requires an open and inclusive dialogue among citizens, not just property owners, about what kind of places we want our cities to be. With their ability to challenge perceptions, engage community and stimulate dialogue, graffiti and street art can be forms of expression that force us to reconsider how we inhabit our shared spaces, and point the way towards an alternative vision of the city in which all citizens play an active role in the construction, revision and imagination of public space.

⁵⁴ Kurt Iveson, ‘Graffiti, Street Art and the City’ (2010) 14(1-2) *City* 26, 28.

⁵⁵ Scott Burnham, ‘The Call and Response of Street Art and the City’ (2010) 14(1-2) *City* 137, 139.

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