

EXPRESSION, EXCLUSION, AND PROPERTY EXPECTATIONS: AN ANALYSIS OF GRAFFITI USING THREE NEW ZEALAND ARTEFACTS

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I INTRODUCTION

Graffiti is so ancient a practice, it may represent an inherent human urge for graphic expression.¹ Contemporary graffiti, however, is greatly derived from an African American, hip hop, cultural triad, along with break dancing and rap music.² Graffiti may be valorised by emphasising its overtly political manifestations. From Martin Luther's audacious nailing of his 95 theses, to a Wittenburg church door, to the courageous street artists of the Arab Spring,³ 'individual ideologues' have daubed messages on 'mortar, brick, steel, and glass ... whatever subsequent laws are constructed'.⁴ Graffiti writing is also and predominantly, a 'narcissistic' practice whereby taggers repeatedly write their tags in public places.⁵ Street art, commissioned or otherwise, includes remarkable examples of artistry.⁶ However, most graffiti is rudimentary and lacks any discernible aesthetic value. These 'rough, violent cries of the ignorant and impoverished'⁷ are most difficult to accommodate within a legal scheme. Laws typically draw a bright line between commissioned murals and graffiti vandalism.⁸ It might be convenient to further draw bright lines between political and narcissistic graffiti; between street art and graffiti vandalism, or between aesthetically valuable graffiti and aesthetically valueless graffiti. However the law is a blunt instrument for inscribing such fine distinctions.

Despite the typical absence of any overt ideological message in tagging, much contemporary graffiti writing can be considered 'political', inasmuch as it often makes a statement, however oblique or underdeveloped, about the writers' marginalisation in society. Indeed, for Ivor Miller, 'graffiti is central to a contemporary dialogue on issues of race and class'.⁹ Freedom of expression includes most offensive statements,¹⁰ as well as lofty utterances. Likewise, a discussion of graffiti and expression needs to engage with broadly despised tagging as much as popular and, indeed, commercially valuable uncommissioned urban art.¹¹

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1 See Roger Gastman and Caleb Neelon, *The History of American Graffiti* (Harper Design, 2011) 20.

2 See David G Lindsey and Robin A Kearns, 'The Writing's in the Wall: Graffiti, Territory and Urban Space in Auckland' (1994) 50(2) *New Zealand Geographer* 7, 8.

3 See, for example, Alastair Beach, 'Revolutionary Road: The Urban Showcase of Egypt's Uprising' *The Independent* (United Kingdom), 9 October 2012, 36.

4 Carlo McCormick in collaboration with Wooster Collective's Marc and Sarah Schiller; Ethel Seno (ed) *Trespass: A History of Uncommissioned Urban Art* (Taschen, 2010) 23 ('Trespass').

5 For a glossary of street art terms, see Alison Young, *Street Art World* (Reaktion Books, 2016) 194-7. Of particular note, a 'tag' is a stylised signature; a 'piece' (a contraction of masterpiece) is an accomplished mural; and 'buffing' is removing graffiti, for example, by painting over in a neutral colour.

6 See, generally, *Trespass*, above n 4.

7 Margo Thompson, *American Graffiti* (Parkstone International, 2012) backcover.

8 See *Crimes Act 1961* (NZ) s 269(2)(a).

9 Ivor L Miller, *Aerosol Kingdom: Subway Painters of New York City* (University Press of Mississippi, 2002) 14.

10 See, eg, *Morse v The Police* [2011] NZSC 45.

11 Banksy is the best-known, living graffiti artist but Jean-Michel Basquiat, Keith Haring and Kenny Scharf were embraced by commercial galleries far earlier: see Thompson, above n 7, 6.

This article is about exclusion, expression and property expectations. It is also concerned with control of the public space. Three artefacts from New Zealand are used to illustrate the difficult legal issues that arise from graffiti. First, a Hastings pie maker's prolific tagging is used to demonstrate how graffiti is typically perceived as a criminal scourge and a pernicious offence against property. The second example, an exhibition in an Auckland gallery, shows how street art, once included, attracts full property rights.¹² Third, Wellington's Ian Curtis memorial indicates how a section of the public may transform graffiti into a community mural, thereby investing it with de facto protection akin to that accorded to public artworks. The defenders of the Curtis memorial effectively determined what should be visible in part of the public space. Drawing distinctions between different kinds of property on the grounds of personhood, the article principally argues that we need to engage with exclusion, expression and property expectations in relation to graffiti; not to wage a futile 'war on graffiti vandalism'.¹³

II EXCLUDING OTHERS FROM PROPERTY

The nature of property rights is highly contested.¹⁴ Nevertheless, a recognised feature of ownership is the legally enforceable power to exclude (conversely, to include) others.¹⁵ In this section, three example artefacts are used to illustrate property issues in relation to graffiti. The first example shows how the power to exclude (include) informs the legal distinction between graffiti vandalism and street art. The second example, highlights the property rights that accrue to artists when they are included by a property owner. The last is an example of a property owner practically waiving their right to exclude. These examples inform a discussion about control of the public space.

A *The Prolific Tagger*

Between July 2009 and November 2010, Blair Kitchen, a 22-year-old pie maker,¹⁶ wrote more than 500 tags around Hastings, a provincial city in the Hawke's Bay region of New Zealand's North Island.¹⁷ His tag 'Kron', which he later changed to 'Dots' and 'Dotstone', was the most

12 A mural comprises four distinguishable forms of property: (1) the support (wall); (2) the medium (the spray paint) which becomes affixed to the support; (3) the physical mural; (4) the expression of the idea embodied in the mural (copyright). The paint applied to a wall is likely to become a fixture: see G W Hinde, *Hinde McMorland & Sim Land Law in New Zealand* (LexisNexis, 7th ed, Vol 1, 2004) 158-62.

13 See for example, Catrin Owen, 'Auckland Council claims it's winning war against graffiti' *Auckland Now* (online), 16 March 2016 <<http://www.stuff.co.nz/auckland/local-news/77937705/Auckland-Council-claims-its-winning-war-against-graffiti>>.

14 Compare AM Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107 discussion of natural property rights, and Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, on property as fraud.

15 See David L Callies and J David Breemer, 'The Right to Exclude Others from Private Property: A Fundamental Constitutional Right' (2000) 3(3) *Washington University Journal of Law & Policy* 39.

16 Kitchen's occupation is not irrelevant. Just as 'anything is art if it is found in an art gallery' (Stuart Culver, 'Whistler v. Ruskin: The Courts, the Public and Modern Art' in Richard Burt (ed), *Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere* (University of Minnesota Press, 1994) 149, 166), so anything outside the gallery might not be art. Pie makers may be expected to make pies, not art. On the institutional theory of art, see George Dickie, *Art and the Aesthetic, An Institutional Analysis* (Cornell University Press, 1974).

17 Marty Sharpe, 'Jail for "Changing Face of Hastings"' *The Dominion Post* (Wellington), 25 August 2011, A5.

prominent in the city during that period.¹⁸ In the Napier District Court,¹⁹ Mackintosh J convicted Kitchen on charges of intentional damage and sentenced him to 14 months imprisonment. In a victim impact statement, the mayor of Hastings, Lawrence Yule, said Kitchen's 'offensive scrawls' had 'changed the face of graffiti vandalism in our district' and refuted Kitchen's claim that he did graffiti 'for the art' on the grounds of 'the sheer number of mindless scribbles put on utilities boxes, council assets, private and commercial property'.²⁰ Hastings District Council buffed the tags at a cost of NZ\$200 each and sought reparation of NZ\$102,800. In the event, the court ordered reparation of NZ\$15,000 to be paid on a pro rata basis among affected property owners. In the face of the ostensibly severe sentence, Kitchen appealed to the High Court. There, Brewer J upheld the tariff and based on precedent,²¹ observed 'it might be considered lenient'.²²

Graffiti is generally presumed to decrease the value of property. Indeed, Doug Harvey argues 'unauthorized graffiti art is, at its root, a direct challenge to the central tenet of capitalism ... private property'.²³ But the proposition that graffiti is economically destructive, lacks nuance. Graffiti implies urbanity in the contemporary city; it provides a veneer of edginess that tourists expect.²⁴ Melbourne's Hosier Lane, for example, is the most photographed tourist attraction in the city.²⁵ Such a magnet has benefits for local businesses and the city (if not the often-homeless artists). As Alison Young observes, graffiti plays an important role in improving the market value of properties in popular inner-city suburbs, such as Fitzroy in Melbourne.²⁶ Generally, whereas 'street art can attract gentrification', Kim Dovey argues, 'tagging is linked to dereliction'.²⁷

B *Blockbuster*

Dick Frizzell is a successful pop-art artist.²⁸ With his son Otis Frizzell and collaborator Mike Weston,²⁹ he exhibited *Blockbuster* at the Saatchi & Saatchi Gallery in Auckland's fashionable Parnell district in 2012.³⁰ Had the artists painted the exterior walls of the gallery in precisely the same way as *Blockbuster*, but without commission or permission, the mural would have constituted graffiti vandalism. Auckland Council might have buffed it and the police prosecuted

18 Ibid.

19 Napier is 20 kilometres from Hastings.

20 Sharpe, above n 17, A5.

21 *Randell v Police* HC Napier CRI-2008-441-8, 5 March 2008, Asher J; *Horne v Police* HC Whangarei, CRI- 2008-488-75, 5 February 2009, Priestley J; *Martin v Police* HC Rotorua CRI-2010-470-13, 22 April 2010, Andrews J.

22 *Kitchen v Police* HC NAP CRI-2011-441-35 25 October 2011 (Brewer J) [6].

23 Doug Harvey, 'The Return of the Culture Wars' *The Nation* (online), 14 February 2011 <<https://www.thenation.com/article/return-culture-wars/>>.

24 Ben Eltham 'If Brisbane wants to be a 'new world city' it should stop persecuting artists and act like one' *The Guardian* (online), 3 February 2016 <<https://www.theguardian.com/artanddesign/2016/feb/03/if-brisbane-wants-to-be-a-new-world-city-it-should-stop-persecuting-artists-and-act-like-one>>.

25 'Graffiti in Melbourne's Hosier Lane' RNZ (8 February 2017) <<http://www.radionz.co.nz/national/programmes/ninetoonoon/audio/201832408/graffiti-in-melbourne's-hosier-lane>>

26 Young, above n 5, 11.

27 Kim Dovey, *Urban Design Thinking: A Conceptual Toolkit* (Bloomsbury Academic, London, 2016) 204.

28 See, generally, Dick Frizzell, *Dick Frizzell: The Painter* (Godwit, 2009).

29 For a biography of Otis Frizzell, see Denis Robinson, *New Zealand's Favourite Artists* (Saint Publishing, 2006) 36-37.

30 See *Blockbuster*, Saatchi & Saatchi Gallery (2012).

the artists.³¹ Once included, however, street art not only enjoys immunity from prosecution, it attracts comprehensive property rights, notably the full panoply of copyright and moral rights protections.³²

C *The Curtis Memorial*

On a council-owned retaining wall in Wallace Street, Mount Cook (an inner city Wellington suburb), a crudely painted memorial for Ian Curtis, the vocalist of the band Joy Division³³ who committed suicide in 1980, has survived in various forms for more than 35 years.³⁴ The simple memorial,³⁵ ‘Ian Curtis, 1956-1980, Walk in Silence’,³⁶ supplemented from time to time by a white cross, may bear comparison to the word art of Colin McCahon, one of New Zealand’s most celebrated artists.³⁷ In reality, however, the memorial is graffiti, no different in legal and aesthetic substance from the hundreds of tags and pieces around Mount Cook. Nevertheless, when Wellington Council buffed the wall in 2011, a public outcry ensued. The memorial was soon repainted and now enjoys effective immunity from council cleaning crews.³⁸ Like many local authorities, Wellington engages in a Sisyphean effort to buff tagging around the city. The Curtis memorial is a notable exception.

The commemorative mural is not officially approved public art, however by adopting a laissez faire approach towards it, Wellington Council staff effectively treat it as a community mural in a way comparable with New York’s eventual embrace of Keith Haring’s *Crack is Wack* (1986).³⁹ The degree of respect the Curtis memorial attracts is indicated, not only by the public response to its deletion, but also by its minimal defacement by taggers for more than three decades.⁴⁰

D *Control Over Public View*

Unlike transgressive artworks exhibited in a gallery – architecture, public art, advertising, and graffiti have captive audiences because they occupy the public space.⁴¹ Architecture and public

31 See, eg, ‘Revok Arrested at LAX For Graffiti Vandalism’ Huffington Post 25 April 2011 <http://www.huffingtonpost.com/2011/04/25/revok-arrested-at-lax-for_n_853474.html>.

32 See *Copyright Act 1994* (NZ), s 16 and part 4.

33 See, generally, Mike West, *Joy Division* (Babylon Books, 1984). Despite a reputation as a cult band, Joy Division were popular in New Zealand. See Man of Errors, ‘In New Zealand we like Joy Division’ 12 February 2012 <<https://manoferrors.wordpress.com/2012/02/12/in-new-zealand-we-like-joy-division/>>.

34 Brendan Manning, ‘Curtis Memorial Removed. But for How Long?’ *The Wellingtonian* (Wellington), 10 November 2011, 1.

35 The latest version, painted in February 2013 by local artists Maurice Bennett and Andrew Tamati Wright, is more developed and includes an image of Curtis’s face: see ‘Honouring a Dead Soul’, *The Dominion Post* (Wellington), 28 February 2013, A6.

36 A line from Joy Division, *Atmosphere* (Factory Records, 1980).

37 A cross and naive white lettering on pumice-like concrete might be compared with Colin McCahon, *Sacred* (1976), which may be viewed at <<http://www.mccahon.co.nz/cm001620>>.

38 At the time of the buffing, a Wellington Council spokesperson commented ‘[w]e won’t be surprised if the name pops up again’ and predicted that the graffiti cleaning crew ‘might turn a blind eye to it’. Quoted by Manning, above n 34, 1.

39 See, ‘Haring’, *nyarchive* <<http://nyarchive.wordpress.com/images/haring/>>.

40 Kelly Burns, ‘Killjoy Division Cleans Up Wall’ *The Dominion Post* (Wellington), 12 September 2009, A5. Although Bennett and Wright painted the latest version, they copied previous versions. It is, therefore, unlikely that any individual could successfully assert copyright in the Curtis memorial, given the number of anonymous people involved in its history.

41 Dovey, above n 27, 202.

art tend to be strictly regulated, but advertising and graffiti are not and may be offensive to different groups in society.⁴² For both graffiti and advertising, a pertinent question therefore relates to the extent to which an individual should be permitted to impinge upon the public view.⁴³ Mark Halsey and Alison Young describe the Nike company as ‘a corporate tagger’ whose billboards are ‘urban scrawl’ and ‘visual pollution’.⁴⁴ Indeed, billboards, trade signs and realtor’s advertisements constitute urban visual blight;⁴⁵ they impose on the public space in ways far more aesthetically offensive than skilled street art and, perhaps, even tagging.

When announcing an abstract mural for a prominent building in Hutt City, a Wellington dormitory city, David Bassett, the deputy mayor, described the 30-year-old commercial sign which was to be painted over as ‘commercial graffiti’.⁴⁶ Bassett’s allusion was significant because Hutt City has taken a strong line against graffiti. It successfully pursued a local Act of Parliament which permits council staff to enter private property to remove graffiti.⁴⁷ The council must give a property owner 10 days notice before taking action, but the situation is imaginable where a proprietor, who has given permission to graffiti artists to paint their wall, might fail to object timeously, and the graffiti will be buffed. This legislation potentially prioritises pleasing the public gaze over individual property rights.

Another instance when the aesthetic interests of the public might trump individual property rights, arises when a graffiti work, say a Banksy stencil, has significant cultural value.⁴⁸ Property owners could then be restricted in the ways they use their properties to preserve a piece they have neither commissioned nor otherwise permitted.⁴⁹

A further public space consideration is the locational appropriateness of graffiti. For Dovey, ‘graffiti becomes vandalism when it is ‘out of place’ – a contamination of place identity’.⁵⁰ Where street art has become an integral part of the broader culture, one finds it accepted as a construction rather than transgression of place identity.⁵¹ Indeed, in some urban contexts, we may expect graffiti. ‘Blank walls at street level contribute nothing to urban life; graffiti writing often brings them to life, it asserts the right of expression over the property owner’s right to blankness.’⁵²

42 Not everyone is offended by graffiti. For example, the Wellington Architecture Centre argues that graffiti ‘adds to the character of the city’ and ‘provides important community and political commentary and should be encouraged’: see Julie Jacobson, ‘Culture Clash over ‘Graffiti Art’ *The New Zealand Herald* (online), 17 June 2007 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10446173>.

43 See Terri Moreau and Derek H Alderman, ‘Graffiti Hurts and the Eradication of Alternative Landscape Expression’ (2011) 101(1) *Geographical Review* 106, 121.

44 Mark Halsey and Alison Young, ‘The Meanings of Graffiti and Municipal Administration’ (2002) 35(2) *Australian and New Zealand Journal of Criminology* 165, 180.

45 See BC Biermann, ‘Spatial Distributions of Power: Illegal Billboards as Graffiti in Los Angeles’ *BanBillboardBlight* <<http://banbillboardblight.org/wp-content/uploads/2010/01/Graffiti-billboards.pdf>>.

46 Eleanor Wenman, ‘Mural covering ‘commercial graffiti’ in Lower Hutt goes live’ *The Dominion Post* (online), 15 May 2017 <<http://www.stuff.co.nz/dominion-post/news/hutt-valley/92462647/mural-covering-commercial-graffiti-in-lower-hutt-goes-live>>.

47 See *Hutt City Council (Graffiti Removal) Act 2012* (NZ) s 6.

48 Debbie Cuthbertson, ‘Call for Melbourne’s two remaining Banksy stencils to be preserved at NGV’ *The Sydney Morning Herald* (online), 12 July 2016 <<http://www.smh.com.au/entertainment/art-and-design/melbourne-arts/call-for-melbournes-two-remaining-banksy-stencils-to-be-preserved-after-street-art-destroyed-by-construction-work-20160711-gq3edk.html>>.

49 Compare with heritage orders under *Resource Management Act 1991* (NZ) s 189.

50 Dovey, above n 27, 203.

51 *Ibid.*

52 *Ibid.*, 207-8.

The Curtis Memorial is contextually appropriate. Wellington's seismically-informed topography necessitates an abundance of paintable retaining walls. Wallace Street, which is the main route to a university campus and a liberal high school, starts with the mural *Herstory*, which includes images of the Mexican artist, Frida Kahlo, and Pippie Longstockings, the Swedish book character. From there, numerous works have been painted (and buffed). Using a benchmark of the gallery goer's sense of aesthetics, it is not always obvious which paintings are commissioned street art and which are graffiti vandalism.⁵³ In contrast, Kitchen, who honed his skills on the stanchions of a Hastings bridge (a council-sanctioned graffiti permit zone) took his tagging to what may be considered contextually inappropriate places.

III GRAFFITI AND PERSONHOOD

The three examples considered in Part II indicate that, in terms of graffiti policy and law, the rights of the wall owner are typically accorded paramount respect, as are those of the commissioned street artist.⁵⁴ Occasionally, the expectations of a section of the public are respected in relation to an illegal work. The graffiti artist is socially excluded, effectively denied legal rights in their works and yet may be commercially exploited; they are, in effect, 'outlaws'.⁵⁵ A different balance of rights and expectations is imaginable which pays greater attention to human expression and impact on the public space.

In *Kitchen*, Brewer J intimated different types of property when he noted that the accused's 'tagging affected *privately owned* property, *council owned* property, and *commercial* property'.⁵⁶ Criminal law typically pits proprietors against graffiti artists, but a more nuanced conception of property that distinguishes between, say, a person's home and a warehouse, is desirable. Georg Hegel's conception of property, particularly as it has been developed by Margaret Radin, may contribute to achieving this outcome. This part of the article loosely applies certain of Hegel's and Radin's ideas to graffiti.

A Property And Personhood

The crucial feature of property in the Hegelian view is putting 'my will in the thing',⁵⁷ for example, by marking an object. Gregory Alexander and Eduardo Peñalver observe: 'One way of understanding how marks on objects perform this function is to interpret a mark such as one's signature ... as publishing that claim for the rest of the world to see.'⁵⁸ Akin to Locke's applied labour theory of property,⁵⁹ in the Hegelian scheme, '[a]ction is needed to perfect the will's relation with the object and to externalize the will'.⁶⁰ For Liam Murphy and Thomas Nagel, the Hegelian conception of property may be characterised as an individual's 'right to possess

53 For images and a guide, see 'A Tour of Mt Cook Street Art' *Mt Cook Mobilised* (2010) <http://mtcookmobilised.pbworks.com/f/MCM_News_Feb10.pdf>.

54 See, for example, the withdrawal of Isabel Bau Madden and Peter Rosenstein, *Tattooed Walls* (University of Mississippi Press, 2006) after photographs of commissioned street art were reproduced without permission of the artists.

55 Compare with Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of: *Homo Sacer. Il potere sovrano e la vita nuda* (first published, 1995)]

56 *Kitchen* HC NAP CRI-2011-441-35 25 October 2011 (Brewer J) [2] (emphasis added).

57 GWF Hegel, *Philosophy of Mind* (W Wallace and AV Miller, Clarendon Press, 2007) [492] [trans of: *Phänomenologie des Geistes* (first published 1807)].

58 Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 63-4.

59 See John Locke, *Two Treatises of Government* (University of Chicago Press, first published 1690, 1990 ed) 129.

60 Alexander and Peñalver, above n 58, 64.

some minimum amount of property in order to express their freedom by enforcing their will on external objects'.⁶¹ Indeed, for Hegel, fundamental inequality arises from the lack of property.⁶²

Alan Ryan says '[t]he attractions of Hegel's development of a concept of property depend on our everyday feelings about our need to identify with and express ourselves in things that we make, control, and use.'⁶³ Ryan further observes, 'Hegel's concern is less with owners and non-owners than with the anchored and the non-anchored; because property is an anchor but not the only anchor.'⁶⁴

In sum, for Hegel, we need to exercise our will on things to express our personhood. This exercise of will typically requires/leads to property rights in those things, but it is a stake in the community, which property traditionally indicates, that really matters. It may be ventured that graffiti artists, in marking things, are effectively expressing an ownership claim (of course, the law does not recognise such property claims, except perhaps in copyright) but may be better seen as asserting their existence in the world, thereby making a political statement.

B *Personhood Property And Graffiti*

In the tradition of Hegel, Radin establishes a distinction between different types of property when she differentiates between 'property that is bound up with a person and property that is held purely instrumentally', categorising the former as 'personal' (personhood) property and the latter as 'fungible' property.⁶⁵ Items of personhood property are things we value and seek to keep because they help to fulfil our humanness; items of fungible property are readily replaceable with other similar things and may, for example, be adequately indemnified and their loss fully compensated with money. The locus classicus is the difference between one's wedding ring and a wedding ring in a jeweller's shop. Both rings have market value but, for the person who might wear their wedding ring for half a century, the market value of the thing is largely irrelevant. Indeed, another token of marriage with no market value might be equally important to her.

As Radin recognises, the fulfilment of personhood is not exclusively determined by property. Rather, property should be included within a project of identifying and valorising the contributory factors of personhood, including anchoring in the community. Personhood is, in part realised by, say, having a particular physical shelter that fellow community members recognise as a particular person's home.⁶⁶ Trespass against that thing is not tantamount to an assault against a person, but that thing and a particular person may be so closely connected, because it promotes their personhood in a fundamental way – that it is categorically different from, say, notional funds being 'phished' from someone's credit card account.

The extent of personhood property is necessarily limited, even for the person whose personality is exceptionally acquisitive.⁶⁷ One's pursuit of personhood must take into account others' personhood expectations. Furthermore, things capable of ownership must be balanced against other factors of personhood. Here, the freedom to express one's ideas and to receive

61 See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2005) 45.

62 GWF Hegel, *Philosophy of Mind* (W Wallace and AV Miller, Clarendon Press, 2007) [49] [trans of: *Phänomenologie des Geistes* (first published 1807)].

63 Alan Ryan, *Property and Political Theory* (Blackwell, 1984) 131.

64 *Ibid*, 137.

65 Margaret Jane Radin, *Reinterpreting Property* (The University of Chicago Press, 1993) 37.

66 For arguments rejecting claims for 'the home as a psychologically special object deserving heightened protection' see Stephanie M Stern 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093, 1144 See also Stephen J Schanbly, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45(2) *Stanford Law Review* 347.

67 Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 961.

the ideas of others, holds a place without parallel in modern Western thinking. Indeed, the right to express one's thoughts and to apprehend the expression of others' ideas is considered so essential to modern conceptions of personhood, to potentially render other rights secondary.⁶⁸ How might this idea apply to graffiti and others' personhood property expectations?

If a corporation owns a downtown parking lot, should its controllers expect the walls of the lot to be free from the self-expression of unpropertied taggers, who might generally be denied access to the factors of self-expression that contribute to their personhood?

Conversely, if taggers write on 'a grandmother's fence',⁶⁹ can this act be considered a defensible expression of their personhood, which must take into account the personhood of others? A grandmother's fence of say, her State house, may not constitute her 'property' in the same way as the stanchions of a bridge belongs to the government, but from a personhood perspective, it is implausible to consider both objects being tagged as equivalent.

For Peter Randell, the father of a youth sentenced to 28 days in jail for tagging, 'graffiti was a way young people could try to be noticed. Many come from broken families, and most of those families used to work at the '[freezing] works that were doing well until the works closed.'⁷⁰ This appears to be a sincere, empirical observation that is neither informed nor intermediated by sociological theory, but is consistent with it. Tony Jefferson observes how marginalised young men, 'lacking in status, and being further deprived of what little they possessed ... there remained only to self, the cultural extension of the self.'⁷¹ In Hegelian terms, these taggers are translating their innate human desire for freedom and self-expression on to an external sphere,⁷² thereby anchoring themselves in the world they live. Young men may use graffiti to construct masculinity,⁷³ claim power and establish independence from the institutions which define and often limit them as young people.⁷⁴ Many young men will simply outgrow tagging as they gain a greater stake in society; a few may become accomplished artists.⁷⁵

68 See, for example, *Brooker v Police* [2007] 3 NZLR 91 (SC), [285] per Thomas J.

69 The 'grandmother's fence' test is, for example, used in the Art-da-Facts course, run by Hutt City youth centres Vibe and Secret Level, to persuade taggers to pursue commissioned street art. See Paul Easton, 'Tagging the Taggers' *The Dominion Post* (Wellington), 19 May 2012, C3.

70 See 'Teen tagger locked up for 28 days' *The Dominion Post* (online), 16 April 2008 <<http://www.stuff.co.nz/national/368031>>

71 See Tony Jefferson, 'Cultural Responses to the Teds' in Stuart Hall and Tony Jefferson (eds) *Resistance through Rituals: Youth sub-culture in post-war Britain* (Unwin Hyman, 1976) 81. 82. Jefferson specifically had in mind 'Teds' ('Bodgies' were the Australasian equivalent) but his observations are equally relevant to contemporary marginalised youths.

72 Tyler Wilson, a tagger interviewed by Paul Easton, 'Tagging the Taggers' *The Dominion Post* (Wellington), 19 May 2012, C3, 'blames boredom for his time as a tagger'. Boredom may, of course, indicate marginalisation.

73 There are many highly accomplished female street artists and yarn bombers, but taggers are predominantly young men.

74 See, generally, Nancy Macdonald, *The Graffiti Subculture: Youth, Masculinity and Identity in London and New York* (Palgrave Macmillan, 2001).

75 With no obvious hint of irony, Ray Wallace, mayor of Hutt City says 'We need young people to reject tagging. It's not art, it's just scrawling. There are no Banksies in the Hutt.' See Easton, above n 72, C3. Banksy recalls 'I was 16 years old when I first trespassed onto some railway tracks and wrote the initials of the graffiti crew (of which I was the only member) on a wall.' See Banksy, [untitled] in *Trespass*, above n 4, 6.

IV POSSIBILITIES

Only rarely is graffiti in New Zealand obscene, racist, sexist, homophobic or a means of marking gang territory. Certainly, graffiti may, in the ‘broken windows’ theory of policing,⁷⁶ lead people to apprehend general lawlessness but graffiti writers appear to be quite focused in the laws they break,⁷⁷ and those do not include crimes of violence. Conversely, a young tagger in Auckland was killed by an outraged business owner.⁷⁸ How does the annoyance of graffiti become a motivation for manslaughter? More broadly, Young ponders, ‘why graffiti and street art presents such a challenge to the territorialisation of urban space into a zone of intolerance and exceptionality that has become so paramount to the self-definition of the contemporary city’.⁷⁹

In an orthodox view, it would be absurd to propose that graffiti should be decriminalised. Conversely, from a Hegelian perspective of property as a means of expressing personhood, it would be equally absurd to ignore the role graffiti plays in allowing many dispossessed young people to assert their being human. However audacious the proposition, we might see graffiti in terms of a general servitude over certain properties, such as downtown laneways, so that just as people might enjoy thoroughfare, they might also be able to paint.⁸⁰

Kurt Iveson says ‘engaging young people in a wider politics of urban aesthetics in which the graffiti ‘problem’ is redefined ... the more progressive legal graffiti programmes may enable a counter-discourse about graffiti to emerge in which *bad* graffiti is the problem to be addressed, not graffiti per se’.⁸¹ But who will decide what is ‘good’ and what is ‘bad’ graffiti?

In Hastings, ‘[t]he abutments of a large bridge on the outskirts of town have been set aside as a “legal” graffiti area’.⁸² Kitchen claimed that he graduated from this permitted space to other walls because the council buffed his works too soon. His self-exculpation is disingenuous. Ample evidence exists that graffiti artists, especially tag writers, have no expectation of permanence for their works. Graffiti permits typically create ‘a zone that becomes saturated with low-quality work that then spills beyond any boundaries that can be inscribed’.⁸³ Besides, illegality may provide a necessary exhilaration.⁸⁴ Hastings’s environment enhancement officer, Jacqui Davis, observes graffiti walls ‘don’t work simply because the [taggers] lose the buzz, and, once the buzz has gone, it just spreads’.⁸⁵ Likewise, Andrea Brighenti observes that tag

76 See Kim Ruscoe, ‘Emery jailed for killing tagger’ *Stuff* (online), 22 February 2009 <<http://www.stuff.co.nz/national/1399650/Emery-jailed-for-killing-tagger>>.

77 Paul Wilson and Patricia Healy, *Vandalism and Graffiti on State Rail* (Australian Institute of Criminology, Canberra, 1986) found no statistical connection between graffiti and personal safety – rather such connections were a matter of perception. Cited by Kurt Iveson, ‘Cities for angry young people? From exclusion and inclusion to engagement in urban policy’ in Brendan Gleeson and Neil Sipe, *Creating Child Friendly Cities: reinstating kids in the city* (Routledge, 2006) 49, 60-1.

78 See Kim Ruscoe, ‘Emery jailed for killing tagger’ *Stuff* (online), 22 February 2009 <<http://www.stuff.co.nz/national/1399650/Emery-jailed-for-killing-tagger>>.

79 Alison Young ‘Negotiated consent or zero tolerance? Responding to graffiti and street art in Melbourne’ (2010) 14 (1-2) *City* 99, 113.

80 See *ibid*, on Young’s model of negotiated tolerance which was rejected by Melbourne City Council.

81 Iveson, above n 77, 62.

82 Tony Wall, ‘To catch a tagger’ *Sunday Star Times* (online), 3 July 2011 <<http://www.stuff.co.nz/sunday-star-times/features/5220823/To-catch-a-tagger>>.

83 Dovey, above n 27, 206.

84 See James T Murray and Karla L Murray, *Broken Windows: Graffiti NYC* (Ginkgo Press, 2002) unpagged.

85 Tony Wall, ‘To catch a tagger’ *Sunday Star Times* (online), 3 July 2011 <<http://www.stuff.co.nz/sunday-star-times/features/5220823/To-catch-a-tagger>>.

writers see illegality as a defining characteristic of their practice.⁸⁶ Intransigence is evident both among property owners and taggers but the former have the law on their side.

V CONCLUSION

This article has used three artefacts to highlight the bluntness of the law in relation to graffiti. Two similar artefacts (Kitchen's tags and the Frizzells' blockbusters) receive disparate legal treatment because one has been included by a property owner and the other has not. The included works attract copyright and moral rights protections, whereas creating the excluded works led to a significant period of imprisonment. Between these poles, the lenience shown to the Curtis Memorial created a de facto public artwork. A crucial consideration arises from graffiti – who controls the public space? Should individual property owners have the unique right to decide the object of the public gaze, whether it is graffiti or advertising?

Urban designers such as Dovey, ask: '[i]s there some way to eliminate the relatively mindless tagging while keeping the street art?'⁸⁷ Experience of crafting and developing copyright law tells us that seeking to judge artistic quality is fraught with peril.⁸⁸ Besides, an approach of allowing aesthetically appealing street art (however that might be decided), but prohibiting tagging, overlooks the importance to personhood of marking things that Hegel established in his theory of property. A general right to tag property would be unthinkable, but, as Radin and others indicate, not all property is the same. While the grandmother's fence, an archetype of personhood property, should be safe from tagging, surely council utility boxes do not deserve the same level of protection from graffiti?

86 Andrea Mubi Brighenti, 'At the Wall: Graffiti Writers, Urban Territoriality, and the Public Domain' (2010) 13(3) *Space and Culture* 315, 318.

87 Dovey, above 27, 205.

88 See, generally, David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' (2003) *Intellectual Property Quarterly* 38.