

A Legal and Economic Analysis of Graffiti¹

by

Daniel J. D'Amico
Economics Department
George Mason University
Fairfax, VA 22030
(561) 870-5941
ddamico@gmu.edu

<http://austrianaddiction.rationalmind.net/>

and

Walter Block
Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics
College of Business Administration
Loyola University New Orleans
6363 St. Charles Avenue, Box 15, Miller 321
New Orleans, LA 70118
c.v.: <http://www.cba.loyno.edu/faculty.html>
office: (504) 864-7934
dept: (504) 864-7944
fax: (504) 864-7970
wblock@loyno.edu
WWW.WALTERBLOCK.COM <http://www.WALTERBLOCK.COM>

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Abstract: A case for the de-criminalization of graffiti is made, based on the existence of an unjust government, and predicated on private property rights. A distinction is made between artistic trespass, or vandalism, on the one hand, which we claim can be undertaken only on private property, and, on the other, graffiti, which in our view can only occur on public property. If the government that claims ownership of the latter is an illicit one, then graffiti can reasonably be interpreted as a justified attack on it, or rebellion.

Key Words: Graffiti, art, painting, property rights

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I. Introduction

According to the Declaration of Independence²: “We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it...”

Suppose there to be an unjust government³. According to the above document, it is then our right to “... abolish it.” This being the case, it is also the right of the citizenry to do anything *less* to this illicit institution than abolish it; for example, to deface government property through graffiti. This follows from the fact that if it is justified to entirely eliminate an entity, then it is surely so to visit upon it any lesser harm. If we have a right to hang a man for a crime he has committed, surely, we have the right to slap in on the wrist instead⁴.

According to just war theory⁵ there are six criteria that must be satisfied before launching into an attack, however severe, upon the unjust government. Although the theory applies, explicitly, only to governments, let us see how a non governmental “war” matches up against these criteria. They are as follows:

² <http://www.yale.edu/lawweb/avalon/declare.htm>

³ We have in mind, as examples, Iraq, Iran and North Korea, of which we are assured by our own government that they are an “axis of evil.” We certainly do not contemplate, as unjust governments, our own, or, that of any countries we the authors are ever likely to visit or reside in.

⁴ For writings on punishment theory supportive of this claim, see Kinsella (1996a, 1996b, 1997), Rothbard (1982).

⁵ <http://www.utm.edu/research/iep/j/justwar.htm>; <http://www.monksofadoration.org/justwar.html>; <http://plato.stanford.edu/entries/war/#2>

1. Just cause. If we posit an unjust government at the outset, it is easy to demonstrate that response to "a wrong received" has been initiated. That, after all, is the defining characteristic of the unjust government: it acts wrongly. To it, it initiates aggression, and thus resistance to it is justified.

Can graffiti be reconciled with this criterion? It seems clear that it can. For the illicit state has, among other things, improperly seized private property. Best, would be to return it to its rightful owners. But if this cannot be done, then, at least, marking it up appears to be justified.

2. Right intention. The motivation for the war against the unjust state must be "morally appropriate." The goal cannot be, even in part, the desire to seize power and self.

Can the graffiti-ist comply? There does not seem to be any insuperable reason why he cannot. Of course, we need not maintain that all graffiti-ists, always, have been motivated in this way. The need for power may possibly have influenced all of them sometimes, and some of them, always. But we are arguing, merely, that it is *possible* to justify graffiti; thus, lower standards apply.⁶

3. Proper authority and public declaration.

A government may war if and only if the proper authorities have made a public declaration to do so. In the case of the U.S. Constitution⁷ this right is reserved to the Congress. According to Article I, Section 8: "The Congress shall have Power To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; *To declare War*, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

It cannot be denied that graffiti fails to pass muster under this particular just war obligation. The artist himself, only by a great stretch of the imagination, can be considered a duly constituted "authority." Moreover, he makes no declaration, apart from his actual artwork. As against that, the U.S. Government has gone to war numerous times without any such official declaration from Congress: Korea, Viet Nam, Grenada, Iraq, etc. So, at least, the graffiti artist is in no worse position than that entity.

Graffiti also plays a role in delegitimizing such undeclared wars. For example, since the U.S occupation of Iraq, numerous stop signs have been painted with the letters WAR underneath STOP. With this addition, the signs now read "stop war." This type of graffiti serves as a counterpoint to illicit state activity.⁸

⁶ Block (1991, 23-25) makes a similar argument with regard to the pimp, maintaining that it is *possible* for there to be a non-invasive member of this profession, one who signs on prostitutes in a completely voluntary manner.

⁷ <http://caselaw.lp.findlaw.com/data/constitution/article01/>; emphasis added by present authors

⁸ <http://www.newportdailynews.com/articles/2004/07/06/news/news5.txt>

4. Last Resort. Have all other remedies been pursued? If not, war should not be declared against the unjust government.

Here, again, we can resort to the pure logic of the situation. By the very fact that the illicit state is still in power, we can infer that all other peaceful alternatives have long ago been attempted, but to no avail. Were the government to leave off its nefarious activities, there would be no justification for graffiti. But it does not, by assumption; therefore, there is.

5. Probability of Success. A futile war serves no practical interest.

Will the graffiti-ist be able to overturn the state? In a word, No. If “success” is defined in these terms, these acts cannot be defended. However, there is more than one measure of success. By definition, an act of painting graffiti is a *successful* act of painting graffiti. Although the probability is never 100%, the police may come along at any time and chase away our would be artist, most likely most attempts to paint on public property succeed, in doing just that.

6. Proportionality. The good must be measured against the bad, before undertaking so serious an act as war. Only if the former can possibly outweigh the latter can the go ahead be given

There will not very likely be any deaths to civilians or soldiers as a result of painting on public property against the law. Will there be any “bad” at all? One possibility is that successful graffiti-ing will engender a general disrespect for all law. But it is difficult to see why such an eventuality should even be placed in the debit column. As we are now analyzing the case of the unjust government, our presumption must be that its laws are improper in the first place.

Consider, now, the following excerpt which was taken from an interview of a young man who considers himself an artist not a vandal.

“So by the time I could finish the NE and put the cap back on the marker, I look up and the bus driver looked up at the same time and I'm sitting there with the marker in my hand - he looking at me, I'm looking at him, you know... So he locks the doors on me. The only thing I could do to get out of it at this point would be to punch this dude in the face, or hit him in the nuts or run through the window... something real drastic.... Dude locked the doors on me and I sat there. This is in my neighborhood, so everyone outside looking like "hey, what's going on on the bus there" as the MTA police pull up, "somebody's getting locked up", oh, its me, they know me, and they know what it's for, cause all I'm doing is writing on stuff, They know that's all I do, I'm not selling, I'm not robbing, all I do is write on stuff... they just taxed me, they just took money out of my father's checks. They charged thousands of dollars to erase three tags off of a surface that's already so-called 'graffiti-proof'. That's how the system is a fraud, see what I'm

saying? All of these things are just a way for them to make more money off the so-called taxpayers, and all that foolishness, its all such a racket" (Deka - WSK Crew, 2003).

This paper will attempt to determine whether or not his views about such are sound in terms of legal and economic theory based on private property rights. We sharply distinguish between justified graffiti and unjustified vandalism, and view graffiti as part and parcel of governmental failure rather than a subculture dedicated to vandalism. In section II we consider the relationship between graffiti and property; section III is devoted to an analysis of second best solutions; section IV discusses homesteading and we conclude in section V with a treatment of graffiti in the absence of illegitimate government.

II. Graffiti and property

First off, one needs to understand what is meant by the term graffiti. This subculture of artistic expression employs different terms associated for various types of styles, placements, and materials used. Typically graffiti artists develop a series of letters as a surname, "tag," or "handle." As such they use this tag as their "trademark" artistic piece. In some sense the graffiti artist is merely writing his name on things. In many psychological analyses of this phenomenon, specifically in terms of gang usage, graffiti is used as a territorial marking device.

The basic question that needs to be addressed is on what surface is the graffiti placed and who owns it?⁹ It is the argument of this paper that, it is *logically impossible* for graffiti to appear on privately owned property. When someone paints on such places without the owner's permission, the proper characterization for such an act is *vandalism* or *trespass* or some such¹⁰. If and only if the painting is done on public property can this appellation be properly used.

Graffiti, in our view, if not that of the artist himself who for the most part we expect is oblivious of these issues, is in effect a call for privatization. It is an attack on government property. It is an unofficial declaration of (very limited) war against the state.

The graffiti artist would in any case be more inclined to place his work on government rather than private property. Obviously a private owner will have a higher incentive to defend it, than a government¹¹. The graffiti artist, when acting rationally, is more likely to place his work upon a surface in which it will not be cleaned up, covered

⁹ For a very different economic analysis of the arts, see Cowen (1998).

¹⁰ This is similar to the claim that spewing forth garbage on private property is either trespass or acceptable, (but cannot be litter) depending upon whether this is done with the owner's permission or not; in sporting events, typically, dropping peanut shells under the seat is done with permission (see on this Anderson, 1989). In contrast, litter can occur, logically, only on government holdings, such as roads or parks (see on this Block, 1991, 210-216).

¹¹ On the Public Choice School which buttresses this contention, see Tullock (1974).

up, or removed right away, i.e. government, rather than public property.¹² One sees this in the reality of graffiti. Predominantly government housing projects, subway terminals, highway overpasses, etc. are the host to most graffiti.

We contend that graffiti, should not be illegal because it is not a violation of private property rights; but rather it amounts to in effect a liberation of stolen property from a coercive thieving government. The unjust government, through coercive tax laws, plunders sums from the individuals it governs.

States Bastiat (1850, 17)¹³: “But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.”

All economic interaction must take place at a mutual benefit to each of the parties involved. It is obvious that the taxpayer does not feel an inherent benefit from paying taxes, otherwise he would surely engage in such an “exchange” willingly. In reality citizens are threatened with the harm of jail time or further fines and penalties. Therefore, the illegitimate government has no justifiable ownership in the buses, subways, roadways, public buildings and so forth, hosts to the majority of graffiti art pieces.

III. Second best solutions

This brings us to the following question: Is it just for a third party to “plunder” such items from the thieving government? To clarify this scenario, the general tax payers will be referred to as person A, the thief or the government, as person B, and the third party-graffiti artist, as person C. If B steals property X from A, B has no legal claim to property X against C. From an ethical perspective, would we prefer B to keep X, or have C liberate it from him? Clearly, the latter, purely as a matter of justice. And, as to pragmatic considerations, allowing C to keep X diminishes the incentive of B to continue stealing from A.

Consider Ragnar Danneskjold, of Ayn Rand’s (1957) novel *Atlas Shrugged* who was a “pirate” operating only against real pirates, e.g., the government. He was thus a morally commendable character i.e. an anti-Robin Hood, Robin Hood. The present paper interprets the graffiti artist as a Danneskjold.

The graffiti artist diminishes the gain of the government from stealing the property of the citizenry. That is the pragmatic benefit. Since the graffiti artist is subject

¹² For more information see www.graffitihurts.com

¹³ Bastiat, throughout his text, attacks the aspects of government systems, which provide for the existence of “legal” plunder. He draws references and critiques the idea of legal positivism which holds close relation to the arguments of this paper in reference to the criminalization of graffiti and the negative connotations that have arisen because of its illegitimacy in current society.

to coercive taxation along with everyone else, he, too, can take on the role of A. This constitutes yet further evidence that the graffiti artist is not stealing, plundering or vandalizing but rather reclaiming his rightful property, or at least a small share of it.

IV. Homesteading

Homesteading is the process that establishes ownership over un-owned natural property (Block, 1990b; Hoppe, 1993; Locke, 1948; Rothbard, 1962; 1973, 32). “The origin of all property is ultimately traceable to the appropriation of an unused nature-given factor by a man and his “mixing” his labor with this natural factor to produce a capital good or a consumer’s good (Rothbard, 1962, 147).” It is our contention that homesteading should be applied to establish property rights over government-developed, and currently un-owned property.

Homesteading can be defined as, the mixing of one’s labor with un- or illegitimately owned property. It is this act that establishes original ownership. The graffiti artist is a homesteader of such state owned property, since this is *precisely* what he does with it. Who is the real vandal? Traditionally, and in today’s society, the graffiti artist has been widely viewed as an outlaw responsible for much destruction and vandalism, but under the proper homesteading theory we see the painted overpass of the graffiti artist as bearing his self-expression. This thus becomes his own property¹⁴. When the government, in response, covers or removes said painting, it becomes the real vandal in two different ways: one, for stealing the money necessary to create the edifice in question in the first place, and, two, for illicitly interfering with the ownership token placed there by the graffiti artist, as an indication that he now possesses it.

What of the objection that the buildings, roads, etc., created with funds mulcted from the long-suffering taxpayer properly belong to them, to the citizenry at large, and not to the homesteading graffiti-ist?

This is difficult to defend. For, remember, we are now dealing with the illicit government, and the citizenry at large have taken on the role of sheep, perhaps unwilling to be shorn, but, still, they have done nothing at all to *oppose* this fleecing. Matters are different, however, for the outdoor artist. He, alone, has *demonstrated* (Rothbard, 1997) revulsion at the improper status quo, and he is the *only one* to have done so. We can thus say to the complaining taxpayer: go, thou, and homestead some of your own money back, and stop complaining about those who have valiantly done so.

This interpretation of graffiti as privatization may upset many street artists at first glance, because it is no part of their intention to do any such thing as homestead unowned or illegitimately owned property. And truth be told, purposefulness is a necessary but not

¹⁴ This can be seen even more clearly in the existence of graffiti on abandoned, previously owned, but currently abandoned and thus now un-owned warehouses and apartment complexes that often litter the landscapes of poverty-stricken, urban, inner cities. Who has a better claim to them than those who have mixed their labor with them?

sufficient condition for transfer of otherwise unowned property into ownership status (see the Hebrew Talmudic tractate, *Baba Metzia*). If someone innocently mixes his labor with virgin territory, but has not the slightest intention of making it his own, then he cannot be said to be the proper owner of it. However, this does not appear to be an insuperable barrier to our analysis. For, surely, were the graffiti artist to be notified of this obscure aspect of homesteading law, there is no doubt he would seize upon it with alacrity.

V. No illegitimate government

Currently, the graffiti artist benefits through the criminal act of painting on government owned property to gain respect, recognition, and fame by the volume of occurrences, difficulty of access, and visibility of his artwork. Now, posit the complete and total absence of the illegitimate government (Hoppe, 2001). Then, these achievements would be incrementally more difficult to attain because of the less likelihood of graffiti to be created in the first place and then to remain in existence. If there were a government in operation, it would wipe out the efforts of the street artist, and, now, be justified in doing so¹⁵. Nor, because of the private property owner's assumed preferences to not have the surfaces of his facilities impacted by paint spray¹⁶, could our graffiti-ist operate in this terrain.¹⁷ The artists must then find a legitimate way to utilize their talents. Conventional art forms such as canvas, clothing and graphic design would all be possible fields of entrance to the now, out-of-work, ex-vandalistic, graffiti artist. The "Magic of the Marketplace" functions even on behalf of the ex vandal. In this regard, the graffiti artists would be most inclined to find *legal* profitable, workable outlets for their skills. Then, too, graffiti predominantly occurs in high poverty areas. It can be inferred that graffiti artists themselves are often plagued by such poverty. Many urban communities provide legal graffiti space by designating walls for such artists. The intention is to decrease the amount of vandalism.¹⁸

A person will steal only so long as his theft provides greater expected benefit than legitimate work (Ehrlich, 1972, 1973, 1974, 1976, 1977, 1978, 1979, 1982). This is exactly what perpetuates the cycle of financially profitless graffiti at present. It is also what saves graffiti artists who reach such an age or reputation when petty crimes of graffiti and vandalism no longer result in minimal consequences.

¹⁵ Remember, we are now assuming, arguendo, the total absence of the illegitimate government.

¹⁶ If the owner did wish this, the result would no longer be graffiti. Rather, it would be an "ordinary" paint job, contracted for in the usual manner.

¹⁷ It has been argued that the incentives of respect and recognition are just as strong for vandalistic graffiti as it is for the liberative variety. But would the complete privatization of government property result in an increase in the amount of vandalistic graffiti? No. Under the current structure, the government through its inability to upkeep its so called property, in effect invites graffiti artists to utilize its unused surfaces and resources. In addition, he receives secondary benefits as party C and A, in the liberation cycle. But after privatization has occurred, graffiti-ists will be shifted to the role of B. Now, there will be the usual disincentives to commit such crimes through enforcement of private property rights.

¹⁸ <http://www.leedsnet.com/gl/article.php?story=20040418154457769&mode=print>

Graffiti is not as such a social problem that needs to be addressed with increased government funding. No social programs are needed to eliminate it. This phenomenon stems, rather, from a lack of justice, where funding is coerced from the public to provide for “public goods.”¹⁹ Only the private owner of any good deserves the right to dictate how it must be used, and to stipulate who may or may not use it.

The government has disguised itself as an entity that promotes social responsibility. By providing road structures, telephone poles, garbage cans, subways, bus systems, public housing, ad nauseum, it has limited the artistic rights of its citizens. The statist dictate what is and is not appropriate space to exert one’s personality through self-expression. Any one who owns so much as a car knows the enjoyment of picking out his personal color, or placing a bumper sticker to differentiate it from the others. The government has stolen money from the masses, and given it away as buses, highways and so forth and is now dictating a criminalization of the population’s own self expression over these objects by prohibiting graffiti.

Let us allow the street artist to have the last word in this paper, as he had earlier:

“So now I come to a point where I like it so much I want it to be a career, graffiti, really, why not? I was born doing it. It has to be me. By doing it I keep it real. I feel like I shouldn’t have to not do graffiti cuz I have to go get a job. I want to make graffiti prints, graffiti canvas - which they been doing up in New York since the 70s... graffiti mugs... If you could drink coffee with a mug with a piece on it that would be good. Graffiti greeting cards. Look at all this stuff artwork is on, that’s where graffiti should be. I’m not seeking to get graffiti on the mainstream. One of my goals is not to have a piece in the Walters art gallery. Cuz most of the time they starve off an artist and then grab up his pieces when he’s dead. I would prefer to walk in someone’s house and see a cup and it has my piece on there. I might not even tell them I did that, but all the same it’d make me feel good” (Deka – WSK Crew, 2003).

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¹⁹ For a critique of the idea that “public goods” constitute a “market failure” or, even exist, see Block, 1983; Evers, 1978; Hoppe, 1989; Hummel, 1990; Osterfeld, 1989; Schmidtz, 1991.

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