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Elizabeth G. Gee

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Comments

CITY WALLS CAN SPEAK: THE STREET ART MOVEMENT AND GRAFFITI'S PLACE IN FIRST AMENDMENT JURISPRUDENCE

I. TO DESTROY IS ALWAYS THE FIRST STEP IN ANY CREATION¹

Walking through any major city, people are likely to see splashes of color, elaborately scrawled names, characters, posters, stickers, mosaics, and other types of graffiti adorning walls, bridges, overpasses, trains, and almost every imaginable surface.² Although graffiti and street art are nothing new in this country, cities and local governments have attempted to prevent individuals from “tagging” private and public property for decades.³ Many cities across the United States classify marking, painting, or writing on another person’s property without authorization or consent as a misdemeanor or felony.⁴ Graffiti artists are considered vandals by most city ordinances and can be punished with fines or even jail time.⁵

While graffiti is largely unpopular among city officials and residents, who consider it vandalism, many others view it as artistic expression, making otherwise drab cities vibrant and colorful.⁶ There exists a longstanding debate as to whether graffiti is vandalism or a form of art, and one question that repeatedly arises in the graffiti debate concerns the interaction between the First Amendment’s Free Speech Clause and graffiti as a form of expressive art.⁷

1. E.E. Cummings (quote).

2. See LOUIS BOU, STREET ART: THE SPRAY FILES 6 (2005) (explaining different types of street art and graffiti that appear in various urban settings).

3. See *Frequently Asked Questions*, GRAFFITI HURTS, <http://www.graffitihurts.org/getfacts/faq.jsp> (last visited Jan. 31, 2012) [hereinafter GRAFFITI HURTS] (providing examples of anti-graffiti measures different jurisdictions have adopted).

4. See *Vincenty v. Bloomberg*, 476 F.3d 74, 77 (2d Cir. 2007) (describing New York City’s vandalism statute).

5. See GRAFFITI HURTS, *supra* note 3 (classifying graffiti as “institutional vandalism” and citing penalties and punishments for vandalism).

6. See, e.g., Adam Nagourney, *Admirers Call It Art, But the Police Call It a Problem*, N.Y. TIMES, Apr. 22, 2011, at A9, available at <http://www.nytimes.com/2011/04/23/us/23graffiti.html?ref=museumofcontemporaryart> (citing various attitudes toward graffiti, with one individual saying “[i]t’s a way of encouraging people to express themselves,” while another stated “I think graffiti is so yesterday.”).

7. See David Leichtman & Avani Bhatt, *Federal Courts and the Communicative Value of Visual Art: Is An Intended Message Required for Strong Protection of Rights Under the First Amendment?*, 58 FED. LAW. 25, 25 (2011) (“[I]t is only natural that art and

Case law does little to define the scope of the First Amendment's protection over public art and expression, and only adds to the controversy over the legitimacy of graffiti as an art form.⁸ Further, laws that seek to restrict or limit graffiti may run afoul of the First Amendment's public forum doctrine, additionally complicating this intersection of law and free expression.⁹

The graffiti debate has reached fever pitch as graffiti and street art have become more widely accepted in art circles.¹⁰ A recent gallery exhibit entitled "Art in the Streets," on display at the Los Angeles Museum of Contemporary Art, illustrates graffiti's leap from subculture to mainstream art.¹¹ The exhibition displayed thousands of examples of urban graffiti covering walls, subway cars, and buses, and also featured prominently known street artists like Shepard Fairey and Banksy.¹²

Despite the increasing acceptance of graffiti in popular culture and the art world, cities have continued to impose harsh penalties and implement measures to combat what they see as pervasive crime and vandalism.¹³ Several property owners in a historic Atlanta neighborhood recently mounted a one million dollar lawsuit against a group of graffiti artists including "two well-known street artists and a skateboard and clothing company."¹⁴ In Pittsburgh, Pennsylvania, one graffiti artist faced sixty-nine misdemeanor charges and four felony charges of criminal mischief for tagging over one hundred properties and causing an estimated \$212,000 in

artistic expression have been evaluated under the Free Speech Clause of the U.S. Constitution, raising questions about whether, when, and why the display of art should be free from government incursion.") (citation omitted).

8. See *id.* at 26 (discussing ambiguous standards for protectable art set out in various courts).

9. See Daniel Mach, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 387 (1997) (considering level of government restriction on public art).

10. See Nagourney, *supra* note 6 ("[T]he battle in Los Angeles reflects what has been a recurring argument in cities around the world: Is graffiti a legitimate form of art?").

11. See *id.* (detailing "Art in the Streets" exhibit and types of art on display).

12. See *id.* (describing scope of exhibit).

13. See Matthew Newton, *Art Crime: Graffiti Wars*, THE CRIME REPORT (Feb. 22, 2010, 02:57:54 AM), <http://www.thecrimereport.org/archive/art-crime-graffiti-wars> (illustrating "increasing crackdown on graffiti across the country," like "vandal squads" dedicated to capturing high-profile graffiti artists").

14. See Kristi E. Swartz, *2 Residents, Firm Sue Graffiti Taggers*, ATLANTA J.-CONST., Apr. 4, 2011, at 2B, available at <http://www.ajc.com/news/atlanta/lawsuit-targets-graffiti-artists-894980.html> [hereinafter Swartz I] (describing civil lawsuit against graffiti artists in Atlanta).

property damage.¹⁵ Another graffiti artist was sentenced to two-and-a-half to five years of imprisonment in a Pennsylvania state penitentiary for violating city ordinances outlawing graffiti.¹⁶

Elsewhere, lawmakers are taking even more drastic measures to combat graffiti.¹⁷ Several cities, including New York, implemented legislation prohibiting the sale of spray paint, broad tipped indelible markers, and other commonly used graffiti implements to individuals under the age of twenty-one.¹⁸ The New York City Code also prohibits individuals under the age of twenty-one from possessing those materials on another person's property, or in any public facility.¹⁹ New York also revoked a street permit that had been granted to the Mark Ecko company after it learned Ecko was planning to host an outdoor art exhibition and graffiti demonstration, arguing that the exhibition and demonstration would incite criminal behavior.²⁰

While continuing to battle against unauthorized graffiti, prosecutors and law enforcement officials have noted a marked resistance to their efforts.²¹ Those who support graffiti as a form of artistic expression have mounted First Amendment challenges to legislation criminalizing graffiti.²² Furthermore, two of the street artists named in the aforementioned one million dollar Atlanta lawsuit have filed a countersuit against the property owners, claiming they were wrongly named in the suit and seeking damages for financial and emotional distress.²³

15. See Newton, *supra* note 13 (noting mountain of charges filed against graffiti artist known as "HERT" for graffiti written throughout Pittsburgh).

16. See *id.* (highlighting notable graffiti lawsuit resulting in prison sentence).

17. See *id.* ("Recent convictions nationwide have shown a hardening of the criminal justice system's stance against graffiti artists.").

18. See *Vincenty v. Bloomberg*, 476 F.3d 74, 77 (2d Cir. 2007) (reciting strict anti-graffiti statute criminalizing not only act of writing graffiti, but also targeting potential vandalism at point of purchase).

19. N.Y. ADC. LAW § 10-117 (2011); see also *Vincenty*, 476 F.3d at 77-78 (restating provision in anti-graffiti statute criminalizing possession of items typically used by graffiti artists).

20. See *Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627, 628 (S.D.N.Y. 2005) (describing lawsuit challenging denial of street activity permit based on content of art to be exhibited).

21. See, e.g., Andrew Reilly, *Saber, Graffiti Artist, Fights to Lift Mural Ban in LA*, HUFFINGTON POST (Oct. 14, 2011, 1:31 PM), http://www.huffingtonpost.com/2011/10/13/artist-saber-fights-to-li_n_1009758.html ("Now Saber [well-known graffiti artist] is approaching public art laws from a different angle, spearheading an effort to reform Los Angeles' mural policies.").

22. See *Ecko.Complex*, 382 F. Supp. 2d at 628 (challenging content-based restriction on legally painted graffiti as infringement on freedom of expression).

23. See Kristi E. Swartz, *Street Artists, Taggers in Graffiti Lawsuit Strike Back With Counterclaims*, ATLANTA J.-CONST. (May 9, 2011, 3:57 PM), <http://www.ajc.com/>

Tension between proponents and opponents of graffiti will only grow as society continues to accept graffiti, while legislatures impose increasingly harsher penalties for it; whatever the resolution may be, for now, the debate wages on.²⁴ Section II of this comment will begin by exploring graffiti's origins and emergence as part of a cultural youth movement in the 1960s and 1970s, as well as its transition from underground representations of rebellion and anti-establishment attitudes, into a legitimate form of fine art. Section III explains the "broken windows theory," the main philosophy underlying graffiti's bad reputation, and how this theory pervades anti-graffiti legislation and permeates mindsets throughout the country. Next, this comment analyzes constitutional questions at the core of society's debate on graffiti's legitimacy in Section IV. Subsection IV(A) examines the scope of First Amendment protection over art, and questions whether this protection extends to graffiti; subsection IV(B) identifies a debate regarding the level of restriction governments can impose on expression in public fora. Sections V and VI discuss anti-graffiti legislation, the steps cities are taking to combat vandalism, and the response from street artists and graffiti proponents. Finally, Section VII analyzes mixed messages regarding graffiti's legitimacy as an artistic and cultural movement that are being sent by the acceptance of street artists like Banksy, the incorporation of street art in corporate guerrilla marketing schemes, and international museums featuring graffiti, in the face of new anti-graffiti legislation.

II. FROM CAVE WALLS TO SUBWAYS: A BRIEF HISTORY OF GRAFFITI

Graffiti can hardly be considered a modern trend.²⁵ Various cultures have written on walls and other surfaces for thousands of years to teach individuals how to write, and to express themselves

news/atlanta/street-artists-taggers-in-940385.html [hereinafter Swartz II] (describing lawsuit brought by graffiti artists in response to lawsuits brought by property owners in Atlanta neighborhood).

24. See Arifa Akbar & Paul Vallely, *Graffiti: Street Art – Or Crime?*, THE INDEPENDENT (London), July 15, 2008, at 10, available at <http://www.independent.co.uk/arts-entertainment/art/features/graffiti-street-art-ndash-or-crime-868736.html> ("Street art, you see, is a highly polarizing phenomenon.").

25. See Marisa A. Gomez, *The Writing On Our Walls: Finding Solutions Through Distinguishing Graffiti Art From Graffiti Vandalism*, 26 U. MICH. J. L. REF. 633, 636 (1993) (detailing early examples of graffiti in ancient cultures, such as Pompeian graffiti, Mayan works, and Egyptian hieroglyphs); see also Lefty Leibowitz, *Art Crimes*, JINX MAGAZINE, http://www.jinxmagazine.com/art_crimes.html (last visited Jan. 1, 2008) ("Graffiti, of course, has been around since man learned how to write.").

artistically.²⁶ From cavemen depicting animals to Egyptian hieroglyphics adorning the walls of tombs of great rulers, graffiti has played a significant role in many cultures throughout history.²⁷ The roots of American graffiti can be traced to the colonial era, with graffiti commercializing drunkenness and criticizing politics.²⁸ As the social and political atmosphere of the country experienced a major shift in the 1960s with the emergence of the counterculture and the acceleration of Civil Rights legislation, graffiti became a way to express cultural pride and even gang affiliation.²⁹

During the 1970s and into the 1980s, modern graffiti picked up steam as a cultural movement in New York City.³⁰ Graffiti artists began to “mark their territory” and express individualism by tagging walls across the city.³¹ One of the first graffiti artists to become widely known in the New York area was known by the tag “TAKI 183.”³² Deemed the “modern godfather of graffiti,” TAKI, short for Demetaki (his Greek name), scrawled his tag throughout Manhattan while working as a messenger in the early 1970s.³³ His tag became so well known that the *New York Times* wrote an article about him in 1971.³⁴ The article interviewed a seventeen year old TAKI,

26. See Gomez, *supra* note 25, at 636-37 (highlighting early purpose of graffiti writing in ancient Western cultures).

27. See *id.* (describing spread of graffiti from history's oldest civilizations to Medieval England, and eventually to American colonies).

28. See *id.* at 637 (“American graffiti began in early colonial America. For two centuries, American graffiti mainly focused on drinking, defecating, and politicking.”) (endnote omitted).

29. See *id.* (explaining rise of “youth culture” in late 1950s and 1960s, which coincided with rise of graffiti expressing ethnic affiliation, gang affiliation, and political propaganda).

30. See *id.* at 637 (mentioning that “tagging,” or signing a name or “tag” on public property, as many people understand graffiti to be, first became popular in New York City).

31. See *id.* (“[Tagging] differed from simple vandalism because it had territorial significance and because it represented a powerful youth subculture which cared little about the values and laws of society, developing a language, aesthetic values, and standards all of its own.”).

32. See *id.* at 637-38 (stating that New York graffiti began with TAKI 183); see also Dimi Arhontidis, *Graffiti Legends: The Artist that Sparked a Pop Culture Phenomenon*, FEED GRIDS, http://feedgrids.com/originals/post/graffiti_legends_artists_that_sparked_pop_culture_phenomenon (last visited Feb. 8, 2010) (describing early graffiti artist TAKI 183 and describing him as “one of the most influential graffiti writers”).

33. See Arhontidis, *supra* note 32 (recounting TAKI 183's early forays into graffiti writing).

34. See *id.* (detailing almost instantaneous recognition of TAKI 183's tag, which caught the attention of the *New York Times*); see also Don Hosan Charles, *TAKI 183' Spawns Pen Pals*, N.Y. TIMES, July 21, 1971, available at http://feedgrids.com/assets/images/posts/taki_183_nytimes.pdf (describing 17-year old tagger TAKI 183, who sparked hundreds of imitators to write tags all over New York City).

who asked that his last name remain undisclosed, and revealed that TAKI had written his name on everything from ice cream trucks and subway walls, to walls in Kennedy Airport.³⁵ Even TAKI admitted he did not know how many times he had taken a magic marker to a wall and written his tag.³⁶ The *Times* article, as well as many graffiti artists and fans, say TAKI spurred hundreds of other graffiti artists to follow suit, igniting the modern explosion of graffiti.³⁷

Early graffiti artists viewed tagging as a form of communication, artistic expression, and as a way to show pride in one's neighborhood.³⁸ Over the years, styles and techniques have evolved from simple tags scrawled with magic marker to large murals with dozens of different paint colors.³⁹

The underground graffiti culture emerged in the art world and reached mainstream appeal, in large part, through artist Jean-Michel Basquiat.⁴⁰ Basquiat began his art career blanketing New York City with his infamous tag "SAMO".⁴¹ As Basquiat transitioned from a graffiti artist to a fine artist, showing in world-class art galleries as part of the Neo-expressionist movement in the 1980s, he took his graffiti style with him and incorporated it into his most well known works.⁴²

Although graffiti and street art have increasingly been acknowledged, if not accepted, as mainstream art, it has never been em-

35. See Hosan Charles, *supra* note 34 (explaining that TAKI 183 began by writing his tag on ice cream trucks in his neighborhood but eventually spread to tagging sites throughout New York City, even reaching as far as Kennedy Airport).

36. See *id.* ("He said he had no idea how many times he had written his name.").

37. See *id.* (stating that TAKI 183 has "widened the field and won imitators"); see also Jim Ralston, *How Do You Combat That Graffiti?*, RELIABLE PLANT, <http://www.reliableplant.com/Read/8967/graffiti> (last visited Sept. 4, 2012) (stating TAKI 183's graffiti has prompted imitators known as "taggers").

38. See Arhontidis, *supra* note 32 (arguing that graffiti can be method for merely proving one's existence); see also Gomez, *supra* note 25, at 637 (illustrating various reasons graffiti writers adorn walls with tags and murals).

39. See Gomez, *supra* note 25, at 639 (illustrating evolution of graffiti and graffiti styles from simple tags done with markers, to spray-painted bubble letters, to distinctive lettering developed and adopted by different cities, to murals covering entire subway cars).

40. See Gabriel Fernandez, *Graffiti & Ghetto*, THE ART WOLF, <http://www.theartwolf.com/basquiat.htm> (last visited Jan. 1, 2012) (describing artwork of Jean-Michel Basquiat).

41. See *id.* (describing Jean-Michel Basquiat's early art career as graffiti artist tagging SAMO© – meaning "Same Old Shit" – on subways in New York City).

42. See Bonnie Rosenberg, *The Life, Works, and Analysis of Jean-Michel Basquiat*, THE ART STORY, <http://www.theartstory.org/artist-basquiat-jean-michel.htm> (last visited Feb. 1, 2012) (discussing various influences on Basquiat's art including his beginnings as graffiti artist and his emergence in New York's punk scene).

braced by the law.⁴³ In most cities, graffiti has continually been considered criminal mischief or vandalism, even while TAKI 183 and Jean-Michel Basquiat have been celebrated for their contributions.⁴⁴ The majority of graffiti is written on another's property, without permission, in violation of the property owner's rights.⁴⁵ Cities continue to view graffiti as a growing problem, costing hundreds of thousands of dollars to clean every year, especially as graffiti has emerged throughout the country.⁴⁶

III. THE 'BROKEN WINDOWS' THEORY

The main proponents of the view that graffiti is criminal activity were James Q. Wilson and George Kelling, criminologists who introduced their "broken windows theory" in the early 1980s.⁴⁷ Wilson and Kelling posited that people are more willing and likely to commit crimes in run-down neighborhoods that appear to be "unwatched and uncared for by residents and local authorities."⁴⁸ They argued that a person walking through a neighborhood full of houses with broken windows and covered in graffiti would interpret the run-down nature of the neighborhood as a signal that "no one cares [about the neighborhood], and so breaking more windows costs nothing."⁴⁹ Wilson and Kelling argued that since "perceptions affect reality[,] the appearance of disorder begets disorder," which fuels crime in seemingly run-down, dilapidated neighborhoods.⁵⁰ In order to decrease and prevent crime, the two criminologists suggested that authorities take the time to "replace or fix the broken windows" rather than wait for crimes to be committed.⁵¹ By

43. See Newton, *supra* note 13 (quoting law enforcement officer arguing that property owners are victims of vandalism).

44. See Fernandez, *supra* note 40 (listing sales and auctions of Basquiat's art, and prestigious gallery shows he participated in).

45. See James Kimmons, *What is The Bundle of Legal Rights of a Real Estate Owner?*, ABOUT.COM, http://realestate.about.com/od/ownershipandrights/f/bundle_of_right.htm (last visited Feb. 3, 2012) (acknowledging property owners' right to exclude others from their property as being included in their "bundle of rights").

46. See Newton, *supra* note 13 (observing harsher penalties for graffiti throughout country).

47. See Daniel Brook, *The Cracks in 'Broken Windows'*, BOSTON GLOBE, Feb. 19, 2006, at E1, available at http://www.boston.com/news/globe/ideas/articles/2006/02/19/the_cracks_in_broken_windows/?page=full ("The broken windows theory first came to prominence in 1982, when criminologists George Kelling and James Q. Wilson first published a lengthy article on the subject . . .").

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

fixing the appearance of a neighborhood, the theory posits, people will be less likely to commit crimes because they believe the neighborhood is watched more closely than those neighborhoods that appear neglected.⁵²

William J. Bratton was a Boston transit police officer when the broken windows theory emerged, and who became a strong proponent of the theory as he moved up the ranks to Boston police commissioner.⁵³ He strongly believed that a police officer's role was to "keep order in a community rather than just respond to serious crimes after the fact."⁵⁴ Bratton implemented the broken windows theory in his policing strategy and saw a twenty-seven percent decrease in crime on Boston public transportation.⁵⁵

Seeing this impressive reduction in crime rates, a young Rudy Giuliani hired Bratton as New York City's police commissioner and set out to see if cleaning up New York City by painting over graffiti, clearing litter, and eradicating panhandlers would also prevent crime there.⁵⁶ Remarkably, the broken windows theory proved itself in New York; rates of crime in New York City dropped dramatically, including a seventy percent decrease in murder and an overall decrease in violent crime.⁵⁷ Other cities followed Giuliani's lead and began enforcing "zero tolerance" policies, targeting seemingly innocuous misdemeanor crimes like littering, jaywalking, loud parties, and especially graffiti.⁵⁸

The broken windows theory pervades many anti-graffiti city codes and ordinances, but recent studies have questioned its valid-

52. *See id.* (theorizing that fixing small instances of urban decay, like graffiti and litter, can help prevent more serious and violent crimes).

53. *See id.* (explaining Bratton utilized the broken windows theory as part of larger initiative to reduce crime on Boston public transit and continued his campaign against "quality of life" offenses as he was promoted to police commissioner).

54. *Id.*

55. *See id.* (claiming twenty-seven percent decrease in crime on Boston T after Bratton began enforcing broken windows theory).

56. *See id.* ("It wasn't long before [Bratton] attracted the attention of . . . Rudy Giuliani."). Continuing in Giuliani's tradition, Mayor Bloomberg asserted his stance on the broken windows theory announcing, "Graffiti poses a direct threat to the quality of life of all New Yorkers . . . It's not just an eyesore. It is an invitation to criminals and a message to citizens that we don't care." Jeff Chang, *American Graffiti*, VILLAGE VOICE (Sep. 10, 2002), <http://www.villagevoice.com/2002-09-10/books/american-graffiti/>.

57. *See Brook, supra* note 47 ("On Giuliani's watch, overall violent crime was cut in half, and the murder rate went down a stunning 70 percent, silencing all but the most stubborn critics.").

58. *See id.* (announcing "new initiative" targeting misdemeanors, citing broken windows theory as justification).

ity.⁵⁹ Critics argue that the decrease in crime rates in the early 1990s was the result of the “crack epidemic” and not the result of new policing tactics.⁶⁰ The crack epidemic began in the 1980s when the drug was first introduced, and gangs started fighting for control of the market, often resorting to violence.⁶¹ As crack became more readily available, the price of the drug decreased, dealers had less of an incentive to compete with gangs and violent drug rings, and cities consequently saw an abatement of violent crime rates.

Other critics of the broken windows theory argue that perceptions of neighborhoods are not determined by the existence of graffiti and broken windows, but rather by the racial makeup of the neighborhood.⁶² One study showed that the “physical signs of decay” were not as determinative of how disordered residents viewed their neighborhood, as much as the existence of African American and Latinos in the same neighborhood, even by residents who were African American and Latino.⁶³ Despite sharp criticism of the broken windows theory, nevertheless, the idea that graffiti may increase and invite crime persists nationwide.⁶⁴

59. *See id.* (stating theory received recent criticism due to rising crime rates in cities abiding by its philosophy); *see also* Stephen Metcalf, *The Giuliani Presidency?*, SLATE MAGAZINE (May 11, 2006, 2:02 PM), http://www.slate.com/articles/arts/the_dilettante/2006/05/the_giuliani_presidency.html (criticizing broken windows theory as being “among the most universally discredited theories in the social sciences”).

60. *See* Brook, *supra* note 47 (describing different theory that may account for decrease in crime seen in New York City and other major cities during early 1990s).

61. *See id.* (explaining that crack was very “lucrative” market when it emerged in late 1980s); *see also* LEONARD A. MAROWITZ, WHY DID THE CRIME RATE DECREASE THROUGH 1999? (CJSC Publications 2000), *available at* <http://ag.ca.gov/cjsc/publications/misc/why/rpt.pdf> (“Recent decreases in violent crimes followed the abatement of the ‘crack epidemic.’”).

62. *See* Brook, *supra* note 47 (theorizing that perceptions about neighborhoods are shaped by race, rather than presence of graffiti and other examples of neighborhood decay).

63. *See id.* (explaining “implicit bias” held by people of all races, which states that people have tendency to “associate minorities with undesirable traits like criminality”).

64. *See* Andrew Blankstein, Richard Winton & David Ng, *Outside Street Art Show, a Different Picture*, L.A. TIMES, Apr. 20, 2011, at A1, *available at* <http://articles.latimes.com/2011/apr/20/local/la-me-04-19-tagger-art-20110420> (quoting graffiti artist “Man One” who stated, “Law enforcement wants you to believe the broken windows theory – that the city falls apart and bigger crimes occur because of an increase in tagging. One of the questions the city should be asking is if there is an increase in violence [due to an art exhibit featuring graffiti].”).

IV. GRAFFITI & THE FIRST AMENDMENT

A. Is Graffiti a Form of Expression Protected by the First Amendment?

The First Amendment of the Constitution protects, among other things, the freedom of speech.⁶⁵ Free speech jurisprudence lacks a firm stance on whether art and forms of artistic expression constitute “speech” and therefore deserve protection.⁶⁶ Many legal scholars and courts tend to agree, however, that art that conveys or communicates a message is clearly protected expression under the First Amendment.⁶⁷ According to one commenter, various theories regarding the scope of the First Amendment’s protection of speech agree that, “when artistic expression conveys a perceptible message, it enjoys full First Amendment protection.”⁶⁸ However, art does not need to contain words to be capable of expressing a message; therefore, First Amendment protection also extends to art that contains an expression, even if the specific ideas expressed are not readily discernable, and especially if the work is displayed to the public.⁶⁹

While it is safe to say with some level of certainty that at least some art is protected by the First Amendment, it is a whole other inquiry to determine what constitutes art.⁷⁰ Is something art because it is aesthetically beautiful?⁷¹ Perhaps something is art because it takes extensive training and skill to create or because it is created with media typically associated with art, like a canvas, paint, or clay.⁷² The problem with defining what art will be protected

65. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

66. See Genevieve Blake, *Expressive Merchandise and the First Amendment in Public Fora*, 34 FORDHAM URB. L.J. 1049, 1057 (2007) (stating that current law regarding protection afforded to visual art is imprecise).

67. See Mach, *supra* note 9, at 387 (“[I]t seems well settled that when artistic expression conveys a perceptible message, it enjoys full First Amendment protection.”).

68. *Id.*

69. See *id.* at 388, 391 (“Art need not, however, express identifiable ideas in order to receive First Amendment protection.”).

70. See, e.g., *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006) (“[W]e do not purport to resolve whether plaintiffs’ wares fit within, or can be reconciled with, broader societal definitions of ‘art,’ a famously malleable concept the contours of which are best defined not by courts, but in the proverbial ‘eye of the beholder.’”); see also *Celli v. City of St. Augustine*, 214 F. Supp. 2d 1255, 1258 (M.D. Fla. 2000) (holding that visual art is protected speech and noting that “[t]he Second Circuit has held that all visual art is protected under the First Amendment”).

71. See *Leichtman & Bhatt, supra* note 7, at 25 (“What if one person considers a certain piece of art beautiful and another thinks it is ugly?”).

72. See *id.* (posing rhetorical questions about how to measure or evaluate art).

under the First Amendment is that art is inherently subjective, and in the case of graffiti, what one may consider art, another may see as vandalism.⁷³ Courts struggle to distinguish between artwork that is expressive, and therefore protectable, and artwork insufficiently expressive to trigger First Amendment protection.⁷⁴ Courts have been hesitant to “deal with questions of aesthetics,” because “art is hopelessly subjective and pliable.”⁷⁵

Whether or not graffiti can be considered art subject to First Amendment protection was the pertinent issue addressed in *Mastrovincenzo v. City of New York*.⁷⁶ In *Mastrovincenzo*, the court had to determine whether the plaintiffs’ street wares, featuring graffiti style, were works of art or pieces of merchandise, the latter requiring the plaintiffs to have purchased vendor permits from New York City.⁷⁷ If the court held that the items being sold were protectable art, and therefore forms of expression protected by the First Amendment, the City’s ordinance requiring vendors to receive licenses could be a First Amendment violation.⁷⁸ The court determined that the plaintiff’s “graffiti-decorated items” were expressive,

73. See, e.g., Leibowitz, *supra* note 25 (lamenting anti-graffiti measures throughout New York City and calling government the “bad guys”). But see Akbar & Vallely, *supra* note 24 (quoting graffiti opponent who described graffiti writers as taking part in “a wholesale self-indulgent campaign to damage property on an industrial scale”).

74. See Blake, *supra* note 66, at 1065 (stating that court in *Mastrovincenzo* had to “delineate a border between protected, expressive art and unprotected, non-expressive merchandise”).

75. *Id.* at 1060; see also Leichtman & Bhatt, *supra* note 7, at 25 (explaining that courts are hesitant to make determination of what art is protected by First Amendment).

76. 435 F.3d 78 (2d Cir. 2006).

77. See *id.* at 81-82 (describing New York City’s General Vendors Law, which attempts to limit and regulate streets and sidewalks by requiring individuals who sell merchandise or other non-food items to obtain vendor’s license). The plaintiffs sold t-shirts and hats that they painted and decorated with graffiti on the street according to the individual request of each client. See *id.* at 86 (illustrating type of merchandise the plaintiffs sold on NYC sidewalks). Plaintiffs considered their merchandise artwork, rather than clothing, and therefore asserted they were not subject to the General Vendors Law. See *id.* (stating that plaintiffs considered their products to be artwork on “nontraditional” canvases). For more information on the General Vendors Law, see *infra* note 78 and accompanying text.

78. See *Mastrovincenzo*, 435 F.3d at 82 (explaining that artists and vendors who sold paintings, photographs, prints, and sculptures had previously challenged this law as First Amendment violation, and so law was not enforceable against “vendors of ‘any paintings, photographs, prints and/or sculpture.’”). The decision not to enforce the General Vendors Law against vendors selling various types of artwork was previously addressed in *Bery v. City of New York*, in which the court stated:

Courts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment’s protective arm.

which was persuasive evidence that they contained protected speech.⁷⁹ Although the court held that graffiti could be considered expressive, and therefore subject to some level of First Amendment protection, the court found New York's ordinance constitutional on other grounds.⁸⁰

B. Graffiti and the Public Space Debate

The First Amendment's protection over expression, and, in certain instances, artwork takes on a different level of significance when artwork is displayed to the public.⁸¹ When art is displayed publicly, it has a greater ability to convey a message than art that is not generally available for public viewing.⁸² Because of the potential for communication, public artwork, like graffiti, may also be considered more expressive in nature, and therefore subject to First Amendment protection, according to reasoning applied in *Mastrovincenzo*.⁸³

The ability to display artwork publicly, and through mainstream channels such as art galleries, museums, and periodicals, is

Courts have struggled with such issues in the past; that is not to say that decisions are impossible.

Bery v. City of New York, 906 F. Supp. 163, 165 (2d Cir. 1996).

79. See *Mastrovincenzo*, 435 F.3d at 96-97 (holding that plaintiff's merchandise had predominantly expressive purpose, and their motivation behind selling goods was primarily for self-expression, rather than for commercial gain). The court in *Mastrovincenzo* had to determine whether the merchandise in question was sufficiently expressive such that it was entitled to First Amendment protection within the *Bery* court's analysis. See *id.* at 93 ("At the outset, we must determine whether the sale of plaintiffs' goods is *presumptively* entitled to First Amendment protection, or more precisely, whether the expressive capacity of plaintiffs' goods is such that we automatically apply First Amendment scrutiny to regulations that restrict their sale or dissemination."). Clothing that contains artwork like graffiti was considered "not presumptively expressive" like paintings or photographs are, but nonetheless the court determined that clothing like that being sold by the plaintiffs could still be protected by the First Amendment. See *id.* (modifying lower court's five-factor framework for determining whether non-presumptively expressive goods should be subject to First Amendment protection).

80. See *id.* at 96-100 (finding plaintiff's merchandise subject to First Amendment protection due to its predominantly expressive purpose; however, also concluding that NYC's purpose of keeping sidewalks clear and preventing sale of stolen goods was compelling government interest sufficiently tailored to achieve ends sought).

81. See *Mach*, *supra* note 9, at 391 ("The First Amendment status of art is even more relevant when art is publicly displayed.").

82. See *id.* ("The public nature of the art itself, moreover, may be intertwined with the work's expressive nature.").

83. For a further discussion of this protection, see *supra* notes 76-79.

imperative for artists to convey their message and expression.⁸⁴ One commentator aptly noted that museums are the dominant way to display art for the public, but that there is a limited amount of space to display such art, and even work that is on display in a museum reaches only a small segment of the population.⁸⁵ As a result, few artists have the ability to convey their art, expression, and message to reach large audiences and promote public debate.⁸⁶ Because the ability to reach a wide audience through traditional avenues can be very difficult, many graffiti artists shirked these traditional avenues, and decided to display their art on walls, buildings, windows, and subway cars instead.⁸⁷

Some graffiti writers, as well as proponents of graffiti, have argued that they have some right to express themselves via their art in a public forum, including writing graffiti on public property.⁸⁸ Thus, another debate surrounding graffiti and its interaction with the First Amendment involves balancing the individual's right to free speech and expression against the government's right to protect and maintain public property.⁸⁹

Case law regarding the public forum doctrine has identified three specific types of public fora:

'traditional' public fora – 'places which by long tradition or by government fiat have been devoted to assembly and debate;' second, 'limited' public fora – 'public property which the State has opened for use by the public as a place for expressive activity;' and third, 'nonpublic' fora – property not dedicated in any significant way to free or open communication.⁹⁰

84. See Mach, *supra* note 9, at 391-92 (explaining that art world limits ability for artists to display their work for populous, and therefore limits scope of public discourse and debate stemming from art).

85. See *id.* at 391-92 ("[A]s wealth in the United States becomes concentrated in fewer hands, there is a danger that public debate will be dictated by a small, wealthy group of speakers.").

86. See *id.* at 392 ("[L]imited museum space means that fewer artists can participate in public artistic discussion . . . [and] because only a small segment of the population attends museums on a regular basis, even the most renowned artists have difficulty reaching mass audiences.").

87. See *id.* at 393-94 (describing public art and art appearing on public property like government buildings).

88. See *id.* at 399 ("[T]he [public forum] doctrine has stood for the basic principle that the government is limited in its ability to restrict expression on certain types of public property.").

89. See *id.* (stating tension between freedom of speech with governmental interest in maintaining public property).

90. *Id.* at 400 (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

According to the Supreme Court in *Perry Education Association v. Perry Local Educators' Association*, “the state’s ability to regulate speech depends on the nature of the forum,” and the government can only craft “[r]easonable time, place, and manner regulations,” when attempting to restrict expression in “traditional public fora.”⁹¹ In the context of limited public fora, if the government holds the property open to the public, it must follow similar guidelines as to those laid out for traditional public fora.⁹²

While case law like *Perry Education* examined legal art or art that was commissioned for placement in a government building or on public property, graffiti written on public property could arguably fit into the *Perry Education* framework.⁹³ This assumes that a state park falls into the category of a traditional forum under the public forum doctrine.⁹⁴ If a graffiti artist writes or paints on a wall within the public state park, he is arguably exercising his right to free speech and expression within that public forum.⁹⁵ Any restrictions or regulations on graffiti art in the public park would likely be subject to intermediate scrutiny because these restrictions would presumably not be content-based, but instead, based on the act of painting in a public space, itself.⁹⁶ Content-neutral regulations may be subject to time, place, and manner restrictions, as long as they are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁹⁷

Many cities have ordinances prohibiting the drawing, writing, or marking of public or private property in the absence of the ex-

91. *Id.*; see also *Perry Education*, 460 U.S. at 45 (citing *U.S. Postal Serv. v. Council of Greenburgh*, 453 U.S. 114, 132 (1981)) (“The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”).

92. See *Mach*, *supra* note 9, at 400 (“The Court imposes similar restraints on speech in limited public fora.”).

93. See *id.* at 383-84 (illustrating artwork displayed in government buildings that has faced considerable controversy, even though artwork in question here was presumably legal and selected to decorate rooms in public buildings).

94. See *Celli v. City of St. Augustine*, 214 F. Supp. 2d 1255, 1260 (M.D. Fla. 2000) (“A traditional public forum is a place that has been ‘devoted to assembly and debate’ either by ‘long tradition’ or ‘government fiat.’”) (internal quotations omitted).

95. See *id.* (“Public parks, street, and sidewalks are all traditional public fora.”).

96. See *Mach*, *supra* note 9, at 401 (stating that content-based decisions in context of traditional public forum would be subject to strict scrutiny).

97. See *Celli*, 214 F. Supp. 2d at 1260 (explaining that content-neutral regulations in traditional public forum context subject to intermediate scrutiny).

press permission of the property owner.⁹⁸ In *Celli v. City of St. Augustine*, a street artist challenged the constitutionality of a city ordinance that prohibited the use or occupation of any public property for the purpose of selling, displaying, or offering for sale any goods without first obtaining a city permit.⁹⁹ After combining elements of the *Celli* ordinance with elements from an ordinance prohibiting the act of marking public property, the resulting ordinance would make it illegal for anyone to mark, write, or display art on public property, like in a public park.¹⁰⁰ A content-neutral restriction on expression under an ordinance like the one crafted above would survive a constitutional challenge as long as it was tailored to serve a significant government interest, and as long as the regulation left open other channels of communication.¹⁰¹ There is a clear and significant government interest in “maintaining aesthetic attractiveness” of a city by prohibiting graffiti in public spaces, as was argued by the City in *Celli*.¹⁰² An ordinance like the one created above would easily satisfy an inquiry into the government’s significant interest, but the inquiry does not end here; the ordinance in question must also be narrowly tailored enough to leave open ample alternative opportunities for communication.¹⁰³

This is where the graffiti debate comes into play, with graffiti proponents arguing the government has not left ample opportunities for communication and expression, hence justifying, in a sense, graffiti writers’ flagrant violation of anti-graffiti legislation.¹⁰⁴ While it is true that artists have legal means of communication, such as art

98. See, e.g., *Vincenty v. Bloomberg*, 476 F.3d 74, 77 (2d Cir. 2007) (quoting City code “forb[idding] any person to write, draw, or paint any inscription, figure, or mark on public or private property without the express permission of the owner or operator of the property”).

99. See *Celli*, 214 F. Supp. 2d at 1257 (quoting Section 22-6 of Ordinance).

100. See *Vincenty*, 476 F.3d at 77 (providing prototypical anti-graffiti statute).

101. See *Celli*, 214 F. Supp. 2d at 1260 (setting out analysis and framework for content-neutral restrictions on speech and expression in public fora).

102. See *id.* at 1261 (“The Court acknowledges that Defendant correctly argues that the City has a substantial interest in maintaining the aesthetic attractiveness of St. Augustine . . .”).

103. See *id.* at 1260 (outlining level of scrutiny content-neutral restriction must meet).

104. See Abby Goodnough, *Boston Vandalism Charges Stir Debate on Art's Place*, N.Y. TIMES (Mar. 11, 2009), at A15, available at <http://www.nytimes.com/2009/03/12/arts/design/12boston.html> (revealing famed graffiti artist Shepard Fairey’s defense of graffiti, arguing that he is “advocating that public space ‘should be filled with more than just commercial advertising’”).

galleries and museums, these channels are extremely limited to the point of being practically unavailable to most artists.¹⁰⁵

Cities have recognized the tension between government control and maintenance of public property and artists' desire to publicly display their art, spurring proposals of alternative graffiti legislation.¹⁰⁶ Instead of "declaring war on the spray-painting vandals," in 1984, then Philadelphia mayor, W. Wilson Goode, decided to "channel [graffiti artists'] creative energy into muralmaking."¹⁰⁷ This decision enabled the establishment of the Mural Arts Program, an initiative that attempts to turn would-be vandals into artists legally beautifying the city.¹⁰⁸ Philadelphia officials have claimed that this alternative stance on graffiti has even helped reduce crime rates throughout the city.¹⁰⁹ The founder of the Mural Arts Program, Jane Golden, argued that the program helps to bring together different racial and ethnic groups, and even members of rival gangs, as a way to collaborate, rather than fight to claim land through tagging.¹¹⁰

Other cities have attempted to embrace the expression of graffiti artists as a right protected by the First Amendment by designating particular city walls for legal public artistic expression.¹¹¹ One commenter argued for the development of legal graffiti programs:

105. See Michelle Bougdanos, *The Visual Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 560 (2002) (describing graffiti as some artists' only means of expressing themselves); see also Susan Farrell, *Graffiti Q & A: Art Crimes*, ART CRIMES (1994), http://www.graffiti.org/faq/graffiti_questions.html (explaining that "[g]raffiti is meant to be a public display. When it is illegal it is a political statement . . .").

106. See Brenden Lowe, *Postcard: Philadelphia*, TIME (Aug. 23, 2007), <http://www.time.com/time/magazine/article/0,9171,1655717,00.html> (describing Philadelphia's method for regulating graffiti); see also Blake, *supra* note 66, at 1051 ("[T]here is a conflict between those who want access to public spaces in which to conduct expressive activities, like sidewalks, and the cities in charge of maintaining those sidewalks that wish to exercise control and restraint on that expressive activity – not necessarily because of the substance of the expression, but merely because the expression exists.").

107. See Lowe, *supra* note 106.

108. See *id.* (categorizing Mural Arts Program as "pro-art rather than antigraffiti").

109. See *id.* ("Philadelphia doesn't keep exact stats on graffiti crimes but says the mural-as-peacekeeper model has proved its worth.").

110. See *id.* (stating that Golden reached out to local gangs to become part of Mural Arts Program, and that it was city's responsibility to help citizens deal with race and violence issues).

111. See Gomez, *supra* note 25, at 701 (identifying providing legal space for graffiti artists as one potential way to reduce vandalism and encourage artistic expression); see also Farrell, *supra* note 105 ("[T]here are . . . 'legal walls' – places where writers can go do murals without fear of being arrested."). There are, of course, those graffiti artists who argue that the illegal nature of graffiti is part of its

A program of legalized graffiti art will reduce vandalism. By providing an outlet for artistic expression and a forum which showcases writers' work, the incentives to vandalize are removed. The murals themselves often discourage vandalism because such works are respected by the writers, who see themselves as artists and would not deface another's work of art.¹¹²

An interview with several graffiti artists revealed that legal walls would encourage graffiti writers to use the legal spaces, rather than writing on private property.¹¹³ One such graffiti artist stated, "[I]legal yards are often the most active yards in cities. Many of the more serious writers end up taking all of their writing to the legal yards and walls."¹¹⁴

V. THE WAR ON GRAFFITI: ANTI-GRAFFITI MEASURES

Most, if not all, states have legislation prohibiting various forms of vandalism, and graffiti is either considered vandalism or criminal mischief in many criminal codes and ordinances.¹¹⁵ Charges for graffiti can vary in severity and are typically characterized as a misdemeanor, or even a felony for repeat offenders.¹¹⁶ Cities employ several different enforcement mechanisms and sanctions for combating illegal graffiti including fines, imprisonment, and restitution to "restore property to its original condition."¹¹⁷

Several cities and states have increased their vandalism penalties and created mandatory minimum punishments for graffiti and

core and purpose as antiestablishment rhetoric, but the graffiti community seems to be split on this point. *See id.* ("Plenty of "hard core" graffiti writers think that graffiti is illegal by definition. They are not interested in having their work sanctioned by society, particularly if that would lead to commercial exploitation of the art form. It is nonetheless true that some of the most detailed and intricate pieces are done on legal walls, where writers can work undisturbed.").

112. *Id.* at 702 (endnote omitted).

113. *See* Farrell, *supra* note 105 (stating that many artists are partial to legal walls, but that they are very limited, leaving most graffiti artists to resort to their own devices and write illegally).

114. *Id.*

115. *See Frequently Asked Questions*, GRAFFITI HURTS, graffitihurts.org/getfacts/faq.jsp (stating existence of statutes, codes, and ordinances criminalizing graffiti, and noting F.B.I. considers graffiti vandalism).

116. *See id.* (citing various enforcement mechanisms for anti-graffiti laws).

117. *See id.* (providing examples of penalties for violating anti-graffiti laws and codes).

vandalism charges.¹¹⁸ For example, in California, graffiti that causes up to \$400 in property damage carries a penalty of six months in jail, a \$1,000 fine, or both.¹¹⁹ Other legislative measures go even further to tackle graffiti by fining property owners who do not remove graffiti from their own premises.¹²⁰ New York City implemented a law in 2006 that would impose fines on owners of commercial and residential property who fail to remove graffiti after receiving a warning.¹²¹ The property owner is responsible for removing the graffiti, but if the owner notifies the mayor's office, the city will remove the graffiti at no charge.¹²² Arguably, Los Angeles maintains one of the most restrictive anti-graffiti laws, evidenced by the city's ban of murals, which are outlawed even if they have been commissioned by a property owner or were painted on private property with the consent of the owner.¹²³ Private owners may seek approval for murals on their property, but are subject to bureaucratic red tape and must be approved on a case-by-case basis by the city.¹²⁴

Other attempts at preventing graffiti include laws like the one at issue in *Vincenty v. Bloomberg*.¹²⁵ New York City had amended its city's Administrative Code to "prohibit the sale of, inter alia, aerosol spray paint containers and broad tipped indelible markers to per-

118. See Chad Smith, *Building Owners Will Be Tagged for Graffiti*, THE VILLAGER, at Vol. 75, Num. 38, available at http://thevillager.com/villager_145/buildingownerswill.html (introducing another antigraffiti measure unleashed within decade).

119. See *Legal Codes and Regulations*, GRAFFITI LA (Feb. 23, 2007), <http://graffitila.com/legal-codes-and-regulations> (describing Los Angeles laws regarding graffiti and punishments for different types of violations).

120. See Smith, *supra* note 118 (explaining anti-graffiti law that targets property owners, instead of elusive graffiti artists).

121. See *id.* (discussing new law aimed at eradicating "resurgence of graffiti," in New York City by targeting not only graffiti writers, but also property owners who failed to remove graffiti from their property). This law seems to incorporate the broken windows theory. Presumably, the NYC officials felt that by failing to remove graffiti from their property, property owners were in essence inviting more crime and graffiti into the neighborhood. Removing graffiti would prevent graffiti from appearing on the property in the future, according to the broken windows theory. See *id.* (stating that property owners are responsible for abating or removing "nuisance" created by graffiti).

122. See *id.* (detailing new law forcing landlords and property owners to remove graffiti, but stating that city will remove graffiti at no cost to property owner if owner signs liability waiver with mayor's office).

123. See Reilly, *supra* note 21 ("[U]ncommissioned murals are banned outright, even if the mural is painted on private property with the consent of the owner.").

124. See *id.* (stating that because murals on private property must receive city approval on case-by-case basis, it is difficult for "private property owners to gain approval for site-specific murals . . .").

125. 476 F.3d 74 (2d Cir. 2007).

sons under 21 years of age.”¹²⁶ The ordinance also prohibited persons under the age of 21 from possessing aerosol spray paint cans, broad tipped indelible markers, or etching acid on someone else’s property, or in any public building or facility.¹²⁷

In some cases, the legal system has failed to provide adequate means of preventing graffiti and street art, and citizens have taken matters into their own hands.¹²⁸ One dramatic example is that of two men, Dave MacDonald and Stan Mobley, owners of a historic building in Atlanta, who are suing a group of known graffitiists for \$1 million for vandalizing their building.¹²⁹ The complaint named several well-known street artists as well as a skateboard company, and claimed that these artists vandalized numerous properties throughout Atlanta.¹³⁰ The owners also claimed that the graffiti artists caused Atlanta property owners to spend thousands of dollars and dozens of hours personally painting over and removing graffiti.¹³¹

VI. FIGHTING BACK: GRAFFITISTS’ RESPONSES TO ANTI-GRAFFITI MEASURES

Despite increasingly restrictive anti-graffiti laws and penalties, some street artists and supporters of graffiti have begun to fight back, not merely by continuing to tag buildings, but by challenging the laws and anti-graffiti lawsuits themselves.¹³² After Dave MacDonald and Stan Mobley filed their \$1 million lawsuit against several well-known Atlanta graffiti artists, two of the defendants named in the lawsuit filed counterclaims against the property owners.¹³³

126. *Id.* at 76.

127. *See id.* at 77 (describing N.Y.C. Administrative Code’s prohibition of possession of marking implements for individuals under 21).

128. *See Swartz I, supra* note 14 (noting that cleaning or painting over graffiti, as cities often do to combat graffiti, does not abate this type of vandalism).

129. *See id.* at 76-77 (reporting that two Atlanta property owners decided to launch lawsuit against known street artists and graffiti writers, instead of waiting for local officials to prevent vandalism).

130. *See id.* at 79-80 (outlining extent of property damage and highlighting strain on city resources caused by graffiti artists).

131. *See id.* at 78-79 (describing lawsuit against group of graffiti artists seeking \$1 million in punitive damages for intentional destruction of property and emotional distress).

132. *See, e.g., Reilly, supra* note 21 (noting proactive stance of graffiti artist in combating anti-graffiti legislation).

133. *See Swartz II, supra* note 23 (“[L]ocal street artists named in a lawsuit in April filed counter suits, claiming they have been damaged after being wrongly named as taggers who have spraypainted [sic] their names on the sides of buildings.”). Interestingly, the lawsuit initiated by MacDonald and Mobley named some of the defendants only by their tags, or handles, and their attorney subsequently

Greg Mike and Douglas Alexander Brewer, who are known street artists throughout the Atlanta area, argued they were falsely accused because they were not connected with the tags on MacDonald's building.¹³⁴ Mike and Brewer contend that MacDonald only targeted them because of their notoriety as well-known street artists, and they believe the graffiti was actually produced by Atlanta teenagers.¹³⁵ Mike further claimed that MacDonald was merely seeking retribution for an incident that had occurred a year prior to the vandalism at issue.¹³⁶ There, Mike had plastered posters on a building owned by MacDonald, believing the building was abandoned.¹³⁷ Mike contended that MacDonald and Mobley named him in the lawsuit to "make an example of him" because of Mike's status in the community.¹³⁸ In their countersuit, Mike and Brewer seek both legal fees and punitive damages for "financial distress, anxiety, loss of business and community support."¹³⁹

Another lawsuit challenging a restriction on artistic expression via anti-graffiti legislation involved the clothing label Ecko.Complex, founded by Marc Ecko and an art exhibition he attempted to host in New York City.¹⁴⁰ Ecko, a former graffiti artist turned fashion mogul, applied for a street permit to host an outdoor art exhibition in conjunction with a demonstration of twenty different artists painting graffiti on replica subway cars.¹⁴¹ After following the city's bureaucratic process, Ecko received a permit for the art exhibition as planned.¹⁴² Soon after, the City questioned

connected the tags with the alleged graffiti writers only after he found a notebook on the ground near the building in question. *See id.* ("The notebook, full of assignments, AP course descriptions and notes, educated [MacDonald and Mobley's attorney] on something else . . . the graffiti tags and the students behind them . . .").

134. *See id.* (outlining defense and claim for countersuit).

135. *See id.* ("Brewer's countersuit states the he's a well-known Atlanta artist – and was sued only because of 'his fame and standing in the local and international art communities, solely because of his high profile, in an effort to garner media attention.'").

136. *See id.* (describing prior incident in detail).

137. *See id.* (detailing previous altercation between Mike and plaintiffs of lawsuit against him).

138. *See id.* (illustrating Mike and Brewer's reasoning behind their counter suit).

139. *See id.* (describing claims in countersuit against Atlanta property owners).

140. *See Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627, 628 (S.D.N.Y. 2005) (describing events leading up to eventual lawsuit initiated by clothing designer Marc Ecko against City of New York).

141. *See id.* (describing plaintiff's clothing company, and art exhibition, which became subject of lawsuit).

142. *See id.* ("After clearing numerous hurdles, including approval by the local community board, Ecko received . . . permit number MO4-042, which permit-

whether Ecko was actually putting on the exhibition for commercial purposes, and to promote his videogame that involved graffiti, and so the City revoked the previously issued permit.¹⁴³ The City later notified Ecko that an exhibition featuring graffiti “would incite criminal behavior,” and Ecko believed this was the true reason his permit was revoked.¹⁴⁴ In a *New York Times* article covering the story, Mayor Michael Bloomberg was quoted as stating, “This is not really art of expression, this is, let’s be honest about what it is: it’s trying to encourage people to do something that’s not in anybody’s interest.”¹⁴⁵

Ecko applied for another permit to host the previously scheduled art exhibition, addressing the City’s argument that the exhibit contained a commercial component, but, Ecko was denied a second time.¹⁴⁶ In issuing its denial, the City explained that the only reason Ecko was denied was because the demonstration was to feature live graffiti painting, and the City felt that this “presented too great a risk of inciting criminal behavior.”¹⁴⁷ In response, Marc Ecko sought an order from the court compelling the City to issue a permit for the event.¹⁴⁸ The court granted Ecko’s request by issuing a permit for the planned art exhibition and graffiti demonstration.¹⁴⁹

The court initially determined that the event Ecko planned was not a commercial event, but involved the exercise of artistic expression, with only incidental commercial benefits to the Ecko com-

ted Ecko to conduct the art demonstration on August 24, 2005, on 22nd Street between 10th and 11th Avenues in Manhattan . . .”).

143. *See id.* (explaining Ecko would have had to pay larger fee for commercial permit if City determined his demonstration was actually commercial event used to promote other Ecko products).

144. *See id.* at 628-29 (showing that City initially stated its revocation of permit was due to Ecko being issued incorrect permit, but City later noted that permit was revoked due to nature of artwork to be exhibited and demonstrated).

145. *See id.* (quoting Jim Rutenberg, *City Revokes Party Permit Over Exhibit With Graffiti*, N.Y. TIMES, Aug. 16, 2005, at B5, available at <http://www.nytimes.com/2005/08/16/nyregion/16graffiti.html>) (referencing New York Times article on City’s revocation of Ecko’s permit).

146. *See id.* at 629 (explaining that Ecko was denied second permit that he “had submitted in response to the purported ‘commercial’ objection . . .”).

147. *See id.* (stating that second permit was solely denied because of proposed art demonstration and possible criminal behavior it could provoke).

148. *See id.* (describing legal action Ecko took in response to objections regarding his art exhibition that he had “spent a great deal of time and money preparing for . . .”).

149. *See id.* (“The Court now grants Ecko’s application and reinstates permit number MO4-042.”).

pany.¹⁵⁰ Therefore, the only issue the court analyzed upon Ecko's request for the permit was whether the City could prohibit Ecko's art demonstration merely because it involved graffiti being painted in an urban setting.¹⁵¹ Graffiti, when done without a property owner's authorization, may be banned by local laws without violating the free expression clause; however, according to the court, it would be unconstitutional to bar the expression of artwork that embodies the graffiti and street art style, when done legally.¹⁵² Furthermore, the court noted that the city's regulation for granting or denying activity permits did not explicitly or implicitly give the City the authority to "govern the content of the street activities for which permits are sought."¹⁵³ The court concluded that the denial of a city activity permit could not be based on a particular form of artistic expression, such as graffiti in this case.¹⁵⁴

VII. MIXED MESSAGES – CELEBRATING & CRIMINALIZING STREET ART

A. Glorified Vandalism or Legitimate Cultural Movement?¹⁵⁵

Graffiti has been the center of a forty-year debate regarding its legitimacy as an art form.¹⁵⁶ Viewpoints regarding graffiti and street art vary from those who see it as art, to those who view it as gang activity, those who view it as a nuisance, and those who see it as social commentary shirking mainstream ideologies.¹⁵⁷ Two conflicting messages regarding graffiti are being simultaneously trans-

150. *See id.* ("What Ecko wishes to sponsor, pure and simple, is a graffiti art exhibition with little or no commercial speech of any consequence.").

151. *See id.* at 630 ("So, the only real issue is whether the City can lawfully proscribe an otherwise-approved public art exhibition on its streets because that exhibition involves painting graffiti on mock subway cars.").

152. *See id.* (recognizing actual graffiti or painting on real subway cars would not be approved by City, but City cannot bar those who wish to use graffiti style in "mock form").

153. *See id.* ("Nowhere on [the] face [of the statute] does that section directly purport to govern the content of the street activities for which permits are sought . . .").

154. *See id.* at 631 ("The unspecified other reasons on which an application may be denied [under the statute] cannot be stretched to include proscriptions of particular content of expression . . .").

155. *See Akbar & Vallyly, supra* note 24 (describing longstanding debate on graffiti).

156. *See Nagourney, supra* note 6 (acknowledging decades-long debate regarding graffiti's place in mainstream society and art).

157. *See id.* (citing various attitudes toward graffiti, with some people seeing it as nothing more than vandalism while others view graffiti as art and way for people to express themselves).

mitted to the population at large.¹⁵⁸ On the one hand, law enforcement continues to marginalize graffiti, taking an increasingly strict stance on eradicating graffiti and harshly punishing those caught in the act.¹⁵⁹ On the other hand, the graffiti style has permeated all facets of mainstream society, including fashion, fine art, entertainment, and even corporate America.¹⁶⁰ The mixed messages certainly do nothing to clear up the current graffiti debate.¹⁶¹

1. *The Case for Graffiti – “There was a time . . . when children of the ghetto expressed themselves with art, not with crime.”*¹⁶²

Graffiti artists, or writers as they are often called, have many different reasons for writing graffiti and “bombing” cities.¹⁶³ Graffiti is very often a vehicle for self-expression, with writers developing a unique tag, color scheme, or lettering to distinguish themselves from other graffiti writers.¹⁶⁴ It can provide an outlet for a human’s natural desire to communicate, and to prove his existence and make his name known.¹⁶⁵ One early graffiti artist, known by his tag “Phase 2,” explained that graffiti was “the only significant vehicle to represent the[] existence,” of underprivileged urban teenagers.¹⁶⁶

Many people question why graffiti artists choose to paint on buildings, subway cars, and other public or private property, rather than on a canvas or other legal medium.¹⁶⁷ Writing graffiti pro-

158. See Akbar & Vallely, *supra* note 24 (describing dichotomy between those who feel graffiti is art and should not be punishable defense and those viewing graffiti as property destruction).

159. See *id.* (quoting graffiti artist who called certain graffiti and vandalism punishments “draconian”).

160. See Jeffrey T. Iverson, *Born In the Streets - Graffiti*, TIME (Aug. 12, 2009) <http://www.time.com/time/travel/article/0,31542,1915899,00.html> (“When it starts inspiring the motifs that adorn designer handbags, graffiti’s entrée into the world of mainstream culture is no longer in doubt.”).

161. See Akbar & Vallely, *supra* note 24 (“So if artistic merit and commercial value aren’t yardsticks for resolving our national confusion [about graffiti] what is?”).

162. See Leibowitz, *supra* note 25 (quoting subway graffiti artist “Lee”).

163. See Gomez, *supra* note 25, at 645-48 (illustrating various motivations behind different graffiti artists including fame, recognition, self-expression, community improvement, and to claim territory).

164. See *id.* at 645-46 (explaining graffiti artists adopt various techniques as well as styles to develop their own tag, or logo); see also Leibowitz, *supra* note 25 (describing graffiti as form of self-expression).

165. See Arhontidis, *supra* note 32 (stating graffiti serves most basic human needs of communication).

166. See *id.* (quoting early graffiti artist’s motivation behind writing graffiti).

167. See Blankstein, Winton & Ng, *supra* note 64 (quoting popular line by William Bratton: “If you want to be an artist, buy a canvas.”).

vides an adrenaline rush for some writers who continue to tag illegally, knowing the consequences they could face if caught.¹⁶⁸ One graffiti artist explained that graffiti is meant to be a “public display,” and to make a political statement that would not be as effective on canvas.¹⁶⁹ Others choose street art and graffiti rather than legal outlets for their art because it is a way to have a large and instantaneous audience without having to go through “elitist” channels in the fine art world.¹⁷⁰ Street art “forces the public to become aware of and interact with the world around them,” something art hanging in a gallery cannot necessarily accomplish.¹⁷¹

Proponents see graffiti as a way to beautify an otherwise bland urban landscape and to bring art and culture to everyone.¹⁷² An interview with several graffitiists reveals that urban environments contain more graffiti than suburban and rural areas because “[b]lank walls are ugly and repressive,” so graffiti writers tag them with bright colors to give a city vibrancy.¹⁷³ Abandoned buildings and run-down, forgotten neighborhoods are given new life and meaning when graffiti writers choose them as the backdrop for their art and expression.¹⁷⁴ Some graffiti writers argue they are reclaiming the streets, which are full of commercial advertising, and

168. See *Bomb the City*, N.Y. PRESS (May 10, 2006), <http://www.nypress.com/article-13440-bomb-the-city.html> (revealing reason many graffiti artists risk harsh penalties for vandalism).

169. See Farrell, *supra* note 105 (stating ability for thousands of people to see graffiti is motivating reason behind act); see also FRANCESCA GAVIN, STREET RENEGADES: NEW UNDERGROUND ART 7 (2007) (“Free public interventions rebel against submissive consumption. They are, by definition, forms of subversive protest.”).

170. See Justin Shady, *A.V. Club Interview with Shepard Fairey*, A.V. CLUB (June 10, 2009), <http://www.avclub.com/articles/shepard-fairey,28943/> (arguing that street art allowed artists to put their work in front of large masses of people, rather than going through various roadblocks in “fine-art world”); see also Blake, *supra* note 66, at 1055 (“[P]arks, streets, and sidewalks often provide the economically disadvantaged with their only access to communicative expression.”) (internal quotation marks omitted).

171. See GAVIN, *supra* note 169 (“In a culture dominated by a glut of sensationalist, vacuous, throwaway media and virtual culture, the ‘real’ physical world has to reassert its presence in our lives.”).

172. See BOU, *supra* note 2 (“Street art turns big-city streets into open-air art exhibitions, producing significant socio-cultural impact and making for more universal communication, because people who have never set foot in a museum are absorbed by this artistic macroexhibition.”).

173. See Farrell, *supra* note 105 (describing graffiti artists’ view of city walls and their interpretation of art they are creating).

174. See BOU, *supra* note 2, at 32 (“[A]bandoned houses are used as artistic media, giving new value and utility to their textures.”); see also Gavin, *supra* note 169 (arguing people living in cities become so accustomed to their surroundings they don’t even notice them, and street art is way to “humanize public space”).

justify their tagging as a “counterbalance” to advertising’s “assault on consumers.”¹⁷⁵

2. *Graffiti as Vandalism – Graffiti’s Opponents*

Graffiti is criminalized in the majority of localities around the country.¹⁷⁶ Writing, inscribing, or carving letters or pictures on another person’s property, without their permission, is considered vandalism or criminal mischief.¹⁷⁷ One of the most deeply rooted notions about property ownership involves a property owner’s right to exclude others from his property and to dictate the use of his land, a basic right which graffiti writers violate with their tags.¹⁷⁸ In order to protect property owners and their right to exclude, governments have sought to not only catch and prosecute graffiti artists, but also to eradicate the practice altogether.¹⁷⁹ Besides unwilling property owners, many other opponents to graffiti and street art view graffiti as creating a disordered and unsafe environment, and view graffiti artists as disrespectful criminals.¹⁸⁰

Local governments often make an effort to clean off or paint over tags and murals since illegal graffiti is considered property destruction and vandalism in many localities.¹⁸¹ Cities can spend hundreds of thousands of dollars in taxpayer money eradicating walls

175. See GAVIN, *supra* note 169, at 6 (“Street art became a counterbalance to commercial advertising and its assault on consumers.”).

176. See GRAFFITI HURTS, *supra* note 3 (stating that FBI considers graffiti to be vandalism); see also Blake, *supra* note 66, at 1055 (“[I]n New York City such expressions (graffiti) have been – and to some extent still are – criminalized, regardless of their content.”).

177. See GRAFFITI HURTS, *supra* note 3 (“Typically, graffiti falls under ‘institutional vandalism’ or ‘criminal mischief.’ While a graffiti arrest may be considered a misdemeanor (a minor offense), more than one can add up to a felony.”).

178. See Blake, *supra* note 66, at 1054 (“While today’s urban sidewalks are ‘largely open to all comers,’ the owners of private property abutting the sidewalks may have substantial influence over what kind of expressive activity takes place there.”); see also Kimmons, *supra* note 45 (describing basic property rights of property owners, including “the right of control,” “the right of exclusion,” and “the right of enjoyment”).

179. See, e.g., *Vincenty v. Bloomberg*, 476 F.3d 74, 76 (2d Cir. 2007) (detailing New York City’s legislation designed to eliminate graffiti by prohibiting sale of spray paint and similar graffiti writing implements, and by prohibiting anyone under age of 21 from possessing graffiti writing implements like spray paint and markers).

180. See GRAFFITI HURTS, *supra* note 3 (outlining ways graffiti can “hurt” communities such as by making residents feel unsafe and by “attracting other forms of crime and street delinquency to the neighborhood”).

181. See *id.* (advising localities and citizens that best way to prevent further graffiti is to remove it as soon as it appears and describing various graffiti abatement programs).

and subways of graffiti.¹⁸² One group reported that in total, communities have spent \$4 billion cleaning and painting over graffiti, and restoring surfaces to their original condition over the course of only just one year.¹⁸³ Money is spent on cleanup efforts, but preventative measures, including increased surveillance and security, are also costly to cities.¹⁸⁴ Clean up is not only costly in terms of dollars, but also in terms of time and manpower; Dave MacDonald and Stan Mobley, the Georgia property owners bringing a \$1 million lawsuit against a group of graffiti artists, stated that it took them over four hours to scrape two posters off a wall of one of the buildings they owned.¹⁸⁵

Anti-graffiti groups believe that graffiti hurts communities and must be eliminated.¹⁸⁶ Due to the pervasive acceptance of the broken windows theory, many opponents argue that graffiti invites crime and criminals into neighborhoods.¹⁸⁷ One anti-graffiti group explained the negative impact graffiti has on communities:

Graffiti sends the signal nobody cares, attracting other forms of crime and street delinquency to the neighborhood. Graffiti decreases a resident's feeling of safety. Neighborhoods with graffiti see a decrease in property values, loss of business growth and tourism, and reduced ridership on transit systems.¹⁸⁸

Moreover, graffiti is often improperly associated with gangs and criminal activity, although, in reality, only around ten percent of all

182. *See id.* (“Graffiti drains tax dollars. Funds that could be used for schools, roads, parks, and other community improvements, are used for graffiti cleanup.”).

183. *See Gomez, supra* note 25, at 656 (noting cost to cities of graffiti cleanup and vandalism repair).

184. *See id.* at 653 (“Graffiti costs go beyond the costs of cleaning and include the costs of preventative measures.”).

185. *See Swartz I, supra* note 14 (describing time it took to remove illegally pasted posters from building wall).

186. *See GRAFFITI HURTS, supra* note 3 (arguing that graffiti is destructive to cities and that even “legal walls” do more harm to communities than good).

187. *See Gomez, supra* note 25 (“Graffiti is ugly, indicative of decay, invites crime and additional graffiti, and is done by criminals who should be punished.”).

188. GRAFFITI HURTS, *supra* note 3.

graffiti is gang related or includes gang symbols.¹⁸⁹ Notwithstanding this fact, the association persists.¹⁹⁰

B. Street Art Turned Mainstream: Banksy, a Case Study

While graffiti has largely remained on the fringe of mainstream art, there are some exceptions.¹⁹¹ One street artist who has straddled the line and made a name for himself in the art world goes by the name of Banksy.¹⁹² Banksy has managed to remain anonymous even though his artwork has appeared all over the world, from a security wall on the West Bank of Palestine, to walls inside the Louvre and the National History Museum.¹⁹³ Although Banksy has tagged walls, bridges, and any number of other private and public surfaces like other graffiti artists, he is not widely regarded as a vandal, but as an artist and cultural icon.¹⁹⁴

Banksy started out like many other graffiti artists and tagged neighborhood walls and trains around London, with occasional run-ins with law enforcement.¹⁹⁵ Banksy learned he needed to work quickly in order to evade security cameras and police officers, so he began creating pre-cut cardboard stencils to tag elaborate designs quickly.¹⁹⁶ His tag began appearing throughout the United Kingdom, and eventually spread to major cities in Europe and the

189. See Amy Larson, *Writing on the Wall: Ugly Vandalism or Beautiful Art?*, KSBW (Jan. 25, 2012, 3:06 AM), <http://www.ksbw.com/r/30298587/detail.html> (explaining that graffiti's negative reputation comes from fact that some gangs use it to "mark their territory," but that only four percent of graffiti in one town was related to gang activity); see also Gomez, *supra* note 25, at 654 (stating that seeing graffiti can instill fear in individuals because many people believe that graffiti will bring gang activity to neighborhoods).

190. See Farrell, *supra* note 105 (calling perception that graffiti art is gang related the "number one misconception" about graffiti).

191. See Collins, *infra* note 192 (highlighting career of street artist and trickster, Banksy).

192. See Lauren Collins, *Banksy Was Here*, THE NEW YORKER (May 14, 2007), http://www.newyorker.com/reporting/2007/05/14/070514fa_fact_collins (describing infamous street artist Banksy and how his street art and pranks have made him household name in U.K.).

193. See *id.* (illustrating that despite some of Banksy's high profile and risky art stunts, his true identity remains unknown).

194. See *id.* (recounting instance where Bristol residents were put to vote over whether Banksy piece should be permitted to stay on urban wall with ninety-three percent voting to keep mural); see also Akbar & Valley, *supra* note 24 ("[Banksy] has legitimised the genre . . .").

195. See BANKSY, WALL AND PIECE (2006) [hereinafter BANKSY I] (recalling time when Banksy narrowly escaped arrest after writing graffiti on side of train).

196. See *id.* (stating that after his near run-in with law enforcement, Banksy learned he would have to either work quickly or abandon street art, and his stenciling method was born).

United States, garnering a sort of cult following with satirical images and anti-authoritarian messages.¹⁹⁷

Banksy grew from merely tagging his name on London walls to crafting images full of anti-war, anti-authority, and anti-consumerism sentiment.¹⁹⁸ Rats are a common subject of Banksy's work and have been depicted spilling toxic waste onto the street, wearing peace signs, and painting signs stating, "it's not a race."¹⁹⁹ Banksy has also painted pictures of children with bombs and large machine guns, making an obvious statement about his opinion on war.²⁰⁰ Banksy not only paints graffiti, but his street art has also involved various pranks and installations.²⁰¹ Making a statement about the treatment of terror suspects at Guantanamo Bay, Banksy inflated a life-sized doll dressed as a Gitmo prisoner in the middle of Disneyland.²⁰² Banksy also created and hung oil paintings mimicking classic art, like his version of the Mona Lisa with a yellow smiley face, in the Louvre.²⁰³

Interviews with the elusive Banksy have revealed his motivation for the art he creates and why he remains on the periphery of

197. See Collins, *supra* note 192 (describing Banksy's early graffiti and street art career and its rapid spread and notoriety). One collector of Banksy art described Banksy's sudden popularity: "He's gone from zero to a hundred in, like, three seconds." *Id.*

198. See, e.g., *id.* (detailing Banksy exhibition called "Barely Legal" that featured live elephant, which pamphlet explained was to bring attention to global poverty); Shepard Fairey, *Banksy*, TIME (Apr. 29, 2010), http://www.time.com/time/specials/packages/article/0,28804,1984685_1984940_1984945,00.html ("He makes social and political statements with a sense of humor."); Alex Altman, *Banksy: An Artist Unmasked*, TIME (July 21, 2008), <http://www.time.com/time/arts/article/0,8599,1825271,00.html> (quoting gallery curator: "His work is a call to action. It's about hierarchies of power, social injustice and paying attention to issues that aren't being addressed.").

199. See Collins, *supra* note 192 ("I have a fantasy that all the little powerless losers will gang up together. That all the vermin will get some good equipment and then the underground will go overground [sic] and tear this city apart.") (quoting Banksy in his book *Existencilism*, published in 2002).

200. See Collins, *supra* note 192 (describing politically-charged works of Banksy, including painting of beach placed on security fence in West Bank).

201. See *id.* (describing various pranks and art installations done by Banksy including handing out fake copies of Paris Hilton's album that included fake song titles like "Why Am I Famous?" and "What Am I For?").

202. See *id.* (reporting Banksy Disneyland prank of sneaking in blow-up doll dressed in orange jumpsuit and hood to resemble recent news pictures of Guantanamo Bay prisoners).

203. See *id.* ("Later, he produced revisionist oil paintings (Mona Lisa with a yellow smiley face, a pastoral landscape surrounded by crime-scene tape) and, disguised in a trenchcoat and fake beard, installed them, respectively, in the Louvre and the Tate. For the Natural History Museum, it was . . . a taxidermy rat equipped with a miniature can of spray paint.").

fame.²⁰⁴ By eschewing traditional media for art, at least initially, Banksy challenged the art business.²⁰⁵ In an excerpt from his book *Wall and Piece*, Banksy explains his view of the art business: “The [a]rt we look at is made by only a select few. A small group create[s] [sic], promote[s], purchase[s], exhibit[s] and decide[s] the success of Art. Only a few hundred people in the world have any real say when you go to an Art gallery”²⁰⁶ Banksy argues that graffiti and street art serve as the antithesis to the exclusive art business because both provide a way to not only create art, but to display art for the public.²⁰⁷

Through his artwork, Banksy also challenges the use of public spaces for advertisements.²⁰⁸ In his book *Existencilism*, Banksy wrote:

Twisted little people go out every day and deface this great city. Leaving their idiotic little scribblings [sic], invading communities, and making people feel dirty and used. They just take, take, take and they don't put anything back. They're mean and selfish and they make the world an ugly place to be. We call them advertising agencies²⁰⁹

As Banksy's notoriety grew, so did many groups' acceptance of his art.²¹⁰ Hollywood celebrities have purchased his work (on canvas, of course) for tens of thousands of dollars, and works that have

204. See Altman, *supra* note 198 (“Banksy is a paradox: he used his anonymity to court attention and became a commercial success by condemning consumer culture.”).

205. See BANKSY, *EXISTENCILISM* (2002) [hereinafter BANKSY II] (“Imagine a city where graffiti wasn't illegal, a city where everybody could draw wherever they liked. A city that felt like a living, breathing thing which belonged to everybody, not just the estate agents and barons of big business.”).

206. BANKSY I, *supra* note 195 (noting Banksy's angst against social acceptance of art).

207. See *id.*

[Graffiti is] actually one of the most honest art forms available. There is no elitism or hype, it exhibits on the best walls a city has to offer and nobody is put off by the price of admission. A wall has always been the best place to publish your work. The people who run our cities don't understand graffiti because they think nothing has the right to exist unless it makes a profit, which makes their opinion worthless.

Id.

208. See Liz Logan, *Banksy Defends His Guerilla Graffiti Art*, TIME (Oct. 9, 2008), <http://www.time.com/time/arts/article/0,8599,1854616,00.html> (quoting Banksy, who argues that advertising is no different than graffiti, so if advertising is legal, graffiti should not cause so much controversy).

209. BANKSY II, *supra* note 205 (comparing effect of legal billboards and illegal graffiti).

210. See Collins, *supra* note 192 (describing various art exhibitions dedicated to Banksy's work).

sold at famed auction house, Sotheby's, have brought sums of \$200,000 and \$575,000.²¹¹ In 2010, Banksy released a documentary film entitled, "Exit Through the Gift Shop," following an artist's immersion into the underground world of street art and graffiti.²¹² The film was a hit at the annual Sundance Festival and was nominated for an Academy Award in 2011 for best documentary.²¹³

Some people welcome the various images and installations that appear on their property, and even believe that it could increase the value of their property.²¹⁴ Works by Banksy tend to draw large crowds; with large crowds comes increased foot traffic and the potential for increased business.²¹⁵ Although authenticating and removing street art for selling can be challenging or impossible in some cases, some property owners have attempted to sell Banksy pieces that have appeared on their walls and doors.²¹⁶ Banksy's piece, "Gorilla in a Pink Mask," located in Bristol, United Kingdom, was painted over when the property owner assumed it was graffiti.²¹⁷ Local residents were upset that the image, a local landmark for a decade, was painted over and subsequently brought an art conservationist to the site to determine whether the mural could be restored.²¹⁸ Ironically, while other cities considered Banksy's work vandalism, residents of Bristol rallied to restore Banksy's graffiti.²¹⁹

211. See *id.* (stating that Brad Pitt and Angelina Jolie are fans who have purchased Banksy's work).

212. See Melena Ryzik, *Riddle? Yes. Enigma? Sure. Documentary?*, N.Y. TIMES, Apr. 13, 2010, at C1, available at <http://www.nytimes.com/2010/04/14/movies/14banksy.html> (describing directorial debut from Banksy).

213. See *Recap: Banksy's "Exit Through the Gift Shop" at Academy Awards*, ARRESTED MOTION (Feb. 28, 2011), <http://arrestedmotion.com/2011/02/banksy-exit-through-the-gift-shop-oscar-best-documentary-academy-awards/> (relating film's Sundance debut, followed by Academy Award nomination for Best Documentary).

214. See Logan, *supra* note 208 ("Unlike most graffiti, Banksy's work, if it remains, is likely to add value to the property, not least because it's considered a valuable work of art.").

215. See *id.* (explaining that since Banksy mural appeared, large crowds have visited area).

216. See *id.* (describing failure of five different auctions because Banksy refused to authenticate pieces, and because organization that authenticates his work will not approve pieces that have been removed from their original site).

217. See *Whitewashed Banksy Restoration*, BBC NEWS (July 15, 2011, 14:28 ET), <http://www.bbc.co.uk/news/uk-england-bristol-14170547> (quoting building owner who painted over Banksy piece assuming it was "a regular piece of graffiti").

218. See *id.* (illustrating local sentiment surrounding painting over of Banksy work and comments of art conservationist who examined work to see if it could be restored).

219. See *id.* (explaining that town residents were reaching out via Twitter in hopes Banksy would repaint the mural); see also Collins, *supra* note 192 (quoting

Not everyone has embraced Banksy's brand of street art and social commentary, especially law enforcement.²²⁰ The Council of Westminster in London ordered the removal of one of Banksy's most well-known murals, which depicted a police officer with a camera standing near a boy painting the words, "One Nation, Under CCTV."²²¹ The Council argued that the mural would encourage graffiti and decided the image needed to be removed.²²² When the decision was made, there was a dispute as to who owned the wall on which Banksy's mural was painted, with one property investment firm claiming the mural was an advertisement that they would fight to keep.²²³ Although the investment firm attempted to keep Banksy's mural on the wall, Banksy was insulted at the notion that his mural was considered an advertisement.²²⁴

C. Guerilla Marketing Campaigns: Graffiti & Corporate America

In addition to appearing in art galleries, graffiti's influence can be seen in marketing campaigns from small, grassroots efforts to Fortune 500 Company advertising.²²⁵ Marketing companies have saturated most traditional advertising avenues such as print, television, radio, and the Internet, so several large marketing firms and advertising agencies adopted the strategies of street artists and graffiti artists as a way to "push products that break through the clutter."²²⁶

In 2001, IBM advertised its servers by spray-painting peace signs, hearts, and penguins on the streets of San Francisco as a part

member of Britain's "Keep Britain Tidy" campaign who expressed concern that Banksy's art glorified vandalism).

220. See Akbar & Vallely, *supra* note 24 ("[Banksy] has legitimised the genre and spawned a new generation of young imitators – much to the chagrin of those who want to clean up behind them."); see also Logan, *supra* note 208 (reporting on removal of twenty-three foot tall Banksy mural).

221. See Logan, *supra* note 208 (describing Banksy piece at center of controversy).

222. See *id.* (claiming Banksy's mural needed to be removed because it "encourages graffiti").

223. See *id.* (describing ownership dispute involving wall Banksy's piece adorns).

224. See *id.* (stating Banksy was "offended" at his art being classified as advertisement).

225. See Amy Wolf, *Guerrilla Art vs. Guerrilla Marketing*, THE INDEPENDENT, (Apr. 11, 2007), <http://www.independent.org/2007/04/11/guerrilla-art-vs-guerrilla-marketing> (outlining guerrilla marketing techniques employed by advertising firms).

226. See *id.* (quoting advertiser who stated, "What all marketers are dealing with is an absolute sensory overload").

of its “Love, Peace & Linux” campaign.²²⁷ IBM employed a New York based advertising agency that developed the campaign as a way to reach a wide customer base, to stand apart from other companies, and to appeal to a younger, more diverse demographic.²²⁸ While the campaign and painted symbols did cause a bit of a stir, city officials were not amused and considered the paintings akin to graffiti, in violation of a city ordinance.²²⁹

It is unlikely that large companies, like IBM, are not aware that advertising campaigns utilizing street art, posters, stickers, and graffiti, are considered vandalism and may violate local laws.²³⁰ However, companies with million-dollar advertising budgets consider any vandalism fines as simply part of the budget.²³¹ Companies are willing to pay what they see as insignificant vandalism fines for the ability to market outside normal advertising channels.²³² Interestingly, however, corporate marketers employing guerrilla-marketing techniques are not always penalized as harshly as street artists.²³³ IBM was given the choice of washing its peace symbols and penguins off the sidewalks or paying a \$500 fine; Microsoft was fined a nominal \$50 for placing butterfly stickers on New York City sidewalks; Chase Bank was merely threatened with a fine after the bank projected its logo onto New York sidewalks.²³⁴ In contrast, many graffiti artists face mandatory fines or possible jail time for similar offenses.²³⁵

227. See *IBM's Graffiti Ads Runs Afoul of City Officials*, CNN (Apr. 19, 2001), http://articles.cnn.com/2001-04-19/tech/ibm.guerilla.idg_1_campaign-ads-ibm-eserver-family?s=PM:TECH (describing IBM's ad campaign that utilized street art and guerrilla marketing techniques).

228. See *id.* (explaining IBM wanted to “shed its stuffy, corporate image” with campaign).

229. See *id.* (reporting that city officials described campaign as “an urban visual blight” in violation of city ordinance against painting signs on public property).

230. See *id.* (“IBM can’t shift the blame on the [advertising] agency, however; responsibility for the infraction lies with ‘the source’ . . .”).

231. See Wolf, *supra* note 225 (explaining that, although Turner Broadcasting was fined \$2 million for a marketing campaign, this is relatively minor expense in their overall budget).

232. See *id.* (“[C]orporations already know that it is cheaper and more effective to use guerrilla marketing illegally and pay the tiny fine.”).

233. See *id.* (illustrating disparity in punishments for vandalism and graffiti between corporate advertisers and street artists); see also Steve Lambert, *Who Hates Guerilla Marketing In Boston?*, ANTIADVERTISING AGENCY (Jan. 31, 2007), <http://antiadvertisingagency.com/who-hates-guerilla-marketing-in-boston/> (“Each week it becomes more clear in the media that advertising is using illegal methods, yet the fines and arrests remain disproportionately on graffiti writers and activists.”).

234. See Wolf, *supra* note 225 (reporting various fines corporations faced after guerrilla marketing campaigns).

235. See *id.* (comparing fines graffiti artists face for offenses similar to those committed by corporate advertisers).

While many guerrilla-marketing efforts undertaken by large companies have faced negligible legal punishment, advertisers may take things too far, and end up giving street artists a bad reputation.²³⁶ In 2007, Turner Broadcasting Systems, Inc. advertised the premiere of a network television show by posting electronic light boards around Boston, causing panic throughout the city as many people believed the battery-operated devices were bombs.²³⁷ Bomb squads were deployed throughout the city and surrounding suburbs, causing traffic delays, and halting Boston's mass transit system.²³⁸ Two freelance artists were subsequently arrested for participating in the marketing campaign, although authorities suspected they were employed by the New York advertising firm, Interference Inc., which had worked with Turner on the campaign.²³⁹

Turner issued an apology to Boston officials and law enforcement and later agreed to pay \$2 million to reimburse the government agencies involved in the bomb scare.²⁴⁰ The Graffiti Research Lab, an organization designed to connect graffiti artists and develop technologies for "urban communication," had previously developed the electronic light boards and technology that the Turner advertising campaign had used, but sought to distance itself from Turner after the bomb scare, and explicitly denied any involvement with the campaign on its website, stating: "This is NOT the work of the Graffiti Research Lab It's just more mindless corporate vandalism from a guerrilla marketer who got busted."²⁴¹

D. Art Exhibitions – Embracing Graffiti

Recent exhibitions held in several major U.S. cities have celebrated graffiti and street art, potentially increasing the art forms'

236. See Lambert, *supra* note 233 (citing guerrilla-style advertising campaign gone awry, causing a bomb scare in Boston).

237. See *Two Held After Ad Campaign Triggers Boston Bomb Scare*, CNN (Jan. 31, 2007), http://articles.cnn.com/2007-01-31/us/boston.bomb scare_1_bomb-scares-charlestown-district-court-peter-berdovsky?_s=PM:US (recounting Turner's written statement explaining electronic light boxes were placed in nine cities, and meant to promote show).

238. See *id.* (describing far-reaching effects of light box ad campaign).

239. See *id.* ("Authorities believe Berdovsky was 'in the employ of other individuals' as part of the marketing campaign").

240. See *Turner, 2nd Firm to Pay \$2 Million Over Scare*, MSNBC (Feb. 5, 2007), <http://www.msnbc.msn.com/id/16990202/#.T0LqpGC4LR0> (stating Turner agreed to pay \$2 million for their marketing campaign gone awry in order to settle any civil or criminal charges that could come out of incident).

241. See Wolf, *supra* note 225 (reciting Graffiti Research Lab's reaction to Turner's light box campaign backlash).

legitimacy.²⁴² The Los Angeles Museum of Contemporary Art sparked citywide controversy with its “Art in the Streets” exhibit, which opened in the spring of 2011.²⁴³ The exhibit featured “urban graffiti” adorning walls, glass, and even a subway car, and was “designed to present graffiti in a historical and critical context,” according to the museum’s director, Jeffrey Deitch.²⁴⁴ While the exhibit was met with critical and commercial success, local law enforcement authorities did not share the enthusiasm of the museum’s patrons.²⁴⁵ Shortly after it opened, authorities began blaming the “Art in the Streets” exhibit for the “new wave” of graffiti that appeared in neighborhoods surrounding the museum.²⁴⁶ One Los Angeles police officer argued that several graffiti tags were, at the very least, “encouraged” by the exhibit, and although law enforcement would not shut down the exhibit, officers would not hesitate to prosecute anyone illegally marking the property of others.²⁴⁷

The “Art in the Streets” exhibit was supposed to travel to the Brooklyn Museum after its run at the Museum of Contemporary Art in Los Angeles, but plans were later cancelled.²⁴⁸ Although the Brooklyn Museum cited financial problems as the reason for cancelling the exhibit, one of the artists featured in the exhibit speculated that there was more to the museum’s decision than financial problems.²⁴⁹ After learning the “Art in the Streets” exhibit was planning on making a stop at the Brooklyn Museum, a member of the City Council pressed the museum not to host the show, because

242. See Nagourney, *supra* note 6 (detailing controversial art exhibit in Los Angeles featuring work of graffiti artists).

243. See *id.* (highlighting dichotomy created by exhibit: “Walk into the Museum of Contemporary Art here and urban graffiti . . . is being celebrated by the city’s art lovers in a hugely popular show. Walk a block away and the same sort of scrawling could get you thrown in jail.”).

244. *Id.*

245. See *id.* (describing “fresh crackdown” on graffiti after MOCA opened exhibit).

246. See *id.* (stating LA Police Department believed exhibit was cause of uptick in illegal graffiti in museum’s surrounding neighborhood).

247. See *id.* (quoting lead police officer who vowed to put vandals in jail himself, even if they were artists featured in museum exhibit).

248. See Kate Taylor, *Citing Finances, Brooklyn Museum Cancels Plans for Graffiti Art Exhibit*, N.Y. TIMES, June 21, 2011, at A16, available at http://www.nytimes.com/2011/06/22/nyregion/brooklyn-museum-cancels-. . .troversial-graffiti-art-show.html?_r=1&ref=museumofcontemporaryart (reporting Brooklyn Museum’s cancellation of “Art in the Streets” exhibit).

249. See *id.* (quoting graffiti artist Saber: “Maybe there are some things going on behind the scenes that we don’t know about . . .”).

the show would “encourage the destruction of [the] taxpayers’ property.”²⁵⁰

The controversy surrounding the “Art in the Streets” exhibit illustrates the mixed message framing the graffiti debate.²⁵¹ What is on display inside the walls of the museum is criminalized outside.²⁵² Los Angeles authorities have said the exhibit has “put them in the awkward position of trying to arrest people for doing something that is being celebrated by the city’s cultural establishment.”²⁵³ Proponents of graffiti-as-art argue that displaying graffiti alongside priceless works of art in the Los Angeles Museum of Contemporary Art is “a final validation of graffiti as an art form.”²⁵⁴

The “Art in the Streets” exhibit is not the first art exhibit featuring street art and graffiti that has been blamed for inciting local individuals to tag the neighborhoods surrounding museums.²⁵⁵ Street artist Shepard Fairey, known for his 2008 “HOPE” portrait of then-presidential candidate Barack Obama, was arrested outside his own art opening after having distributed tens of thousands of stickers with the portrait and posting them throughout Chicago and Boston.²⁵⁶ Immediately preceding the opening of Fairey’s show at the Boston Institute of Contemporary Art, Fairey’s images and stickers began to appear throughout Boston’s back-bay neighborhood, although Fairey denied any connection to the graffiti.²⁵⁷ The mixed message regarding street art was again illustrated, in dramatic form, with the arrest of the very artist who was being lauded by art critics at the opening of his own art retrospective.²⁵⁸

250. *See id.* (citing City Council member’s letter to director of Brooklyn Museum, which reminded museum that museum “receives about \$9 million annually from the city”).

251. *See* Nagourney, *supra* note 6 (stating the “Art in the Streets” exhibit “fueled” graffiti debate).

252. *See id.* (explaining art exhibit put law enforcement in “the awkward position of trying to arrest people for doing something that is being celebrated by the city’s cultural establishment”).

253. *Id.*

254. *Id.*

255. *See* Goodnough, *supra* note 104 (describing art exhibit featuring Shepard Fairey in Boston and simultaneous increase in Fairey stickers popping up around city).

256. *See id.* (stating that images linked to Fairey began to appear as his museum exhibit opening neared).

257. *See id.* (citing complaint by head of “Neighborhood Association of the Back Bay”).

258. *See id.* (explaining that Fairey was arrested “as he arrived at the opening-night party for his retrospective at the Institute of Contemporary Art”).

VIII. CONCLUSION

While the war on graffiti has waged on in the United States and many other countries for decades, the debate seems to have intensified within the past several years.²⁵⁹ In recent years, law enforcement officials around the country have sought to “crack down” on graffiti and street art with new and harsher legislation on vandalism and criminal mischief.²⁶⁰ Examples of this strict anti-graffiti stance include laws like the one at issue in *Vincenty*, prohibiting the mere possession of spray paint and other writing implements commonly used by graffiti artists, and laws like one currently in effect in Los Angeles completely banning all exterior murals.²⁶¹ Many anti-graffiti laws, as well as society’s negative view of graffiti as destroying property and inviting criminal behavior, seem to stem from the broken windows theory.²⁶²

Despite graffiti’s bad reputation, its entrance into the mainstream is beyond doubt.²⁶³ With this wider acceptance comes the question of how and where to draw the line between graffiti art and graffiti vandalism.²⁶⁴ Prohibitions on graffiti may effectively stifle free speech and free expression, and thereby infringe upon the constitutional guarantees of the First Amendment.²⁶⁵ Recent court decisions have acknowledged that graffiti contains expressive elements capable of conveying a message, and that graffiti may have some level of protection under the First Amendment.²⁶⁶ While not all expressive speech is protected, and the government may properly impose certain restrictions on public speech and the display of public artwork, the restrictions must be narrowly tailored to serve a

259. See Mach, *supra* note 9, at 383 (“Art has become a battleground on which American society fights its most intensely political and deeply personal wars.”).

260. See Smith, *supra* note 118 (stating “changing nature of modern graffiti” has spurred new and more stringent penalties for vandalism).

261. See *Vincenty v. Bloomberg*, 476 F.3d 74, 77 (2d Cir. 2007) (detailing stringent anti-graffiti law aimed at preventing minors from even possessing spray paint).

262. See Brook, *supra* note 47 (examining broken windows theory and its applicability to anti-graffiti legislation).

263. See Blankstein, Winton, & Ng, *supra* note 64 (“The street art scene, which has long influenced popular culture, has slowly been entering the mainstream of the art world.”).

264. See Gomez, *supra* note 25, at 697 (“Any graffiti policy must recognize that not all graffiti is vandalism, but that graffiti may become vandalism when it is done in an inappropriate place and without permission.”).

265. See Mach, *supra* note 9, at 429 (“Much of the power of artistic expression lies in its ability to communicate thoughts and emotions that transcend the printed or spoken word.”).

266. See Leichtman & Bhatt, *supra* note 7, at 25-26 (discussing evolution of court cases analyzing First Amendment protection over art).

significant government interest.²⁶⁷ Certainly, governments have a significant interest in prohibiting vandalism and maintaining public spaces by preventing or restricting graffiti.²⁶⁸

However, courts have also held that restrictions on public expression must leave open ample alternative channels of communication.²⁶⁹ Opponents of graffiti argue graffiti artists should utilize legal means of expressing their art, like on a canvas rather than private property.²⁷⁰ Graffiti artists and supporters claim, however, that they have no other effective means of reaching the public and conveying their artistic message, than utilizing public space.²⁷¹ Wealth and power can influence who has the ability to effectively display art or other forms of expression to the population at large.²⁷² Graffiti artists note the imbalance in the permitted use of legal space and argue the unfairness of allowing advertisers to assault the public through billboards simply because they can afford to pay for the right, while graffiti artists are excluded from the same public space because they don't have the same wealth and power that corporations have.²⁷³

Legislators will have to recognize the significance of graffiti and street art as a legitimate cultural and artistic movement: otherwise, the graffiti war will wage on, in ever increasing intensity, leaving no clear victor.²⁷⁴ While it may be simpler for lawmakers to prohibit all graffiti, rather than making value and merit judgments as to which graffiti should be permitted, the current legal ban on graffiti conflicts with its simultaneous cultural acceptance and wide-

267. *See id.* at 27 (explaining standard of scrutiny applied to incursions onto free speech for visual art).

268. *See id.* at 26 (describing standard of review and level of scrutiny various courts have applied to laws burdening rights of artists).

269. *See id.* at 27 (recognizing that content-neutral restrictions on expression must be narrowly tailored *and* leave open ample alternative channels for communication) (emphasis added).

270. *See* Farrell, *supra* note 105 (posing question of why graffiti writers have not simply found legal ways of expressing their art).

271. *See* Goodnough, *supra* note 104 (stating that street artists are "raising important issues about . . . who decides what we see in public space.").

272. *See* BANKSY I, *supra* note 195 (lamenting elitism of art world in which only wealthy have ability to determine what art is seen by public).

273. *See* Wolf, *supra* note 225 (citing graffiti artist who argued that corporate advertising is "NYC's true graffiti problem" and "challenged the appropriation of public space by corporate advertisers").

274. *See* Mach, *supra* note 9, at 383 ("Increasingly, our most profound cultural tensions surface when people contest the meaning and value of artistic expression.").

spread approval.²⁷⁵ Whatever the solution may be, lawmakers and law enforcement, alike, must open their eyes to the walls around them.

*Elizabeth G. Gee**

275. See Nagourney, *supra* note 6 (quoting director of Museum of Contemporary Art who curated “Art in the Streets” exhibit who stated, “I want people to look at this and understand this is an important contribution to contemporary art.”).

* J.D. Candidate, May 2013, Villanova University School of Law; B.S., Drexel University, 2009.