

Letter to George Loper concerning graffiti, August 6, 2002.

George,

I wrote a letter to the editor of the the Daily Progress about graffiti.¹ I argued that there are legal and historical conventions that give the public some control rights over public space—the land and buildings, both publicly– and privately–owned, around which we all live our lives. I wondered, in the letter, what differences there are between controlling public space institutionally (with an architectural review board, for example) and controlling it personally (by painting on it). I tried to be careful not to say that the difference between the two is negligible. Mainly, I wanted to propose that graffiti is not an altogether illegitimate way to use public space.

There have been two responses to that letter. In abstract, these are their respective arguments:

1. Graffitiists are vandals, in that they only devalue community and private property. While architectural review ordinances are intended to improve property and virtually all citizens agree with their results, graffiti is intended to ruin property and nearly everyone thinks it's repulsive.²
2. Nonpropertarian ideas may be dismissed as out of hand because they are not practicable; furthermore, because other people have considered these ideas already and discarded them, the ideas have no merit. The notion that graffiti could be permissible speech is ridiculous.³

Besides direct responses to my letter, other writers have advanced their thoughts about graffiti. Here, in summary, are the other arguments I would like to address:

3. Graffiti can be useful, but should only be permitted when it reflects already existing community standards. We can deem some graffiti as unacceptable, and we ought to. In response to unacceptable graffiti the community must prosecute the graffitiists as well as any problems that may have inspired their graffiti.⁴
4. Graffiti should be prevented and removed because it undermines civic pride and possibly has a hand in causing slums. A community must manage its identity.⁵

I want to reply to these arguments here. I think each of these four arguments is legitimate.

1 “Graffiti gives public a right to participate,” The Daily Progress, Charlottesville, July 19, 2002; also at loper.org/~george/.

2 “Letter's logic simply rationalizes vandalism,” July 31, 2002, The Daily Progress, Charlottesville.

3 “Tyler Sewell Responds to Max Edason,” loper.org/~george/.

4 “George Loper/Al Weed Correspondence About Charlottesville Graffiti,” loper.org/~george/.

5 Ibid.

However, I intend to show that none of them compels criminalization of graffiti. I also want to advance, at the same time, some of my other ideas about graffiti.

(First, I want to be clear on what I mean by graffiti. I don't mean just spray painting. I mean illegal defacement of whatever kind, including posters and flyers. The relevant parts of the Charlottesville City Code are §§ 5-146 and 17-6, and possibly §§ 5-147 and 17-4. Also, at least partially relevant to what I'm talking about are §§ 17-5, 17-27, 34-764, 34-765, 34-766, and maybe even §§ 17-28, 28-28, 28-29, and 28-30.)

YELLOW RIBBONS ON LARK STREET, ALBANY, NY

Three of the arguments above refer to community standards. How community standards play a part in graffiti is one of the most curious questions about the issue. While Charlottesville city ordinances treat all graffiti equally, the community often doesn't. George Loper observes that we usually leave graffiti under overpasses alone, as well as American flags put up in public space after September 11.⁶ An illustrative story is this one:

In January 1991, a group of merchants on Albanys downtown Lark Street decided to put up yellow ribbons in support of U.S. troops fighting in the Persian Gulf. The florist among them made ribbon arrangements and together they put the ribbons up on Lark Street lampposts. Within a few hours, in the dark of night, local anti-war activists ripped all the ribbons down. The merchants, furious, put out an \$800 bounty on the identification of the unknown activists, who took responsibility in a letter to the editor of an Albany newspaper. The merchants also asked Albany police to watch Lark Street more closely. Resilient, they decided to make new ribbons and put them up again. As they installed the ribbons for the second time, a Vietnam veteran, unassociated with the original activists, violently ripped them down. Other community members responded by putting green "peace" ribbons on Lark Street lampposts. Eventually, all the ribbons, green and yellow, hung undisturbed.⁷

What the merchants forgot, in their anger and their insistence that the ribbons stay in place, was that they were the ones breaking the law. The activists who ripped the first ribbons down were quick to point out that the merchants regularly tore down flyers from the Lark Street lampposts, including posters the activists had put up. One activist caught the gist of it, reminding, "Putting stuff up, not taking stuff down on public property is what's illegal."⁸

6 Ibid.

7 "Vandals take down ribbons," Jan 31, 1991; "Second time man charged with trashing Lark Street's new ribbons," Feb 4, 1991; "Warrant issued for ribbon-ripping suspect," Feb 5, 1991; "Peace ribbons join lineup on Lark Street," Feb 9, 1991; "Suspect's appearance delayed," Feb 14, 1991; "Vietnam vet angered by troop support," Mar 7, 1991, Times-Union, Albany, NY.

8 Bob Black, "Friendly Fire," leaflet, n.d.; see also the Albany City Code at § 217-3.

Who were the vandals? There's evidence that part of the community endorsed the ribbons, which were hugely popular back in 1991, and, of course, clear evidence that some community members did not. I don't think it's appropriate to say, per the first enumerated argument above, that the yellow ribbons were defacements and that they devalued property. Nor do I think, as suggested by argument three or four above, that it would have been easy to determine whether the community standards of progressive Albany would have the ribbons stay or have them go. It's possible that the merchants could have obtained official permission to put up the ribbons. But they didn't, and I don't think their yellow ribbons were worthless speech or vandalism because they were illegal. Likewise, I don't think the activists or the Vietnam vet were out of place taking them down. Speech done in public space is perhaps the most vulnerable of all kinds since it is subject to all the viciousness of an entire community. That quality might be the most valuable aspect of graffiti, and I will elaborate on this possibility below.

This story from Albany is great because it's a case of the tables being turned. In this case, merchants so used to thinking of flyers on their street as a nuisance suddenly find a reason to use the public street for their own politics, and hardly realize the irony of it. I believe the story is good evidence that there is useful graffiti; and that if you ban graffiti you may throw out the good with the bad.

FENCE CUTTING

In the western U.S. in the 1880s when barbed wire fences started turning up, anonymous cowboys who cut the fences started turning up, too. Some landowners called these cowboys vandals. Some grangers were scared to death of the fence-cutting cowboys, some of whom moved in gangs and called themselves names like the Owls, the Javelinas, and the Blue Devils.⁹ Texas Ranger Ira Aten told his captain, "They are a hard lot of men in here, and they are thieves. . . The good citizens hold the wire-cutters in dread for they know they would not hesitate a moment to murder them."¹⁰ Without a doubt, the landowners said, the fence-cutters did not understand private property.

I see all kinds of parallels between fence cutting and graffitiing. For the most obvious thing, both are acts in defiance of prevailing ideas about property. Also, fence-cutters and graffitiists are thought of, and perhaps think of themselves, as outlaws and they do their work surreptitiously. It's a little odd for me to compare graffitiists, who I'm ostensibly defending here, to fence-cutters, who were breaking the law (as soon as the laws could be made) and are still considered in most histories as having misserved their frontier communities. Instead, I think that fence-cutters did honorable work, that they may have been right in opposing the use of barbed wire in the west, and that the spirit of their activism can help us understand modern graffitiists.

9 "Fence Cutting," The Handbook of Texas Online.

10 Ira Aten to L.P. Seiker, Richland, Texas, August 31, 1888.

The fence-cutters did do honorable work. Even though fence-buying landowners were sure they were right and the ends of a now-prosperous southwest to some extent justify the means of criminalizing fence-cutting, the fence-cutters often opened land that was public by law and by rights. Walter Prescott Webb, giving the history of the Great Plains, relates that “[t]he fence men were not only inconsiderate of the damage to stock incident to the use of barbed wire, but they were equally inconsiderate of their fellow man. They fenced up the water holes; they stretched the wire across the well-traveled roads; sometimes they inclosed vast areas which they did not own.”¹¹ The fencers were so zealous in enclosing public lands that after becoming president in 1901, Teddy Roosevelt demanded that “the fences must come down!”¹² By cutting wire the fence-cutters were liberating public space from complete private control; issues about water rights and access to public lands were issues then and are still issues in the west today.

The fence-cutters may have also been right to oppose barbed wire. Here I want to address part of the second argument above. I don't want to argue about a partly irrelevant issue right here in the middle of this discussion about graffiti, so I'll just briefly make the claim that nonproprietary ideas might be usable in certain places, and maybe in the American southwest. For evidence of this, I'd refer an interested reader to the existence and various documents of the U.S. Bureau of Land Management, certain portions of Webb's *The Great Plains* maybe, and the history of land use in the southwest generally.

Most importantly, the fence-cutters were activists who had little use for the papers and no use for barbed wire which they were certain was bad. In this way they are most like modern graffitiists. There has been some investigative journalism about what the average graffitiist is like and why he does what he does. I don't think I've read any of it, but I maintain that implicit in any graffiti is the idea that the graffitiist thought he had some right to the victim property. Each of the fence-cutters may not have carried a manifesto in his pocket or in his head to defend what he was doing. Most of them, I'm sure, cut fences because they thought it was the right thing to do. It seems like some people, in equating graffiti exactly with vandalism, believe graffitiists are out just to destroy or at least devalue property. Why not just smash it, then? Why do graffitiists plan, sometimes design, and then put up their slogans and art if all they mean to do is mindlessly ruin things? Like the fence-cutters who cut barbed wire to open the range and make a statement, graffitiists are reclaiming public space and their message, aside from what the paint says, is that they have something to say and have not been afforded the opportunity to say it.

VULNERABILITY AND ANONYMITY

I want to point out that the greatest value of graffiti might be the kind of speech it is. I suggested above that graffiti is useful because it is speech completely vulnerable to the community. Just as I can paint “Fuck the pigz” on the side of the local precinct building, the “pigs” can come out and

11 Walter Prescott Webb, *The Great Plains* (Lincoln: University of Nebraska Press, 1931), p. 315.

12 Otto Wolfgang, “How the Wild West Was Fenced In,” *The Cattleman*, Aug. 1966, 53:3.

powerwash it away. Graffiti is speech with no real permanency and no credentials, and therefore may be judged by the merit of its content and by nothing else. Also, graffiti is a way to speak anonymously to the entire community, and such ways are rare, anymore. Unlike almost any other medium that reaches every person in a given community, graffitiists need not pay their identity for a ticket to the discussion.

With the first idea, that graffiti is vulnerable to the community, I want to respond additionally to arguments three and four, above, which maintain that graffiti should be regulated in the interest of managing community identity. Community is one of a few curious things that “are what they do.” Although communities write charters and ordinances to define themselves, those communities are each so much more than those codes as to be almost something entirely different than codes and customs altogether. I don't think you may argue that any new aspect of a community detracts or improves the community unless you are its unanimously recognized autocrat. You can applaud or decry acts as being consistent or inconsistent with the community's history or as acts that you, as a community member, do or do not endorse. No one knows the quiddity of the community itself, though. Graffiti pops up only if the community does it and lasts only so long as the community lets it stay.¹³ What does it mean when graffiti pops up despite ordinances that forbid it? I think it means that the community is changing, and that its ordinances might not accurately reflect the attitudes of the community. From this comes the question I intended to imply in my letter to the editor: What gives the community's desire to control the architecture of buildings endorsement and the force of law, and no endorsement at all of the community's apparent desire to graffiti? I know that, for one, architectural review boards usually come as a result of democratic procedure, just as repeals of graffiti ordinances could. If there is no other reason, then maybe it would be ethical to seek such repeals.

As for anonymous speech, I think it's crucial that we continue to make it easy for Americans to communicate anonymously with each other. Anonymous speech played an integral part in the formation of the American ideals codified in the U.S. Constitution and Bill of Rights. There is an enormous number of anonymous and pseudonymous public comments from the 18th century: among them, Cato's Letters, on freedom of speech, attributed to John Trenchard and Thomas Gordon, Common Sense, by “An Englishman” later identified as Thomas Paine, and The Federalist Papers, of unquestionable influence on our newborn country, signed “Publius.” Clarence Thomas, concurring with a 1995 Supreme Court decision, *McIntyre v. Ohio Elections Commission*, said that “[t]he practice of publishing one's thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Anti-Federalist pieces appear to have been signed by their true authors.”¹⁴ From the same decision, which struck down an Ohio law requiring leaflet authors to publish their names in their leaflets, it was the opinion of the

13 In this regard, graffiti is more vulnerable (and less pretentious) the less permanent the damage it causes. A flyer taped to a pole is pretty unassuming speech, less than a wheatpasted flyer, which in turn is much more vulnerable than painted and acid-burnt messages. It might be important to consider this, and think about drawing lines. I'm not going to do it here.

14 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

court that “[a]nonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind.”¹⁵ Today, we hardly have a way to communicate anonymously in our community. Many daily and weekly newspapers in the U.S. today will not print anonymous or pseudonymous letters to the editor, and even so a much smaller portion of the community reads them than read them in the 1700s. The internet allows for anonymity but consists mostly of forums for affinity groups rather than for geographical communities. Furthermore, I don't think the internet should be considered a public forum because, like the modern newspaper, it does not suffuse community life. In many places today, the only community forums where anonymity is allowed are the streets themselves. Leafleting and graffiti are the anonymous ways the public can use the city streets; leafleting is a legal method, but in some ways not completely anonymous. I don't think that graffiti should be legalized simply because it is an anonymous medium, but I think that in light of its prevalence we should consider what use it has as a way of getting ones ideas across.

I want to make it clear that I don't think that the vulnerability of or the anonymity provided by graffiti are reasons by themselves that graffiti should be sanctioned. I do think that they are aspects of graffiti that are usually overlooked and I bring them up for that reason.

FINALLY

To tie up loose ends, I want to make a brief response to the gist of the second argument above. I'm not sure what I've written here will convince anyone that my ideas about graffiti haven't all come from a bong. The notion that “all property is ours man and you can't really own it dude”¹⁶ has been a real problem for historical figures in ethics and law.¹⁷ The fact that a cadre of anybody is laughing at me doesn't bother me, and I don't think it sufficiently debunks what I've said. Nevertheless, I understand the essential complaint here: you can't really believe this stupid idea because it just can't work and it's just not right. I don't think that's a meaningless way to dismiss an argument, particularly in postmodernity.

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For this article as a whole, a summary: I think a community creates de facto public space. I think the community, as a whole and per each member, has certain rights in controlling public space. I don't know exactly what those rights are. I don't know whether our laws and prevailing attitudes violate those rights, or not. Graffiti is a way of interacting with public space. It is a

¹⁵ *Id.* at 341 (majority).

¹⁶ “Tyler Sewell Responds to Max Edason,” loper.org/~george/.

¹⁷ See, just for starters, John Locke, *Second Treatise of Government*; Karl Marx, “Private Property and Communism,” and *The Communist Manifesto*; Jeremy Waldron, *The Right to Private Property*; Robert Wright and Morton Gitelman, *Cases and Materials on Land Use*; Pierre-Joseph Proudhon, *What Is Property? An Inquiry into the Principle of Right and of Government*; *Spann v. City of Dallas*, 111 Tex. 350 (1921); and many others.

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unique form of speech and provides for community participation in ways that other media do not. If our control rights over public space allow for graffiti, then graffiti should be legal with no exception. If those rights do not allow for graffiti, graffiti should be categorically illegal and all graffitiists should be prosecuted.

—Max Edason (electronic mail, August 6, 2002).