2019

Graffiti, Speech, and Crime

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Article

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INTRODUCTION

Graffiti resides at the uncomfortable intersection of criminal law and free speech. Graffiti is not the shout of revolution to the gathered, protesting masses,[1] or the political pamphlet flung from a 1920s window.[2] It is not the obscene-rendered-political-

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1. *See* Debs v. United States, 249 U.S. 211, 216–17 (1919) (upholding a conviction under the Espionage Act of 1917 for a public speech that incited interference with World War I recruitment).

2. *See* Abrams v. United States, 250 U.S. 616, 624 (1919) (holding that the throwing of pamphlets that called for a strike of U.S. war efforts was a violation of the Espionage Act of 1917).

jacketed protest of war,[3] or a flag set aflame in the name of reclaiming patriotism.[4] It is an illicit scrawl.[5] It is damage and defiance rolled into one from the moment of its creation. It occupies a small, unpopular, legally-derided space. It is the easiest of hard First Amendment decisions. When asked to choose between the tag that appears in the middle of the night on someone else's property and the possibility that the tag might enjoy an embedded meaning, First Amendment jurisprudence does not blink. It does not falter or wax philosophical about the values of equality or democracy or the utility of a free marketplace of ideas. It blesses the criminalization of the act and so the words that comprise the act. In this quiet (and quieting) moment, the law takes a knee. It relinquishes some larger promise of First Amendment doctrine and elevates the value of property, in the process closing any corridor for a free speech defense.

At first blush, this might seem the right result. Criminal law regulates graffiti as a property or nuisance offense.[6] Not only does graffiti damage the physical space upon which it is placed, but according to policing theorists, it signals a subdermal lawlessness that will lead to greater harm if left unchecked.[7] Whether a mere tag or an elaborate mural, graffiti debases and undermines property rights. The focus on property damage tends to preclude free speech defenses that might be available to other criminalized speech.[8] Unlike cross-burners or political inciters or even the purveyors of the obscene, taggers have been unable to claim as their defense that their speech has some value or that it warrants some First Amendment shelter even in face of competing criminal law.

3. *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[A]bsent a more particularized and compelling reason for its actions, the state may not, consistent with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

4. *See* Texas v. Johnson, 491 U.S. 397, 419–20 (1989) (holding that Johnson's burning of the American flag was protected speech under the First Amendment).

5. The Oxford English Dictionary defines graffiti as "[w]riting or drawings scribbled, scratched, or sprayed illicitly on a wall or other surface in a public place." *Graffiti*, OXFORD ENGLISH DICTIONARY, www.oed.com/viewdictionaryentry/Entry/80475 (last visited Oct. 29, 2018).

6. *See infra* note 98 and accompanying text (outlining the various city ordinances that criminalize graffiti).

7. *See infra* notes 105–40 and accompanying text (explaining, in the context of the "broken windows" theory, that graffiti in neighborhoods can represent crime, deviation, and lack of police presence).

8. *See infra* notes 98, 106–40 and accompanying text, discussing criminalization of graffiti based on property damage theories.

On closer examination, precluding a speech defense for graffiti is at odds with First Amendment doctrine. The First Amendment categorizes personal liberties of speech, religion, press, and association as negative rights.[9] Confronted with other rights and interests, the law attempts to balance those rights and interests against the values enshrined in the First Amendment. In the context of free speech doctrine, the Court and scholars have attempted to construct careful calibrations of where one right or interest should begin and where another must end. In reality, rights inevitably bleed into one another—in our modern, interconnected world, more so than ever. Wedding cakes become speech and religion and property.[10] Healthcare becomes privacy and religion.[11] Money itself becomes speech, property, and association.[12] No neat lines divide one fundamental right from another. Instead, rights to property, speech, religion, privacy, and

9. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

10. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, 2290 (2017) (granting certiorari). In *Masterpiece Cakeshop*, petitioner argued that cake created in his shop was his speech and represented his religious beliefs. *See also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S.Ct. 1719, 1726 (2018); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 294 (Colo. App. 2015) (noting that the State's anti-discrimination law's "proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clause of the First Amendment . . ."), *rev'd sub nom. Masterpiece Cakeshop, Ltd v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719; Terri R. Day & Danielle Weatherby, *Contemplating* Masterpiece Cakeshop, 74 WASH. & LEE L. REV. ONLINE 86 (2017) (discussing the significance of the *Masterpiece Cakeshop* case and expansion of First Amendment speech doctrines to objects and services).

11. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court linked healthcare and privacy, recognizing a marital right to privacy that in turn prevented state bans on contraception. *Id.* at 485–86. More recently, the Trump administration has directly linked notions of privacy, healthcare and religion with the creation of the Conscience and Religious Freedom Division within the U.S. Department of Health and Human Services. *See* Juliet Eilpern & Ariana Eunjung Cha, *New HHS Civil Rights Division to Shield Health Workers with Moral or Religious Objections,* WASH. POST (Jan. 17, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-creating-civil-rights-division-to-shield-health-workers-with-moral-or-religious-objections/2018/01/17/5663d1c0-fbe2-11e7-8f662df0b94bb98a_story.html?utm_term=.fed9e5f1605f (describing the creation of the new Conscience and Religious Freedom Division within the U.S. Health and Human Services Department to "ease the way for doctors, nurses and other medical professionals to opt out of providing services that violate their moral or religious beliefs").

12. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 430–32

association mix and mingle in an alchemy of identity, equality, and liberty.

In this blending and balancing of rights, those most on the periphery of power are the most vulnerable.[13] As the Supreme Court heralds a new era of First Amendment rights preserved by access to the airwaves, technology, and ever widening forums of communication, the bind between speech rights and access to resources is renewed and reinforced.[14] Those with property enjoy wider freedom of speech. Those with funds may purchase advertising time and space. Those with real property may display their beliefs or host events to promote such beliefs. In contrast, the speech of those without property is increasingly marginalized and, in the case of graffiti artists and activists, criminalized.

For these marginalized speakers, law turns away from its careful blending of rights practiced in other speech realms and draws a hard line. Graffiti is calculated in terms of the damage it causes and not in terms of the speech value it may contain.[15] A Banksy is criminalized in the same way as a smashed window or a trenched lawn. Criminal law leaves no space for Banksy's artistic or political content. Unlike other forms of speech that may be criminalized for their eventual effect or their violation of some content-neutral regulation, graffiti is just damage.

In this dark boundary between property interests preserved by criminal law and speech interests at the heart of the First Amendment lurks a complex, overlooked reality. While there can be no doubt that graffiti damages property in ways other speech may not, there can also be no doubt that some graffiti carries with it a voice and identity absent in other forums of speech. To deny any possibility of a speech defense to graffiti is therefore to deny the potential speech value of graffiti and to ignore the heavy lift that graffiti—and other forms of illicit speech—may do in a society that is increasingly allegiant to property and power.

(2010) (holding that the government cannot suppress political speech by limiting contributions by corporations to political advertising and equating money itself to speech).

13. *See* Amanda Manjarrez, Note*, States Must Protect Issue Advocacy in a Post-*Citizens United *World,* 21 LEWIS & CLARK L. REV. 219, 233 (2017) (noting that one effect of the *Citizens United* decision was the skyrocketing of money, largely coming from wealthy corporate interest groups or political nonprofits, being funneled in to influence political elections).

14. *See Citizens United*, 558 U.S. at 430–32 (holding that monetary donations were equivalent to speech).

15. *See infra* note 20 and accompanying text.

To understand this argument is to examine the entwined relationship of the First Amendment, criminal law, and property rights. It is to consider that subversive speech such as graffiti—even as it damages property and impedes on other sacred rights—may carry a speech value that is worth defending.[16] Treating graffiti as a mere property offense ignores the increasingly vital corridor of communication and civic engagement that illicit speech such as graffiti opens. The value of graffiti as speech is tied not only to its explicit message, but to its status as outsider or marginalized speech. The medium is itself part of the communication.

Artists and activists alike have long recognized this reality. In one portion of her politically-charged video for *Formation*, Beyoncé juxtaposed a hoodie-clad Black child dancing in front of a line of riot police.[17] The child raises his hands, and as the police follow suit, the camera pans away to a white cinder-block wall spray-painted with the words "Stop Shooting Us."[18] The juxtaposition is jarring: the child dancing, the unmoving police; the formality of the officers, the informality of the graffiti.[19] The message is clear. Beyond the literal words, that Beyoncé chose

16. *See infra* notes 46–80 and accompanying text (noting that graffiti often carries the messages of political-dissent movements, resistance groups, and socially, politically, and economically marginalized young people).

17. Beyoncé Knowles-Carter, *Formation*, BEYONCE (Feb. 6, 2016), http://www.beyonce.com/formation.

18. *Id.* The video, and the song, have garnered significant criticism for containing an "anti-police" message, particularly in the scene described. *See* Lisa Respers France, *Protests Planned Against and For Beyoncé*, CNN (Feb. 9, 2016), http://www.cnn.com/2016/02/09/entertainment/beyonce-boycott-super-bowl-feat (explaining that those who were opposed to Beyoncé's Formation performance were to gather outside of NFL headquarters in New York City to protest); Lisa Respers France, *Why the Beyoncé Controversy Is Bigger than You Think,* CNN (Feb. 24, 2016), https://www.cnn.com/2016/02/23/entertainment/beyonce-controversy-feat/index.html (noting the mixed reactions viewers had to Beyoncé's *Formation* performance); Carma Hassan et al. *Police Union Calls for Law Enforcement Labor to Boycott Beyoncé World Tour,* CNN (Feb. 20, 2016), http://www.cnn.com/2016/02/19/us/beyonce-police-boycott (noting critics objections to Beyoncé's *Formation* performance due to its #BlackLivesMatter themes); Ashley Lutz, *People Are Calling for a Beyoncé Boycott After Her Super Bowl Song Sends Harsh Message to the Police*, BUS. INSIDER (Feb. 7, 2016), https://www.businessinsider.com/beyonce-super-bowl-formation-song-anti-police-2016-2 (noting that Beyoncé's music video features a police car sinking into a flood). Without commenting on the validity of this critique, the existence of the critique suggests the scene played a vital role consistent with traditional speech's role in the deliberative democracy.

19. *See* Jon Carmanica et al., *Beyoncé in 'Formation': Entertainer, Activist, Both?*, N.Y. TIMES (Feb. 6, 2016), http://www.nytimes.com/2016/02/07/arts/

graffiti to make the statement conveys the outsider status of the words themselves.

To speak this way is an act of defiance, a rejection of the very notion of the narrow forums of acceptable speech. Yet when used this way, graffiti—even this simple, spray-painted text—is unquestionably a form of speech. The regulation of that speech raises First Amendment concerns that implicate not only the traditional questions of who may speak and how, but also questions about the link between economic power, criminal law, free speech rights, and the narratives of justice and power in the United States.

In a post-9/11 and a post-*Citizens United* world, in which concerns about security corral speech rights and where many fear that wealth will drive access to the remaining forums of political speech, graffiti occupies a vital space. Its very method of creation renders it a tool of the powerless and the economically disenfranchised. To the most marginal of marginalized voices, it is a means of resistance. To over-police marginalized speech such as graffiti is to risk removing a vital avenue of expression in some communities.[20] As Beyoncé and any street activist would tell you, the act of graffiti carries a power all its own. It rejects the notion that speech must be cabined and confined, relying instead on its rebel status to communicate and, in the process, to undermine free speech doctrine's previous allegiance to designated forums and deference to property interests.[21]

This Article is therefore a defense of speech that in its very creation is a criminal act. More precisely, it argues that permitting an affirmative free speech defense to graffiti prosecutions facilitates community evaluation of the proper balance between

music/beyonce-formation-super-bowl-video.html (discussing the symbolism and imagery of Beyoncé's *Formation* video and Super Bowl performance).

20. *See* JEFF FERRELL, CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY 171, 176 (1996) ("The writing of graffiti . . . unfolds within the system of legal and economic domination, systems which guarantee unequal access to private property and cultural resources."); Margaret L. Mettler, Note, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 274–75 (2012) (noting that unlike other forms of speech, some graffiti presents messages that lack viable alternative forums of expression); Kelly P. Welch, Note, *Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205, 209 (2011) (noting the evolution of graffiti in the Los Angeles area from vandalism to political expression and ethnic and racial identification).

21. *See* Welch, *supra* note 20, at 207–09 (describing graffiti's role in pushing accepted speech boundaries and quoting Los Angeles graffiti artist Cristian Gheorghiu, also known as Smear, that graffiti is "crime transformed into art").

speech and property. Allowing such a defense would not only recognize the value of the expressive component of graffiti, but it would open a space for an alternative narrative about speech, power, and property rights. Ultimately, citizen jurors would weigh the graffiti's speech value in the context of the criminal case before them.[22] In this, defendants and jurors make choices about the stories law can and should hear.

Permitting an affirmative free speech defense in the case of graffiti is hardly a get-out-of-jail-free card. Juror demographics suggest a juror is more likely to align herself with a property owner than with a defendant who spray-painted the side of a building. Such a juror may find the graffiti and its purported claim of speech not credible or even offensive. The juror might conclude that graffiti not only damages the physical property but also threatens the sanctity of the neighborhood itself. Even if the juror finds some artistic, social, or political merit in the graffiti, she may still reject the defense in favor of property interests. There would also be a very real possibility that speech-based challenges to graffiti charges will rise or fall on the content of the speech itself, with more favored messages more likely to receive a sympathetic ear from jurors than less favored, or outright offensive, messages. Such risks are not exclusive to graffiti,[23] and they do not justify wholesale preclusion of a free-speech defense. Moreover, by creating a forum for citizens serving as jurors to weigh in on the competing values of speech and property, a speech defense to graffiti promotes not only free speech, but also democratic values and citizen-driven law.

In addition, this Article challenges the prevailing doctrinal compromise that values different voices—even dissenting ones—

22. While most cases in the criminal system do not ultimately proceed to a jury trial, this does not mean that a defense does not affect outcome or that a jury verdict, however rare, does not influence charging decisions and plea offers in other cases. The creation of a free speech defense to graffiti signals a shift in legislative treatment of the conduct or harm. From a prosecutor's perspective, the existence of this new defense also signals new avenues of litigation that may consume precious prosecutorial or judicial resources. Both may influence charging decisions on the front end of the case and/or incentivize plea bargaining on the back end of the case. Even if few cases proceed to trial, acquittals in cases that do proceed to a jury under the proposed defense could affect charging decisions or plea offers in the cases that followed. In this, the defense pushes law's narrative regardless of whether or not the case actually goes to a jury.

23. *See generally* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003) (describing the effect of human bias on criminal verdicts).

only so long as those voices remain in designated and constitutionally accepted boundaries. Even while recognizing the importance of different and dissenting speech, the Court and scholars argue that such speech must abide by designated rules and exist in designated forums.[24] Dissenters must follow the rules created by the very system they challenge. This is particularly evident in the regulation of graffiti—speech that seeks to claim unsanctioned spaces and, in that process, to raise unsanctioned voices.[25]

This Article has four components. Part I considers the value of graffiti. Part II turns to the criminal regulation of graffiti. Part III considers the construction of "free speech" as a First Amendment doctrine and the underlying values that drive the doctrine. Finally, Part IV discusses the affirmative speech defense to criminal charges stemming from graffiti, and how such a defense promotes free speech interests. To be sure, the scope of this Article's concluding argument is limited. It does not contend that it should be impossible to criminalize graffiti or that property interests should never be protected under criminal law. Nor, as noted above, does this Article contend that all graffiti has equal speech value, or even any speech value at all. What this Article does argue is that in the process of criminalizing graffiti, American criminal law has overlooked any value that graffiti may have as speech and thereby endorsed a body of law that promotes private property interests at the expense of individual liberty. In the context of graffiti, this is particularly perilous. Graffiti, with its outsider status, carries a potential to introduce an unbounded and previously excluded voice. While this voice may not always be worthy of protection, it is certainly worthy of consideration.

I. WHY GRAFFITI MATTERS

Graffiti may vary widely in its form or content. But regardless of its presentation, at its creation it is an act of defiance.[26] A graffiti artist claims a space—either permanently or temporarily—that is not his or her own. Part of graffiti's meaning lies in

24. *See* Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses.").

25. *See* FERRELL, *supra* note 20, at 178–86 (describing the anarchist tradition of graffiti as a means of rejecting authoritarianism and majoritarian aesthetics).

26. *Id.* at 176 ("Graffiti writing . . . constitutes a sort of anarchist resistance to cultural domination . . . .").

this act of appropriation, in the rejection of the notion that speech must be cabined and confined.[27] These artists rely on graffiti's rebel status both to communicate their message and, in the process, to undermine the free speech doctrine's purported allegiance to designated forums and civil speech.[28]

As a general rule, free speech and criminal law scholars typically have very little to say about graffiti.[29] It is a nuisance, and it is regulated as such. Even with the commodification of graffiti as art or fashion—as in the cases of Basquiat,[30] Banksy,[31] Molly Crabapple,[32] and Gucci's Graffiti Ghost[33]—graffiti is more likely to be described as a menace than as valued speech.[34]

But there is something powerful in speech that claims a physical space *as* a physical space. To embed speech on an object is not only to alter and to claim the object itself, but to transcend the impermanence of spoken word and to defy all forces that would silence or erase the uttered thought. This status as word-rendered-physical-object is a double-edged sword, however. In

27. *See* Welch, *supra* note 20, at 207–09 (describing graffiti as challenging traditional classifications of speech).

28. *Id.* at 208 (noting the role of graffiti as both crime and art); FERRELL, *supra* note 20, at 174–76 (arguing that graffiti pushes back on traditional free speech doctrine that dictates parameters of speech in terms of time, place, and manner, if not content and aesthetic).

29. There is, however, a growing body of literature on the topic of graffiti in the context of free speech and crime. *See, e.g.*, Mettler, *supra* note 20, at 258 (discussing First Amendment protection of uncommissioned art).

30. *See Jean-Michel Basquiat: American Painter*, THE ART STORY: MODERN ART INSIGHT, https://www.theartstory.org/artist-basquiat-jean-michel.htm (last visited Oct. 5, 2018) (describing Basquiat as a New York graffiti artist who worked in the international art gallery scene).

31. *See* Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN.COM (Feb. 2013), https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304 ("On his way to becoming an international icon, the subversive and secretive street artist turned the art world upside-down.").

32. *See* Ron Rosenbaum, *Meet Molly Crabapple, an Artist, Activist, Reporter, and Fire-Eater All in One*, SMITHSONIAN MAG. (Apr. 2016), https://www.smithsonianmag.com/arts-culture/molly-crabapple-artist-arctivist-reporter-fire-eater-180958502 (outlining the artist's career as an artist and activist in the Middle East).

33. *See* Daniel Syrek, *Meet GucciGhost – The Graffiti Artist Turned Fashion Star*, CHI. TRIB. (Nov. 1, 2016), http://www.chicagotribune.com/lifestyles/style/sc-fashion-1107-gucci-ghost-interview-20161101-story.html (noting that the New York street artist "skyrocketed into the international fashion stratosphere").

34. *See* CDH, *Notes on the Commodification of Street Art*, 263 ART MONTHLY AUSTL. 42 (Sept. 2013), http://www.cdh-art.com/Writing/CDH%20AMA%20Notes%20on%20the%20commodification%20of%20street%20art.pdf (describing the complicated treatment of street art as both "art" and crime).

its physical manifestation, this speech is subjected to a class of regulation that the spoken word may elude. A book can be burned.[35] Newspaper offices raided.[36] Printing presses smashed.[37] Walls whitewashed.[38] The written word or painted image erased. In the process those who claimed the physical space with their speech face a vulnerability a speaker may avoid. Words spoken alone may be difficult to attribute or to prove without a physical record. A charge of a threat uttered in private may dissolve in the face of the inevitable and often insurmountable proof dilemma of what he said versus what she now claims.

Physical words are different. They occupy a permanent, or semi-permanent, state in which an author or artist claims both the speech and the space upon which the speech is placed. There is a physical record and so a different possibility of regulation by the State—one grounded in theories of property and ownership.[39] Because of this possibility of criminal prosecution for an offense against property, the act of claiming a physical space for certain types of speech becomes an act of disobedience itself. It is to claim, literally and physically, the realm claimed by another and to mark it as one's own.

As lofty as free speech debates often are in championing the speech of dissent, change, equality, or liberty, they often overlook what is simultaneously the most humble, defiant, and common presentation of conduct, rendered speech, and speech rendered physical—graffiti.[40] Long the scourge of urban centers and rural

35. *See generally* REBECCA KNUTH, BURNING BOOKS AND LEVELING LIBRARIES: EXTREMIST VIOLENCE AND CULTURE DESTRUCTION (2006) (describing the history of book burning as a means for suppressing dissenting perspectives).

36. *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 90–92 (1998) (describing control of the press by the government). *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) (describing control of speech in the promotion of national security interests).

37. *See* JONATHAN ROSE, THE HOLOCAUST AND THE BOOK: DESTRUCTION AND PRESERVATION (2008) (describing historical policies of destroying methods of publishing anti-Majoritarian sentiment).

38. *See* Welch, *supra* note 20, at 207 (describing Los Angeles graffiti abatement ordinances that require property owners to paint over or remove graffiti).

39. *See infra* notes 98, 106–40 and accompanying text (discussing criminalization of graffiti based on property damage theories).

40. Even Steven H. Shiffrin's groundbreaking book, DISSENT, INJUSTICE AND THE MEANING OF AMERICA, which examined neglected forums of dissent and alternative avenues of communication, focused on methods of speech far more traditional than graffiti. *See* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE

abandoned property alike, graffiti is among the most criminally regulated speech in the United States. It is typically regulated as a "nuisance"—a catchall damage-to-property-style offense with relatively few elements[41]—or a "trespass"—a common-law property offense that contemplates an unlawful entry but no additional harm.[42]

Enforcement of such anti-graffiti sentiment has served three primary functions. First, it regulates, and in theory deters, the undeniable property damage that graffiti can cause, either by harming the property physically or by undermining the property rights of the owner.[43] Such property interests are impeded regardless of the graffiti's artistic value or merit.[44] Second, it has

AND THE MEANINGS OF AMERICA (1999) (discussing, throughout the text, dissenting alternative speech such as flag burning, the arts, and commercial speech).

41. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86 (5th ed. 1984) (describing the common law concept of nuisance as a "catchword" action and the evolution of civil and criminal regulation of nuisance). For examples of nuisance statutes, see, for example, ARIZ. REV. STAT § 13-2908 (1978); CAL. PENAL CODE § 370 (1872); COLO. REV. STAT. ANN. § 18-4-501 (West 2004); 720 ILL. COMP. STAT. 5/21-1.3 (2012); ME. REV. STAT. ANN. tit. 17, § 806 (1992); NEV. STAT. § 206.310 (2013); N.H. REV. STAT. ANN. § 634:2 (2013); 18 PA. STAT. AND CONS. STAT. ANN. § 3304 (West 2006); TEX. PENAL CODE ANN. § 28.03 (2007); UTAH CODE ANN. § 76-6-106 (West 2012) (all general property damage statutes).

42. *See* George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220, 232–34 (1917); George E. Woodbine, *The Origins of the Action of Trespass*, 34 YALE L.J. 343, 358 (1925) (both describing the historical development of criminal trespass). For examples of different constructions of trespass statutes, see CONN. GEN. STAT. § 4b-11 (2011); FLA. STAT. § 810.08 (2000); GA. CODE ANN. § 16-7-21 (2001); LA. STAT. ANN. § 14:63 (2012); MISS. CODE ANN. § 97-17-87 (2010); NEV. REV. STAT. ANN. § 207.200 (West 2009) (all trespass statutes).

43. *See infra* notes 98, 112–40 and accompanying text (explaining that graffiti is an affront to the owner's ability to control access and content on her property).

44. A multi-million dollar Banksy mural is, in theory, subject to the same regulation as a spray-painted tag proclaiming that the "Eagles Rule" or that "John ♥'s Samantha 4-ever" (both of which are readily available for viewing in some iteration on almost any interstate highway overpass). *See Banksy Liverpool Murals Sold for £3.2m to Qatari Buyer,* BBC NEWS (Sept. 21, 2017), http://www.bbc.com/news/uk-england-merseyside-41351209. For a discussion of the current trend in street art popularity, see *Popularity of Street Art,* ART PRICE, https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2017/popularity-of-street-art (last visited Oct. 29, 2018) (listing Banksy sales in 2017 as totaling in excess of $6 million).

As will be discussed further in Part II, criminal regulation as a general matter is unconcerned with the content or quality of the graffiti, though certainly prosecutorial discretion may produce different results for the two pieces.

served as a convenient basis to detain (and with increasing regularity to punish) youthful offenders ranging from disaffected teens to suspected gang members.[45] Finally, it has been employed to dismantle or contain political-dissent movements ranging from Operation Life to Occupy Wall Street to Black Lives Matter.[46]

In this the value of graffiti as speech emerges. Not only may some graffiti carry artistic merit, but some graffiti may also serve critical social and political functions that elude other forms of speech.[47] Just as graffiti is regulated for the property damage

45. Many graffiti ordinances are targeted specifically at youth and/or potential gang members. *See* CAL. COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON YOUTH GANG VIOLENCE, FINAL REPORT 9 (1986) (noting that graffiti carries an implicit threat to communities of gang and youth violence); U.S. DEP'T OF JUSTICE, GANG PROSECUTION MANUAL 5–12 (2009), https://www.nationalgangcenter.gov/content/documents/gang-prosecution-manual.pdf (citing graffiti as indicia of gang activity); *see also, e.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.1(C) (2009) ("[T]he spread of graffiti often leads to violence, genuine threats to life, and the perpetuation of gangs, gang violence, and gang territories."); GIG HARBOR, WASH., MUNICIPAL CODE ch. 9.39.030(B)(2) (2018) (creating a stand-alone offense for minors caught with implements of graffiti, including broad tipped markers). Increasingly, juvenile courts are recognizing graffiti as one of the most frequently charged offenses among youthful offender populations. *See* Nancy Fishman, *Youth Court as an Option for Criminal Court Diversion*, 83 N.Y. ST. B. ASS'N J., 38, 39 (2011) (noting that the types of cases involving youthful offenders are often graffiti-related); John R. Lewis, *Tough Legislation Aims to Wipe Out the 'Tagging' Epidemic*, L.A. TIMES, March 21, 1993, at B15 (defining a "tagger" as a young person engaged in the vandalism of property, who is not necessarily a gang member, and noting that graffiti arrests provide a mechanism by which to detain and question youth).

Beyond this, scholars have noted that graffiti prosecutions are targeted at minority actors as a means of controlling behavior. *See* Jeff Ferrell, *Trying to Make Us a Parking Lot: Petit Apartheid, Cultural Space, and the Public Negotiation of Ethnicity*, *in* PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 55, 60 (Dragan Milovanovic & Katheryn K. Russell eds., 2001) (arguing that arrests and prosecutions for graffiti serve as a means of targeting Black and Latinx youth).

Richard Delgado has also posited the theory that such offenses serve as a "basis" for arrest, but also that there is a different perception of their "dangerousness" based on the actor. A young Black man who tags a building may be perceived by police officers as a greater threat than an affluent white teenager in a suburb. *See* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503, 509–12 (1994) (narrating that certain groups of people are depicted as violent or prone to crime).

46. *See, e.g.*, Corrine Segal, *Projection Artist Brings Light to Social Issues with Attention-Grabbing Protests*, PBS NEWS HOUR (Sept. 17, 2017), https://www.pbs.org/newshour/arts/projection-light-artists-protest (describing the work and repeated arrest of graffiti projectionist Illuminator).

47. *See, e.g.*, Joe Austin, *Knowing Their Place: Local Knowledge, Social Prestige, and the Writing in Formation in New York* City, *in* GENERATIONS OF

it causes, so too does it strike a blow against traditional property constructions and notions of worth and identity linked to property ownership.[48] Emerging wealth gaps in the United States highlight in painful detail that increasingly we are a nation of owners and non-owners, of gentrified neighborhoods and priced out tenants.[49] Coupled with the dominant notion that speech is linked to property ownership, with speech rights pivoting around access to property and shrinking public forums,[50] graffiti and other forms of illicit speech give voice to movements that are otherwise pushed out by dominant speech doctrine.[51] Beyond this, graffiti, in claiming a physical space, pushes back on not only notions of ownership, but also neighborhood identity.[52]

The graffiti movements of the 1980s and 1990s sought to reclaim urban spaces that were increasingly fractured by gentrifi-

YOUTH: YOUTH CULTURES AND HISTORY IN TWENTIETH-CENTURY AMERICA 240, 240–50 (Joe Austin & Michael Nevin Willard eds., 1998) (describing the role of graffiti in marginalized youth identity).

48. *See* FERRELL, *supra* note 20, at 176 (noting that "[g]raffiti writing breaks the hegemonic hold of corporate/governmental style over the urban environment and the situations of daily life . . . it interrupts the pleasant, efficient uniformity of 'planned' urban space and predictable urban living . . . [and] graffiti disrupts the lived experience of mass culture, the passivity of mediated consumption."). Graffiti artists often describe their underlying goals as marking their existence. *See* MICHAEL WALSH, GRAFFITO 34–35 (1996) (quoting Omar, a graffiti artist, "[h]ow many people can walk through a city and prove they were there? [My tag is] a sign I was here. My hand made this mark. I'm fucking alive!").

49. *See* Christopher Ingraham, *The Richest 1 Percent Now Owns More of the Country's Wealth Than at Any Time In the Past 50 Years*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/06/the-richest-1-percent-now-owns-more-of-the-countrys-wealth-than-at-any-time-in-the-past-50-years (discussing wealth and ownership gaps in the American economy).

50. *See* Rowley Rice, Note, *We Are Not Interested: How Dominant Political Parties Use Campaign Finance Law to Lock Interest Groups and Third Parties Out of the System*, 89 S. CAL. L. REV. 917, 939–47 (2016) (comparing U.S. and British systems of campaign finance reform and the particular effect of *Citizens United* on speech forums and speech).

51. *See* TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 34–36 (1994) (chronicling the links between gentrification and urban revitalization in New York City and the importance of graffiti to emerging Hip Hop culture). *See generally* STEPHEN J. POWERS, ART OF GETTING OVER: GRAFFITI AT THE MILLENNIUM (1999) (examining the works, stories, and messages of numerous graffiti artists and writers); JANICE RAHN, PAINTING WITHOUT PERMISSION: GRAFFITI SUBCULTURE (2002) (discussing the important role of graffiti as a method of claiming urban identity).

52. *See* ROSE, *supra* note 51, at 33–34.

cation and policing theories that overly regulated poor neighborhoods and their largely of color populations.[53] Particularly in large cities like New York City, Los Angeles, Chicago and San Diego, urban revitalization policies often declared the neighborhoods of poor and of color individuals "slums" and relocated residents.[54] The end product was not only the gentrification of the "slum" neighborhoods, but also the splintering of relocated Black and Latinx communities.[55] Left with limited city resources or political power, these fractured communities relied on illicit speech including graffiti to preserve their identity in the midst of an emerging urban reality that sought to render them irrelevant or invisible.[56]

Graffiti has also functioned as a mechanism of resistance—not only to particular political, social, or religious authorities, but also to the very structures that might segregate and confine communities.[57] This resistance may be literal. Graffiti pushes back against the physical structure of an urban landscape that grows increasingly homogenous as private space is maximized through skyscrapers and multi-storied structures, while public spaces are minimized and depersonalized.[58] The resistance may

53. *See* FERRELL, *supra* note 20, at 3–16 (describing the rise of urban graffiti movements in response to the division of traditionally poor and often Black or Latinx neighborhoods). Ferrell notes that in such neighborhoods, and throughout the cities in question, graffiti served as a means of not only reclaiming specific spaces but of signaling a continued existence even as old neighborhoods were undermined in the name of gentrification and urban policing policies. *Id.*

54. *See* ROSE, *supra* note 51, at 30–34 (describing this phenomenon in the Bronx, Bedford Stuyvesant and Harlem in New York City). This phenomenon is not isolated to New York, or even the United States. Graffiti has proliferated throughout the world as method of expressing resistance and identity. *See* Jeff Ferrell, *Urban Graffiti: Crime, Control and Resistance*, 27 YOUTH & SOC'Y 73, 73 (1995).

55. *See* ROSE, *supra* note 51, at 33–34.

56. *Id.* at 34 (arguing that "[a]lthough city leaders and the popular press had literally and figuratively condemned the South Bronx neighborhoods and their inhabitants, its youngest [B]lack and Hispanic residents answered back" with graffiti and in the process attempted to reclaim their neighborhood, their identity and their power); Ferrell, *supra* note 54, at 78–80 (noting that graffiti writers seek to document their existence in neighborhoods that have excluded them).

57. *See, e.g.*, Ferrell, *supra* note 54, at 77 (discussing graffiti on the Berlin Wall as a form of resistance).

58. *See id.* at 79 (arguing that part of what urban graffiti artists seek to do is reclaim increasingly depersonalized public spaces); HERBERT I. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION 101–03 (1989) (describing the emerging trend in American cities to fracture and isolate

also be ideological. Graffiti artists transform physical spaces into platforms of dissent and defiance.[59]

The tradition of using graffiti as a mechanism of resistance is not new, nor is it confined to the United States. Graffiti artists in East Germany transformed the meaning of the Berlin Wall from a means of confinement to a record of resistance.[60] In former Soviet countries, urban graffiti channeled and communicated political resistance.[61] In Great Britain, feminists used graffiti to alter offensive billboards and to challenge the subjugation of women.[62] In Northern Ireland, Catholic youth painted murals to promote resistance to British rule.[63] Nicaraguan and Canadian youth graffitied symbols of colonialism and repainted their cities with pro-revolutionary murals.[64] In Palestine, where militants in occupied lands have limited access to traditional forums of communication, young graffiti artists paint street art to promote resistance.[65] More recently, in Egypt, graffiti fueled and informed the Arab spring uprisings in a variety of ways.[66] Such

communities and individuals through the construction of impersonal skyscrapers with little accessible public space); Mike Davis, *Fortress Los Angeles: The Militarization of Urban Space*, *in* VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 154, 154–80 (Michael Sorkin ed., 1992) (describing urban spatial sorting as designed to maximize use of real state at a cost to public space); *see also* Susan G. Davis, *Streets Too Dead for Dreamin'*, 255 NATION 220, 220–21 (1992) (noting the rise of "themed spaces" in contemporary cities); Michael Sorkin, *Introduction* to VARIATIONS ON A THEME PARK, *supra*, at xi–xv.

59. *See* Ferrell, *supra* note 54, at 79.

60. *See* TERRY TILLMAN, THE WRITINGS ON THE WALL: PEACE AT THE BERLIN WALL 17 (1990) (describing how art on the Berlin wall transformed it from an oppressive tool into a symbol of resistance and hope).

61. *See generally* JOHN BUSHNELL, MOSCOW GRAFFITI: LANGUAGE AND SUBCULTURE (1990) (describing the role of graffiti in undermining Soviet rule).

62. *See, e.g.*, JILL POSENER, SPRAY IT LOUD 12–42 (1982) (providing examples of feminist use of graffiti to modify offensive billboards and to more broadly challenge the subjugation of women); *see also* Jessica Bennett, *The #MeToo Moment: Art Inspired by the Reckoning*, N.Y. TIMES (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/us/reader-art-inspired-by-the-metoo-moment-sexual-harassment.html (describing the Guerilla Girls movement).

63. *See* BILL ROLSTON, POLITICS AND PAINTING: MURALS AND CONFLICT IN NORTHERN IRELAND 73–111 (1991).

64. *See* Ferrell, *supra* note 54, at 77.

65. *See* Rich Wiles, *Palestinian Graffiti: 'Tagging' Resistance*, AL JAZEERA (Nov. 26, 2013), http://www.aljazeera.com/indepth/features/2013/11/palestinian-graffiti-tagging-resistance-2013112015849368961.html.

66. *See* Waleed Rashad, *Egypt's Murals Are More Than Just Art, They Are a Form of Revolution*, SMITHSONIAN MAG. (May 2013), https://www.smithsonianmag.com/arts-culture/egypts-murals-are-more-than-just-art-they-are-a-form-of-revolution-36377865.

graffiti documented events that were often suppressed in mainstream media sources and served as tools of organization for the tech savvy and unsavvy alike, providing information on past and future events.[67]

In the United States, graffiti shares an equally storied tradition of supporting resistance. In 1970, students at UCLA took over the student union and graffitied their demand to "Free Bobby"—a reference to Black Panther leader Bobby Seale—in defiance of an indifferent, if not vindictive, police force.[68] In New York City during the 1980s and 1990s, the Hip Hop movement utilized graffiti to mark a presence in defiance of policing policies implemented by urban revitalization mayors.[69] More recently, the Black Lives Matter movement has used graffiti not only to draw attention to inherent racism but to mobilize change in communities that may suppress speech or react with indifference or hostility in the face of unequal treatment and the in-custody deaths of Black men and women.[70] In the early 1990s women scrawled the names of men who had harassed and assaulted them on bathroom stalls to share information and to name their assailants in the face of campus policies that seemed indifferent to sexual assault and harassment.[71] Today, the #MeToo movement has utilized graffiti to signal unity and safe spaces for women to speak of their experiences.[72] The use of graffiti to promote a political cause is not isolated to the unknown artist. Well

67. *Id.*

68. *See* SUSAN A. PHILLIPS, WALLBANGIN': GRAFFITI AND GANGS IN L.A. 52 (1999).

69. *See* RAHN, *supra* note 51, at 2 (discussing graffiti's role in the Hip Hop movement); Ferrell, *supra* note 54, at 60–61. *See generally* POWERS, *supra* note 51 (chronicling various stories and works of graffiti).

70. *See* Leah Freeman & Eric Bradner, *Trump's DC Hotel Vandalized with 'Black Lives Matter' Graffiti*, CNN (Oct. 2, 2016), https://www.cnn.com/2016/10/02/politics/donald-trump-black-lives-matter-graffiti/index.html (describing use of graffiti to protest statements made by then candidate Trump regarding the Black community); Peter Holley, *'Black Lives Matter' Graffiti Appears on Confederate Memorials Across the U.S.*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/23/black-lives-matter-graffiti-appears-on-confederate-memorials-across-the-u-s (noting the use of graffiti to motivate protest of confederate memorials).

71. *See* JoAnne Jacobs, *Rape and the Bathroom Wall*, BALT. SUN (Dec. 19, 1990), http://articles.baltimoresun.com/1990-12-19/news/1990353005_1_university-explicit-gutmann (describing the movement on college campuses to "name" rapists by writing their name on women's bathroom walls as a means of warning other women and giving voice to an experience that was otherwise repressed).

72. *See* Caitlin Dickerson & Stephanie Saul, *Two Colleges Bound by History Are Roiled by the #MeToo Moment*, N.Y. TIMES (Dec. 2, 2017), https://www

known graffiti artists such as Banksy, Shepard Fairey, Molly Crabapple, and Basquiat (to name a few) recognize, and have recognized, the power of graffiti to push political change and to give voice to what otherwise would be suppressed.[73]

Chicano Park in San Diego, now included on the National Register of Historical Places, began as an act of neighborhood reclamation when San Diego attempted to repurpose public space in the Latinx neighborhood of Barrio Logan.[74] Fearing that a critical component of the community was literally being bulldozed away, members of the neighborhood created vibrant renditions of their cultural identity on highway support stanchions.[75] Later, recognized Latinx artists constructed more permanent works on the same structures.[76] The resulting park, in addition to its striking visual presentation, served other purposes. It not only unified the community in an act of rebellion against more powerful state actors, but it marked and celebrated the identity and lives of those in the community.[77]

The documentation of the history of the community mattered because it spoke to the people who every day passed by and through the park. It also mattered because it claimed a real space—even if it was only a space under a highway—as the community's own in defiance of larger, better financed interests that might seek to minimize or erase the very voice of the people who lived there.[78] Chicano Park joins a graffitic tradition of memorializing culture, race, politics, and lives that might not have access to other mechanisms or forums for speech.[79]

.nytimes.com/2017/12/02/us/colleges-sexual-harassment.html (describing #metoo graffiti at Morehouse College, Spellman College, and Stanford University urging the institutions to end policies that condone and encourage the harassment of women).

73. *See Writings on the Wall: Urban Political Graffiti from Brexit to Trump – in Pictures*, GUARDIAN (May 17, 2017), https://www.theguardian.com/cities/gallery/2017/may/17/writing-wall-political-graffiti-banksy-brexit-trump-in-pictures (providing examples of this political expression through graffiti).

74. *See* Phillip Brookman, *El Centro Cultural de la Raza, Fifteen Years*, *in* MADE IN AZTLAN 12, 19–21, 38–43 (Phillip Brookman & Guillermo Gomez-Pena eds., 1986) (describing the history of Chicano Park and the Barrio Logan).

75. *Id.*

76. *Id.*

77. This significance was perhaps best expressed in oral histories of the park documented by the Chicano Park Museum. *See* CHICANO PARK MUSEUM, http://www.chicanoparkmuseum.org (last visited Oct. 29, 2018).

78. *See* PHILLIPS, *supra* note 68, at 1–49 (describing the anthropological value of graffiti in Los Angeles as a means of documenting youth identity).

79. *Id.* (discussing the use of memorial graffiti in Los Angeles to document not only gang violence, but to call for social reform). *See generally* G. JAMES

In all of this, graffiti recognizes that there is a power to being seen that carries with it a power to be heard. From rape victims to those who would challenge colonialism or police brutality to those who resist occupation, graffiti is a medium like no other. In larger conversations about race and socioeconomic political movements, graffiti not only records a marginal voice, it grants it a power that is directly linked to its physical, visual existence. For marginalized communities and speakers, graffiti is more than the sum of its parts. It exceeds artistic expression (whether a tag or an elaborate mural) and opens up the possibility for underrepresented individuals to claim their identity and to resist cultural and social norms that would silence their voice.[80] Illicit speech such as graffiti lays claim to a power and purpose that cannot be realized in other, more bounded speech forums—the message itself is embedded in the medium of the speech.[81] Certain words carry a meaning all their own that no synonym can replace.[82] So too does graffiti shoulder a meaning and message that other means fail. To defend graffiti is therefore to defend the value of that message.

This is not to say that graffiti either always serves a vaunted role or that it always accurately represents the identity of the

DAICHENDT, STAY UP! LOS ANGELES STREET ART (2012) (chronicling the role of street art, including graffiti to push marginalized political positions).

80. *See* DAICHENDT, *supra* note 79, at 69–70; PHILLIPS, *supra* note 68, at 13–61 (describing the communicative power of graffiti); ROSE, *supra* note 51, at 42 (noting that even simple tagging of subway trains in NYC in the 1970s created a mechanism by which splintered communities, particularly those of Black and Latino boys and men, could communicate and show unity).

81. Questions of the value of medium certainly arise in the context of other illicit and non-illicit forms of speech. The early Hip Hop movement, for example, served a similar resistive purpose in New York City in particular. *See* ROSE, *supra* note 51, at 34–36. *See generally* PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE (2009) (describing the role of Hip Hop in pushing back on dominant race-based policing models). Even protected speech categories have struggled to reclaim power in the face of permissive restrictions particularly in the context of forums. *See* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 3 (2012) (describing curtailment of political dissent to designated protest zones at the Democratic and Republican Conventions).

82. *See* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 39–55 (2002) (noting that even this most offensive word has undergone a "reclamation" of sorts as a means of expressing particular identity and rebellion); *see also* Jessica Valenti, *SlutWalks and the Future of Feminism*, WASH. POST (June 3, 2011), https://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH_story.html (describing the adoption of derogatory words such as "slut" as a mechanism of empowerment and reclaiming identity).

community in which it appears. Works by noted scholars such as Randall Kennedy[83] and James Forman, Jr.[84] highlight the contested nature of the claim that graffiti benefits marginalized populations. In their critique of the relationship between crime enforcement and the Black community, both Kennedy and Forman note that policing, even of minor offenses, in minority neighborhoods carries an undeniably protective component.[85] To paraphrase Kennedy, the presence of graffiti not only signals blight but it transforms simple acts of existence in the neighborhood into acts of peril.[86] In this, the graffiti on the walls, homes, and stores of these communities do not serve as positive acts of reclaiming space, voice, and identity; they serve as a warning.[87]

As will be discussed further in Section IV, I do not doubt the accuracy of this critique, nor do I doubt, as both Kennedy and Forman seem to acknowledge, that in urban spaces graffiti exists both as an act of lawlessness and as an act of reclamation. Graffiti may both appear as a threat or warning to some and appear as a mark of identity and community to others. The creation of an affirmative defense of speech to graffiti is a recognition of the duality of illicit speech—a duality neglected under current policies that criminalize graffiti.

II. CRIMINALIZING GRAFFITI

Despite the role that graffiti plays in promoting dissenting and marginalized speech, First Amendment scholars tend to ignore or minimize its communicative components. They are not alone in this perception. Criminal law regulates graffiti based on the harm it causes property interests.[88] As a result, graffiti is not afforded a free speech defense because it is not treated as a "speech" based crime.[89]

83. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (exploring in depth the relationship between minority communities and current enforcement of criminal law).

84. *See generally* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (noting the role Black communities play in supporting tougher policing).

85. *See id.* at 11; KENNEDY, *supra* note 83, at 3 (noting the focus of "law and order" rhetoric on limiting the misery caused by crime).

86. *See* KENNEDY, *supra* note 83, at 136–67, 351.

87. *See id.* at 351.

88. *See* L.A., CAL., MUN. CODE § 49.84.1(A) (2000) (rationalizing graffiti regulation based on detriments to property value).

89. *Cf.* Mettler, *supra* note 20, at 251 (arguing for the extension of a free speech defense for private property owners who wish to preserve uncommissioned graffiti on their own property).

Graffiti's effect on property is real and tangible. The estimated cost for removing or obscuring graffiti on federally-controlled property falls between $5 and $15 billion dollars annually.[90] Nationally, municipal and county governments estimate the cost to eradicate graffiti in their jurisdictions to be in the millions of dollars.[91] In the 2017–2018 budget, Mayor Eric Garceti promised a $2 million dollar increase to the graffiti removal budget for Los Angeles.[92] The same budget failed to provide specific budget numbers for the removal program, but past estimates placed the cost of graffiti removal in Los Angeles at $7 million per year.[93] In its 2018 Budget Overview, Chicago Mayor Rahm Emanuel highlighted "enhanced graffiti removal" as one of his 2018 initiatives.[94] The budget for the initiative was a precise $4,719,423.[95] Graffiti, however, is not simply a large urban or coastal problem. Tucson, Arizona, for example, places the estimated cost of graffiti removal at $1.6 million.[96] In addition to

90. Jim Walsh & Dennis Wagner, *Wiping Out Graffiti? Here's an App for That*, USA TODAY (Mar. 2, 2010), https://usatoday30.usatoday.com/tech/news/2010-03-01-graffiti-tech_N.htm (placing the federal cost of graffiti abatement between $15–18 billion annually). Precise budget figures for graffiti abatement by the federal government are challenging to locate in part because multiple agencies include it in their budget. The Environmental Protection Agency, the Department of the Interior, and the General Services Administration include maintenance of public property in their budgets. *See generally* DEP'T OF THE INTERIOR, FISCAL YEAR 2019: THE INTERIOR BUDGET IN BRIEF (2018), https://www.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf; ENVTL. PROT. AGENCY, FY 2019 EPA BUDGET IN BRIEF (2018), https://www.epa.gov/sites/production/files/2018-02/documents/fy-2019-epa-bib.pdf; U.S. GEN. SERVS. ADMIN., FY 2019 CONGRESSIONAL JUSTIFICATION (2018), https://www.gsa.gov/cdnstatic/GSA%20FY%202019%20CJ.pdf. The Department of Justice puts the total federal cost of graffiti abatement at $12 billion per year. *See* DEBORAH LAM WEISEL, U.S. DEP'T OF JUSTICE, GRAFFITI 2 (2002), http://www.popcenter.org/problems/pdfs/graffiti.pdf.

91. Municipal estimates for graffiti clean-up vary, but major municipalities report graffiti clean-up in the millions, with an aggregate total in the billions. *See, e.g.*, Sonia Krishnan, *Graffiti Vandals Cost Public Millions*, SEATTLE TIMES (Apr. 26, 2010), https://www.seattletimes.com/seattle-news/graffiti-vandals-cost-public-millions.

92. *See* CITY OF L.A., 2017–18 BUDGET SUMMARY 12 (2017), http://cao.lacity.org/budget17-18/2017-18Budget_Summary.pdf.

93. *See* Aaron Mendelson, *LA. Scrubs Away 30 Million Square Feet of Graffiti Each Year*, S. CAL. PUB. RADIO (Sept. 10, 2015), http://www.scpr.org/news/2015/09/10/54285/la-scrubs-away-30-million-square-feet-of-graffiti.

94. *See* CITY OF CHI., 2018 BUDGET OVERVIEW 88 (2018), https://www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2018Budget/2018_Budget_Overview.pdf. In light of past initiatives, Emanuel boasted a eighteen percent drop in graffiti. *Id.*

95. *Id.* at 91.

96. *See* Bud Foster, *New Program Aims to Ease Graffiti Clean-up Costs*,

the cost of removing the graffiti, the surface upon which the graffiti is placed may be damaged either through the application of the tag or through its removal.[97]

The aggregate cost of repair to private property is harder to determine. Private citizens are not obligated to report the cost of removing graffiti from their property, although some jurisdictions charge homeowners a fine for displaying graffiti on their property in addition to charging a cost for city-sponsored removal.[98] Even without data, there is little question that graffiti is, as an illicitly placed image, an affront to the owner's ability to control access and content on his property.

In addition, graffiti arguably causes a harm that cannot be calibrated in terms of the cost of removal or property repair. Graffiti can carry a psychological effect on the value of the property.[99] The presence of graffiti not only may offend the owner's sense of aesthetic or ownership, but it may fundamentally change how the owner views his property in the first place.

Furthermore, graffiti is often viewed as a sign of greater harm to come, or of danger already in our midst. New York City Mayor Rudy Giuliani warned that graffiti is used primarily by gangs[100] (as will be discussed in a moment, this turns out to be a

TUCSON NEWS NOW (Feb. 23, 2016), http://www.tucsonnewsnow.com/story/31285484/new-program-aims-to-ease-graffiti-clean-up-costs.

97. *See* WEISEL, *supra* note 90, at 1 (noting the high costs to repair surfaces damaged by graffiti); *see also* Marc Ferris, *Graffiti as Art. As a Gang Tag. As a Mess*, N.Y. TIMES (Sept. 8, 2002), http://www.nytimes.com/2002/09/08/nyregion/graffiti-as-art-as-a-gang-tag-as-a-mess.html (describing Westchester County's growing graffiti abatement costs resulting not only from the cost of removal but from the cost of restoration of the surface upon which the graffiti appeared).

98. *See, e.g.*, L.A., CAL., MUN. CODE § 49.84.3(B) (2015) (restricting graffiti, murals, and other public displays); SAN DIEGO, CAL., MUN. CODE, §§ 54.405(b)–54.407 (2015); MIAMI, FLA., ORDINANCES PART II, §§ 37-2(f)–(g) (2007); ATLANTA, GA., ORDINANCES PART II, § 74-174 (2011); BOS., MASS., MUN. CODE, § 16-8.5 (2005); N.Y.C., N.Y., ADMIN. CODE §§ 10-117, 10-117.3 (2015) (criminalizing the act of creating graffiti, possession of graffiti paraphernalia including broad tipped markers and foam brushes by minors and the display of graffiti images by property owners).

99. Under graffiti abatement ordinances, a municipality may require a homeowner to remove graffiti from his own property even if the homeowner commissioned the work and/or would like to continue to display the work. *See* Steve Hartman, *Mural Inspired by Starry Night Becomes a First Amendment Issue*, CBS NEWS (Aug. 24, 2018), https://www.cbsnews.com/news/mural-inspired-by-starry-night-becomes-a-first-amendment-issue (describing a city's threat to fine a family up to $250 per day after the homeowners commissioned a starry night mural for their autistic son); *see also supra* note 38 and accompanying text.

100. *See* Jonathan P. Hicks, *Mayor Announces New Assault on Graffiti, Citing Its Toll on City,* N.Y. TIMES (Nov. 17, 1994), http://www.nytimes.com/1994/

contested proposition[101]). His successor, Michael Bloomberg, warned that graffiti "is an invitation to criminals and a message to citizens that we don't care."[102] Despite evidence that relatively small amounts of graffiti are "gang" related[103]—and despite the benefits of graffiti to some perspectives and some communities—the fear of what graffiti signals persists. That this mythology around graffiti seems to fall somewhere toward the Boogeyman end of the spectrum of real threats has not blunted efforts to control it. Such a characterization of graffiti allows graffiti regulation to become a means to control behavior and to justify arrest among particular marginalized populations.[104] Graffiti is used as the sign to scare a neighborhood—or those viewing the neighborhood—into believing that the community is unsafe and that its youth must be arrested; its outsider voices must remain submerged.[105]

The rise in graffiti prosecution and the stand-alone criminalization of graffiti can be linked to the emergence of broken windows policing in the early 1990s.[106] As a theory, broken windows policing is based on the premise that people are more willing and likely to commit crimes in neighborhoods that appear unwatched and uncared for by residents and local authorities.[107]

11/17/nyregion/mayor-announces-new-assault-on-graffiti-citing-its-toll-on-city.html.

101. *See* Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 743 (1990) (noting that graffiti attributed to gang members in Los Angeles frequently was not in fact gang-related).

102. *See* Jeff Chang, *American Graffiti*, VILLAGE VOICE (Sept. 10, 2002), http://www.villagevoice.com/arts/american-graffiti-7142061.

103. *See* Burrell, *supra* note 101.

104. This critique of deterrent policing is not limited to graffiti. Opponents contend that arrests and stops based on suspicion of low-level offenses tend to have a disproportionate impact on minority male populations. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 557–63 (S.D.N.Y. 2013) (concluding that NYPD's stop and frisk policies were unconstitutional in part because the policy promoted race-based stops and targeted Black and Latino populations disproportionally). For a broader critique of policing policies, crime and race, see generally Delgado, *supra* note 45.

105. *See, e.g.*, CITY OF N.Y. POLICE DEP'T, COMBATING GRAFFITI: RECLAIMING PUBLIC SPACES IN NEW YORK 4 (2004), http://www.nyc.gov/html/nypd/downloads/pdf/anti_graffiti/Combating_Graffiti.pdf (warning that graffiti may be associated with hate groups, gangs or, "the occult" and therefore must be removed to protect citizens).

106. *See* Daniel Brook, *The Cracks in "Broken Windows,"* BOS. GLOBE (Feb. 19, 2006), http://archive.boston.com/new.globe.ideas/articles.2006/02/19/the_cracks_in_broken_windows (describing the emergence of broken windows policing and criticisms of the practice).

107. George L. Kelling & James Q. Wilson, *Broken Windows*, ATL. MONTHLY

Adherents to this theory reason that broken windows are a "gateway" offense to greater crime.[108] When communities are concerned about murder and other violent crime, a minor property offense such as a broken window seems almost laughably insignificant; its harm a welcome alternative to a notification of a murder or rape. But the broken windows theory is premised on the notion that any neighborhood at any moment could slide from broken windows to murder.[109] If a neighborhood doesn't bother to prevent or repair broken windows, would it bother to prevent or even be capable of preventing more serious crime? In order to decrease crime, therefore, a neighborhood should "replace or fix the broken windows,"[110] and so present an appearance of watchfulness and lawfulness.

But broken windows policing was not just a call for community activism; it was a call for proactive law enforcement that prioritized order as a means of preventing crime. Proponents argued that it was far better—and that it was a police officer's job—to "keep order in a community" rather than to just respond to serious crime after the fact.[111] The theory was not without its results[112] and controversies.[113] Boston and New York both reported dramatic drops in crime after implementing broken windows policing.[114] Soon, other cities adopted the theory and the zero-tolerance policies that accompanied it.[115]

(Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* GEORGE L. KELLING & WILLIAM H. SOUSA, JR., MANHATTAN INST., DO POLICE MATTER?: AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 9–10, 18 (2001) (claiming that broken windows policing had a statistically significant role in the decrease in New York City's crime rates).

113. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6 (2001) (arguing that broken windows policing did little to reduce crime rates in the cities in which it was implemented and subjected minority populations to the worst of both worlds—increased arrests and convictions on minor offenses and longer prison sentences based on prior records and retributive sentencing schemes); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (summarizing other studies on broken windows policing and calling into question Kelling and Sousa's claims).

114. *See* KELLING & SOUSA, *supra* note 112, at 18; Harcourt & Ludwig, *supra* note 113, at 274.

115. *See* Harcourt & Ludwig, *supra* note 113, at 272.

Broken windows policing targeted graffiti on the theory that the proliferation of graffiti not only damages the physical structure upon which it is placed, but damages the community in which it appears.[116] Seen through this lens, even the most benign of graffiti images may inch a neighborhood towards descent. The presence of the spray-painted image suggests lawlessness or indifference. Initials carved or written with a sharpie marker on windows and porches advertise neglect and blight. Even a mural, with its hours of construction and intricacy of design, may signal a lack of police presence that might have otherwise interrupted the project. If graffiti can spread with apparent wanton abandon, what does that say about the police presence in the neighborhood or law enforcement in the community? The theory of broken windows or gateway crime policing, after all, rests on the premise that to allow minor crime to go unchecked will communicate that greater crimes may enjoy similar immunity.

There are reasons to question the broken windows theory of deterrence, as will be discussed in a moment,[117] but the underlying claim that minor crimes, even if they lead to no greater offense, may undermine confidence in a neighborhood makes some sense.[118] Likewise, a police presence signals an interest in the community and may deter crimes and criminals.[119] Outside the context of policing theory, the presence of graffiti may signal a lack of interest by property owners in maintaining their undisturbed private property.[120] Under either a theory of societal devaluation or property devaluation, graffiti is unique in that it occupies a physical space and so serves as a constant and visual reminder of the crime that occurred—one that may well linger even after the offending tag is removed.[121]

Further still, graffiti carries with it a sense of violation. It is a mark on spaces normally held apart. The home, the business,

116. *See* WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC, at ix (1998) (noting damage to the New York City community caused by crime).

117. *See infra* notes 129–41 and accompanying text.

118. *See supra* notes 83–87 and accompanying text.

119. *See supra* notes 83–87 and accompanying text.

120. *See* FERRELL, *supra* note 20, at 178–81 (describing graffiti as an affront to the property owner's aesthetic and a rejection of the property owner's unfettered control of the property).

121. In this, it is no accident that mayors in Los Angeles and Chicago created specific budget line items for graffiti removal in conjunction with their urban revitalization efforts. *See supra* notes 92–96 and accompanying text.

the monument, the side of the road—whether collectively or individually owned—are spaces that are subject to control. They mirror the most conservative of the collective social sense, reflecting either public property's calming influences of collective decision-making or private property's practical and conforming aesthetic. Although communities may confront other shocking pieces of public art—Edwin Meese's bare-breasted lady justice,[122] the neighbor with the purple house and garish lawn ornaments, the business with the bright orange storefront and leering owl[123]—such deviations are regularized in some way. They are subject to laws, regulations, and communally agreed-upon ordinances that dictate not only their content, but often the method used to display that content.[124] Despite the broad variance among communities regarding this regulation, graffiti seems to fall outside the scope of them all.[125] It is an unanticipated and unbidden display by the property owner—whether public or private—and, unlike other restrictions on property, carries a criminal status.

Setting aside for a moment the regulation of graffiti on public spaces, the regulation of graffiti on private property, particularly dwellings, is consistent with long-held principles of criminal law. In criminal law, the home is recognized as a sphere in which individuals may enjoy not only an expectation of privacy that is not found in other spheres,[126] but also a right to protect that space that is not found in other locations.[127] In this context, graffiti on a dwelling not only signals the possibility of other crime, but it also defies the very notion that the home is a sacred

122. *See* Dan Eggen, *Sculpted Bodies and a Strip Act at Justice Dept.*, WASH. POST (June 25, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/24/AR2005062401797.html (discussing the infamous appearance of the bare breasted sculpture of Lady Justice behind Attorney General Edwin Meese III as he discussed a report on pornography).

123. *See generally* HOOTERS, https://www.hooters.com (last visited Oct. 29, 2018) (website for a business with notable storefront design).

124. *See generally* David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 J.L. & POL. 171 (2007) (describing the history of sign regulations).

125. *See* FERRELL, *supra* note 20, at 190 (comparing graffiti to anarchist movements in its rejection of all authority).

126. *See* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 1–8 (2009) (describing the evolution of the law's relationship with the home including heightened expectations of privacy in the context of the Fourth Amendment and the up to very recent (and arguably current) reluctance of law enforcement to make arrests in domestic violence cases).

127. *Id.* at 55–86 (discussing the importance of the home in the construction of self-defense doctrine).

or special space. Some jurisdictions have recognized this distinction, carving out either distinct sentencing regimes or distinct crimes for graffiti placed on private dwellings or privately occupied buildings.[128]

All this is to say what many proponents of broken windows or deterrent policing have long suspected: graffiti is bad. It damages property and people in tangible and intangible ways. Criminalizing it, regardless of its content or aesthetic appeal, makes sense. But the true legacy of this policy is complex. Despite the popularity of broken windows policing and its purported crime reduction, critics question its results.[129] Did it actually reduce crime rates, or did it just create an atmosphere in which police could justify over intrusion into citizen's lives?[130] Did it improve the community's sense of security, or did it just support the increasing militarization of the police?[131] Did it target minority-populated neighborhoods in an effort to keep them safe, or in an effort to cox their citizenry into submission?[132] In the context of New York City, where this debate has been especially contentious and litigious,[133] the zero-tolerance policies of the New York Police Department in the 1990s and early 2000s facilitated a revitalization of the city and the gentrification of neighborhoods; but like all changes, there were trade-offs.[134]

Plaintiffs challenging New York City's stop-and-frisk policy contended that broken windows policing promoted a carte blanche authority for officers to target young men of color for brief detentions often based on the thinnest of suspicions.[135] Eric

128. *See* Mettler, *supra* note 20, at 258.

129. *See* HARCOURT, *supra* note 113, at 6; Harcourt & Ludwig, *supra* note 113.

130. *See* Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS FRONTLINE (June 28, 2016), https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing.

131. *Id.*

132. *Id.*

133. In *Floyd v. City of New York*, Black male plaintiffs challenged the New York City Police Department's policy of *Terry* stops known as "stop and frisk." *See* Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html.

134. *See* ANDREW KARMEN, NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S 92–98 (2000) (arguing that stop and frisk and other aggressive police tactics that targeted minority populations were products of broken window policing policies).

135. *See* Complaint at 2, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-01034).

Garner's encounter with Staten Island police officers in 2014 offers another glimpse at proactive policing. Garner was stopped and eventually arrested after officers allegedly observed him selling loose cigarettes.[136] In cellphone video of the incident, Garner can be heard protesting the frequency of police encounters for such trivial offenses.[137] As the encounter escalates, Garner protests first that he wants to be left alone and second that he can't breathe.[138] In the end, Eric Garner dies as a result of a police administered chokehold in response to an offense punishable by a ticket.[139] Garner is hardly alone in his experience of police investigation for minor offenses based on an apparent belief that even minor crimes lead to major danger for communities.

Certainly, it may be argued that stop and frisk and other aggressive police tactics always existed. Broken windows policing just gave name and policy goals to the practice, and cellphone video capability just offered documentation to a reality that long existed.[140] Whatever the true legacy of the policy, to think of graffiti as speech complicates the discussion. It suggests that the behavior to be regulated may actually carry some value. This renders graffiti constitutionally distinct from a broken window or a street-corner crack purveyor. Graffiti carries a message beyond an invitation to crime. Critics of broken windows policing, in fact, have noted that graffiti can unite rather than separate a community.[141]

From this perspective, graffiti is seen not as a sign of blight or neglect, but as a mechanism of expressing marginalized perspectives. In the United States, where large swaths of the population lack the economic power to own property, where urban communities are rapidly gentrifying, and where visible spaces

136. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 392–97 (2016) (discussing methods and benefits of citizens monitoring police).

141. *See* Michelle Bougdanos, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall Is It Anyway?*, 18 N.Y. L. SCH. J. HUM. RTS. 549, 549 (2002) (describing one graffiti artist's approach to creating murals that benefit the community). The City of Portland recognized this proposition in its anti-graffiti ordinance, noting that some types of graffiti (murals) can "increase community identity and foster a sense of place." PORTLAND, OR., CITY CODE & CHARTER tit. 4, ch. 4.10.010 (2009), http://www.portlandoregon.gov/citycode/article/257806.

are commercialized, the possibility of expressing dissent through a legally permissible physical display is curtailed. While the President may be able to place his name on some of the world's most desirable property, the lowly tagger or muralist, even if equally (or more) politically aware, cannot. The difference is not the value of the message, but the net worth of the speaker. Donald Trump owns the property and so, within certain limitations, can label it as he pleases; the tagger, with no property, cannot.

In this, whether a gang tag or a Shepard Fairey mural,[142] graffiti celebrates and identifies the component parts of the community that might otherwise be lost or silenced under broken windows' goal of clean streets, orderly citizens, and an economic and legal system that links expression to property rights. Graffiti is a voice that will not be broken or corralled or owned. It is conduct that claims space and, in the process, defies ownership and any other cultural norm that might silence it. For some disenfranchised or marginalized communities graffiti may be a unique avenue of communication.

Some might argue that to accept that graffiti is speech begs the question of whether it is the type of speech that the law can and should recognize and protect. Put another way, even if graffiti communicates a message, does it carry a constitutional value? Certainly some, if not all, graffiti carries a communicative value.[143] Even if the message is mundane or poorly constructed, First Amendment theory would suggest that it carries some value that at times may rise to a level warranting protection.[144] At a minimum, as will be discussed in Part III, the marketplace of ideas theory of speech would suggest that the value of the

142. Shepard Fairey, a Chicago-based graffiti artist, is credited with creating the now-ubiquitous "Giant Obey" stencil mural, as well as creating works for Barack Obama's 2008 campaign and Bernie Sanders' 2016 campaign. *See* SHEPARD FAIREY, COVERT TO OVERT (2015) (collecting Fairey's works). More recently, Fairey created a "We the People" series of posters featuring a Black, Latina, or an American-flag-hijab-clad Muslim woman that have become mainstays at anti-Trump and women's marches. For examples of these and other recent works, see *We the People Art*, OBEYGIANT.COM (Jan. 16, 2017), https://obeygiant.com/people-art-avail-download-free.

143. For a rather endearing account of this value, see Kie Relyea, *Iconic Rock South of Bellingham Tells Layers of Community Stories*, BELLINGHAM HERALD (July 10, 2018), https://www.bellinghamherald.com/news/local/article214592485.html. For a more monetized account of this value, see Robin Pogrebin & Scott Reyburn, *A Basquiat Sells for "Mind-Blowing" $110.5 Million at Auction*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/arts/jean-michel-basquiat-painting-is-sold-for-110-million-at-auction.html.

144. *See infra* Part III.

speech is irrelevant (or only marginally relevant) to the decision to regulate.

Current regulation of graffiti, however, is indifferent to its status as speech.[145] That graffiti may serve to communicate otherwise suppressed messages—or, in many jurisdictions, even that the property owner may want to retain the graffiti—is irrelevant for criminal law's purposes.[146] The defense of speech is precluded in the assessment of criminal liability.[147]

Not only is this rejection of a speech defense inconsistent with the treatment of speech in the context of torts (which offers a variety of defenses based on speech rights),[148] but it creates an odd and absolute hierarchy of values—prioritizing property rights absolutely over speech rights. This is further complicated by the fact that criminal law relies on the State to enforce such a hierarchy of values. In short, in the case of graffiti regulation, the State becomes the guardian of property rights at the expense of speech rights.

Admittedly, this heroic view of graffiti is not without its difficulties. For every tagger reclaiming some space in his neighborhood as his own or some political movement rising from a spray-paint can, there is a grandmother scrubbing the tag off her garage door to avoid a city fine under an abatement statute or some frustrated business owner who is whitewashing his store's walls. But this vision of graffiti as a voice for a neighborhood—as speech itself—turns the underlying premise of broken windows policing on its head. This reorientation of the policing theory suggests the need for a new theory of criminal law that takes into account the speech value of graffiti. First, allowing speech as a defense to graffiti charges categorically rejects the notion that a state actor through criminal enforcement is more capable of protecting a community's identity than the members of that community itself. Second, a free speech defense to graffiti supports the notion that communities themselves should have some say in weighing the value of the speech that is graffiti in contrast to the property rights this speech undermines. Third, the possibility of a speech defense to graffiti argues that the above described weighing of values should—in at least some cases—be an explicit part of a trial (or even charging and plea) conversation, and should not be relegated to the politically expedient

145. *See supra* note 98 and accompanying text.
146. *See supra* note 99.
147. *See supra* notes 34, 41–42, 98–99 and accompanying text.
148. *See infra* notes 186–92 and accompanying text.

backrooms of police or prosecutorial discretion. This inevitably begs the question of where graffiti fits in the larger free speech cannon? Part III explores the implications of inserting graffiti into a larger First Amendment construct.

III. FREE SPEECH AND GRAFFITI

The history of the First Amendment and free speech jurisprudence is complex.[149] It twists and turns around prevailing judicial thought and is rewritten as notions of liberty and democracy itself shift. Yet, in its various iterations, two related free speech ideals emerge: the notion of free speech rights as a means to promote equality, and the notion of free speech rights as promoting political liberty.[150] Both profess an allegiance to the First Amendment's negative construction of speech rights—as less of a right to speak and more of a promise of non-interference with speech. And both, as of late, pivot increasingly around property in two distinct ways. First, both seek to develop a workable doctrine surrounding the inevitable conflict between other rights and concerns, including property interests (both public and private) and speech interests. Second, particularly as of late, the notion of speech itself is increasingly linked to property—property not only as a means to facilitate speech,[151] but property as speech.[152]

Within this larger, value-driven framework, free speech regulation is divided between regulation of content and regulation of something other than content that nonetheless impacts speech.[153] Admittedly, it is hard to fit graffiti neatly into permissive speech categories derived from either of these regulatory

149. *See generally* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) (providing a comprehensive history of the evolution of speech doctrine).

150. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010) (positing that it is helpful to think of the *Citizens United* decision in terms of overarching speech doctrine).

151. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (overturning FEC regulation of corporate financing of political speech).

152. *See, e.g.*, Petition for Writ of Certiorari at 18–22, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing that a cake was in fact speech). Ultimately, the Court did not reach the free speech question raised by the petitioner. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723–24. However, Justice Thomas wrote separately and signaled a willingness to recognize the cake in question as speech. *See id.* at 1740 (Thomas, J., concurring).

153. Such content-neutral regulations are colloquially known as "time, place or manner" restrictions. For examples of the Court upholding such restrictions,

techniques. Some graffiti would appear to fall into low value speech categories and suffer regulation as such. All graffiti would seem subject to time, place, or manner restrictions, which would constitutionally permit regulation without consideration of the content of the speech itself.

In discussing free speech doctrine, however, lines are rarely clear, and boundaries of speech regulation and permission may sway. For example, speech that in one era may appear to be properly regulated as threatening will later be exalted as dissenting speech critical to the democratic process as community norms of political dissent and activism shift.[154] The pornography of one era is the accepted artistic expression of another.[155] The same can be said for time, place, or manner restrictions. As neighborhoods and the nature of property itself shift, so does the regulation of the speech that must be allowed to occur on the property. Acknowledging these shifting values and norms, this Part discusses free speech doctrine as it stands today. Part IV turns to the argument that given the value of graffiti, and given the unavailability of alternative forums for the type of expression graffiti engages in, criminal law ought to recognize a free speech defense to graffiti.

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see Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Grayned v. City of Rockford, 408 U.S. 104 (1972); Schneider v. State, 308 U.S. 147 (1939). For a more general discussion of time, place, or manner restrictions, see JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS §§ 3:6–3:11 (1979).

154. *See* Rabban, *supra* note 149, at 1345–51 (discussing the evolution of the "clear and present danger" analysis).

155. For example, under the Comstock Act of 1873, any discussion of sexual intercourse, including that connected with sex education, was classified as pornography. *See* Gloria Feldt, *Margaret Sanger's Obscenity*, N.Y. TIMES (Oct. 15, 2006), https://www.nytimes.com/2006/10/15/opinion/nyregionopinions/15CIfeldt.html (describing Margaret Sanger's struggle against the Comstock Act's application to sex education). Similarly, an early Thomas Edison film featuring a woman dancing was considered shocking when released because the woman revealed underskirts as she danced. *Id.* Today sex education is widely accepted as part of public education. *See What's the State of Sex Education in the U.S.?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us (last visited Oct. 6, 2018). Also, Instagram stars routinely post nude and semi-nude photos of themselves and others. *See* Cardi B. (@iamcardib), INSTAGRAM, https://www.instagram.com/p/BlHLWiBHZOP/?hl=en&taken-by=iamcardib (last visited Oct. 6, 2018); Scott Disick (@letthelordbewithyou), INSTAGRAM, https://www.instagram.com/p/8lOUR1u3-0/?utm_source=ig_embed (last visited Oct. 29, 2018); Kim Kardashian (@kimkardashian), INSTAGRAM, https://www.instagram.com/p/BjF0AnaF_7y/?hl=en&taken-by=kimkardashian (last visited Oct. 29, 2018). All of this suggests, as the Court intended, evolving community standards of the obscene or pornographic.

A. REGULATING THE CONTENT OF SPEECH

Despite free speech's front and center position in the First Amendment (and the accompanying rhetoric of free speech during the American Revolution),[156] the regulation of speech in the face of competing values was almost immediate. As early as 1798, the Alien and Sedition Acts permitted suppression of anti-government speech in the name of national security.[157] The regulation of speech has often struck an uneasy balance between the speech itself and interests implicated either by the content of the speech or by the impact that the speech may have on other rights and interests—specifically those related to property and national security.[158]

Thus, speech can be permissibly regulated despite the First Amendment when it falls into an "unprotected" category of speech or, as will be discussed momentarily, when it infringes upon a private property owner's rights or oversteps the permissible bounds of public spaces.[159] In the former category, the content of the speech itself drives the regulation. Obscene, truly threatening or libelous speech is of little or no interest to the First Amendment and may be constitutionally proscribed based on its content.[160] The evaluation of what speech "qualifies" as

156. In *Whitney v. California*, for example, the Court proclaimed that "[t]hose who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." 274 U.S. 357, 375 (1927).

157. *See* JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 24, 41 (1951) (discussing "a dangerous French faction was at work"); LEONARD WILLIAMS LEVY, EMERGENCE OF A FREE PRESS 30 (1985) (describing prosecutions for anti-government speech); Frederick S. Allis, Jr., *Boston and the Alien and Sedition Laws*, *in* PROCEEDINGS OF THE BOSTONIAN SOCIETY 39–51 (1951) (describing one of my favorite Alien and Sedition Act prosecutions of David Brown in 1800 for carving "[m]ay moral virtue be the basis of civil government" into a "liberty" pole in Boston).

158. For other examples of such a balance, see CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (1964) (describing southern states' restrictions on abolitionist speech both before and after the Civil War). *See also* Charles J. Reid, Jr., *The Devil Comes to Kansas: A Story of Free Love, Sexual Privacy, and the Law*, 19 MICH. J. GENDER & L. 71 (2012) (describing the regulation of pro-union and free love speech as evidenced in the Moses Harmon trial).

159. *See infra* note 160.

160. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (listing unprotected categories of speech). *Chaplinsky* drew its list in no small part from Justice Holmes's famous declaration in *Schenck v. United States*, 249 U.S. 47, 52 (1919), that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." For a further description of categories of "unprotected" speech, see generally Rabban, *supra*

low-value speech is more complicated. Modern free speech doctrine leaves this determination to the community that must suffer the speech.

For example, obscenity has always been permissibly regulated under the First Amendment.[161] Despite this, the U.S. Supreme Court has struggled to define obscenity.[162] In constructing a standard for classifying speech as obscene, the Court turned to community norms to judge what speech has redeeming value and so merits protection.[163] Starting in the 1950s, the Court chose to define obscenity not in terms of its "immorality," but in

note 149 (discussing instances of protected and unprotected speech). Even the notion of some speech as "unprotected" has received pushback from more modern Courts. For example, in *R.A.V. v. City of St. Paul*, the Court stated:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," *Roth v. United States*, 354 U.S. 476, 483 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Chaplinsky*, 315 U.S. at 571–72; or that the "protection of the First Amendment does not extend" to them, *Bose Corp. v. Consumers Union of* U.S., *Inc.*, 466 U.S. 485, 504 (1984); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

505 U.S. 377, 383–84 (1992).

161. *See Chaplinsky*, 315 U.S. at 572.

162. This struggle produced Justice Potter Stewart's famous submission that while he could not define what was obscene, he "know[s] it when [he] see[s] it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

163. *See* Miller v. California, 413 U.S. 15, 24–25 (1973) (modifying and arguably rejecting the *Roth-Memoirs* test to conclude that a work may be regulated if: (a) "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (expanding the *Roth* test to permit regulation only if "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value"); Roth v. United States, 354 U.S. 476, 489 (1957) (holding that material was obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest").

terms of its value to community in which it resided.[164] Likewise, in the context of political speech, community values and norms have driven the constitutionally permissible regulation of speech. Early Red Scare cases of the 1910s and 1920s criminalized the speech of socialists, anarchists, and communists in the name of national security.[165] Today the pamphleteering, meetings, and soap box oratory of these activists seem more quaint than threatening. Later cases struck down the regulation of subversive speech unless that speech intentionally incited people to cause imminent and serious harm.[166]

Inherent in this shift was an assessment of the danger the speech itself presented. And, at the end of the day, the assessment of that danger, as with its obscene cousin, lay with the citizen juror in whose midst the speech occurred.[167] As the citizen's fear of obscene, subversive, or non-conformist speech shifted, so too did their willingness to criminalize and punish such speech.[168] Admittedly this shift is a fraught proposition, and one not without interference from formal actors. Accusations of forum shopping,[169] puritanical veto of nonconforming speech,[170]

164. In prior cases, the Court had considered the immoral effect of the speech. *Compare Roth*, 354 U.S. at 487–89 (rejecting the test articulated in Regina v. Hicklin [1868] 3 QB 360, 481 (Eng.) determining the potential effect of the speech on youth in particular), *with* William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 77 (1960) (arguing that after *Roth*, "material is judged by its appeal to and effect upon the audience to which the material is primarily directed. In this view, material is never inherently obscene; instead, its obscenity varies with the circumstances of its dissemination. Material may be obscene when directed to one class of persons but not when directed to another").

165. *See* Gitlow v. New York, 268 U.S. 652, 672 (1925) (finding the state anarchy statute constitutional); Debs v. United States, 249 U.S. 211, 216–17 (1919) (holding speech about socialism was not protected when the purpose was to oppose war); Schenck v. United States, 249 U.S. 47, 52 (1919) (finding speech unprotected in wartime that might be said in times of speech).

166. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

167. *See* Smith v. United States, 431 U.S. 291, 301–03 (1977) (holding that the state legislature's isolation from the community itself precluded the legislature from setting community standards for the purpose of determining obscenity); Hamling v. United States, 418 U.S. 87, 104 (1974) (holding that citizen jurors were entitled to draw on their own experiences and knowledge in obscenity cases).

168. *See infra* notes 169–70.

169. See Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 56–57 (2010) (describing the government's use of forum shopping in pornography cases to find communities that would convict).

170. *See* Alyson Walls, *Prosecutors Seek Conservative Venues for Porn Trials*,

and contextual acceptance[171] all arise particularly in the face of modern obscenity regulation. Coupled with discretionary decision making by prosecutors and police forces in the enforcement of law, this has produced an ever-shifting classification of low-value speech.

The development of a speech jurisprudence dependent on citizen evaluation of speech content is premised on a notion that the proliferation of speech—including speech that is non-conformist or (as will be discussed in the context of time, place, or manner restrictions) that must be subsidized to exist—is valuable to the democracy.[172] This creates a paradox of sorts—a vision

PITTSBURGH TRIB.-REV. (May 18, 2004), https://webarchive.org/web/20080114025700/http://www.pittsburghlive.com/x/pittsburghtrib/s_194571.html (discussing federal prosecutors' tendency to prosecute obscenity cases in more conservative communities).

171. Nudity, including the usually fatal combination of nudity coupled with sadomasochistic violence, may be acceptable if presented as a fifteenth century triptych warning of the dangers of sin, but may be more problematic if presented as a homoerotic depiction displayed in the Midwest. *Compare* HIERONYMUS BOSCH, THE GARDEN OF EARTHLY DELIGHTS, Panel 2 (c. 1490–1510), https://www.museodelprado.es/en/the-collection/art-work/the-garden-of-earthly-delights-triptych/02388242-6d6a-4e9e-a992-e1311eab3609 (fifteenth century triptych oil painting depicting earthly pleasures such as nudity and sex juxtaposed with a depiction of hell), *with* ROBERT MAPPLETHORPE, ROBERT MAPPLETHORPE: PERFECT MOMENT (Cincinnati Contemporary Arts Center Exhibit 1990) (describing how the Cincinnati Contemporary Arts Center, which displayed the photographs, along with the Director of the Center, was tried for alleged violations of Ohio obscenity laws for displaying a homoerotic depiction of nudity in *City of Cincinnati v. Contemporary Art Ctr.*, 566 N.E.2d 207 (Ohio Mun. Ct. 1990)). A selection of these photographs as displayed in 1990 can be viewed in Grace Dobush's article, *25 Years Later: Cincinnati and the Obscenity Trial over Mapplethorpe Art*, WASH. POST (Oct. 24, 2015), https://www.washingtonpost.com/entertainment/museums/25-years-later-cincinnati-and-the-obscenity-trial-over-mapplethorpe-art/2015/10/22/07c6aba2-6dcb-11e5-9bfe-e59f5e244f92_story.html (follow "View Photos" hyperlink; then follow left arrow hyperlink).

172. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . . and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'" (first quoting Bridges v. California, 314 U.S. 252, 270 (1941); and then quoting NAACP v. Button, 371 U.S. 415, 429 (1963))); *id.* at 270 (explaining that democracy requires a commitment to the notion that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949))); Roth v. United States, 354 U.S. 476, 484 (1957) (stating the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Frank I. Michelman, Foreword, *Traces of Self-Government*, 100 HARV. L. REV. 4, 27 (1986) ("[I]ts requisite forum is 'a political community of equals,' where individual reason corresponds to public rational debate) (quoting

of free speech rights that is simultaneously both "anti-regulatory" and "pro-regulatory." It is anti-regulatory in the sense that it anticipates that the First Amendment permits all but the most dangerous or socially costly speech.[173] Citizens and not the government draw the boundaries of this speech. But it is also pro-regulatory as it imagines that in the face of resource inequality, the government at times must mandate the creation of spaces for minority speech to occur.[174] In both its regulatory and anti-regulatory stances, the ideal of the First Amendment as a means of promoting equality and free thought is one that seeks to advance democratic values by promoting speech and promoting citizen participation in the assessment of speech.[175]

This vision in turn embraces an anti-discrimination, pro-speech perspective that promotes and protects marginalized speech in the face of majority opposition or apathy.[176] Relying on citizens to themselves assess the inherent value of the speech in question not only prevents a top down regulatory model of speech, but it may promote speech that otherwise occupies a fringe status.[177] This may occur in two ways. First, jurors may reject the criminalization of certain speech because they view it as having a potential value. As a result, defendants will be acquitted or, perhaps, prosecutors will decline even to charge

RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983)).

173. *Cf.* Hamling v. United States, 418 U.S. 87, 103 (1974) (citing Miller v. California, 413 U.S. 15, 31–32 (1973) (discussing that the First Amendment does not require juries to consider national standards).

174. Most recently, consider Justice Stevens' dissent in *Citizens United v. Federal Election Commission*. Adopting an equality-based vision of the First Amendment, Stevens argued that the need to limit corporate contribution and speech in the political context is born of the power of corporate resources. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting). Stevens noted that corporations could muster and deploy resources "on a scale few natural persons can match." *Id.* at 469. In the process, corporations can dominate forums of speech, "drowning out . . . noncorporate voices . . . ." *Id.* at 470. To promote equality, therefore, Stevens contended that the government properly regulated corporate financing of speech, leaving room in the process for less flush endeavors to speak. *Id.* at 431–32, 485.

175. *See Roth*, 354 U.S. at 484 (observing that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes . . . ."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980) (espousing the notion that the First Amendment promotes democracy by "assuring an open political dialogue and process").

176. *See* Sullivan, *supra* note 150, at 149–50.

177. *See id.* at 155.

speakers, as they recognize juror preferences.[178] Second, even as jurors may decline to find a redeeming value in some speech, in rejecting the free speech defense, they nonetheless preserve a space for voices that might otherwise be targeted for their unpopular or anti-majoritarian views by drawing boundaries that would permit other speech. These boundaries, in turn, evolve as different speech norms emerge and social values change. Early pamphleteering, while initially unprotected, would now be unlikely to raise community ire, just as images of a topless adult women, once scandalous, are now widely accepted as expressive and permissible.[179]

This is not to say that content-based regulation, or more accurately, a citizen-based-assessment of the speech content, is the sole source or champion of an equality-based vision of speech.[180] Nor is it to say that citizen-based assessment of content is always liberating to minority perspectives; it usually is not.[181] In fact, the Supreme Court's development of an equality-based model includes formalized components that are both protective and promotive in the face of unsympathetic informal citizen-based components—including regulatory components based on something other than the content of the speech itself.[182] In promoting equality through content regulation, the government acts in both negative and affirmative postures—guarding against content-based regulation of speech and promoting speech whose content is unpopular or marginalized.[183] At first blush this may seem to cut against a system that relies on and allows the citizenry to directly judge and evaluate the value of speech.[184] Reality, however, belies this first impression. By rigging the marketplace of

178. *See* Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. (forthcoming 2019) (describing the influence of acquittal on future charging decisions).

179. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.").

180. *See, e.g.*, Sullivan, *supra* note 150, at 149 (discussing using the First Amendment to "redistribute speaking power").

181. *See infra* Part IV.

182. *See infra* notes 191–93 and accompanying text.

183. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (Stevens, J., dissenting) (arguing for regulating speech to promote equality); Sullivan, *supra* note 150 (discussing a vision with affirmative action to promote marginal speech).

184. *See* Sullivan, *supra* note 150, at 145 ("[T]he First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas.").

ideas—that is, by removing some or restricting other speech—the government allows majoritarian positions to flourish. The Court, in promoting equality, seeks to prevent those positions from stifling countervailing perspectives to the point of extinction, and in turn allows for the continued evolution of thought and community norms.[185]

There is no denying that this is an active judicial role. Elected governments, after all, are less likely to regulate mainstream or popular speech in comparison to more unusual, unorthodox or minority speech. It therefore falls to the Court to protect this outlier speech by removing government-based restrictions and promoting equality in speech in the process.[186] As such, the Court redistributes speaking power and removes requirements for allegiance to a particular perspective in exchange for an allocation of resources.[187] The preservation of competing ideals and ideas—whether in the creation of public forums in streets, parks, town squares, or in the form of striking down particularly aggressive forms of content regulation—all serve not only as a subsidy for dissent and otherwise resource-deprived speech, but also to enrich an ongoing public conversation about the value of speech itself.[188] As discussed in Section B, beyond content based regulation of speech, content neutral regulation in the form of time, place, or manner restrictions also effect significant swaths of speech.[189]

B. REGULATING SPEECH BY TIME, PLACE, OR MANNER

In contrast, regulation of speech based on its impact on some other right does not inquire into the content of the speech except as such content affects the other right in question.[190] Such time,

185. *See id.* at 150–52.

186. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 319 (1990) (invalidating decisions to criminalize flag burnings as protest); Texas v. Johnson, 491 U.S. 397, 420 (1989) (same); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (deviating from prior cases in which the Court had permitted the regulation of "seditious" speech and prohibiting government regulation of subversive speech, unless it intentionally incites people to cause imminent and likely harm); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring public official to show actual malice in libel suits, so protecting the ability to criticize the government).

187. *See* Sullivan, *supra* note 150, at 149.

188. *See id.* at 149–52.

189. *See infra* Part B.

190. *See, e.g.*, *infra* note 192.

place, or manner regulations seek to control *how* speech is presented—not *what* speech is presented.[191] The Court has repeatedly permitted reasonable time, place, or manner restrictions so long as such restrictions are content-neutral, are narrowly tailored to serve government interests, and leave open ample alternative means of expression.[192] This type of regulation considers other interests—most commonly property interests—in contrast to speech interests.[193] Thus private property owners may regulate speech on their own property (and use the state to enforce the regulation) not because the speech is "low-value" but because the speech occurs on their property.[194] Likewise, even in public forums—spaces traditionally or recently made available for public use, including speech use—the state may regulate speech in the interest of promoting competing interests.[195] Though the regulation may curtail speech, it does not, as a matter of constitutional law, render it impermissible.[196]

In recent free speech cases, the Court has considered a slight variation on traditional time, place, or manner restrictions. *Citizens United* struck down a regulation that limited corporate financing of political speech, and in *Masterpiece Cakeshop*, the Court was asked to consider whether a cake is speech.[197] Both

191. *See* Michael Anthony Lawrence, *Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 48 (2007).

192. *See generally* Cox v. Louisiana, 379 U.S. 536 (1965) (finding the law regulating demonstrations was too broad); Cox v. New Hampshire, 312 U.S. 569 (1941) (requiring parade organizers to have a license and pay a fee on a public street).

193. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (balancing the interests of regulating expression on private property). At times such property interests and rights are linked to other interests such as national security or public safety, the idea being that the use of the property for the speech interferes with such interests. *Cf.* Laura S. Underkuffler, *When Should Rights "Trump?" An Examination of Speech and Property*, 52 ME. L. REV. 312, 315 (2000) ("[R]ights of individuals are usually contrasted with public-interest demands.").

194. *See* Craig L. Finder, *Rights of Shopping Center Owners to Regulate Free Speech and Public Disclosure*, IN THE ZONE (Fox Rothschild), Oct. 2011, at 1 ("[S]tates generally protect the rights of private property owners to enact regulations governing political protests, demonstrations and similar activities on their properties.").

195. The public forum designation is a contested proposition as well with lower courts upholding restrictions on public parks, streets, sidewalks, and other traditional locations of speech for safety or community interests. *See* Perry Educ. Assoc. v. Perry Local Educs. Assoc., 460 U.S. 37, 45–46 (1983).

196. *See id.* at 55.

197. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

these cases involve whether to equate property—money or a cake—with speech, confronting the argument that content-neutral government regulations impermissibly interfere with a property interest that coincides with the owner's speech interest.[198]

This jurisprudential conversation between speech and property is hardly new. The early conception of the First Amendment drew heavily on notions of speech as property and viewed governmental speech restrictions as property incursions.[199] While this treatment of speech and corresponding First Amendment rights waned during particular judicial eras, it has persisted by pushing back on the notion that a liberty interest such as speech is different from other, more tangible interests such as property.[200]

In many ways this marriage, or perhaps more accurately, this single identity of speech (or any liberty) as a property interest, has served proponents of speech well.[201] The same liberty interest that forbid the government from breaking down doors in the middle of the night on a whim also prevented the government from forcing one to remove signs from yards or windows, or forcing another to post such a sign. The same liberty interest that designated the sidewalk a common space—a shared property of sorts—prevented the government from blocking the path of a protest or the pamphleteer on the same sidewalk, and likewise prevented the government from forcing a private property owner to accommodate a speaker.[202]

Linking speech and property as analogous liberty interests also made sense at the Founding. The mechanisms of speech the

Though arguably the First Amendment claim advanced in *Masterpiece Cakeshop* was about whether or not the shop owner could be compelled to speak in a particular way and thus took on a content component. Ultimately, the majority declined to rule broadly on the speech issue.

198. *See generally Masterpiece Cakeshop*, 138 S. Ct. 1719; *Citizens United*, 588 U.S. 310.

199. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment,* 63 U. CHI. L. REV. 49, 58–71 (1996) (describing Madison's vision of the First Amendment as protection against government seizure of the means of speech, such as the printing press or burning books, as opposed to government regulation of spoken word).

200. *Id.* at 71–72.

201. *Id.* at 57 ("[A] property-based system in which the First Amendment simply protects the individual's right to transmit his information is more likely to result in sound collective governance, and the accumulation of socially beneficial knowledge . . . .").

202. *See* Sullivan, *supra* note 150, at 158–63.

Founders sought to protect—their presses and pamphlets—were property.[203] And perhaps more importantly, they were property produced by the same folks who owned real property.[204] The Founders' allegiance to the budding republican democracy was an allegiance to a world in which property itself was the key to the realm.[205] One's status as a real property owner granted access to vote, to membership in government (including the bench), to a seat in a jury box, and, in some jurisdictions, to the very identity as a citizen.[206]

Property, however, is not a static concept. Common law property rights were vague nearly from their conception—eventually coming to be described as a bundle of often unruly sticks that could be taken apart or unfurled in the name of competing interests.[207] Notions of easements, public right of ways, restrictive covenants—to name a few—all were historically deemed permissible curtailments of real property rights in the name of the larger social good.[208] The identity of property has also shifted. People are no longer property—slavery is outlawed, and wives and children are no longer imagined to be the subordinate property of the husband and father.[209] Property in the modern

203. *See* McGinnis, *supra* note 199, at 56–57, 60–61.

204. *See id.* at 58–71 (discussing the Madisonian First Amendment).

205. In *Boyd v. United States*, the Court, interpreting the Founders' sentiment underlying the Fourth Amendment, quoted Lord Camden: "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable . . ." 116 U.S. 616, 627 (1886). The case that *Boyd* quoted, *Entick v. Carrington*, further noted that "every invasion of private property, be it ever so minute, is a trespass." Entick v. Carrington (1765) Eng. Rep. 1029, 1066.

206. *See* Andrew Gurthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1117 (2014) (discussing property owners as being allowed to serve on juries); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787-1828*, 33 J. EARLY REPUBLIC 219, 220 (2013) (discussing requiring property in order to vote).

207. *See* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928) (describing property as a bundle of rights); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 801 (1986) (same).

208. *See* Bob Meinig, *What Is the Nature of a Public Right-of-Way?*, MRSC (Jan. 2, 2014), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/January-2014/What-is-the-Nature-of-a-Public-Right-of-Way.aspx (discussing easements and public right of ways).

209. *See* Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105, 133 (Jean Allain ed., 2012).

world is also disentangled from the tangible. Reputation is described as a property interest.[210] A person cannot be owned, but she can claim ownership to her own good name. Likewise, intellectual property has emerged as a brave, new property world.[211] Ideas that may never take on a tangible form may nonetheless exist and receive protection as property.

Just as property notions have shifted, so have notions of democracy itself. With increasing enfranchisement and civil rights activism, democracy and property disentangled themselves from the ideals of rights and identity. So too the meaning of the rhetoric of speech has shifted. The Founders' characterization of speech as necessary to promote the democracy morphed over time and through judicial rulings into an equality theory of speech that required the defense and promotion minority or oppressed perspectives.[212] This is not to say that property rights were ceded with this shift. Indeed, one way to reconcile the tendency to uphold property interests (particularly private property interests) over speech interests may be to see speech as a component liberty that recedes in the face of more rigorous property interests.[213]

Regardless of whether or not one accepts this vision of speech as a component of property, jurisprudence surrounding time, place, manner restrictions—whether traditional or more recent—resides in the notion that the right to speech is akin to any other individual right. As such it should exist for the most part in a sphere beyond government control—as with the content regulation doctrine—but must also give way in the face of other more compelling interests.[214] Even protected speech, therefore, may be regulated—not for its content but for its collision with property interests.[215] Likewise, speech may not be regulated if the speech in question is linked to the property right itself. Resource-poor speech, for example, may not expropriate another's property for its purposes.[216] Nor may speech regulation restrict

210. *See, e.g.*, Epstein, *supra* note 207, at 801 (discussing reputational interests as "property" interests).

211. *See* McGinnis, *supra* note 199, at 100–18 (discussing the rise of intellectual property-based property and speech claims).

212. *See supra* notes 174–86 and accompanying text.

213. *See* Shelley Ross Saxer, *A Property Rights View: Commentary on* Property and Speech *by Robert A. Sedler*, 21 WASH. U. J.L. & POL'Y 155, 160–61 (2006).

214. *See supra* note 195.

215. *See supra* note 197 and accompanying text.

216. *See* Texas v. Johnson, 491 U.S. 397, 412–13 n.8 (1989) (noting that

an owner's use of their own property to promote speech even if that use excludes all others.[217]

This regulation of speech based on its impact may produce odd results. Nazis may be permitted to march through the center of predominantly Jewish towns,[218] and crosses may be burned in Black families' yards.[219] Union protestors, however, may not assemble without a permit,[220] nor may anti-racism musicians turn their amps up to eleven[221] after ten o'clock at night in a city that reportedly never sleeps.[222] If the regulation of speech based on content is decidedly democratic—relying on citizens to judge the value of the speech with courts interceding in an effort to promote equality—then content neutral regulation is decidedly non-populist. The Court's jurisprudence in the area of time, place, or manner restrictions does not seek input from the citizenry as to how to weigh the value of speech in comparison to that of property.[223]

Despite its non-populist approach, regulating speech based on its disruption of property interests points to a judicial construct of free speech as promoting liberty by checking the government's power to regulate private actors. In this sense, the citizen's interests are promoted by the absence of government interference. In situations where property rights and speech interests clash, the property owner may assert a claim that he is entitled to preserve the sanctity of his property interests even in the face of compelling, important, or generally desired speech.[224]

As with any doctrine, there are exceptions. Graffiti abatement statutes that require the removal of even desired graffiti

while the Court concluded that one could burn an American flag in protest, one could not steal a flag and burn it); Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (holding that New Hampshire may not force drivers to display a message on their vehicles); Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding unions could not picket their employer's office space without his permission).

217. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 325–26 (2010).

218. *See* Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977).

219. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

220. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).

221. *See* THIS IS SPINAL TAP: THE OFFICIAL COMPANION 30 (2000) (noting "[t]hese [amplifiers] go to eleven").

222. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

223. *See supra* notes 187–92 and accompanying text.

224. Admittedly this is not always the case. As will be discussed, there are times when the government has forced property owners to provide a forum for speech in the interest of promoting equality, even at the cost of liberties. *See infra* notes 227–32 and accompanying text.

pieces may undermine the ability of the property owner to exercise his full property rights.[225] In the case of libel, one's reputation—which under common law was treated as a property interest—may nonetheless be reallocated in the face of speech interests.[226]

In addition, the Court has preserved forums of expression, even those on private property, when equality interests appear to mandate curtailing property rights in the interest of preserving marginalized speech.[227] In recognizing public forums—whether traditional or of more modern construct—the Court carves out spaces for speech, even in the face of competing property interests.[228] Likewise, the Court's jurisprudence in the context of libel represents another example in which dissenting or

225. *See, e.g.*, Mettler, *supra* note 20, at 256.

226. Fla. Star v. B.J.F., 491 U.S. 524 (1989) (finding imposing damages on the newspaper for publishing a victim's name violates the First Amendment); Cox Broad. Corp. v. Connecticut, 420 U.S. 469 (1975) (finding government cannot restrict the publication of truthful information); *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring an actual malice standard for defamation suits).

227. *See* Amalgamated Food Empls. Union Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308, 325 (1968) *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976) (holding that workers' speech interests overrode private property owner's regulation of speech in a shopping center); Marsh v. Alabama, 326 U.S. 501, 511 (1946) (Frankfurter, J., concurring) ("Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town."). This is admittedly a fickle and imprecisely demarcated case line. *See, e.g.*, *Hudgens*, 424 U.S. 507 (holding union members had no constitutional right to picket an employer located in a privately-owned shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (holding that there was no First Amendment right to protest on private property when the speech was unrelated to the property itself). In his dissent in *Hudgens*, Justice Marshall argued that there is an inseparable relationship between private property and speech rights. *Hudgens*, 424 U.S. at 543 (Marshall, J., dissenting) ("[P]roperty does become 'clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.'" (quoting Munn v. Illinois, 94 U.S. 113, 126 (1877))).

228. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–14 (1969); Pickering v. Bd. of Educ., 391 U.S. 563, 573–75 (1968) (both striking down punishment of speakers who addressed matters of public concern in a school and workplace, respectively); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–37 (2001); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984); Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (differing slightly from the previous cases, all holding that the government cannot condition a grant of benefits or funds based on the speaker's allegiance to or expression of a particular perspective).

critical speech is preserved, even as it clashes with private property interests.[229] Finally, the Court has held that while the federal Constitution may not always preserve speech rights in the face of property interests, state constitutions may preserve such speech rights even if such preservation contradicts federal case law.[230] Each of these examples recast time, place, or manner restrictions in terms of interests in equality, as opposed to liberty.[231] These cases recognize that there may be times when the government must and should subsidize dissenting speech as such speech serves a democratic function of presenting countervailing, and often critical, perspectives.[232] This preserving space for speech has receded in recent cases. Most notably in *Citizens United*, the Court drew a direct line between property interests and speech rights, in the process arguably jeopardizing past efforts to preserve forums for underfunded, dissenting, or unorthodox speech.[233] Coupled with recent argument in *Masterpiece Cakeshop*, the emerging free speech doctrine would seem to promote a deregulating speech in the interest of preserving liberty over an interest in promoting equality. This claim, however, arguably overlooks the entwined nature of promoting equality and protecting liberty.

Preserving speech in the face of property interests is not in fact irreconcilable with a notion of speech as liberty. Admittedly, the portrayal of speech in liberty terms is one that adheres to a notion that the ideals of the First Amendment flourish in a free market of ideas. In this imaginary marketplace, dissenting voices are left to their own devices to thrive or wither based on their ability to carve their own space in the public conscience. This theoretical free flow of information allows citizens to weigh and consider competing and complementary ideas and to choose among them. To view speech as liberty—a freedom worthy of independent defense, as opposed to a mere tool of other freedoms—might therefore be to reject regulation that seeks either to alter the balance of speaking power by redistributing access to resources or spaces for speech or to prioritize one type of speaker

229. *See Sullivan*, 376 U.S. 254 (1964).

230. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding states can provide broader rights that do not infringe on federal constitutional rights).

231. *See* Sullivan, *supra* note 150, at 150–51.

232. *See id.*

233. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Sullivan, *supra* note 150, at 145 (discussing *Citizens United* as "representing a triumph of the libertarian over the egalitarian vision of free speech").

over another. This line of thinking, after all, is the same that permits the government to prohibit, restrict, or regulate speakers in public forums on a theory that the government cannot and should not subsidize speech.[234] It also permits the government to condition the grant of government resources—including funding—on the promotion of a particular perspective on the theory that the government is not obligated to subsidize speech in the first place.[235]

This traditional conception of speech as liberty however, overlooks the looming reality that some ideas may never have the opportunity to enter the marketplace of ideas without government assistance. Under this vision, to believe that ideas should be permitted to compete in a market of ideas is also to believe that such ideas should be granted a space to enter the market in the first place.[236] By promoting regulation of property as a means to ensure the existence of some types of speech, cases that promote speech as a matter of equality, therefore, promote it as a matter of liberty interests as well—promoting regulation of property as a means to ensure the existence of some types of speech.

C. SPEECH, CRIMINAL LAW, AND SPACES FOR DISSENT

Regardless of whether the regulation in question is based on the type of speech or the manner of the speech, criminal law serves as the primary enforcer of such regulations and at times offers a "speech" defense.[237] On the one hand, illicit speech such as graffiti is rarely regulated based on its content, but instead for its effect on property.[238] Applying a pure free speech analysis to graffiti would therefore suggest that in the context of private property, no speech defense should exist, and in the context of public forums, a speech defense would be limited. On the other

234. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966) (affirming removal of protesters from government-owned jail property by refusing to value speech rights over other lawful designated uses of the property).

235. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991).

236. *See infra* notes 249–83, and accompanying text.

237. *Cf.* Beauharnais v. Illinois, 343 U.S. 250, 254 (discussing a "truth" defense to criminal libel charges under state statute). This is not to say that criminal law is the only enforcer. Certainly, there is a robust body of civil law that enforces speech regulation by subjecting offending speakers to tort liability or civil fines, but criminal law remains a primary form of government enforcement of speech regulation.

238. *See supra* notes 41–42, and accompanying text.

hand, this neat dichotomy of content versus content-neutral regulation becomes problematic in the context of speech such as graffiti, in which the communication itself is embedded in the mechanism of the speech.[239] For some speech, to regulate where, when, or how it can occur is to regulate it out of existence.[240] The content of this speech is thus regulated in the shadow of the content-neutral regulation.

A similar argument has been posited by legal realists in the context of harmful speech.[241] Such scholars argue that when the First Amendment is understood to forbid regulation of speech that is known to cause harm—because to do so would be content-based—it has the effect of silencing speakers most affected by the harmful speech.[242] To permit the use of an insulting racial epithet is to create a hostile marketplace of ideas in which an already marginalized speaker may feel unable to respond in kind with speech. That speech is boxed in and walled out by a dominant perspective that promotes the bias and inequality that the epithet epitomizes.[243] As a result, content neutrality *is not* neutral. It merely supports dominant paradigms and mainstream ideologies.[244] It closes a space for speech that does not conform or quietly and politely offer resistance.[245] Simply put the playing field of speech is not level. Not all speech is equal, and a free marketplace of ideas is only free to those who have either little to lose with their speech (and so are willing to accept the consequences of regulation), or who control the means and mechanisms by which speech is disseminated.

This critique is particularly relevant in a post-*Citizens United* world. To talk about speech, particularly political speech,

239. *See supra* notes 47–81, and accompanying text.

240. For an example of this outside of the context of graffiti, see *infra* notes 249–55 and accompanying text.

241. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 380–83; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171 (1994); Richard Delgado & Jean Stefancic, *Southern Dreams and A New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 313–14 (2015); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 DUKE L.J. 1, 17–22 (1984).

242. Ingber, *supra* note 241, at 17–22.

243. *Id.*

244. *Id.*

245. *See* KENNEDY, *supra* note 82; *cf.* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 161 (1997) (describing hate speech as a weapon used by the empowered to maintain their social position in the face of growing opposition).

is to talk about money and access to forums.[246] Access, in turn, is defined in terms of either the speaker's own resources or his ability to conform his message to majoritarian positions. In this world, a formal guarantee of a right to speak without interference may mean very little in the face of radically unequal economic and social power. Any egalitarian value in free speech is reduced by the reality that all speech may be constitutionally stifled by content-neutral regulations that have the decided effect of restricting access to means and forums of speech.

A formalistic content-neutral approach to speech rights assumes at its core that all parties (or viewpoints) have the ability to exercise speech rights.[247] Or in the alternative, it takes the position that the suppression of some speech through content-neutral regulation does no harm.[248] Either perspective is troubling, and either produces an end result in which some types of speech will have few forums of expression, and others will enjoy near carte blanche access to an audience. This seems an odd outcome under a theory of free speech doctrine designed to promote equality, but it is equally troubling under a theory of free speech that seeks to promote liberty. And while this dilemma is more pronounced in the context of privately-owned forums, the existence of public forums for speech does not solve this problem.

Consider, the public forum case *Hague v. CIO*.[249] Frank Hague, the mayor of Jersey City, sought to enforce an ordinance that prohibited public meetings in public places without a permit.[250] Hague, in an effort to break up CIO union organizing efforts, declined to issue such a permit.[251] His strategy was to thwart the CIO's purposes by making it impossible for the CIO to engage in any expressive conduct within Jersey City.[252] As time, place, or manner restrictions go, Hague's scheme was classic. The restriction in question—a permit requirement for speech on public property—was agnostic as to the content of the speech itself.[253]

246. *See* Citizens United v. Fed. Election Comm'n, 580 U.S. 310, 339 (2010).

247. *See* Ingber, *supra* note 241, at 10.

248. This approach also sometimes takes the approach that the suppression of speech does less harm than the non-regulation of the speech to competing rights and interests.

249. Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (plurality opinion).

250. *Id.* at 501.

251. *Id.* at 501–02 (discussing Hague's decision not to issue a permit).

252. *See* Balkin, *supra* note 241, at 400 n.57.

253. *See Hague*, 307 U.S. at 502, 502 & n.1.

Unable to obtain a permit for their speech, the CIO was still free to engage it its expressive activity.[254] It could purchase or rent private property on which to speak or it could speak on property it already owned.[255] The problem was the CIO, like many dissident speakers, did not own property and lacked the economic means to acquire it. That a market existed where they might hypothetically acquire a forum for their speech was of little solace to the CIO.

Even if the CIO could afford to purchase property or access to property, it was unlikely to be able to privately acquire property that fostered the CIO's expressive purpose in the same way as the public forum it originally sought.[256] The CIO protestors chose the location of their speech for a reason. It was linked to the effectiveness of their communication itself, but it was also part and parcel of their communication. For their speech rights to be real, they required access to a place of meaningful communication. Rights, the CIO claimed, must mean more than an ability in a literal sense to exercise them. Such rights must take into account the ability to disseminate the message itself. Speech that is never heard is the equivalent of no speech at all.

Under an equality theory, the regulation of speech based on access to mechanisms and forums of speech would seem to demand a proactive leveling of the speech field.[257] Under a theory of speech as liberty, regulating of speech in absolute terms based on access to forums would seem to overvalue property rights and interests in a way that has not made sense perhaps since the Founding.

Current treatment of outsider speech regulated by time, place, or manner restrictions—which swings on fulcrums of competing interests and available alternative forms—offers little more than a guarantee of form-based liberty, and by default

254. *Id.* at 506 (discussing the lower courts' rulings regarding Hague's permit requirement).

255. It is possible that under the City's ordinance, even a rally on private property might have been subject to the permit requirement in question. *See id.* at 502 n.1; Balkin, *supra* note 241, at 400 n.57. The Court did not reach this issue, so it is impossible to know if such a private gathering would have been possible without a permit, or in the alternative, if Hague would have issued the permit if it were required. *Id.* at 515–16 (noting the limited scope of the ruling).

256. *See* Balkin, *supra* note 241, at 400–01.

257. *See* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 108–14 (1993) (arguing that government subsidy of free speech promotes a more open marketplace of ideas); Ingber, *supra* note 241, at 403 (arguing that the marketplace of ideas is premised on the false notion that citizens make rational decisions in prioritizing ideas and speech).

form-based equality.[258] Under this construct, all, in theory, have an equal opportunity to realize speech rights, but in reality, the realization of these rights is ultimately unequal. Setting aside formal promises of access, such guarantees are, by their nature, unequal. They favor those who are already the most favored and powerful.[259] They ring hollow in the face of speech that is created and exists in defiance of the very rights and values that formalism favors.

While a time, place, or manner restriction may not literally endorse particular content, this form-based speech protection will not guarantee a substantive liberty to speak or substantive equality for that speech. Quite the contrary, it is more likely to undermine the substantive goal. In this, the formal right to speech—the right to be free from content-based regulation—is less about the protection of speech and more about questions of access to the places where and the means by which speech is permitted.

In reality, formal speech equality withers in the face of substantive economic inequality. As the Court permits the contractions of public forums of speech, the right to speak is bought by those who can afford the private forums in which to lawfully exercise the right as they please. Private property owners can post a sign in their own yard. Or if the yard is big enough, they can host a rally to promote their perspective without offending time, place, or manner restrictions. Those with resources can rent a hall or pay for a permit, sound systems (and their accompanying sound technicians), added security—all in the interest of promoting their content while complying with their jurisdictions' time, place, or manner restrictions. Following the Court's decision in *Citizens United*, those able to purchase media access can publicize their viewpoint knowing that, with little government regulation over corporate based campaign contributions, those able to court the largest donors will have the capital to purchase forums of speech.[260] And the free market will ensure that those unable to secure large quantities of capital will be priced out of the speech market. The marketplace of ideas descends to the tyranny of the actual marketplace.

Viewed in this way, those most in need of open forums of speech—the true outside perspective—will bear the brunt force

258. *See* Balkin, *supra* note 241, at 403.

259. *See* Ingber, *supra* note 241, at 86–87.

260. *See* Manjarrez, *supra* note 13; Rice, *supra* note 50; Sullivan, *supra* note 150.

of content-neutral regulations. The First Amendment question, —whether couched in terms of equality or liberty,—is turned on its head. The problem is no longer that government restrains speech, but that private actors present the most serious impediment to the realization of the substantive right.

The State, for its part, controls access to forums of speech in two senses. First it controls public property. And second, it allows private property owners to place an economic tariff on speech rights by allowing them to deny access to their property without compensation. As the Court defended the government's right to deny access to public forums for students protesting segregation in *Adderly* on the grounds that "[t]he State, no less than a private owner of property has the right to preserve the property under its control for the use to which it is lawfully dedicated," it endorsed the position that the private owner's property rights override any competing third-party claim to free speech.[261]

In *Hague*, the Court created "a kind of First Amendment easement" to permit speech on public streets and parks in defiance of Hague's permit requirement.[262] The solution is interesting. It arguably redistributes the burden that free speech must bear to the government and away from private citizens and their property.[263] The true effect of the easement, however, may in fact only shift the type of burden that private citizens bear away from access to their private real property and onto increased collective financial burdens as citizens in the community bear the cost of street clean up, increased security, and other associated costs.[264] Beyond this, the proposition of a public-only easement causes questions about the equality of forums to resurface. An easement for speech may well consign dissenting voices to locations and forums utterly disconnected from the very message those voices seek to communicate.

Since the Court's decision in 1939, indeed in the last ten years, there has been a proliferation of private forums that are distinct from those contemplated by the *Hague* or even *Adderly*

261. Adderley v. Florida, 385 U.S. 39, 47 (1966).

262. *See* Hague v. Comm. for Indus. Org., 25 F. Supp. 127, 145–46, 151 (D. N.J. 1938) (first proposing the public easement for speech), *aff'd as modified*, 307 U.S. 496 (1939); Balkin, *supra* note 241, at 402 (describing the Court's solution as "a kind of First Amendment easement").

263. *Supra* note 262.

264. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 964, 998 (2d. ed. 1988).

Court. Cyber or virtual forums with their egalitarian access criteria would seem to undo the claim that economic power is a prerequisite for meaningful speech rights. Such forums are plentiful, easy to access, and require little capital to reach a broad audience.[265] One need only witness the effect of social media on movements like Black Lives Matter, Occupy Wall Street, or the Arab Spring to understand the simultaneous power and equalizing force of new forums.[266]

For its part, the Supreme Court and its lower-court brethren have spoken of forum restriction in terms of permissive content-neutral regulation. The right to speak, decisions have reasoned, is not the same as the right to access any forum of speech.[267] Accordingly, restrictions on access to forums—even public ones and those with a heritage of speech—are permissible provided that such restrictions are reasonably linked to legitimate government goals.[268]

Despite the admitted difference between a post on Facebook and the March on Washington or a picket line, restrictions of forums present similar dualities with regard to speech rights. On the one hand, whether discussing a public or a private forum, the existence of the forum alone would not seem to point to a right to unfettered access. On the other hand, not all forums are created equal. As discussed above in the context of *Hague*, location matters. To relegate speech to a particular forum or location based on the theory that the restriction is content neutral is to overlook the significance of the location to the speech's function.[269] In those cases, the formal regulation impedes the functionality of the right.

This reality problematizes the Supreme Court's statement that if "ample alternative channels of communication" exist, then the state may engage in content-neutral regulation of the

265. *See* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 276–77 (2006).

266. *See, e.g.*, Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power.

267. *See* Balkin, *supra* note 241, at 398–400.

268. *Id.* at 401.

269. *See* KROTOSZYNSKI, *supra* note 81.

speaker's chosen forum of speech.[270] First, this view would seem to undermine the notion of a "free marketplace of ideas," where speakers are free to make autonomous choices about their speech. Second, it is premised on the notion that all locations for and methods of speaking are equal or at least reasonably fungible. Third, it seems to shift the focus away from what appears to be the relevant First Amendment inquiries, such as whether the regulation abridges the right to speak and whether the regulation is necessary.

It is hard to imagine a similar constitutional claim in other contexts. This type of analysis does occur in the context of criminal procedure—if the Fourth Amendment was violated but the discovery of the evidence in question was inevitable, or if the attorney's performance fell below the Sixth Amendment's requirement of competent counsel but the outcome would have been the same for the defendant, then the claim is moot.[271] No harm, no constitutional foul. In other contexts, however, such an analysis seems unimaginable.[272] It seems that when individual liberties are at stake, actor autonomy matters and we as citizens do not forgo our rights simply because we are able to work around the government's regulation, or because a court can imagine choices we *might* have made, but did not make, with regard to the exercise of our rights.

In the context of First Amendment, however, a content-neutral restriction may survive, so long as the reviewing court can conclude that the speaker could have expressed his speech in a different way, regardless of the speaker's own sentiments regarding the judicially identified alternative.[273] This premise

270. *See* Hill v. Colorado, 530 U.S. 703, 726 (2000) ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."). The concept of "ample alternative channels" actually originated in *O'Brien*. *See* United States v. O'Brien, 391 U.S. 367, 388–89 (1968) (Harlan, J., concurring).

271. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 440 (1984) (affirming inevitable discovery exception to the Fourth Amendment); Strickland v. Washington, 466 U.S. 668, 682 (1984) (requiring a showing of prejudice in ineffective assistance of counsel claims).

272. *See* Enrique Armijo, *The "Ample Alternative Channels" Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1662–63 (2016) (noting for example that the due process clause would not be satisfied if plaintiff in same sex marriage litigation had been permitted to enjoy the same benefits of marriage through civil union).

273. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified

seems oddly well accepted among most (though not all) First Amendment scholars.[274] The logic of this acceptance seems to be that "a typical law aimed at non-communicative effects is unlikely to excessively inhibit the communication of some viewpoint of fact, because many different media would remain available to the speakers."[275] Put in terms of the marketplace of ideas, the content of the speech is not excluded from the market; it just must reach the market through some other, legal channel.[276] The idea itself is still able to contribute to the communal dialog, so whatever harm the restriction visits upon the speaker is minimal.[277]

All this assumes, of course, that courts take seriously the analysis into the availability of alternative channels of communication and the effect of the restriction on the speech itself. Such assumption may not always be warranted. At a minimum, courts seem deaf to the claim that the speaker chose the particular mode of expression precisely because it was not equal but superior to other alternatives the court might find in retrospect.

Forums, after all, are neither equal nor fungible. Critiques of protest zones at political conventions demonstrates this plainly. While such zones may permit free political speech, speech in the confined and often isolated space of the protest zones at the Democratic National Convention in 2008 are hardly the same as protests on the floor of the Convention in 1968.[278] They do not offer the same access nor do they marshal the same

without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

274. *See* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 937 (1984) (noting that time, place, and manner restrictions that interfere with expressive conduct are nonetheless "possibly the most universally accepted tenet of first amendment doctrine"). *But see* Armijo, *supra* note 272, at 1668 (arguing that although the "ample alternative channels analysis was in its incipiency a misguided afterthought . . . the concept now carries dispositive force in First Amendment doctrine").

275. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1305 (2005).

276. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 67 (1987).

277. *Id.* at 68.

278. *See* KROTOSZYNSKI, *supra* note 81 (describing political convention designated protest zones as means of "banishing protestors from the vicinity" of the Democratic and Republican Conventions).

power to disrupt (or, if you prefer, to communicate). Not only are they isolated by their nature, but they undermine the very function of the speech they seek to contain.

Cyber forums face equal challenges. While such forums may have a decided advantage in terms of cost and ease of dispersal over speech in the non-virtual world, they may restrict the message and diminish its impact of at least some speech. First and foremost, cyber speech is not the same as a physical presence in the real world. This is not to discount its utility, but to recognize its difference. This difference is at times beneficial and at times hampering. Movements like the Arab Spring survived and grew thanks in part the ease of cyber speech.[279] This movement, however, would not have had the same power if it lacked a live component.[280] There is a power to marching in the street that cannot be supplanted by even the cleverest of Facebook posts.

Certainly the cyber world offers a variety of low-cost or no-cost venues for speech and circumvents formal media constructs. Facebook, Snapchat, Instagram, YouTube, Blogger, and even email servers are free. Courts are fond of pointing to these alternative channels of communication when upholding content-neutral restrictions.[281] But courts overlook the fact that, while the platform itself may be free, the devices and internet through which one may access such platforms are not.[282] Admittedly, there may be a myriad of "free" access points, but these often carry their own distinct set of time, place, and manner restrictions that may limit speech.[283] In this sense, their utility as an alternative channel of communication is limited.

279. *See* Ramesh Srinivasan, *Taking Power Through Technology in the Arab Spring*, AL JAZEERA (Oct. 26, 2012), http://www.aljazeera.com/indepth/opinion/2012/09/2012919115344299848.html (describing the role of social media in the Arab Spring by granting in particular access to formerly exclusive media outlets).

280. *See* Jessi Hempl, *Social Media Made the Arab Spring but Couldn't Save It*, WIRED (Jan. 26, 2016), https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it (describing the limited value of social media in the Arab Spring movement).

281. *See* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004) (finding that the ability to communicate protest messages through mass media qualified as a "viable alternative means . . . to enable protesters to communicate their messages to the delegates").

282. Consider the bill my internet provider sends every month or the cost of the iPad Pro by Apple, APPLE, https://www.apple.com/shop/buy-ipad/ipad-pro (last visited Nov. 11, 2018) (listing the iPad Pro starting at $799).

283. The New York City Public Library Internet Use Policy, for example, explains that the library filters internet content, blocking information deemed "inappropriate or offensive" and may limit the total amount of time a person

Beyond these basic limitations, these channels of communication carry with them their own content-regulation policies that, unlike government-based regulations, do not implicate First Amendment concerns because they are restrictions imposed by private rather than state actors.[284] All of which leads to a final irony: in relying on such online platforms, the government justifies its own regulation of speech by relying on the private sector to provide a speech forum in a way that the public sector or other private actors are not willing to do. This seems an odd solution to a First Amendment concern.

In this sense, whether considering online or more traditional forums of speech, the previously sensible proposition that a speaker may be entitled to speak but not entitled to choose where, when, or how he speaks seems less sensible. It undermines the speaker's choice, it undermines his speech, and it is premised on a false proposition of equality.

In the context of graffiti, this claim about the unique nature of the forum is especially salient. A critical component of graffiti's communicative nature is not only its message, but the illicit and physical components of its message.[285] Graffiti may promote a neighborhood's cultural identity or mark a particularly fraught or significant location. In these cases, there is no available alternative forum that permits communication of the message. The forum is the message. Restrictions on the time, place, or manner of the speech therefore is a regulation of the content of the speech itself.

may utilize the free internet access. *Policy on Public Use of the Internet*, N.Y. PUB. LIBR., https://www.nypl.org/help/computers-internet-and-wireless-access/policy-on-public-use-of-the-internet (last visited Oct. 7, 2018).

284. Facebook, for example, recently released a twenty-five page "Community Standards" guideline that sets forth criteria to remove posts based on their content. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards (last visited Oct. 7, 2018). These standards are not new; as early as 2013 Facebook discussed removing "hate speech" from its social media platform. *Controversial, Harmful and Hateful Speech on Facebook*, FACEBOOK (May 28, 2013), https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054. These standards, however, are more restrictive than state regulation of speech including "hate speech."

285. *See supra* notes 17–20 and accompanying text.

IV. A FREE SPEECH DEFENSE OF GRAFFITI

One way to address the concern that regulating graffiti suppresses already marginalized speech is to recognize an affirmative free speech defense to graffiti crimes.[286] An affirmative defense of speech to criminalized graffiti serves three important functions. First, it acknowledges that there is a speech value in illicit speech such as graffiti and that such value is eroded or erased by regulations that deprioritize it. Second, an affirmative defense of speech rejects the claim that regulation based on something other than content does not, in fact, regulate content. Instead such a defense delves beneath the surface of such regulations and considers their silencing effect on particular speakers and particular messages. Finally, an affirmative defense of speech embeds decisions about the value of illicit or criminalized speech in the hands of the very citizens who hear (or perhaps suffer) the speech in the first place. Unlike the blanket decriminalization of graffiti, a speech-based defense allows members of the community—as jurors—to weigh speech values in the context of an actual prosecution and actual speech.

In each of these functions the underlying values of First Amendment doctrine are promoted. Acknowledging speech value in even the most marginal of voices and mechanisms ensures a vibrant and diverse marketplace in which contribution is possible regardless of property ownership or power. To unpack the effect of content-neutral regulation is to push not only First Amendment equality, but to preserve the liberty interests of speakers themselves.

Admittedly, there are limits to the defense, and in many ways, it is an imperfect discretionary mechanism that may contribute to, rather than ameliorate, the silencing effect of majoritarian positions on nonconforming, dissenting, and resistant speech. In this, an affirmative defense of speech to graffiti is no panacea. But it is a novel solution to a doctrinal regime that, to date, has ignored the speech possibility of graffiti. While imperfect, it is a start.

286. In criminal law, an affirmative defense is one that allows the defendant to claim that while the state may have proven the elements of the offense, some additional fact or factors should excuse or justify the defendant's actions thereby mitigating or absolving his culpability. *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1345–57 (1979).

A. THE NATURE OF AFFIRMATIVE DEFENSES

Codified law is a blunt instrument. Criminal law is no exception. Once codified, criminal law is static and immobile—defining regulated behavior before it occurs.[287] To construct criminal law is therefore to make a best guess about the proper balance between the anticipated harm and the restrictions necessary to prevent such harm. Left a static construct, criminal law can be clumsy and unruly. Unable to account for the nuance of real time existence, criminal law is tempered by discretionary moments that hone the law's application. Most discretionary moments in criminal law happen on a formal level, as state-sanctioned actors make choices that drive criminal law toward a just application or outcome. In the field, police choose which cases to investigate and whom to arrest.[288] Prosecutors choose which charges to file, or not to file at all.[289] Judges issue discretionary rulings that shape the narrative of cases or dismiss them outright.[290] Other discretionary moments occur in informal contexts. Juries nullify verdicts in cases that offend their sense of what the law ought to be or how it should be applied,[291] and affirmative defenses carve out exceptions to otherwise prohibited behavior.[292]

287. *See* Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 661 (2012) (describing the static nature of codified law).

288. *See* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1713 (2017) (noting the extent of police and prosecutorial discretion); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 562 (1960) (examining how police decisions can drive or undermine a criminal case).

289. *See* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 495–507 (2017) (discussing the role of prosecutorial discretion in criminal law). *See generally* Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955) (same).

290. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1996–2001 (2007); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330–31 (2017).

291. *See* Carroll, *supra* note 287, at 695–96; Paul Butler, *Jurors Need to Take the Law into Their Own Hands*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands (arguing that jurors serve a critical function of checking problematic discretionary decisions by formal state actors); *see also* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700–03 (1995).

292. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985). For an example of a common affirmative defense, consider self-defense which decriminalizes assault behavior in particular circumstances. *See* MODEL PENAL CODE § 3.04(1) (AM. LAW INST., Proposed Official Draft 1962) (defining self-defense as justifiable use of force "when the actor believes that

As jurors contemplate an affirmative defense, they by necessity weigh competing values and norms, judging when an actor should be insulated from liability and when he should suffer conviction. Admittedly this balancing is done within the context of formally constructed law. But whether through statutory edict or common law tradition, affirmative defenses ask jurors to consider not only the behavior that is criminal, but some aspect beyond that behavior that might justify or excuse it.[293] To consider, for example, the reasonableness of a response or the imminence of a threat in the context of an affirmative defense of self-defense[294] is to define these terms in the context of the juror's own lived experiences.[295] It is to ask a juror to choose between the competing narratives of the prosecution and defense and to cast a verdict based not only on which rings most true, but on which version of the world the juror believes *ought* to exist.[296] In this, the weighing of an affirmative defense in a criminal case is a moment of direct democracy on a small scale. In a jury room, twelve ordinary citizens construct and interpret the law in the context of a particular case and their own aspirations of what the law ought to be.[297]

such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion").

293. *See* Patterson v. New York, 432 U.S. 197, 202 (1977) (noting the historic tradition of affirmative defenses, as well as the defendant's burden under such defenses); Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV 527, 543–47 (1955). Unlike general defenses, affirmative defenses place a burden on the defense to both acknowledge criminal action and offer some justification or excuse for such action. *See* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 326 (1980) ("[For] affirmative defenses, the placement of burdens of production, judicial comment on the evidence, shifts in burdens of persuasion or production by presumptive language . . . , and permissive inferences . . . are [all] primarily . . . method[s] of allocating burdens of persuasion on the relevant factual issues in a criminal case."). *See generally* Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37 (Spring 2015) (providing a comprehensive overview of defenses in all states).

294. See MODEL PENAL CODE § 3.04 (AM. LAW INST., Proposed Official Draft 1962).

295. *See* Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 586 (2014). *See generally* LEE, *supra* note 23 (describing the role of citizen jurors' experiences in evaluating defenses and criminal charges).

296. Carroll, *supra* note 295, at 585.

297. *See* Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 831–32 (2015).

B. AN AFFIRMATIVE DEFENSE OF SPEECH FOR GRAFFITI

Any potential affirmative defense of free speech requires the jury to weigh the apparent value of the speech itself against any competing interests. Jurors already do this in obscenity and political speech cases, in which they consider the speech in question and the value such speech brings to the community.[298] A topless dancer may continue to perform not because she is especially good, but because her expressive act carries a modicum of redeeming value to the community.[299] A protestor may burn his own flag,[300] or wear his "fuck the draft" jacket,[301] not because the majority of citizens finds his message or his mechanism of communication compelling, but because they find a value in the dissenting speech itself that outweighs the interests that might silence it.[302] Whether weighing a content-based regulation or a regulation based on a time, place, or manner restriction, a juror can determine where the speech in question lies on a continuum of social values.

To place the decision-making process regarding the speech value of graffiti in the hands of the jury through the proposed affirmative defense is to reconfigure the balance of power between formal law and the citizens who live under the law.[303] Discretionary decisions occur on a daily basis in formal corridors as police, prosecutors, and judges decide which cases should proceed and how.[304] They occur less frequently in informal spheres such as jury nullification.[305] The value of an affirmative defense lies in part in its ability to regularize such informal discretion by attaching elements and proof requirements to claims of legal exception.[306] If the fear of jury nullification is that it will produce

298. *See supra* notes 149–55 and accompanying text.

299. *See* California v. LaRue, 409 U.S. 109, 126–27 (1972).

300. *See* Texas v. Johnson, 491 U.S. 397, 414–19 (1989).

301. *See* California v. Cohen, 403 U.S. 15, 19–22 (1971).

302. *See Johnson*, 491 U.S. at 408–09 (relying on community norms to judge obscenity or inciting speech); *Cohen*, 403 U.S. at 24–26 (same).

303. *See* Carroll, *supra* note 295, at 583, 595 (arguing that citizens are at times better able to calibrate law than formal actors).

304. *See* Carroll, *supra* note 287, at 696 n.200.

305. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

306. *See generally* Colleen P. Murphy, *Context and the Allocation of Decisionmaking: Reflections on* United States v. Gaudin, 82 VA. L. REV. 961, 977–81 (1996) (describing the historical function of affirmative defenses and the importance of their defined elements); *see also supra* note 293 and accompanying text.

lawlessness or unequal application of law,[307] the affirmative defense accomplishes the goal of permitting citizens to push the construction of law while offering guidelines for such behavior.

In terms of First Amendment rhetoric, an affirmative defense of speech adheres to a vision of democracy based on an open exchange of ideas and a free debate of values that occurs both in formal spheres of government, but also in the informal sphere of the citizenry.[308] Such a defense fills a critical gap in current First Amendment analysis of illicit speech by asking jurors to consider the expressive value of the graffiti in the face of the damage it may cause. In this balancing, the citizens of the communities most affected by graffiti are empowered to calibrate its worth.[309]

A citizen juror who believes that graffiti is blight may reject the defense. That same juror may recognize that a mural that unites a community matters more than the wall that the mural occupies. Or the juror may simply prefer to avoid the suppression of the dissenting speech that a conviction may produce. Likewise, the juror may consider a tag that marks the existence of a now dispersed population as carrying a value that is otherwise lost in a formal world focused on urban revitalization and gateway-offense policing.[310] Or the juror may view the tag as a warning that undermines the community and as such is not speech worth defending.[311] In short, the affirmative defense of speech for graffiti would undo the current rote calculus that the value of property always outweighs the value of illicit speech.[312] If presented, the defense would ask jurors to consider which speech warrants criminalization, and which speech deserves to be left free of government regulation or, in the alternative, which government regulations exceed the permissible curtailment of speech.

Constructing an affirmative defense of speech for graffiti has the additional benefit of allowing the accused to choose whether or not to assert the defense. Defendants who wish to maintain the defiance component of their speech act may decline

307. *See* Brown, *supra* note 305, at 1173–94 (recognizing and disputing such claims); Carroll, *supra* note 295, at 621–34 (same).

308. *See* Roth v. United States, 354 U.S. 476, 484 (defending the "unfettered interchange of ideas for the bring about of political and social changes desired by the people").

309. *See supra* notes 74–78 and accompanying text.

310. *See generally* FERRELL, *supra* note 20; POWERS, *supra* note 51; RAHN, *supra* note 51 (exemplifying the values that the juror could consider).

311. *See supra* notes 89, 95–105 and accompanying text.

312. *See supra* notes 21–22 and accompanying text.

to assert the defense. For these defendants, the value of the medium of graffiti may be diluted by the existence of the defense, and they may opt to preserve their speech as an act of rebellion that is criminal rather than a potentially permissible act. Likewise, some defendants may accept that their graffiti, though speech, carries no particular meaning for the community and decline to assert the defense. That some may not assert the defense does not suggest that the defense is insufficient or irrelevant, but rather that it both maintains the autonomy of the accused and serves a critical honing function for the law.

Finally, an affirmative defense offers the defendant some control over the narrative of the case. Like all affirmative defenses, an affirmative defense of speech in a graffiti case would carry some burden of persuasion for the defendant.[313] Unlike a defense that merely challenges the sufficiency of the prosecutor's case, the affirmative defense would require the defendant to produce evidence of the value of the graffiti-based speech in an effort to establish and prove the defense.[314] On the one hand, this persuasion requirement may preclude the defense for some defendants, but it will also limit the rote use of the defense.[315] Those defendants who are able to meet the proof requirements would, of course, be bound to meet the elemental requirements of the defense as codified, but in doing so they would push the law to recognize and legitimate their contrarian claim.[316] In this sense, regardless of its potential for success, the affirmative defense opens a space for a story criminal law currently neglects.[317]

C. LIMITS TO THE DEFENSE

Like all defenses that rely on community interpretation, an affirmative defense of speech risks reduction to the lowest common denominators of valued speech.[318] Just as a community may

313. *See* MODEL PENAL CODE § 1.13 (AM. LAW INST. Proposed Official Draft 1962); Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 173–74 (1969) (discussing proof requirements for affirmative defenses).

314. *See* Fletcher, *supra* note 292, at 954–57.

315. *See* Murphy, *supra* note 306, at 977–80.

316. Josh Bowers argues that defenses serve not only to expose, but to precisely craft narratives that may more efficiently answer the defendant's actual lived experience. *See* Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 206–12 (2017).

317. *See generally* Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589 (2013) (discussing the value of allowing defendants to craft counter narratives to formal law).

318. This argument has been made in the context of obscenity standards.

accept or reject the perceived imminence of a threat in the face of a self-defense claim, the community may reject the notion that the speech interests contained in graffiti outweigh the damage the graffiti does to property interests small or large. An affirmative defense's proof requirement only aggravates this reality. A person likely to be chosen as a juror may also be more likely to align herself with a property owner who laments the damage graffiti causes or the lawless message it sends.[319] The community may accept that to criminalize graffiti may silence some speakers, but nonetheless reject the defense believing either that such speech lacks value or that its mechanism of communication is not worthy of protection. Depending on the composition of the jury, some graffitied messages may resonate with community values and others may not. In this, the defense of speech that relies on community valuation of graffiti may ironically promote content discrimination that First Amendment jurisprudence prohibits, even in cases where content-neutral regulation controls the speech.

Further, an affirmative defense of graffiti in a criminal context would not prevent a property owner from either seeking civil remedies for the damage caused by the graffiti or from engaging in the self-help remedy of removing graffiti from private property. The defense therefore provides limited cover for dissenting speech. It does not offer, at least in the context of private property, a guaranteed platform for speech, but only protection from governmental interference in the form of a criminal conviction. In public forums, the defense would arguably carry more protection, though even this may be limited, as described above.

In this sense, an affirmative defense of speech for graffiti charges, like any affirmative defense is imperfect. Such a defense is limited both in terms of the cover it provides and the situations in which it may reasonably be expected to apply. Nonetheless, such a defense creates an important, and now absent, shelter for dissenting speech by recognizing the potential

See, e.g., Erik G. Swenson, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855, 878 (1998) ("A local community standard leads to the lowest-common-denominator approach, whereby distributors market only material that conforms to the standards of the most sensitive community."). As a result, an affirmative defense of speech may create the same silencing effect that government regulation of speech does. Accepted speech will be left relatively unregulated while non-conventional speech will receive little protection.

319. For a discussion on this phenomenon in the context of race, see Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L. J. 1690, 1696–97 (2015).

value of graffiti even in the face of the property damage it causes. Further, the defense vests this evaluation in the hands of community members – the men and women who live in the midst of the very speech they are asked to judge. This in turn enforces a bottom up democratic process that seems somehow poetically fitting for street speech such as graffiti.

CONCLUSION

It is easy for criminal law to dismiss the speech value of graffiti. Crafted as outsider speech, graffiti at its very moment of creation is an act of defiance. It is regulated as property damage or as a public nuisance and resigned to an ignoble place in the canon of the First Amendment. Yet this construction of graffiti as wholly outside of the realm of free speech's notice overlooks the value of graffiti.

In the end, there can be no question that graffiti damages property. There can be no question that graffiti disrupts the carefully constructed lines of accepted forums and constitutionally permissible regulation. But there can also be no question that for all its disruption, graffiti sometimes carries with it the voice and identity of marginalized and powerless speakers. Regardless of its presentation, graffiti pushes back on accepted notions of forums of speech and communication itself. In an emerging political world in which access to speech pivots around a fulcrum of money, power, and polite acts of dissent, graffiti remains an ever defiant and street savvy actor. Graffiti challenges the notion that time, place, or manner regulations do not also regulate content. Instead graffiti remains true to its creation—defiant of the cabined constructs of First Amendment doctrine that reject the communicative value of an illicit scrawl.

This Article maintains that to promote the values of the First Amendment—whether in terms of equality or in terms of liberty—is to carve a protected space for graffiti in criminal law. An affirmative defense of graffiti not only recognizes the speech issues at stake in the regulation of graffiti, but allows decisions about the value of graffiti to occur in the very community in which the graffiti appears. In this, this Article lays claim to the dual nature of illicit speech—acknowledging the harm it may cause, that law currently regulates, while simultaneously embracing its empowering nature. Both aspects are worthy of the law's attention.